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

THE GOVERNMENT OF CANADA

Respondent/Party

INVESTOR'S REPLY TO MEXICO'S ARTICLE 1128 SUBMISSION

Appleton & Associates
International Lawyers
77 Bloor Street West, Suite 1800
Toronto, Ontario M5S 1M2
Tel: (416) 966-8800
Fax: (416) 966-8801

I. Overview

is Reply responds to Mexico's submission under NAFTA Article 1128. While Mexico s correct some of Canada's mistakes in interpreting NAFTA, the remainder of its mission is inconsistent with the text and context of the NAFTA provisions at issue l antithetical to NAFTA's objects and purposes.

S welcomes Mexico's submission that the first step in analyzing an alleged breach of FTA Article 1102(2) is to determine if the foreign and domestic investments are in e circumstances." Mexico's submission confirms that Canada's submission is wrong llege that the Tribunal's national treatment analysis should begin with the "treatment".

wever, Mexico's other submissions on the meaning of Article 1102 repeat the same tual and contextual mistakes made by Canada in its submissions. Just like Canada ore it, in rejecting the application of the equality of competitive opportunities test to FTA Article 1102, Mexico forgets that it endorsed the application of the equality of npetitive opportunities test in the *Cross-Border Trucking* case. Just like Canada before Mexico's interpretation breaches its GATS commitment to apply the equality of npetitive opportunities test to Article 1102.

xico's submission that NAFTA Chapter 15 somehow replaces the application of the rnational law on state responsibility to Chapter 11 is equally misplaced. Mexico ply repeats the same groundless arguments made by Canada. Just like Canada, Mexico ls to reconcile its interpretation with the NAFTA text or the GATT Panel decision that resses the issue. Just like Canada, Mexico fails to explain why the NAFTA's drafters uld seek to restrict customary international law rules that apply to those state terprises and monopolies which also exercise governmental powers.

5. Mexico's approach to NAFTA Article 1105 is also different from that adopted by Canada. However, while Mexico avoids some of Canada's errors, it misstates the idence relating to this obligation. The latter confirms that conduct by a state is y and a violation of Article 1105 where the state acts based on irrelevant reasons.

al Treatment Requires Equality of Competitive Opportunities

Mexico's Submission Corrects Canada's Misreading of the Text

A 1102(2) reads as follows:

> Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

confirms that an assessment of whether the relevant investments are in "like stances" is the first step in an analysis of an alleged breach of NAFTA Article).[1] Mexico's submission corrects Canada's mistaken submission that the station of "like circumstances" is dependent on the "treatment" in question.

xico implicitly recognizes, Canada's approach suffers from a number of logical First, the text of NAFTA Article 1102 requires that "like circumstances" be ined as a first step. It is only after at least a *prima facie* determination of like stances that the nature of the treatment becomes relevant. If "like circumstances" exist, the treatment that is being accorded becomes irrelevant.

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[1] If [the relevant investments] are *not* in like circumstances, and are treated differently, there is no ach because being *in* like circumstances is the factual predicate to Article 1102's operation", 1128 submission at para. 11.

9. Second, a violation of national treatment will only occur where the less favorable treatment results in some difference between the investments being compared. A Party lowed to use the differences resulting from its less favorable treatment to e investments are "unlike".

sely what Canada has done in this case. Canada Post and UPS Canada are ments". They are both enterprises that earn a return on equity for their sole , respectively, the Government of Canada and UPS. Both enterprises earn , at least in part, by competing against each other in the market for courier nada has granted Canada Post certain special governmental powers and at are not available to UPS Canada. These powers and privileges are used ost in a manner that results in less favorable treatment of UPS Canada.

argues that the fact that UPS Canada does not have the same governmental Canada Post renders it "unlike". This argument is completely circular. It is on of governmental powers by Canada that is the source of the less favorable ny violation of national treatment could be excused by Canada's reasoning as nvestment will always be "unlike" in some manner due to its less favorable

nterpretation proposed by Canada inevitably leads to an inquiry into the otivations behind the "treatment" that is inconsistent with the text of NAFTA . NAFTA Article 1102 contemplates an objective inquiry into the nature of nts and of the treatment accorded to them. The reasons behind the n treatment are not objective "circumstances" that can fit within the text of

B. *Equality of Competitive Opportunities is Consistent with The Text of NAFTA Article 1102*

cting Canada's misreading of the text of NAFTA Article 1102 by confirming
ticle requires a tribunal to begin with an assessment of "like circumstances",
n proceeds to repeat some of Canada's mistakes in interpreting other aspects
le. Primarily, Mexico mistakenly argues that the Tribunal can only interpret
rticle 1102 as guaranteeing equality of competitive opportunities by "departing
lain text."[2] This is incorrect. The Investor's interpretation is the logical result
g the principles in the *Vienna Convention on the Law of Treaties*.

1) of the *Vienna Convention* provides that "A treaty shall be interpreted in
in accordance with the ordinary meaning to be given to the terms of the treaty
ntext and in the light of its object and purpose." The ordinary meaning of the
circumstances" is not self-evident but becomes clear when examined in its
l in the light of the NAFTA's object and purpose.

lf-evident is that the term "like circumstances" cannot have the meaning
by Canada. Canada alleges that the appropriate comparator must be the
nvestment in the "most similar circumstances". The text of NAFTA Article
ever, has a threshold of "likeness" to identify the class of relevant Canadian
rs. Once this threshold is met, there is no further search for the most similar
r.

e Context of NAFTA Article 1102 Demonstrates it Guarantees Equality of mpetitive Opportunities

xt of NAFTA Article 1102 demonstrates the true meaning of "like
ces" and that the Article guarantees equality of competitive opportunities. The

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[2] submission at para. 9.

other national treatment obligations within the NAFTA are a critical aspect of the context of NAFTA Article 1102. In particular:

tional treatment obligation for investments is reproduced in NAFTA
r 14 which addresses financial services. Due to the special sensitivity of the
al services sector, NAFTA's drafters included additional interpretive
ce on the meaning of national treatment for investments in Chapter 14.
nterpretive guidance expressly confirms national treatment *for*
ents means a requirement to provide equality of competitive
tunities;

servations made to NAFTA Article 1102 demonstrate that it applies to
n the same economic sector that supply similar services;

tional treatment obligation for cross-border trade in services contains the
'in like circumstances" language as NAFTA Article 1102. The NAFTA
s have confirmed that "like circumstances" has the same meaning as
age in the GATS that also expressly refers to conditions of competition;

A Article 1505 uses the phrase "in like circumstances" to refer to
ting firms;

AFTA national treatment obligation for trade in goods incorporates by
ce the obligations of GATT Article III and the jurisprudence interpreting it
iring equality of competitive opportunities. NAFTA Article 1102 is
ed on GATT Article III:4; and

tional treatment obligation for investments in the Canada-US Free Trade
ment used an explicit GATT-based approach that was implicitly continued
FTA.

i) NAFTA Article 1405 Confirms That Equality of Competitive Opportunities Applies to Investments

