IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

RESPONSE OF THE GOVERNMENT OF CANADA TO THE *AMICUS CURIAE* SUBMISSION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

(November 10, 2005)

Department of Justice
Room 844, East Tower
Bank of Canada
234 Wellington Street
Ottawa, Ontario
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INTRODUCTION

1. The Chamber of Commerce of the United States of America ("US Chamber") has filed for leave to present its views on two issues of NAFTA interpretation. Canada does not object to leave being granted.

2. Canada takes this opportunity to respond to the arguments raised by the US Chamber on two issues of interpretation: A) the proper meaning of national treatment in Article 1102; and B) the rules of state responsibility, state enterprises and NAFTA Chapter 15.

A. THE MEANING OF NATIONAL TREATMENT IN ARTICLE 1102

3. The US Chamber requests that the Tribunal:

> use this arbitration to return to a straightforward interpretation of the national treatment obligation in NAFTA Article 1102 that would promote a cohesive and purposive meaning to this obligation.[1]

4. Its position, like the one taken by the Claimant, UPS of America Inc, calls for the Tribunal to "maintain unity among international economic law obligations contained in the NAFTA, bilateral investment treaties and the various WTO Agreements."[2]

5. Parties to the NAFTA, parties to the WTO Agreements and parties to particular bilateral investment treaties have negotiated specific obligations, using particular language, in each of these treaties. The specific language in each treaty articulates the particular agreement between the parties and the scope of their obligations.

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[1] *Amicus Curiae Submission by the Chamber of Commerce of the United States of America*, 20 October 2005, para. 43.

[2] *Amicus Curiae Submission by the Chamber of Commerce of the United States of America*, 20 October 2005, para. 10.

6. The role of a tribunal in interpreting a treaty is to interpret the specific language of the treaty at issue. Therefore, contrary to what the US Chamber advocates, it is not for a tribunal charged with the resolution of a Chapter 11 dispute to use an arbitration to promote "unity" among different obligations and to advance an interpretation that closes the gap between the meanings of different provisions of different treaties. Rather, in this case, the Tribunal's role is to assess the meaning of the terms in NAFTA Article 1102 according to the general rule of interpretation in customary international law.

7. More specifically, the US Chamber's request that the Tribunal "return" to an interpretation adopted in the *Mexican Cross Border Trucking Services* dispute is misguided. The US Chamber asserts that in that case the Panel established a "protection of competitive opportunities test" found in GATT jurisprudence, for national treatment with respect to investment and cross border services trade in the NAFTA.[3] This is incorrect.

8. Rather, the Panel in the *Cross-Border Trucking Services* case compared the Mexican and US trucking service providers and determined that Mexican service providers received less favourable treatment. It then went on to read the phrase "like circumstances" to permit differential treatment, where appropriate, to meet

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[3] *Amicus Curiae Submission by the Chamber of Commerce of the United States of America*, 20 October 2005, para. 10. In addition, the US Chamber does not take account of the fact that the concept of competitive opportunities in GATT jurisprudence pertains to "favourable treatment" and not "likeness". See for example *United States - Section 337 of the Tariff Act of 1930*, Report of the Panel, BISD 36S/386, adopted 7 November 1989, para 5.11, in which the GATT Panel states that it is the words "treatment no less favourable" in paragraph 4 that call for *effective equality of opportunities* for imported products. Note also that Canada rejects the Claimant's interpretation of what "conditions of competitive equality" constitute in WTO jurisprudence. (Tab 2). Consider for example, the Appellate Body's decision in *Dominican Republic – Cigarettes*, in which it held that the detrimental effects on the conditions of competition of a measure do not constitute less favourable treatment where they are caused by other factors or circumstances than the foreign origin of the product. *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Report of the Appellate Body, WT/DS302/AB/R, 25 April 2005, para. 96 (Respondent's Book of Authorities, Tab 108). Consider as well, the fact that customs treatment is not something that affects conditions of competition within the GATT. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body stated that "the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs." Report of the Appellate Body, WT/DS8/AB/R, 4 October 1996, at 16. (Respondent's Book of Authorities, Tab 56).

legitimate regulatory objectives.[4] After a consideration of the facts the Panel went on to conclude that:

> With regard to objectives, it seems unlikely to the panel that the "in like circumstances" language in Articles 1202 and 1203 could be expected to permit a very significant barrier to trade, namely a prohibition on cross-border trucking services.[5]

9. Clearly the Panel in *Cross-Border Trucking Services* did not adopt an "equality of competitive opportunities test". In addition, to the extent that the Panel interpreted "like circumstances" as an exception, Canada respectfully disagrees. What is clear, is that the US Chamber has placed much emphasis on a case that is of limited comparative value for the Tribunal in this case.

10. Contrary to the opinion advanced by the US Chamber and the Claimant, predictability will not be served by giving the same meaning to all national treatment provisions, irrespective of the terms they contain or the agreements in which they are found. Predictability is better served by applying the terms as they actually appear in the treaty text under consideration. In addition, it would be more useful and predictable for the Tribunal to seek guidance from other NAFTA Chapter 11 decisions that have considered Article 1102 than from a Chapter 20 arbitration contending with Article 1202 or from WTO decisions, which interpret the language of the GATT or the GATS.

11. As the Chapter 11 tribunal in *Methanex* has recently pointed out, Article 1102 does not use the "term of art in international trade, 'like products', which appears and plays a critical role in the application of GATT Article III. Indeed the term 'like products' appears nowhere in NAFTA Chapter 11."[6] The difference in

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[4] *In the Matter of Cross-Border Trucking Services,* USA-MEX-98-2008-01, Final Report of the Panel, (February 6, 2001), para. 258. (Investor's Book of Authorities, Tab 106).

