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Mexico City, 11 June 2001

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RE: *United Parcel Service of America, Inc. (UPS) v. Government of Canada*

To the Members of the Tribunal:

1. The Government of Mexico makes this submission pursuant to NAFTA Article 1128 in relation to the petitions of the Canadian Union of Postal Workers ("CUPW") and of the Council of Canadians (the "Council") in the above referenced proceeding.

## A. INTRODUCTION

2. Mexico has a specific and unique interest in the resolution of this issue. Although the power of a court to receive *amicus* briefs is well recognized in domestic law of Canada and the United States, it is not recognized under Mexican law.

3. Under Mexican law, only a person with a legal interest in the dispute —*i.e.*, a party whose substantive rights may be affected as a result of litigation between the disputing parties— may make third party submissions. The concept of an *amicus* intervention is thus foreign to Mexican law.

4. NAFTA Chapter Eleven establishes a dispute settlement mechanism that carefully balances the procedures of common law countries and those of civil law countries. The fact that a specific procedure may exist in a Party's domestic law cannot serve as a ground for incorporating it into an international dispute settlement regime negotiated by countries with different legal traditions.

5. Even though in this arbitration both the disputing Party and the Party of the disputing investor are common law countries (in Canada's case, common and civil law), Mexico is

concerned that concepts or procedures that are alien to its legal tradition and which were not agreed to as part of Section B may be imported into NAFTA dispute settlement proceedings involving other NAFTA Parties and then set a precedent for future cases where Mexico is the disputing Party.

6. The Government of Mexico agrees with the disputing parties' position that the Tribunal has no jurisdiction under the NAFTA and the UNCITRAL Arbitration Rules to add the Petitioners as parties to this proceeding. Both disputing parties have also agreed that the questions of jurisdiction and place of arbitration are not issues on which a third non-party could provide an opinion. Mexico supports this position.

## B. SUBMISSION

7. Mexico submits that the NAFTA does not authorize this Tribunal to accept unsolicited submissions, such as *amicus* briefs, as is explained further below. Even if the UNCITRAL Arbitration Rules are silent on the matter or, as the *Methanex* Tribunal found, Article 15 authorizes a tribunal to conduct the arbitration so as to accept such submissions, in Mexico's view, the absence of express language in the international treaty means that that the Tribunal cannot take it upon itself to authorize actions that that sovereign States party to the Treaty did not authorize.

### 1. The Parties in a NAFTA Chapter Eleven dispute Settlement Proceeding

8. Section B allows an investor of a Party to make a claim for money damages arising from the alleged breach by another Party of certain obligations set forth in Chapter Eleven. By its express terms, Chapter Eleven allows only an investor of a Party[1] to submit a claim to arbitration under Section B, and such claims can only be directed against one NAFTA Party, *i.e.* the host State of the investment of the disputing investor. Article 1139 defines the disputing parties as the disputing investor and the disputing Party[2].

9. Except as provided under Article 1128, no other person has a legal interest in the dispute, and therefore, Chapter Eleven does not provide for the intervention of other persons.

10. Indeed, even an enterprise of a Party that is a juridical person owned or controlled, directly or indirectly, by an investor of another Party —and that, by definition, is an entity that has a legal personality separate and distinct from that of the investor— may not submit a claim to arbitration on its own against the Party under whose law it is established or organized, and it is also not afforded a right of intervention, even though it would have an interest in the dispute.

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1. Article 1139 defines investor of a Party as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".
2. Under Article 1139, "disputing investor means an investor that makes a claim under Section B" and "disputing Party means a Party against which a claim is made under Section B".

11. Thus, Section B limits the participation to the Investor who submits a claim to arbitration and the NAFTA Party against whom the claim is made. In addition, it provides a limited right to the other NAFTA Parties only to make submissions regarding the interpretation of the treaty[3]. Except for the parties already mentioned, NAFTA does not grant any right to third parties to participate in the proceeding.

## 2. Participation by a NAFTA Party

12. Since the NAFTA Parties have a fundamental interest in the proper interpretation of the Agreement, they agreed to allow for non-disputing NAFTA Parties to make submissions in cases involving another Party. Article 1128 itself is limited in that non-disputing Parties can make submissions only on questions of interpretation of the NAFTA. Canada has submitted in this proceeding that the "[Q]uestions regarding purely the interpretation of NAFTA Chapter Eleven are not matters upon which the Tribunal should receive *amicus* briefs. To permit the Petitioners to make submissions on this issue would accord to them the substantive rights of NAFTA Parties under NAFTA Article 1128, which is beyond the power of the Tribunal"[4]. Mexico concurs in this statement.