TA Chapter 11 nor NAFTA Chapter 12 (dealing with Cross-Border Trade in
ly to "measures adopted or maintained by a Party to the extent that they are
hapter Fourteen (Financial Services)".[3] In order to exclude financial
the national treatment obligations in NAFTA Chapters 11 and 12, the
duced these obligations in NAFTA Article 1405 as follows:

> arty shall accord to investors of another Party treatment no less favorable than that it
> s to its own investors, in like circumstances, with respect to the establishment, acquisition,
> ion, management, conduct, operation, and sale or other disposition of financial institutions
> vestments in financial institutions in its territory.
>
> arty shall accord to financial institutions of another Party and to investments of investors of
> r Party in financial institutions treatment no less favorable than that it accords to its own
> ial institutions and to investments of its own investors in financial institutions, in like
> stances, with respect to the establishment, acquisition, expansion, management, conduct,
> ion, and sale or other disposition of financial institutions and investments in financial
> tions in its territory.
>
> t to Article 1404, where a Party permits the cross-border provision of a financial service it
> ccord to the cross-border financial service providers of another Party treatment no less
> ble than that it accords to its own financial service providers, in like circumstances, with
> t to the provision of such service.

, 2 and 3 of NAFTA Article 1405 thus reproduce the national treatment
or both investment and services in NAFTA Articles 1102(1), 1102(2) and
nilarly, NAFTA Article 1405(4) reproduces the "best treatment in
requirement for state and provincial measures in NAFTA Articles 1102(3)

19. At this point, however, the drafters of NAFTA Article 1405 added explanations of these national treatment obligations to provide better guidance to interpreters of these provisions in this critical sector. These explanations are as follows:

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[3] NAFTA Article 1101(3). See also NAFTA Article 1201(2)(a) for the services exclusion.

5. *A Party's treatment of financial institutions and cross-border financial service providers of another Party, whether different or identical to that accorded to its own institutions or providers in like circumstances, is consistent with paragraphs 1 through 3 if the treatment affords equal competitive opportunities.*

A Party's treatment affords equal competitive opportunities if it does not disadvantage financial institutions and cross-border financial services providers of another Party in their ability to provide financial services as compared with the ability of the Party's own financial institutions and financial services providers to provide such services, in like circumstances.

Differences in market share, profitability or size do not in and of themselves establish a denial of equality of competitive opportunities, but such differences may be used as evidence regarding whether a Party's treatment affords equal competitive opportunities.

TA Article 1405(5) therefore confirms that the standard of equality of competitive rtunities applies to *investments* as well as to trade in goods.

da's NAFTA Statement of Implementation demonstrates that the standard is not ited to Chapter 14 and investments in financial service providers. The Statement hasizes that Chapter 14 captures "general rules" and the "principle" of national ment.[4] The additional explanatory comments on the meaning of national treatment nvestments in financial services were added for greater certainty in light of the itivity of this sector.

well as confirming that the standard of equality of competitive opportunities applies to stments as well as to trade in goods, NAFTA Article 1405(5) also confirms long-blished GATT doctrine that different treatment does not necessarily mean less rable treatment and, conversely, that identical treatment can result in less favorable ment.[5]

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nt of Implementation says at 172 - 173: "The second objective [of Chapter 14] was to move beyond S] FTA by basing market access on a set of *general rules* enshrining national treatment, MFN right of consumers to purchase financial services on a cross-border basis and the right to market access tablishment of a commercial presence, (Investor's Book of Authorities Tab 9). The emphasis on *ples*, rather than the a la carte approach taken in the FTA, is path-breaking of the best kind, building ade in the Uruguay Round negotiations in drafting a General Agreement on Trade in Services ed].

Government of Canada, Reply at para. 537, *Canada Beer*, GATT Feb. 18. 1992, DS17/R - 39/27, k of Authorities (Tab 131) at para. 5.12.

22. Similarly, NAFTA Articles 1405(6) and (7) confirm that the inquiry into a national treatment violation consists of an examination of competitive disadvantages using evidence such as differences in market share, size or profitability. They also confirm that it is equality of opportunities, not equality of results that is guaranteed by the national treatment obligation.

24. In Annex II to the NAFTA, the Parties set out their reservations to obligations, including their national treatment and most-favored nation treatment obligations for both Investment and Cross-Border Trade in Services. The many common reservations for both Chapters 11 and 12 demonstrates the fundamental similarity between national treatment for cross-border services trade and investment.

25. Moreover, for each reservation, the NAFTA Parties set out the following information:

a. The general sector for which the reservation is made (e.g. Transportation);
b. The specific sub-sector involved (e.g. Water Transportation);
c. The standard industry classification covered by the reservation (e.g. SIC 4543 – Marine Towing Industry);
d. The obligation to which the reservation is taken (e.g. national treatment);
e. A description of the economic activities covered by the reservation (e.g. "Canada reserves the right to adopt or maintain any measure relating to investment in or provision of maritime cabotage services"); and
f. Any existing measures covered by the reservation.

[6] Mexico's Article 1128 submission at paras. 7 and 10.

25. The use of specific economic sub-sectors to identify reservations to national treatment demonstrates that the identification of the precise economic sector in which the investment operates is the critical first step in the analysis under NAFTA Article 1102. Once firms compete in the same economic sector, then the obligation to provide "treatment no less favorable" applies. Thus, where NAFTA Parties chose not to provide "treatment no less favorable", they identified specific economic sectors and business activities in their Annex II reservations.

iii) *NAFTA Article 1202 and the GATS Confirm That "Like Circumstances" Involves Conditions of Competition*

national treatment obligation for cross-border trade in services contains the same e circumstances" formulation as NAFTA Article 1102. NAFTA Article 1202 reads:

> Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.

he NAFTA Chapter 20 state-to-state arbitration in *Cross-border Trucking Services*, all e NAFTA Parties agreed that the meaning of "like circumstances" in NAFTA Article 1202 was the same as "like services and service providers". The Chapter 20 Panel stated:

> The Panel, in interpreting the phrase "in like circumstances" in Articles 1202 and 1203, has sought guidance in other agreements that use similar language. ***The Parties do not dispute that the use of the phrase "in like circumstances" was intended to have a meaning that was similar to the phrase "like services and service providers" as proposed by Canada and Mexico during NAFTA negotiations.*** Also, the United States contends, and Mexico does not dispute, that the phrase "in like circumstances" is not substantively different from the phrase "in like situations" as used in bilateral investment treaties.[7]

The NAFTA Chapter 20 Panel found simultaneous violations of the national treatment obligations contained in both NAFTA Articles 1202 and 1102 arising from the same US measure. It did so based on an analysis of what it referred to as "similar national

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[7] *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-Mex-98-2008-01) Final Report of the Panel, February 6, 2001, Book of Authorities (Tab 106) at para. 249.

treatment obligations" in GATT Article III and, in particular, the *Section 337* case which first articulated the well-known "equality of competitive opportunities" test.[8] The NAFTA Chapter 20 Panel specifically discussed the interpretation of NAFTA Article 1102 by reference to "long-established doctrine under the GATT and WTO" that

> national treatment in goods "to protect expectations regarding competitive ties".[9]

age of "like services and service providers" proposed by Canada and Mexico in 'A negotiations, which all three NAFTA Parties agreed was equivalent to "like nces", eventually made its way into the GATS. In that agreement, the Parties ressly confirmed that national treatment requires equality of competitive ties - just as the NAFTA Parties had in NAFTA Article 1405. Article XVII of , entitled National Treatment, reads:

> ... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
>
> A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> ***Formally identical or formally different treatment shall be considered to be less favourable treatment if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.***

30. The NAFTA was negotiated concurrently with the GATS and all three NAFTA Parties are also parties to that agreement.[10] The meaning of NAFTA's "like circumstances"

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[8] *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-Mex-98-2008-01) Final Report of the Panel, February 6, 2001, Book of Authorities (Tab 106) at para. 251.

