BURFORD & MANEY PC

700 LOUISIANA, SUITE 4600, HOUSTON, TEXAS 77002-2732

T + 1.713.237.1111 F + 1.713.222.1475 WWW.BURFORDMANEY.COM

L/EX

2009 APR -7 A 11: 10

DEPARTMENT OF STATE

April 2, 2009

Ms. Alicia Frechette
Executive Director (L/EX)
Office of the Legal Adviser
United States Department of State
2201 C St. N.W., Room 5519
Washington, D.C. 20520

SERVICE OF PROCESS IN
OFFICIAL CAPACITY ONLY
Lisa B. Grimm, Actng.
EXECUTIVE DIRECTOR
OFFICE OF THE LEGAL ADVISER

Re: Notice of Arbitration pursuant to Article 1119 of the North American Free Trade Agreement (NAFTA) related to Cross-Border Trucking Services between Mexico and the United States

Dear Ms. Frechette:

Enclosed is the Notice of Arbitration by the independent trucking companies of Mexico. As noted therein, the Claimants are nominating Thomas Heather Rodríguez at White & Case in Mexico City as their arbitrator.

In keeping with the principles enunciated in NAFTA Article 1118, we welcome any discussions you wish to have on these matters.

Very truly,

Mark Maney

MM:tm
Encls.

NOTICE OF ARBITRATION

UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN

CANACAR,

*As Representative of its Constituents*,

Claimants/Investors

AND

THE UNITED STATES OF AMERICA,

Respondent/Party

Mark Maney
Burford & Maney PC
700 Louisiana, Suite 4600
Houston, Texas 77002

Pedro Ojeda Cardenas
Ojeda Abogados
Alborada 136-701
Parques del Pedregal
Tlalpan
Mexico D.F. 14010

Counsel for the Claimants

## *1. Demand for Arbitration*

Pursuant to Article 3 of the United Nations Commission on International Trade Law (UNCITRAL) and Articles 1116 and 1120 of the North American Free Trade Agreement (NAFTA), the Cámara Nacional del Autotransporte de Carga (CANACAR), as representative of its constituent members (the Claimants), demands arbitration against the United States of America.

## *2. Names and Addresses of the Parties*

### *A. The Claimants*

Pursuant to Mexican law, CANACAR has authority to represent the interests of its individual constituent members, which comprise the independent trucking companies of Mexico. In fact, the only Mexican trucking companies that are not included as Claimants are captive trucking divisions of companies that transport their own goods, such as trucks owned and operated by Coca Cola® transporting Coca Cola® products.

In addition, individual members of CANACAR have independently ratified CANACAR's representative capacity in this matter.

CANACAR's address is as follows:

CANACAR
Pachuca No. 158-Bis
Col. Condesa
Mexico, D.F.
C.P. 06140

### *B. The United States*

The United States is to be served by service on:

Ms. Alicia Frechette
Executive Director (L/EX)
Office of the Legal Advisor
United States Department of State

2201 C St. N.W., Room 5519
Washington, D.C. 20520

### 3. *Basis for Demand for Arbitration*

The Claimants bring these claims in their own behalf pursuant to NAFTA Article 1116.

The United States has violated three provisions of NAFTA Chapter 11:

(a) Article 1102 (national treatment);

(b) Article 1103 (most-favored nation treatment), and

(c) Article 1105 (minimum standard of treatment).

### 4. *Summary of the Claims*

#### *A. Articles Violated*

The United States has violated Articles 1102 and 1103 in two distinct ways: (1) by refusing entry of the Claimants into the United States for provision of trucking services, and (2) by prohibiting the Claimants from making investments in United States enterprises to provide such services.

The United States has violated Article 1105 through its calculated refusal to comply with the unanimous arbitration opinion *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-MEX-98-2008-01) ("*Cross-Border Trucking*").