13. Allowing *amicus* briefs regarding legal matters would exceed the power conferred upon the Tribunal by the NAFTA. Moreover, allowing *amicus* briefs on factual matters would grant non-parties a right that is not even conferred to the other NAFTA Parties by Chapter Eleven. Only the NAFTA Parties have the power to modify the treaty in order to allow non-party participation. They have not done so. If the Tribunal allowed *amicus* briefs, in the respectful submission of Mexico, this would create new rights that the NAFTA Parties have not yet opened to discussion.

14. Moreover, the *Methanex* Tribunal concluded that "Article 15(1) ... cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons *who are not parties* the substantive status rights or privilege of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA."[5] [Emphasis added.] However, that Tribunal added "allowing a third party to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules"[6].

15. Article 15(1) of the UNCITRAL Arbitration Rules states that:

> Subject to this Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided

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3. See NAFTA Article 1128.
4. See Canada's Submission on Canadian Union of Postal Workers and the Council of Canadians Petition for Intervention, 28, May 2001, at para 49.
5. See Methanex Corporation vs. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", dated 15 January 2001, at para 27.
6. Ibid., para. 31.

> that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

16. Mexico respectfully disagrees with the *Methanex* Tribunal's last conclusion. The acceptance of *amicus* briefs under Article 15(1) of the UNCITRAL Arbitration Rules is beyond the jurisdiction of a Tribunal because it could obligate the disputing parties to respond to such arguments. Thus, the grant of an apparently minor procedural right could create a substantive legal issue in dispute. Mexico considers that nothing in the NAFTA nor in the UNCITRAL Arbitration Rules restrains a disputing party such as Canada in this case from consulting parties such as the Petitioners and adopting their views as its own arguments in order to support its case. In fact, Mexico itself has done this in cases in which it has been the respondent.

17. Under Articles 1127 and 1129, the NAFTA Parties are entitled to obtain all the documents and other information exchanged in the course of a proceeding under Section B of Chapter 11 of the Agreement, including the evidence tendered to the Tribunal, but that right is not extended to other persons. Therefore, when a NAFTA Party receives information related to evidence and written arguments in order to make a submission, the Party must treat that information as if it were a disputing party.

18. NAFTA Parties have availed themselves of the opportunity to make submissions in writing to tribunals hearing claims against another Party. However, non-disputing Parties have not taken an active role in such proceedings beyond the filing of such submissions and attendance at the hearing to observe it.

19. Given the limited scope of Article 1128 submissions, if *amicus curiae* submissions of the type proposed were allowed, *amici* would have greater rights than the NAFTA Parties themselves. Since nowhere in Chapter Eleven are non-NAFTA third parties even contemplated, such a result was not intended by the NAFTA Parties. In Mexico's view, allowing *amicus curiae* submissions would render Article 1128 meaningless, contrary to the principle of effectiveness in treaty interpretation, because the NAFTA Parties would then be able to make submissions on questions on interpretation of the Agreement under Article 1128, and *amicus* briefs would be filed for other purposes. In either case the result would be inconsistent with the plain language of the chapter.

### 3. Tribunals Have Limited Authority to Seek Other Evidence or Information

20. Article 1133 only allows tribunals to seek for information from experts with consent of the disputing parties:

> ...a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters

raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

21. Thus, even the Tribunal's authority to act on its own initiative for the appointment of experts and receiving their opinions is limited; in any event, is subject to the disputing parties' approval.

## C. CONCLUDING REMARKS

22. Mexico supports the disputing parties' opposition to that Petitioners' request for: (1) status as parties: (2) the right to have all documents and pleadings in the proceeding disclosed to them; and (3) the right to make submissions on jurisdiction and the place of arbitration. The Tribunal has no jurisdiction to accede to these requests. Mexico submits that these issues are reserved to the submissions of the disputing parties and to the other NAFTA Parties with respect to the interpretation of the treaty.

23. Regarding the Petitioners' request, in the alternative, for permission to intervene as *amicus curiae*, Mexico reiterates its position in the sense that Article 15(1) of the UNCITRAL Arbitration Rules does not provide this Tribunal with the power to authorize the reception of *amicus* briefs.

24. If the NAFTA Parties had intended to incorporate such a right, they would have done so expressly, just as they did in the case of Article 1128 submissions. The express limitation of the rights of the NAFTA Parties —who have a direct legal interest in all disputes— and enterprises of a Party with a participation of investors another Party —who would have a direct or indirect interest in certain disputes— leads to the conclusion that other types of interventions are not allowed.

25. In the event that the Tribunal does accede to either Petitioner's request for amicus status, Mexico requests that the Tribunal formally record Mexico's concerns stated in Part A above so as not to prejudice Mexico's position in future proceedings.

All of which is respectfully submitted

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