[9] *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-Mex-98-2008-01) Final Report of the Panel, February 6, Book of Authorities (Tab 106) at para. 289.

[10] World Trade Organization (WTO) Status of Legal Instruments WTO/*Leg/1* Supplement 3, October 2002, Investor's Book of Authorities, Tab 183.

language in NAFTA Articles 1202 and 1102 must therefore be consistent with the meaning of national treatment in the GATS.

21 The need for a consistent interpretation between NAFTA Chapter 11 and the GATS is / the fact that the GATS also applies to investments. The GATS defines "the ervice" to include services supplied "by a service supplier of one Member, mmercial presence in the territory of any other Member".[11]

nade commitments covering the courier sector in the GATS.[12] UPS supplies ces in Canada through its commercial presence, UPS Canada. Thus, Canada that "modifies conditions of competition" in favour of Canadian liers violates Canada's GATS commitments in the courier sector.

TA, the Parties chose to have service suppliers who supply through a presence in the territory protected by NAFTA Chapter 11 rather than NAFTA [13] They did so because, unlike the Members of the WTO, the NAFTA Parties an agreement to provide such investments with additional protections (such from expropriation).

, drafters could not have intended the national treatment protection for o supply a service through a commercial presence in the territory of another ower under the NAFTA than under the GATS. Instead, they must have

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Investor's Book of Authorities, Tab 77.

Canadian Schedule of Specific Commitments to the GATS, The Legal Texts, The Results of Multilateral Trade Negotiations, World Trade Organization, 15 April 1994, Respondent's b 10). See also para. 695 of Canada's Counter Memorial: "[Canada has] committed to urier services .."

le 1213(2) excludes from the definition of cross-border trade in services "the provision of a f a Party by an investment, defined in Article 1139 (Investment - Definitions) in that

assumed that by protecting such investments under NAFTA Chapter 11 rather than NAFTA Chapter 12, they were providing a level of protection from violations of national treatment that was at least as strong as the one in the GATS. Measures that modify
of competition in favor of domestic service providers must therefore have been violate Article 1102.

NAFTA drafters were *under an obligation* to ensure that national treatment or investors who supply a service through a commercial presence in the nother Party was not lower under the NAFTA than under the GATS. Article ATS, entitled "Economic Integration," says:

> Agreement shall not prevent any of its Members from being a party to or entering into an ment liberalizing trade in services [such as the NAFTA] ... *provided that such an agreement ovides for the absence or elimination of substantially all discrimination, in the sense of le XVII* [the GATS national treatment Article].

II of the GATS protects equality of competitive opportunities for service at supply services through a commercial presence. By interpreting NAFTA 2 of the NAFTA to provide less than that level of protection, Mexico and uld be in breach of their obligation in Article V of the GATS.

NAFTA Article 1505 Uses "In Like Circumstances" to Refer to Competitors

rticle 1505 states that:

> riminatory provision includes *treating*:
>
> a parent, a subsidiary or other enterprise with common ownership *more favorably* than an unaffiliated enterprise; or
> one class of enterprises *more favorably* than another,
> *ke circumstances*; [emphasis added]

As with Article 1102, the avoidance of "discriminatory provision" requires treatment no less favorable of an enterprise in like circumstances.

37. NAFTA Article 1502(3)(d) uses the "discriminatory provision of the monopoly good or service" as an example of an anti-competitive practice that may adversely affect an investment of an investor of another Party. By definition, in order to be an anti-competitive practice, the discriminatory provision must involve more favorable treatment of one enterprise that competes with another. The enterprises "in like circumstances"

v) NAFTA Article 1102 Tracks The Language of GATT Article III(4)

39. In NAFTA's Preamble, the NAFTA Parties recognized that they had negotiated NAFTA to "build on their respective rights and obligations under the *General Agreement on Tariffs and Trade* ...". By that point in time, the GATT had achieved tremendous success in reducing economic protectionism in trade in goods. It did so not only by eliminating tariffs and import quotas, but also by requiring that goods receive national treatment once they crossed the border.

40. The national treatment obligation in GATT Article III countered two forms of economic protectionism. First, in Article III:2, it addressed discriminatory taxes. Second, in Article III:4, it addressed discriminatory regulation.[14] At the same time, the GATT allowed for

[14] GATT Article III(4):

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of

exceptions to these disciplines for both government procurement and subsidies in Article III:8.[15]

41 FTA's drafters negotiated its provisions on trade in goods, they simply ad the national treatment obligation in GATT Article III by reference.[16] In hey ensured that they had also incorporated by reference the GATT Article III ace on "equality of competitive opportunities".

42 when negotiating provisions on trade in services and investment, there was no eement to incorporate by reference. For cross border trade in services, Canada o proposed replicating the GATT Article III "like products" language with ces and service providers". However, the NAFTA Parties ultimately settled on nstances" language in both NAFTA Articles 1102 and 1202 on the ling that this was not materially different from that proposed by Canada and

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nternal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

[15] GATT Article III:8:

> 8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
>
> (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

[16] NAFTA Article 301(1) reads:

> Each party shall accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement of Tariffs and Trade* (GATT), including its interpretive notes, and to this end Article III of the GATT and its interpretive notes or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

[17] *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-Mex-98-2008-01) Final Report of the Panel, February 6, 2001, Book of Authorities (Tab 106) at para. 249.

43. Indeed, the structure of Article III:4 was clearly the inspiration for NAFTA Article 1102. It reads:

> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ....

44. GATT Article III:4 and NAFTA Article 1102 both have the following similarities:

a. They identify foreign and domestic economic interests (respectively, products and investments);

b. They require a party to accord these economic interests "treatment no less favorable";

c. This "no less favorable" treatment need only be afforded to economic interests that satisfy a "likeness" requirement;

d. The "no less favoreble" treatment must be accorded throughout the time the economic interest continues in the territory (in the case of a product, from its offering for sale through its transportation and distribution to its final use; in the case of an investment, from its establishment through its conduct and operation to its final disposition); and

e. The obligation is subject to exceptions for government procurement and subsidies.