#### *B. Finding of Breach*

The United States' breaches of its NAFTA obligations have already been definitely determined by the unanimous opinion in *Cross-Border Trucking*, which held, *inter alia:*

> ***(1) Refusal to Allow Entry***
>
> On the basis of the analysis set out above, the Panel unanimously determines that the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under Annex I (reservations for existing measures and liberalization commitments), Article

1202 (national treatment for cross-border services), and Article 1203 (most-favored nation treatment for cross-border services) of NAFTA. An exception to these obligations is not authorized by the "in like circumstances" language in Articles 1202 and 1203, or by the exceptions set out in Chapter Nine or under Article 2101. [*Cross-Border Trucking* at ¶ 295]

***(2) Prohibition on Direct Investments***

The Panel further unanimously determines that the United States was and remains in breach of its obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1102 (national treatment), and Article 1103 (most-favored-nation treatment) to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States. [*Cross-Border Trucking* at ¶ 297]

***(3) Non-Compliance with Arbitration Decision***

It is equally clear the United States has not complied with the recommendations of the arbitration panel or its own voluntary assurances that it would shortly comply with its NAFTA obligations and the panel opinion.

## *5. Factual Background*

### *A. Pre-NAFTA regulations*

#### *(1) Pre-1980*

Prior to 1980, the United States law did not distinguish between United States, Mexican or Canadian applicants for operating authority as motor carriers. Instead, operating authority was granted based on the economic justification for separate, individual routes. The regulatory regime, however, did restrict new entry into the U.S. market.

#### *(2) The 1980 Motor Carrier Act*

In 1980, the Motor Carrier Act eliminated regulatory barriers to entry into the U.S. market, including for Mexican and Canadian motor carriers. The Act made no distinction for non-U.S. nationals in obtaining operating authority from the ICC.

### *(3) The Bus Regulatory Act of 1982*

The equal treatment for Mexican companies ended in 1982 with the passage of the Bus Regulatory Reform Act, which included a moratorium against the issuance of operating authority to foreign motor carriers.

Initially, the moratorium was limited to two-years and was directed at both Canada and Mexico.

With respect to Canada, however, the moratorium was immediately lifted in response to Canada's Brock-Gotlieb Understanding, which confirmed that U.S. carriers would have continued access to the Canadian market.

On the other hand, the moratorium against Mexican trucking companies was extended every two years through 1995.

### *(4) The ICC Termination Act of 1995*

In 1995, pursuant to the ICC Termination Act, the Department of Transportation took over the ICC's responsibilities to issue motor carrier operating authorities.

The 1995 Act preserved the moratorium against Mexican trucking companies and the President's authority to modify or remove it.

Although the general moratorium continued in place, several exceptions were created that allowed Mexican carriers to enter the United States: (a) the commercial zone of border towns exception, (b) the Mexico-Canada transit exception, (c) the grand-fathered Mexican operators exception, (d) the U.S.-owned Mexican carrier exception, and (e) a temporary exception that allowed Mexican carriers to lease trucks and drivers to U.S. carriers.

*(a) Commercial Zone Exception*

Since before 1982, Mexican carriers have been permitted to operate in the commercial zones associated with municipalities along the United States-Mexico border: "U.S. motor carriers that operate exclusively within a commercial zone are not subject to the licensing jurisdiction of the Department of Transportation." 49 C.F.R. §372.241.

To enter the commercial zones, Mexican carriers need to obtain a Certificate of Registration from the Federal Motor Carrier Safety Administration. While this limited application process is less extensive than the process for authority to operate throughout the United States, the Certification still requires the Mexican carrier to name a U.S. legal process agent, to pay an application fee, and to certify that the applicant has access to and will comply with Federal Motor Carrier Safety Regulations. The Certification thus requires an investment in the United States to provide trucking services.

*(b) The Canadian Transit Exception*

United States regulations place no restrictions on Mexican trucks entering the United States in transit to Canada and do not require any operating authorization to do so. The only formal requirements are insurance and compliance with the U.S. safety regulations.

*(c) The Grandfathered Operators Exception*

Five Mexican carriers, which had acquired operating authority prior to 1982, have had their operating authority "grandfathered."

*(d) U.S.-Owned Mexican-Domiciled Carriers*

Mexican-domiciled carriers that have majority U.S.-ownership are exempt from the moratorium, so that United States Investors can operate in Mexico and the United States, but Mexican Investors cannot do the same.

On information and belief, there are currently about 160 U.S.-owned, Mexican-domiciled carriers that operate within the United States.

