November 3, 2005

Via Facsimile

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Dear Sirs:

Re: United Parcel Service of America Inc. v. Government of Canada

I am writing to respond to the disputing investor's (UPS) 'observations' concerning our application for *Amicus Curiae* standing. Its response, which was prepared by Mr. Appleton's firm, misrepresents certain matters, and goes well beyond the bounds of acceptable advocacy. For these reasons we believe it should be disregarded.

Mr. Appleton is scornful of our clients' concerns about the potential impacts of investor-State litigation on social services, suggesting they reflect an element of bad faith disentitling them to intervener status. In this context, it is appropriate to point out that he himself has previously collaborated with our clients in formulating the very views he now derides. Moreover, in some instances he castigates our clients for expressing views that reflect the very legal advice he has, on retainer, provided to them.

Sack
Goldblatt
Mitchell

In a legal opinion Mr. Appleton prepared for the Council of Canadians[1], and in another for the Canadian Health Coalition (which is supported by both our clients), Mr. Appleton expresses a view of the NAFTA reservation for social services that flatly contradicts the view he expresses at paragraphs 14 and 15 of the UPS present submissions. In his opinion for the Health Coalition, which is currently posted to Mr. Appleton's web site, Mr. Appleton says, referring to the risk that the US view of this reservation might prevail:

> "If this type of definition were adopted by a NAFTA Tribunal, it could render Canada's reservation virtually meaningless for many portions of the health, public education and child care sectors, as each sector contains services provided by private commercial providers in Canada."[2]

Nevertheless, he now dismisses this very concern about the broader implications of the position now being urged on behalf of UPS.

The UPS submissions also castigate our clients for using blunt language to express their criticism of NAFTA investment disciplines. In fact, our clients' advocacy has been modest by comparison with Mr. Appleton's own hyperbolic statements about investment rules such as those set out in Article 1110 of NAFTA. For example, in a widely quoted interview Mr. Appleton describes such rules this way:

> **"They could be putting liquid plutonium in children's food; if you ban it and the company making it is an American company, you have to pay compensation."**[3]

Appearing before a Special Legislative Committee of the Legislative Assembly of the Province of British Columbia to comment on the OECD's proposed multi-lateral agreement on investment, which essentially would have replicated NAFTA investment rules, Mr. Appleton states:

> **"...this is, in essence, an economic constitution. We do not have the right to property in Canada under our constitution, and Canadians do**

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[1] See Barry Appleton to Peter Bleyer, Executive Director, Council of Canadians, Memorandum re: Reservations to the Proposed Multilateral Agreement on Investment, Toronto, November 14, 1997

[2] Legal Opinion for the Canadian Health Coalition, April 10, 2000; http://www.appletonlaw.com/cases/AltaGovtB11-Appleton.PDF ; accessed Nov. 1, 2005

[3] From http://www.equalityrights.org/ngoun98/maiun.htm

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not have the right to property under the MAI, but foreign investors would. That's the difference. So we're in a rather absurd situation..."[4]

The UPS submissions also disparage our clients' constitutional challenge to Canadian measures implementing NAFTA investor-State procedures, as if that application disqualifies them from participating in this proceeding. To the contrary, the fact of their application, which was noted in their initial application for standing before this Tribunal, demonstrates the *bone fides* of their interest in the present case.

Our clients are critics of the NAFTA investment process and make no apology for that. They believe that Canadian measures implementing the regime are unconstitutional. Nevertheless, while these procedures endure, our clients have a direct and general public interest in not having them read and applied in the expansive manner urged by Mr. Appleton. We understand that this view is unpopular with Mr. Appleton's clients, but it is an entirely valid position for our clients' to adopt and one that we believe is important for this Tribunal to consider.

Finally, Mr. Appleton misrepresents the facts of domestic judicial proceedings involving the review of NAFTA awards. He states that "Canada's own courts have repeatedly denied similar attempts by the Council to intervene in reviews of NAFTA arbitral awards." In fact the Council has made only one application to participate in such a proceeding. CUPW-STTP has made none. His assertion that the Council of Canadians was a party to an application before the BC Supreme Court involving the review of Metalclad award is also false.

Rather than respond to the actual submissions that we have made in our application, Mr. Appleton has chosen selectively from the views our clients have expressed in other fora for the purpose of castigating them. Our clients have made no effort to disguise their criticisms of the investor-State regime and in fact have expressed this criticism in the affidavits sworn in support of their initial application for party standing, which this Tribunal has reviewed and determined.

Absent some indication of bad faith, and there is absolutely no support for the oblique suggestion made by UPS in this regard, our clients' extrajudicial comments are of no relevance to the application before this Tribunal.

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[4] Testimony of Barry Appleton, The Transcript, Issue No. 5, Victoria, September 30, 1998, pp. 141 ff , as contained in 1998 Legislative Session: 3rd Session, 36th Parliament, **Report: The Multilateral Agreement on Investment: The Transcripts of Proceedings** (Hansard).

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This is particularly true because, unlike Mr. Appleton's views, our clients' extra-judicial comments are entirely consistent with the position taken in their written submissions.

Sincerely,

S. Shrybman per

Steven Shrybman

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cc Ms. E. Obadia
cc Mr. I.G. Whitehall
cc Mr. B. Appleton

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