[5] *In the Matter of Cross-Border Trucking Services,* USA-MEX-98-2008-01, Final Report of the Panel, (February 6, 2001), para. 258. (Investor's Book of Authorities, Tab 106).

[6] *Methanex Award,* Part IV, Chapter B, at 14, para. 30. (Investor's Book of Authorities, Tab 171).

wording in Article 1102 led that Tribunal to conclude that:

> International law directs this Tribunal, first and foremost, to the text; here, the text and the drafters' intentions, which it manifests, show that trade provisions were not to be transported to investment provisions.[7]

12. To apply the reasoning of the *Methanex* Tribunal, the concepts of "like services", "competitive or substitutable services" or "equality of competitive opportunities" are trade law concepts that are not found in Article 1102 and it would be incongruous to impute these WTO terms into a provision dealing with investment in "like circumstances".[8] Canada agrees with that Tribunal that it would be unwarranted to interpret a provision by inserting new words unless there are clear indications elsewhere in the text that, at best, the drafters wished to do so or, at least, that they were not opposed to doing so.[9]

13. On the contrary, however, the NAFTA Parties are opposed to the incorporation of the Claimant's idea of an "equality of competitive opportunities" into the interpretation of NAFTA Article 1102.

14. In its submission under Article 1128 in this case Mexico has asserted that:

> There is no warrant for employing a shorthand test used to describe the precisely worded obligations contained in Article III of the GATT, which applies to trade in goods, to the interpretation of Article 1102, which contains its own test for compare the treatment accorded to investors and

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[7] *Methanex Award,* Part IV, Chapter B, at 19, para. 37. (Investor's Book of Authorities, Tab 171).

[8] *Methanex Award,* Part IV, Chapter B, at 17, para. 34. (Investor's Book of Authorities, Tab 171).

[9] *Methanex Award,* Part IV, Chapter B, at 17, para. 35. (Investor's Book of Authorities, Tab 171); see also *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body, WT/DS50/AB/R, adopted 16 January 1998, in which it was held that the "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.", para. 45. (Tab 3).

their investments.[10]

15. In the Methenex case, after examining the text and context of Article 1102 the US concluded that:

> Given the significant differences between the texts, the contexts and the objects and purposes here, there is no basis for reading Article 1102 to incorporate a GATT "like products" analysis. For these reasons, the GATT and WTO authorities cited by Methanex are inapposite.[11]

16. The Methenex tribunal agreed with the United States.

17. To summarise, three critical elements emerge from the single national treatment test found in NAFTA Article 1102:

- First, the Claimant must prove that Canada accorded treatment to UPS Canada, and to a domestic investor or its investment
- Second, the Claimant must show that Canada accorded these treatments "in like circumstances". It is in this context that nationality-based discrimination is important.
- Third, the Claimant must demonstrate that the treatment accorded to the Claimant or UPS Canada was not "no less favourable".

B. STATE RESPONSIBILITY AND NAFTA CHAPTER 15

18. In its submission the US Chamber refers to responsibility of states under different treaties and cites cases regarding state responsibility out of context. The US Chamber argues that Canada "suggests that the NAFTA [...] actually reduces States' responsibility for the actions of monopolies under customary international

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[10] *NAFTA Article 1128 Submission of the United Mexican States*, October 20, 2005, para. 10, footnote omitted. (Tab 4).

[11] *Methanex v. United States,* Amended Statement of Defense of Respondent, United States of America, December 5, 2003, para. 304. (Respondent's Book of Authorities, Tab 111).

law."[12] Not only does this statement misrepresent Canada's views, it demonstrates the US Chamber's misunderstanding of the co-relation between the rules of state responsibility and NAFTA Chapter 11.

19. In order to determine the rules of attribution and the obligations applicable to monopolies and state enterprises the tribunal must first look to the treaty. The customary rules of state responsibility recognise the primary role of the treaty in this regard.

20. The NAFTA does not contain "three tiers of responsibility" for the conduct of monopolies and state enterprises as the US Chamber asserts. The responsibilities of the state with respect to the conduct of monopolies and state enterprises are set out in Chapter 15 of the NAFTA.

21. Traditionally, matters of state responsibility were resolved between states. More recently, states have entered into agreements that permit an investor to bring a dispute on its own behalf when certain precise obligations owed to its home state have been violated. NAFTA Articles 1116 and 1117 set out those obligations as NAFTA Chapter 11, Section A and Articles 1502(3)(a) and 1503(2).

22. Therefore, NAFTA Chapter 11 takes the Parties out of the traditional confines of customary international law, which limits disputants to states. And, in so doing, it circumscribes the types of claims that can be brought by an investor. For example, an investor cannot bring a complaint about a breach of an obligation pertaining to the trade in goods, services or procurement. Nor can it bring a complaint against a state enterprise or monopoly unless it can show that its actions are an exercise of delegated governmental authority within the meaning of Articles 1502(3)(a) or 1503(2).

23. In addition, whether or not the obligations of monopolies and state enterprises under the NAFTA go further, or not as far, as those in the WTO Agreements is

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[12] *Amicus Curiae Submission by the Chamber of Commerce of the United States of America*, 20 October 2005, para. 38.

not relevant. Each treaty contains its own obligations. For example, there is no provision equivalent to Article 1502(3)(d) in WTO Agreements.

24. Canada refers the Tribunal to its counter-memorial and its rejoinder where it has fully set out its position on the relationship between customary rules of state responsibility and rules that are set out in a treaty.[13]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, Ontario, Canada, this 10th day of November, 2005.

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[13] Canada's Counter-Memorial, Part III, IV, D; Canada's Rejoinder, Part II.