*(e) The Leasing Exception*

Prior to the enactment of the Motor Carrier Safety Improvement Act of 1999, Mexican carriers could lease trucks and drivers to U.S. carriers. Apparently, the exception was eliminated to prevent Mexican carriers from utilizing the operating permits of U.S.-based companies.

### *B. NAFTA Requirements*

NAFTA came into force on January 1, 1994. One of its core provisions was the opening of the U.S. and Mexican markets for trucking services.

#### *(1) Trucking Services*

NAFTA Annex I provided that a Mexican carriers could obtain operating authority to provide cross-boundary trucking services in border states in December 18, 1995, and cross-border trucking services throughout the United States by January 1, 2000.

#### *(2) Direct Investment in U.S. Carriers*

Direct investments in U.S.-based carriers were to be permitted by December 18, 1995, which would have allowed the establishment of enterprises providing trucking services for the transport of international cargo ***between points within the United States,*** not just between Mexico and the United States.

#### *(3) NAFTA Provisions*

Due to its importance to this case, the reservation at issue in the Schedule of the United States Sector: Transportation, Sub-Sector: Land Transportation, Phase-Out: Cross-Border Services, Investment, pages I-U-18 to I-U-20, is quoted in all relevant parts:

**Sector**: Transportation

**Sub-Sector**: Land Transportation

**Industry Classification**:
SIC 4213 Trucking, except Local
SIC 4215 Courier Services, Except by Air
SIC 4131 Intercity and Rural Bus Transportation
SIC 4142 Bus Charter Service, Except Local
SIC 4151 School Buses (limited to interstate transportation not related to school activity)

**Type of Reservation**: National Treatment (Articles 1102,1202) Most-Favored-Nation Treatment (Articles 1103, 1203) Local Presence (Article 1205)

**Level of Government**: Federal

**Measures**: 49 U.S.C.§10922(l)(1) and (2); 49 U.S.C.§10530(3); 49 U.S.C.§§ 10329,10330 and 1170519; 19 U.S.C. §1202; 49 C.F.R. § 1044 Memorandum of Understanding Between the United States of America and the United Mexican States on Facilitation of Charter/Tour Bus Service, December 3, 1990 As qualified by paragraph 2 of the Description element

Description: ***Cross-Border Services***

1. Operating authority from the Interstate Commerce Commission (ICC) is required to provide interstate or cross-border bus or truck services in the territory of the United States. A moratorium remains in place on new grants of operating authority for persons of Mexico. ....

3. Under the moratorium, persons of Mexico without operating authority may operate only within ICC Border Commercial Zones, for which ICC operating authority is not required. Persons of Mexico providing truck services, including for hire, private, and exempt services, without operating authority are required to obtain a certificate of registration from the ICC to enter the United States and operate to or from the ICC Border Commercial Zones. Persons of Mexico providing bus services are not required to obtain an ICC certificate of registration to provide these services to or from the ICC Border Commercial Zones.

4. Only persons of the United States, using U.S. registered and either U.S. built or duty paid trucks or buses, may provide truck or bus service between points in the territory of the United States.

***Investment***

5. The moratorium has the effect of being an investment restriction because enterprises of the United States providing bus or truck services that are owned or controlled by persons of Mexico may not obtain ICC operating authority.

Phase-out: **Cross-Border Services**

A person of Mexico will be permitted to obtain operating authority to provide:

(a) three years after the date of signature of this Agreement, cross-border truck services to or from border states (California, Arizona, New Mexico and Texas), and such persons will be permitted to enter and depart the territory of United States through different ports of entry;

....

(c) six years after the date of entry into force of this Agreement, cross-border truck services.

**Investment**

A person of Mexico will be permitted to establish an enterprise in the United States to provide:

(a) three years after the date of signature of this Agreement, truck services for the transportation of international cargo between points in the United States; and

(b) seven years after the date of entry into force of this Agreement, bus services between points in the United States. The moratorium will remain in place on grants of authority for the provision of truck services by persons of Mexico between points in the United States for the transportation of goods other than international cargo.