45. The words "treatment no less favorable" were used in NAFTA Article 1102 as their meaning had been considered extensively in GATT jurisprudence. As set out in the Investor's Memorial, this jurisprudence had interpreted "treatment no less favorable" as requiring equality of competitive opportunities.[18]

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[18] Investor's Memorial at para. 536.

vi) *NAFTA Article 1102 Follows The GATT-based Approach in the Canada-US Free Trade Agreement*

46. The NAFTA's predecessor agreement, the Canada-US Free Trade Agreement ("FTA"), contained a national treatment obligation for investments that had an express exception for certain public policy objectives that was modeled on the exception to national treatment for trade in goods in GATT Article XX.[19] FTA Article 1602 reads:

> 1. Except as otherwise provided in this Chapter, each Party shall accord to investors of the other Party treatment no less favorable than that accorded in like circumstances to its investors with respect to measures affecting:
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> a) the establishment of new business enterprises located in its territory;
> b) the acquisition of business enterprises located in its territory;
> c) the conduct and operation of business enterprises located in its territory; and
> e) the sale of business enterprises located in its territory. ...
>
> 8. Notwithstanding paragraph 1, the treatment a Party accords to investors of the other Party may be different from the treatment a Party accords its investors provided that:
>
> a) the difference in treatment is no greater than necessary for prudential, fiduciary, health and safety, or consumer protection reasons;
>
> b) such different treatment is equivalent in effect to the treatment accorded by the Party to its investors for such reasons; and
>
> c) prior notification of the proposed treatment has been given in accordance with Article 1803.
>
> 9. The Party proposing or according the different treatment under paragraph 8 shall have the burden of establishing that such treatment is consistent with that paragraph.

47. In debating the meaning of "like circumstances" in the *Cross-border Trucking Services* case, Mexico stated that its "immediate source" was in the corresponding chapter of the

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[19] GATT Article XX reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (*a*) necessary to protect public morals;
>
> (*b*) necessary to protect human, animal or plant life or health; ...

FTA. The United States also argued that the "elaborating language in the FTA" should be port the meaning of "like circumstances". Based on these submissions, the Panel concluded that "the phrase 'like circumstances' may properly include treatment under the conditions specified in the FTA".[28]

e time, the Chapter 20 Panel recognized that "a broad interpretation of the 'in stances' language could render NAFTA Articles 1202 and 1203 meaningless". d that, when used to justify less favorable treatment, the phrase "in like ces" should be interpreted narrowly in the same manner as GATT Article

ace of an exception to national treatment for investments in the FTA modeled XX of the GATT is further evidence that NAFTA's drafters intended to adapt cepts for the new areas of trade in services and investment. NAFTA's drafters iminate the elaborating language in FTA Articles 1602(8) and (9) as they that these exceptions were implicit in the language of "like circumstances".

order Trucking Services, Mexico expressly acknowledged that the strict o justification of less favorable treatment set out in the FTA was continued in its positions in that case are completely inconsistent with the views that it now in its Article 1128 submission.

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oss-Border Trucking Services (Secretariat File No. USA-Mex-98-2008-01) Final Report of the 01, Investor's Book of Authorities (Tab 106) at paras. 249 and 258. The Parties were referring which has the same wording as FTA Article 1602, except that it relates to services rather than

ross-Border Trucking Services (Secretariat File No. USA-Mex-98-2008-01) Final Report of the 01, Investor's Book of Authorities (Tab 106) at paras. 259 and 260. Articles 1202 and 1203 of nal treatment and most-favored-nation treatment obligations for trade in services.

D. *Relevant Rules of International Law Confirm That Equality of Competitive Opportunities Applies to National Treatment for Investments*

)(c) of the *Vienna Convention* states that "any relevant rules of international
le in the relations between the parties" "shall be taken into account" in
NAFTA Article 1102. In addition, the *Vienna Convention* also directs
t "A special meaning shall be given to a term if it is established that the
ended."[22]

12, 14 and 15 of the NAFTA are part of the context of Article 1102 while the
nents are relevant rules of international law. Taken together, they establish
. Article 1102 has a special meaning. The NAFTA drafters confirmed their
pply this special meaning by entitling Article 1102 "National Treatment"
ding national treatment as a principle and rule of the NAFTA in Article

rafters chose to use the heading "National Treatment" for NAFTA Article
t a heading such as "Non-discrimination Against Aliens". By doing so, they
r intention to create a framework for economic integration for the 21st
r than a codification of 19th century forms of diplomatic protection.

lco's Submission Overstates The Implications of The *Methanex* Decision

bmission adopts passages in Canada's Rejoinder that rely heavily on certain
ents in the *Methanex* decision.[23] These comments were cited by Canada out
In addition, the *Methanex* tribunal was not referred to many of the provisions

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Article 31(4), Investor's Book of Authorities (Tab 19).

ticle 1128 submission at para. 10: "Mexico respectfully agrees with the findings of the
l in Canada's Reply at paragraphs 62 *et seq.*"

of NAFTA, the FTA or the comments of the NAFTA Parties in *Cross-border Trucking* cussed above. Its failure to consider this context thereby diminishes the certain of its comments regarding the relationship between the GATT and ticle 1102.

x, the tribunal faced a claim that was seriously flawed on numerous levels. nt challenged a ban on the fuel additive MTBE, but was not a manufacturer of stead, it manufactured methanol, an ingredient used in the production of ns, the claimant was only indirectly affected by the measure through its general mpact on upstream suppliers of methanol.

ent this fundamental flaw, the claimant argued that both methanol and ethanol sting "oxygenates" - a claim that the tribunal found was unsubstantiated.[24] nt then confused equality of competitive opportunities with equality of results. at the mere fact that there was a difference in the treatment of ethanol and reated a *prima facie* violation even though this difference of results was the a regulatory process that the tribunal found to be fair and non-discriminatory. se flaws in Methanex' claims was sufficient to dispose of its case.

s, the *Methanex* tribunal engaged in a lengthy *obiter* discussion of the p between NAFTA Article 1102 and provisions for national treatment in trade und in the GATT and other NAFTA chapters. In doing so, the *Methanex* rectly emphasized that a claim under NAFTA Article 1102 must be brought ion of national treatment of *investments* and not for a claim about treatment of by an investment. Thus, the fact that the goods produced by Methanex were lifferent treatment following their initial sale than the goods produced by nufacturers could not be a violation of NAFTA Article 1102.

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ion v. United States of America, UNCITRAL Arbitration Proceedings, Final Award on s, August 3, 2005, 2005 WL 1950817, Investor's Book of Authorities (Tab 171) at Part IV-

58. In making this important distinction between treatment with respect to goods and with respect to investments, the *Methanex* tribunal also made some regrettable errors. Thus, the tribunal noted that while NAFTA Article 301(2) spoke of "like, directly competitive or substitutable goods", provisions in NAFTA Chapters 7 and 9 referred only to "like ods". It concluded that "like goods" were not a short-hand for "like, directly npetitive or substitutable goods".[25] In doing so, the tribunal appears to have ignored extensive GATT jurisprudence interpreting "like products" using a competition based mework even when this phrase does not appear in Articles referring to "directly mpetitive or substitutable" products.[26]

e *Methanex* tribunal also observed that the phrase "in like circumstances" was used for AFTA's trade in services provisions and not in relation to trade in goods.[27] This servation disposed of Methanex's claim based on the treatment of its goods, but it only ves to emphasize that "like circumstances" is equivalent to "like services and service oviders" for a claim based on the treatment of either cross-border service providers or restments in the service sector.

leed, much of the *Methanex* analysis is consistent with the equality of competitive opportunities approach advanced by UPS. Thus, the *Methanex* tribunal observed that:

a. NAFTA's drafters "were fluent in GATT law";[28]

b. A violation of NAFTA Article 1102 does not require the demonstration of malign intent;[29]

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[25] *Methanex* Final Award at Part IV-Chapter B-Page 15.