### *(4) Relation to NAFTA Chapter 11*

According to Annex I, the relevant Chapter provisions against which the Reservations were taken are Articles 1102 (national treatment in investment), 1202 (national treatment in

cross-border trade in services), 1103 (most-favored-nation treatment in investment), 1203 (most-favored-nation treatment in cross-border trade in services), and 1205 (local presence in cross-border trade in services).

As a practical matter, however, all of the restrictions relate to Investments, as that term is defined in Chapter 11, because provision of trucking services necessarily requires an investment of capital within the United States. In fact, Annex I notes the restriction on investment: "The moratorium has the effect of being an investment restriction because enterprises of the United States providing bus or truck services that are owned or controlled by persons of Mexico may not obtain ICC operating authority."

Moreover, for a Mexican carrier to take full economic advantage of the United States market, it would be required to make a direct investment in a U.S.-based entity. A Mexican carrier, for example, that does not own all or part of a U.S. entity could not (under NAFTA provisions) transport international cargo between points within the United States, an economic advantage that substantially increases the value of being able to operate outside the commercial border zones. Other material economic advantages inure solely to Mexican carriers that make an investment in the United States, such as lower lease and insurance rates for U.S.-licensed trucks, also making it necessary to make a direct investment to take full advantage of the U.S. market.

As a result, all of the restrictions on trucking services are violations of both Chapter 11 and Chapter 12 of NAFTA.

### *C. The United States' Assurances of Compliance with its NAFTA Obligations*

In September of 1995, United States Secretary of Transportation issued a press release announcing proposed measures for the "smooth, safe and efficient NAFTA transition."

Over the next months, the ICC published a proposed regulation entitled "Freight Operations by Mexican Carriers - Implementation of North American Free Trade Agreement." The ICC stated that the proposed regulations would be adopted as a final rule and would be effective on the date of implementation of NAFTA's cross-border truck service provisions, December 18, 1995.

The proposed ICC regulations required Mexican, U.S. and Canadian applicants to make an investment in the United States to qualify to provide services, including certifications that they had in place a system and an individual responsible for compliance with the regulations and policies of the Federal Motor Carrier Safety Regulations, the USDOT, and the ICC.

Although the procedures for obtaining authority to provide service between Mexico and the border states were to be identical to those in place for applicants from the United States and Canada, the application form for Mexican carriers was designated OP-1MX.

On December 4, 1995, U.S. Secretary of Transportation reiterated at a joint U.S.-Mexico press conference that both the United States and Mexico were "ready for December 18."

### *D. The United States' Refusal to Comply*

On December 18, 1995, the Secretary of Transportation repudiated the earlier assurances of compliance. In the December 18th press release, the Secretary stated that, due to alleged issues with Mexican truck safety, the United States would accept and process applications for cross-border trucking services from Mexican carriers, but the applications would not be finalized.

The policy of accepting applications but refusing to finalize them continues to date, and thus, the United States continues the moratorium on Mexican trucks that had been in place prior to December 18, 1995.

The December 18 press release also announced that beginning immediately, Mexican nationals could invest in U.S. carriers engaged in international commerce, but that statement was simply untrue. To date, the Department of Transporation maintains a complete ban on Mexican nationals owning or controlling U.S. carriers. This ban is enforced by the application form for new operating authority, which requires that the applicant certify that the applicant is not a Mexican national, and the carriers are not owned or controlled by Mexican nationals.

Many of the Claimants have applied for operating permits for cross-border services and to make investments in the United States. Many more have decided not to make such applications because they know that they will be denied.

### *E. Discrimination Against Mexican Carriers*

Although the United States agreed in NAFTA to phase out its moratorium against Mexican carriers, the United States has acted entirely to the contrary, singling out Mexican carriers as the sole group in the World that is prohibited from obtaining authorization to provide trucking services in the United States.

The U.S. "flagging" action, which concludes without support or inquiry that Mexican motor carriers, as a class, are too dangerous to be allowed in the United States is discriminatory, factually inaccurate, and an intrinsic denial of national treatment. U.S. carriers, unlike Mexican carriers, are entitled under U.S. law to both (1) consideration on their individual merits and (2) a full opportunity to contest the denial of operating authority. Both of these rights have been denied to Mexican Investors in violation of NAFTA.

Claimants are denied most-favored-nation treatment in that the U.S. Government accords national treatment to Canadian motor carriers (indeed carriers from any nation in the world other than Mexico), with none of the restrictions imposed on Mexican carriers.

The discrimination in favor of United States' interests is manifest. The United States permits roughly 150 Mexican-domiciled carriers who claim majority U.S. ownership to operate freely in the United States despite alleged deficiencies in the Mexican truck regulatory system. Similarly, until 1999, four years after restrictions on cross-border trucking were to be lifted under Annex I, the United States permitted U.S. motor carriers to lease Mexican trucks and drivers for operations in the United States.

In other words, U.S.-owned entities can use Mexican trucks and drivers in the United States, but Mexican-owned carriers cannot.

Notably, the ability of U.S. entities to gain access to Mexican markets was based on the United States' promises in NAFTA to open its own markets to Mexican investment. The panel in *Cross-Border Trucking* noted that:

> operating restrictions imposed formerly by the ICC and now by the USDOT in effect disallow new grants of operating authority to U.S. carriers owned or controlled by Mexican carriers. In order for the United States to obtain investment rights in Mexico, the United States agreed to take a comparable step by committing to modify the moratorium to permit Mexican nationals to own or control companies established in the United States to transport international cargo between points in the United States.

Despite its promises, the United States continues to distinguish between carriers based on the nationality of their ownership or control, denying Mexican-owned carriers national treatment (compared to U.S.-owned carriers) and most-favored-nation treatment (as Canadian carriers are subject to no such restrictions).

### *F. The Cross-Border Trucking Arbitration*

In order to protect the interests of Mexican carriers, on December 18, 1995, the Government of Mexico challenged the United States' refusal to comply with its NAFTA obligations.

Following years of negotiations, with no result, in 1998, Mexico initiated Party-to-Party arbitration against the United States in the *Cross-Border Trucking* matter. The U.S. violations were so clear that Canada intervened in Mexico's behalf.

In 2001, as set out above, the *Cross-Border Trucking* panel unanimously determined that the United States was in violation of Chapters 11 and 12 of NAFTA and recommended immediate efforts to bring the United States into compliance.

The United States, for its part, assured Mexico and the Claimants that the United States would shortly be in compliance with its NAFTA obligations. The assurances, however, were once again unfulfilled.

### *G. The United States' Admissions of NAFTA Violations*

The panel in *Cross-Border Trucking* noted that the United States did not even make a significant effort to defend the merits of its prohibition on direct investments by Mexican carriers. At the Oral Hearing, the representative of the United States stated the U.S. position as follows:

> On safety, the base defense goes to the services. We have a separate statement and position on the investments. What we said on investment is Mexico brought this case, [therefore] it's up to Mexico to prove its point.
>
> This is not a safety case with that. The situation, I think, is quite forthright and clear enough. The investment restriction arose from the moratorium, it's part of the moratorium that is still in place.

In essence, the United States has conceded that safety concerns, which are the claimed basis for the U.S. refusal to implement its cross-border service obligations, are not applicable to the moratorium on direct investments.

The United States has also conceded its violations of NAFTA in its filings in *Department of Transportation v. Public Citizen,* 124 S.Ct. 2204 (2004). In that case, the United

States Department of Transportation judicially admitted that the United States needed to open its borders to comply with its NAFTA commitments; for example:

> In November 2002, the President lifted a trade moratorium on certain operations by Mexican motor carriers in the United States. The President took that action ... to comply with the ruling of an international arbitration panel under the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605 (1993). [Brief of the United States at 2]
>
> The determination to allow cross-border operations by Mexican carriers was the result of the joint exercise by Congress and the President of their constitutional responsibilities for foreign trade and foreign relations, and was made in accordance with NAFTA obligations .... [Brief of the United States at 3]
>
> In May 2001, following the President's statements of his intent to comply with the decision of the NAFTA arbitration panel .... [Brief of the United States at 8]
>
> The President determined that permitting cross-border operations is "consistent with obligations of the United States under NAFTA and with our national transportation policy," and that "expeditious action is required to implement th[e] modification to the moratorium" on United States operations by Mexican motor carriers. [United States Brief at 15 (citations omitted)]
>
> [T]he President determined under Section 13902(c)(5) that the moratorium needed to be modified expeditiously to comply with NAFTA .... [Brief of the United States at 40]
>
> ... the President's effort to bring the United States into compliance with its obligations under NAFTA and the arbitration decision of February 2001 would be further delayed .... [Brief of the United States at 47]
>
> [T]he President [made] the decision-pursuant to his authority under 49 U.S.C. 13902(c)-to comply with the North American Free Trade Agreement (NAFTA) and open United States markets to Mexican carriers. [Reply Brief of United States at 3]