[26] Investor's Reply at para. 549.

[27] *Methanex*, Final Award at Part IV-Chapter B-Page 17.

[28] *Methanex* Final Award at Part IV-Chapter B-Page 14.

[29] *Methanex* Final Award at Part IV-Chapter B-Page 1.

c. Where the government differentiates between two members of a domestic class which serves as the appropriate comparator, the investor is entitled to the most favorable treatment given to the domestic members;[30] and

[illegible]e market share of domestic producers is evidence to be considered in determining whether a violation had occurred.[31]

[illegible]nex decision cannot be understood as supporting the proposition that no [illegible]reatment violation can occur where there are some domestic firms, no matter [illegible]l, receiving similar treatment and that are more "like" the foreign firm. Such an [illegible]tion would allow a NAFTA Party to adopt a blatantly protectionist practice of [illegible] foreign firms from a market by conferring special competitive advantages onto [illegible]t "national champion". As long as some domestic fringe players remained in [illegible]et, the government could excuse its conduct by finding some aspect of these [illegible]yers that was more "like" the foreign investor than the national champion.

62. Indeed, this is precisely what Canada has sought to do in this case. The Canadian courier market is characterized by competition between a dominant local firm, Canada Post Corporation, a tier of foreign firms such as UPS, FedEx and DHL and a third tier of small players that includes the Canadian firm, Canpar. The only evidence in the record about Canpar is that it has a market share of less than 5% and is privately-owned.

63. Canada Post and its subsidiary, Purolator, control more than half the market while foreign firms account for an additional 30%. Yet, Canada claims that the appropriate comparator is a fringe player such as Canpar as it is privately-owned. This is no answer, however, to UPS' claim that Canada differentiates between two groups of the comparable domestic

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[30] *Methanex* Final Award at Part IV-Chapter B-Page 10.

[31] *Methanex* Final Award at Part IV-Chapter B-Page 9.

class, government-owned courier companies and privately-owned courier companies. UPS is entitled to the most favorable treatment accorded to any domestic courier mpanies in "like circumstances", not just to those firms in the "most similar umstances".

ed, NAFTA confirms that the fact that a firm is owned by the government rather than ivate entity cannot be used to render two investments "unlike". NAFTA Article 1139 nes "investor of a Party" as "a Party or state enterprise thereof, or a national or an erprise of such Party, that seeks to make, is making or has made an investment". It defines an "investment" as "an enterprise" regardless of whether it is publicly or vately-owned.[23] If the mere fact of ownership by a Party or a state enterprise was ficient to render investments "unlike", the drafters would not have included Parties state enterprises together with nationals and private enterprises in the definitions of vestor" and "investment".

FTA Article 1139 assures that a foreign investment owned by a Party or state erprise is entitled to treatment no less favorable than a privately-owned domestic estor. The converse is equally true. Privately owned foreign firms are entitled to tment no less favorable than state enterprises. The existence of government ownership s not automatically render investments "unlike".

Equality of Competitive Opportunities Is Consistent With NAFTA's Objects and Purpose

icle 31(1) of the *Vienna Convention* directs this Tribunal to consider the meaning of term "like circumstances" in Article 1102 in light of NAFTA's object and purpose. interpretation of NAFTA Article 1102 that follows the same conceptual approach for national treatment disciplines is consistent with NAFTA's objectives. NAFTA's

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[23] Article 201 states that "enterprise means any entity constituted or organized under applicable law, ..., privately-owned or governmentally-owned,..."

Preamble states that the Parties wished to build upon their respective rights and
nder the GATT. NAFTA Article 102 identifies national treatment as a
principle and rule applicable to the entire agreement.

investment is fundamentally intertwined with international trade in goods
A firm can supply goods and services to a foreign market either by
that market or by establishing a presence in that market through an
International investment can also complement international trade by
ntra-firm trade in goods and services between the subsidiary and its parent.[33]

al treatment disciplines in investment agreements serve to enhance efficiency
vay as in international trade agreements. As UNCTAD has explained, "the
ational treatment serves to eliminate distortions in competition and thus is
nce the efficient operation of the economies involved".[34]

s confirmed that the interpretation of national treatment for investments
the equality of competitive opportunities standard used by the WTO:

> In relation to FDI, national treatment involves an economic aim not dissimilar to that which has motivated its adoption in trade agreements: *foreign and domestic investors should be subject to the same competitive conditions on the host country* market, and therefore no government measure should unduly favour domestic investors.[35]

70. Many of the arguments against the equality of competitive opportunities approach made in Canada's submissions, and implicitly endorsed by Mexico, raise undue fears that it will constrain the flexibility of NAFTA governments to preserve the public welfare. These

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[33] Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, 1999, 2nd ed.), Investor's Book of Authorities (Tab 177) at 337-338.

[34] UNCTAD, *National Treatment* (New York: United Nations, 1999), Investor's Book of Authorities (Tab 10) at 3.

[35] UNCTAD, *National Treatment*, Investor's Book of Authorities (Tab 10) at 8.

arguments, however, are based upon a confusion of the notion of equality of competitive with equality of results. A difference in results that does not involve a competitive opportunities does not need to be justified by a government as nsure a public policy goal.

competing foreign and domestic investors may be subject to a common ieme for the issuing of environmental permits. The fact that a permit is reign investor and granted to a domestic one does not require justification ant unless the foreign investor also demonstrates that the denial was based t are not competitively neutral. If foreign and domestic firms have equal to obtain permits by investing in environmentally sensitive technologies, the licensing outcomes does not deny equality of competitive opportunities.

demonstrates one of the reasons for the failure of Methanex' claim. Even Methanex competed with ethanol manufacturers, Methanex did not hat the differences in regulatory outcomes for methanol and ethanol-based e the result of a process that was biased against methanol manufacturers. found that the State of California had followed an impartial process based on fic opinion in a sector where Methanex had no legitimate expectation of en regulatory review. There was no evidence that environmental pollution -based gasoline additives would have been treated any differently than n MTBE.[36]

r an Investor has met its burden of demonstrating that the different results fferent competitive opportunities that the evidentiary burden shifts to the o excuse this *prima facie* violation of national treatment. At that point, the government is a strict one that requires it to show that the less favorable ecessary.

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rd, Investor's Book of Authorities (Tab 171) at Part II, Chapter B, paras. 9-12.