### *H. Recent Actions by the United States*

In March of this year, the United States ended any prospect that it would comply with even the barest minimum of its NAFTA obligations as to investments in cross-border trucking. As reported by the New York Times:

> The $410 billion spending bill that Mr. Obama signed into law last week cuts off financing for a pilot program that allows Mexican trucks to deliver goods across the United States. The move clearly violates the North American Free Trade Agreement, which promised – starting in 2000 – to open cargo transport throughout the United States, Mexico and Canada to carriers from all three countries. This week, Mexico retaliated, leveling tariffs against $2.4 billion worth of American imports.

New York Times, March 19, 2009, at A30.

### *6. Damages and Other Relief*

The closure of the U.S. market to Mexican carriers causes billions of dollars in losses to the Claimants.

Mexican carriers have a substantial economic advantage over their U.S. counterparts – Mexican drivers make materially less than U.S. drivers – which explains why the International Brotherhood of the Teamsters is so against the opening of the U.S. market to competition.

If the United States complies with its NAFTA obligations, it would open up a huge market for Mexican carriers to utilize their competitive advantage. As recognized by the DOT, there are more than 4.5 million northbound truck crossings of the United States-Mexico border each year. Currently, if those trucks are owned by a Mexican Investor, they cannot continue beyond the border areas. In addition, if NAFTA were implemented, for a small investment, Mexican carriers could carry international cargo anywhere within the United States.

Claimants have retained Dr. Jeff Leitzinger of EconOne in Los Angeles to quantify the applicable damages. The Government of Mexico estimates that the United States' breaches cost Mexico more than $2 billion (U.S.) a year and has, accordingly, imposed tariffs on $2.4 billion of goods exported from the United States to Mexico.

The Claimants damage is not limited to their lost opportunities. The Claimants have also been damaged by the refusal of the United States to comply with the ruling of the

arbitration panel in *Cross-Border Trucking*, and therefore delayed bringing this action and rested on the representation of the Mexican government in that proceeding. The Claimants' reasonable belief was bolstered by the United States' repeated assurances that it would shortly come into compliance.

Had the United States complied with the previous arbitration ruling, this proceeding would have been unnecessary. Claimants therefore request, pursuant to Article 32 of the UNCITRAL rules, that the United States government be required to pay all costs of the arbitration from inception.

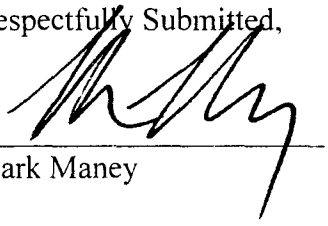
*7. **Appointment of Arbitrator***

The Claimants nominate Thomas Heather Rodríguez as arbitrator.

Thomas Heather Rodríguez
White & Case, S.C.
Torre del Bosque - PH
Blvd. Manuel Avila Camacho #24
Col. Lomas de Chapultepec
11000 México, D.F.
Mexico
Telephone: + 5255 5540 9600

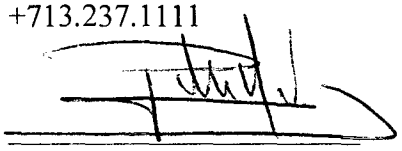
Dated: April 2, 2009

Respectfully Submitted,



Mark Maney

Burford & Maney PC
700 Louisiana, Suite 4600
Houston, Texas 77002
mmaney@burfordmaney.com
+713.237.1111



Pedro Ojeda Cardenas

Ojeda Abogados
Alborada 136-701
Parques del Pedregal
Tlalpan
Mexico D.F. 14010
pedromojeda@yahoo.com.mx
+525.55.606.9070

Counsel for the Claimants