G. *The Equality of Competitive Opportunities Test Has Been Followed By NAFTA pter 11 Tribunals*

AFTA Chapter 20 Panel in *Cross-border Trucking Services* provided the lanation of NAFTA Article 1102 as protecting expectations of equal opportunities, the same approach has been followed consistently by NAFTA tribunals. In particular:

Myers v. Canada: The tribunal determined that Myers Canada was in like mstances with a Canadian state enterprise as they competed in same nomic sector for the same customers. Myers Canada was provided less reble treatment as it was prevented from using its affiliate's U.S.-based essing facilities through an export ban. The Canadian firm had access to its processing facilities in Canada and was not affected by the ban. The rnment failed to meet its burden to justify the ban.[37]

e & Talbot v. Canada: The tribunal determined that Canada had committed a *ia facie* violation of national treatment by granting Pope & Talbot's Canadian idiaries less export quota than certain Canadian competitors. However, it that Canada met its burden of justifying the difference in treatment as a portional response that was necessary to respond to the threat of U.S. ntervailing duty actions. It is only in considering the proportionality of this ification that the *Pope & Talbot* tribunal observed that a substantial number of adian firms were also treated less favorably than other Canadian petitors.[38]

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da, First Partial Award, November 13, 2000, *WL* 34510032; 8 *ICSID Rep.* (2000); 40 *I.L.M.* 250 and 251, Investor's Book of Authorities (Tab 4).

v. Canada, UNCITRAL Arbitration Proceedings, Award on the Merits of Phase 2, April 10, paras. 77 and 78, Investor's Book of Authorities (Tab 7). See discussion of this aspect of the -589.

c. *Feldman v. Mexico*: The tribunal determined that Feldman's investment was in like circumstances with other Mexican resellers of cigarettes. It found that Mexico accorded the investment less favorable treatment with respect to export taxes and that Mexico did not meet its burden of justifying this less favorable treatment.[39] While the *Feldman* tribunal did exclude Mexican cigarette manufacturers from the group of firms "in like circumstances", this only confirms that it adopted a framework of examining competition in the market. Feldman's investment did not compete with Mexican cigarette manufacturers as it offered a wholesale trading service that was completely different from the manufacturing and distribution of goods being performed by the excluded firms.

d. *Loewen v. United States*: In this case, Loewen's investment was not a competitor of O'Keefe, the U.S. plaintiff in a jury trial against the investment. Rather, Loewen had acquired O'Keefe's business and the trial arose out of a dispute relating to the acquisition.[40] This was a vendor-purchaser relationship, not a competitive one. Accordingly, the *Loewen* tribunal found there were no "like circumstances".

e. *ADF v. United States*: The tribunal found that ADF was in like circumstances with U.S. competitors that supplied steel products to construction projects. The Investor challenged a "Buy America" requirement imposed on suppliers to such projects. It failed, however, to demonstrate that the measure disadvantaged it in its competition against American-owned suppliers.[41]

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[39] *Marvin Feldman v. Mexico* ARB (AF) /99/1 Award December 16, 2002, 42 I.L.M. 625 (2003), Investor's Book of Authorities (Tab 8) at paras. 170-172 and 176-177.

[40] *The Loewen Group, Inc. et al v. United States of America*, (Award), (June 26,2003);42 ILM 81 1, [*Loewen* Award], Respondent's Book of Authorities (Tab 61).

[41] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, 2003 WL 2408325, Investor's Book of Authorities (Tab 95) at paras. 155-158.

f. *GAMI v. Mexico*: The claimant challenged measures by Mexico that provided ancial assistance to insolvent competitors in the sugar industry. It failed, wever, to demonstrate that a policy of assisting insolvent firms systematically ored any domestic firms over foreign ones. All firms were eligible for the ne assistance.[42]

tribunal correctly commented that NAFTA tribunals do not second-guess the government policy decisions. A measure may be unwise from a public policy , but will not trigger a violation of NAFTA Article 1102 unless it also entails a f equality of competitive opportunities.

brief discussion of this point, rather than explaining that the claimant had monstrate "less favorable treatment", the *GAMI* tribunal held that the fact that ned measures were plausibly related to a public policy objective meant there like circumstances".

where the measure does violate equality of competitive opportunities, it cannot nerely by pointing to some "plausible" public policy objective. As the *Cross-cking Services* Panel noted, based on the language in the FTA, a tory measure can only be justified if the government demonstrates that it is " to achieve the public policy objective. The *GAMI* tribunal's comments be interpreted as disregarding the test set out in *Cross-border Trucking* .D. *Myers*, *Pope & Talbot* and *Feldman*. In all of these cases, the burden was pondent to excuse a *prima facie* violation of national treatment on public policy

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Inc. v. Government of the United Mexican States, (November 15,2004), (Final Award), tor's Book of Authorities (Tab 100) at para. 114.

III. The Application of National Treatment To Canada

A. Chapter 11

78. NAFTA Chapter 11 applies to "measures adopted or maintai

79. Chapter 11 does not say that the meaning of "Party" or the customary international law of state responsibility is affected by Chapter 15. Yet, despite this, Mexico supports Canada in arguing that NAFTA Chapter 15 implicitly removes the application of the customary international law of state responsibility from Chapter 11.[44]

80. Neither Mexico, nor Canada, provide any textual support for their interpretation. Indeed, they overlook the clear textual support applying the international law of state responsibility to Chapter 11:

a. NAFTA Article 1108 excludes certain forms of state enterprise conduct such as procurement, subsidies and grants from certain Chapter 11 obligations.[45] If

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[43] NAFTA Article 1101.

[44] Mexico Article 1128 submission at para. 5.

[45] NAFTA Article 1108(7) says that Articles 1102, 1103 and 1107 do not apply to:

(a) procurement by a Party or a state enterprise; or
(b) subsidies or grants provided by a Party or a state enterprise ...

NAFTA Chapter 11 cannot apply directly to the actions of state enterprises, as ico alleges, then there would be no need for the NAFTA drafters to exclude e forms of state enterprise conduct from specific Chapter 11 obligations in this . Canada's argument that the NAFTA drafters only mentioned state rprises in NAFTA Article 1108 "for greater certainty"[46] is absurd. Canada not explain why there is any need for more certainty in excluding state rprise conduct through Article 1108 than there is for excluding them from the e of NAFTA Article 1102.

pter 10 of the NAFTA limits state responsibility under NAFTA's procurement gations only to federal level governments or to specifically listed provincial state government entities. Chapter 10 demonstrates that when the NAFTA ters wished to limit state responsibility for state enterprise actions they chose o so explicitly. Furthermore, Canada chose to include, rather than exclude, ada Post under NAFTA Chapter 10.

ada clearly thought about monopolies and state enterprises during the drafting e reservations in the NAFTA Annexes,[47] but chose not to exclude monopolies tate enterprise actions from the scope of Chapter 11.

nel has previously rejected the argument raised by Mexico that treaty articles addressing monopoly and state enterprise conduct implicitly affect the of the customary international law of state responsibility to the other articles y. The Panel rejected Canada's argument that GATT Article XVII, the GATT

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icle 1108(8)(b) says Article 1106(1)(b), (c), (f) and (g), and 3(a) and (b) do not apply to y or a state enterprise.

r at para. 8.

Canada's exclusion in Annex I of measures restricting ownership is certain of its state ope of NAFTA Article 1102.

equivalent to NAFTA Articles 1502(3)(a) and 1503(2), affected the application of the international law of state responsibility to other GATT Articles.[48]

...t simply dismiss the authority of this decision because it addressed the ... provision in the GATT and not the NAFTA.[49] The decision of the Panel was ... to the GATT and applies universally to all treaties. Indeed, the GATT ...ion can simply be seen as an application of the universally accepted ...ressed by the ICJ in the *ELSI* case:

> ...portant principle of international law should not be held to have been tacitly dispensed with ...rnational agreement, in the absence of words making clear an intention to do so.[50]

...ter 15

...o can point to no text in Chapter 11 in support of its claim that ordinary ...mary international law do not apply to its interpretation, it can find no ...rt in Chapter 15. Although Chapter 15 addresses the conduct of state ...d private monopolies, it does so largely to create obligations on the NAFTA ...g to the conduct of these entities that go beyond those existing under ...ternational law. Customary international law does not render NAFTA ...*nutile*, it merely clarifies the meaning of some of its obligations.

...rt, *Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, ...d March 22, 1988, Investor's Book of Authorities (Tab 156), at para. 4.27. The Panel ...ent that "the clause indicated that the activities of marketing boards which did purchase and ...rticle XVII and did not need to be in accordance with other provisions of GATT."

...t para. 12.

...e *(ELSI)*, *United States v. Italy*, 1989, ICJ, Investor's Book of Authorities (Tab 44), 15 at

84. NAFTA Chapter 15 addresses distortions in competition created by three very different types of economic agents: purely private actors; all private monopolies and state enterprises; and those specific monopolies and state enterprises that exercise delegated governmental authority. For each type of actor, there is an increasing scope of dispute resolution as the actor assumes greater governmental characteristics.

86. Under customary international law, state enterprises are not *ipso facto* agents or organs of the state. Privately-owned monopolies are even less likely to be agents or organs. Yet, NAFTA Chapter 15 imposes obligations on the NAFTA Parties for the conduct of these entities even in circumstances where they are acting in an entirely non-governmental capacity. These obligations are subject to state-to-state arbitration.

87. For example, NAFTA Article 1503(3) creates an obligation on a NAFTA Party to "ensure that *any* state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party" [emphasis added]. Similarly, NAFTA Articles 1502(3)(b), (c) and (d) impose various obligations on a Party to apply measures that ensure that "*any* privately-owned monopoly" follows similar principles of non-discriminatory treatment even if it does not exercise any governmental authority.

88. The obligations imposed in Articles 1502(b), (c), (d) and 1503(3) can be viewed as rendering the NAFTA Parties responsible for conduct by some non-governmental actors that does not conform with the general principles of non-discriminatory treatment otherwise applicable to governmental actors. Each of these Articles prohibits a specific

type of discriminatory treatment such as not acting in accordance with commercial considerations, discriminating in the sale of goods or services and anti-competitive conduct.[51]

89. At the same time that they were imposing these additional obligations for the conduct of certain purely non-governmental entities, NAFTA's drafters sought to clarify that the

> whenever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges; ...

90. Article 1503(2) is identical but for four differences. It applies to state enterprises rather than monopolies; it does not require the authority to be delegated in connection with any monopoly good or service; it illustrates the meaning of governmental authority by referring to any "licenses" rather than "import or export licenses"; and it only requires actions consistent with Chapters 11 and 14 rather than the entire Agreement. Both Articles 1502(3)(a) and 1503(2) are subject to investor-state arbitration.

91. Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* directs that "relevant rules of international law applicable in the relations between the parties" must be "taken into account" in interpreting NAFTA Articles 1502(3)(a) and 1503(2). The customary

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[51] Article 1505 confirms that the phrase "non-discriminatory treatment" used in Articles 1502(3) and 1503(3) means "the better of national treatment and most-favored nation treatment, as set out in the relevant provisions of this Agreement". As set out in this submission, it also confirms that anti-competitive conduct proscribed by Article 1502(3)(d), such as the discriminatory provision of the monopoly good or service, is similar to conduct that violates national treatment.

international law on state responsibility, captured in the ILC's *Articles on State Responsibility*, are such relevant international law rules.

92. Neither Article 1502(3)(a), nor Article 1503(2), say that they affect the application of

governmental actors, such discriminatory treatment is already included within the scope of Article 1102.

93. As Canada accepted in its pleadings, Article 5 of the *ILC Articles* is very similar to NAFTA Articles 1502(3)(a) and 1503(2).[52] Those NAFTA Articles so closely follow Article 5 of the *ILC Articles* that the NAFTA drafters must have had the ILC Article in mind when drafting those NAFTA Articles. In fact, at the time of drafting the NAFTA, the final form of Article 5 of the ILC Articles was unknown.[53] Under this situation, the

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[52] Canada's Counter Memorial at para. 808. The final form of Article 5 reads:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

[53] The uncertainty surrounding the final form of Article 5 is demonstrated by the difference in the wording between the 1996 draft and the final draft quoted in the preceding footnote. The 1996 draft reads:

> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
> (a) it is established that such person or group of persons was in fact acting on behalf of the State; or
> (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

NAFTA drafters included Articles 1502(3)(a) and 1503(2) to clarify the circumstances under which the NAFTA Parties were responsible for the acts of monopolies and state hat were also agents of a Party.

ry international law on state responsibility applicable to agents, therefore, meaning of NAFTA Articles 1502(3)(a) and 1503(2). The customary l law meaning of the exercise of "governmental authority" is particularly Recent decisions considering BIT claims confirm the customary international on is an exercise of "governmental authority" even if it has commercial even if it does not control others.

le *Ventures v. Romania* and *Eureko v. Poland*, investor-state tribunals whether promises in share sale agreements made by state entities with a al personality were attributable to the state. Respondents in both cases argued re not attributable because they were commercial conduct by separate legal h Tribunals rejected the suggestion that there was an absolute distinction vernmental and commercial acts and attributed responsibility.[54]

Ventures ICSID Tribunal said the distinction between governmental and acts "plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts ... should by definition not be attributable while governmental acts ... should be attributable."[55] Similarly, the *Eureko* Tribunal said the Respondent's submission "flies in the face of well recognized rules and principles of international law."[56]

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[54] *Noble Ventures, Inc. v. Romania* (Award) at para. 83 Investor's Book of Authorities (Tab 178); *Eureko B.V. v Republic of Poland* (Partial Award), 2005 WL 2166281 (August 19, 2005), Investor's Book of Authorities (Tab 179) at para. 134.

[55] *Noble Ventures v. Romania* at para. 82.

[56] *Eureko v. Poland* at para. 125.

ustomary international law on attribution of the acts of agents, the customary
law on attribution of the acts of organs was settled at the time the NAFTA
[37] There was no doubt that the state was responsible for all the actions of its
hat any entity, including state enterprises, could be an organ if it was
part of the State. The accepted rule of attribution applicable to organs is
the ILC Commentary recognizing "the state as a subject of international law
nsible for the conduct of all the organs... whether or not they have separate
ality under its internal law."[38]

d rule of attribution applicable to organs is also reflected in older decisions,
zberg v. Finland,[39] in which all the actions of a state enterprise were

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views is well represented by the consistency between the ILC Draft Article in 1996, Investor's
b 185) and the final form of the Article addressing attribution for the acts of organs. The
d 6 read:

f an organ of the State shall be considered as an act of that State under international law,
rgan belongs to the constituent, executive, judicial or other power, whether its functions are of
l or an internal character, and whether it holds a superior or a subordinate position in the
f the State

es of the present articles, conduct of any State organ having that status under the internal law
all be considered as an act of the State concerned under international law, provided that
ng in that capacity in the case in question.

f the *ILC Articles* also attributes all the conduct of state organs:

f any State organ shall be considered an act of that State under international law, whether the
s legislative, executive, judicial or another functions, whatever position it holds in the
f the State, and whatever its character as an organ of the central government or of a territorial
t.

ides any person or entity which has that status in accordance with the internal law of the State.

001), Investor's Book of Authorities (Tab 180) at 83, para. 7

rs v. *Finland*, Human Rights Committee, Communication No. CCPR/C/15/D/61/1979, April
C 8, Investor's Book of Authorities (Tab 153) at para. 9.1. The case is discussed at paras. 448

attributed to the state, and the *British Gas Corporation* case,[40] in which all the Corporation's activities, including its commercial decision to retire female employees at a r age than male employees, was found to be subject to international human rights he accepted rules of attribution applicable to organs is also reflected in more lecisions under investment protection treaties, such as *Salini v. Morocco*, in which ctions of a corporation 80% owned by the government were attributed to the

he settled nature of the customary international law rules on state responsibility ble to state organs, the NAFTA drafters did not need to clarify in Chapter 15 the tances under which the conduct of state enterprises, who were also organs of the as attributable to the state. Thus, while Articles 1502(3)(a) and 1503(2) clarified sponsibility for the actions of state agents, no further clarifications were needed for ons of state organs.[43]

plication of accepted rules of treaty interpretation demonstrates that in interpreting tionship between NAFTA Chapters 11 and 15, UPS has not, as Mexico alleges, e[d] general principles of State responsibility with precisely worded primary

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thers v. British Gas plc [1990] ECR I-3313, Investor's Book of Authorities (Tab 181) at para. 18; *rs v. British Gas plc* (House of Lords decision), [1991] 2 CMLR 217, Investor's Book of 182) at para. 10.

the Corporation was subject to international law, the House of Lords identified features that displays. The House said: "... British Gas performed its public service of providing a gas supply of the State. The corporation was not independent; its members were appointed by the State; the sponsible to the minister acting on behalf of the State, and the corporation was subject to y the Secretary of State (at para. 10)." The House of Lords also rejected the Respondent's he European Court of Justice in its present ruling ... had not clearly provided that nationalised g out commercial functions were to be regarded as organs of the State (at para. 14)."

mort S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on 23, 2001, 2001 WL 34774212, Investor's Book of Authorities (Tab 192) at paras. 33-35. The case ras. 448 - 449 of UPS' Reply.

to note that the Energy Charter Treaty also has provisions that are similar to NAFTA Articles 503(2). See Investor's Book of Authorities (Tab 184).

obligations."[64] This application of interp
international law rules on state responsib
operate on the primary obligations in NA
international law rules applicable to state
NAFTA Articles 1502(3) and 1503(2).

IV. NAFTA Article 1105

101. UPS welcomes much of Mexico's submi
standard of treatment prescribed by NAF
state action amounting to a breach of Art
the state's action to be "egregious" or to demonstrate "bad faith." Mexico, therefore, distances itself from Canada's submissions, early in this arbitration, that state action must fall below the standard prescribed in the *Neer* case before it amounted to a breach of NAFTA Article 1105.[65]

102. Mexico's use of NAFTA Article 1105 decisions to describe the content of customary international law reinforces the role of tribunal decisions in demonstrating the state practice that displays *opinio juris*. As recognized by the *ADF* Tribunal, in a passage which Canada noticeably overlooks, arbitral case law is a source of customary international law:

> We understand Mondev to be saying - and we would respectfully agree with it - that any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law.[66]

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[64] Mexico's Article 1128 submission at para. 5.

[65] Canada's Memorial (Jurisdiction Phase) at para. 96.

[66] *ADF*, Award, at para. 184.

103. After recognizing the value of arbitral decisions in describing the content of customary international law, Mexico then incorrectly argues NAPTA Chapter [1 tribunals have e strong qualifiers to emphasize the strictness of the test that must be met" in a breach of Article 1105.[87] For example, Mexico refers to the *Waste II* decision as requiring state conduct to be "*wholly* arbitrary." Mexico s following passage from *Waste Management II*, quoted by *the GAMI*

> ogether, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum rd of treatment of fair and equitable treatment is infringed by conduct attributable to the ed harmful to the claimant if the conduct is *arbitrary*, grossly unfair, unjust or idiosyncratic, *rminatory* and exposes the claimant to sectional or racial prejudice ...[88]

Mexico overlooks decisions, such as *Pope & Talbot* and *Metalclad*, in als found that the state failed to meet the Article 1105 standard but did not adjectives in describing the state's conduct.

d Tribunal considered a claim that Mexico breached its Article 1105 rough the actions of one of its municipalities. That municipality was only nsider construction issues when granting or denying building permits to tors. The municipality exceeded that authority when it refused the investor's vironmental grounds.[89] In finding that this amounted to a breach of Article bunal simply said "[n]one of the reasons [for refusing the permit] included a ny problems associated with the physical construction of the landfill or to defects therein" and, therefore, "Metalclad was not treated fairly or equitably AFTA and succeeds on its claim under Article 1105."[90]

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8 Submission at para. 15.

I, Canada's Book of Authorities (Tab 71)[emphasis added], quoted in *GAMI*, Investor's b 71) at para. 98.

Book of Authorities (Tab 86) at para. 86. Although the *Metalclad* Award was subsequently court in British Columbia, the court did not overturn this aspect of the Award.

Book of Authorities (Tab 86) at paras. 92 - 93 and para. 101.

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100. Similarly, the *Pope & Talbot* Tribunal found Canada breached Article 1105 through threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting [the] request for information."[71]

All of Which is Respectfully Submitted

Appleton & Associates per RW

Appleton & Associates International Lawyers **Date: November 10, 2005**

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[71] *Pope & Talbot*, Award on the Merits, Phase 2, April 10, 2001, Investor's Book of Authorities (Tab 7) at paras. 177 - 181.

[72] Canada's Rejoinder at para. 293: "Contrary to the Claimant's assertions, acting without reason or fact or on the basis of irrelevant considerations do not amount to a breach of a customary rule for the simple reason that they would impose an unacceptable international legal standard on States. Decision-makers must be able to make mistakes without breaching the minimum standard in every instance."