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October 20, 2005

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VIA FACSIMILE
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Eloise M. Obadia
International Centre for Settlement
Of Investment Disputes
Secretary of the Tribunal
1818 H Street, N.W.
Washington, DC 20433

Re: Arbitration between United Parcel Service and Canada

Dear Ms. Obadia:

Submitted herewith for filing are : (i) an Application for Leave to File *Amicus Curiae* Submission by the Chamber of Commerce of the United States of America, and (ii) the Amicus Submission. Copies of this letter and its enclosures have been sent via facsimile to the members of the Tribunal and counsel for the parties. In addition, an original and six copies have been delivered to your attention at 1818 H Street, N.W., Washington, D.C. 20433.

Please do call if there are any questions concerning the Application and Submission.

Sincerely,

Charles Owen Verrill, Jr.
Counsel to the Chamber of Commerce
of the United States of America

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WRFMAIN 12389948.1

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORH 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

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* SUBMISSION

BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

October 20, 2005

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I. Overview

1. On October 17, 2001, this Tribunal issued its Decision on Petitions for Intervention and Participation as *Amici Curiae*.[1] Pursuant to the procedures established therein and in subsequent decisions by this Tribunal,[2] the Chamber of Commerce of the United States of America ("Chamber") makes this application for leave to file submissions as *amicus curiae*.

2. The Chamber is the world's largest business federation with an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations, in every industry sector and from every geographic region of the United States. It also has member companies from Canada.

3. The Chamber represents the interests of United States investors abroad. Its submissions will emphasize the importance of a consistent approach to the interpretation of national treatment protections across the areas of goods, services and investment as well as the importance of ensuring that governments abide by their relevant international treaty commitments when they delegate government powers to state-owned enterprises.

4. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the United States business community. For example, in *Pakootas v. Teck Cominco Metals, Ltd.*, the Chamber challenged the extraterritorial application of US law.[3] In *F. Hoffman-LaRoche, Ltd. v. Empagran*, the Chamber argued that, under well-established international law principles, injuries arising in foreign commerce do not give rise to claims that may be heard in US courts.[4]

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1 UPS Decision on Petitions for Intervention and Participation as Amici Curiae dated October 17, 2001.

2 Procedural Directions for Amicus Submission dated April 4, 2003; UPS Direction of the Tribunal on the Participation of Amicus Curiae dated August 1, 2003.

3 *Pakootas v. Teck Cominco Metals, Ltd.*, No. 04-80091 (9th Cir. 2005) 2004 *WL* 2578982 (E.D.Wash.), 59 ERC 1870, 35 Envtl. L. Rep. 20,083.

4 *F. Hoffman-LaRoche, Ltd. v. Empagran* , No. 03-724 (US Supreme Court 2004) 542 U.S. 155, 124 S.Ct. 2359,

II. The Chamber's Interest in This Arbitration

5. The Chamber is a proponent of free trade and consistently supports ambitious and comprehensive free trade agreements[5] and remains a staunch advocate of the benefits of the NAFTA.[6]

6. The Chamber's members are collectively responsible for a substantial portion of overseas investment activity. The matters at issue on this arbitration directly implicate the interests and reasonable expectations of those investors.

III. The Chamber Should Be Granted Leave to Participate as *Amicus Curiae*

A. The Test for Amicus Standing

7. The criteria that international arbitral tribunals should consider in exercising their discretion to allow the Chamber to participate as *amicus curiae* are derived from the following sources of international law: the Decision on *Amicus Curiae* in *Methanex v. United States* ("*Methanex*"); this Tribunal's Decision on Petitions for Intervention and Participation as *Amici Curiae* ("*UPS*"); and the Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* in *Aguas Argentinas, S.A. et al. v. The Argentine Republic* ("*Aguas Argentina*").[7]

8. These sources of international law establish the following test for participation as *amicus curiae* in investor-state arbitration: (a) will the submissions assist the Tribunal by providing perspective, knowledge, expertise, insight or material not provided by the parties; (b) will the submissions address

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159 L.Ed.2d 226, 72 USLW 4501, 2004-1 Trade Cases P 74,448, 04 Cal. Daily Op. Serv. 5094, 2004 Daily Journal D.A.R. 6990, 17 Fla. L. Weekly Fed. S 374. See also *Christie's International PLC v. Kruman*, No. 02-340 (US Supreme Court 2003) 539 U.S. 978, 124 S.Ct. 27, 156 L.Ed.2d 690, 71 USLW 3169, 72 USLW 3147.

5 See US Chamber website at http://www.uschamber.com/issues/index/international/fta.htm

6 See US Chamber website at http://www.uschamber.com/issues/index/international/nafta.htm.

7 *Methanex v. United States - Decision on Petitions From Third Persons To Intervene As Amici Curiae* (January 15, 2001) 2001 *WL* 34786163; United Parcel Service Inc. v. Government of Canada - Decision on Petitions for Intervention and Participation as Amici Curiae (October 17, 2001) 2001 *WL* 34804267; *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Order in Response to a Petition for Transparency and Participation as Amicus Curiae Aguas Argentina* (May 19, 2005) 2005 *WL* 1458630.

matters within the scope of the dispute; (c) does the applicant have a significant interest in the arbitration; and (d) is there a public interest in the subject-matter of the arbitration? These considerations are to be balanced against the possibility of unduly burdening or unfairly prejudicing either disputing party or disrupting the Tribunal process.

B. Assistance to the Tribunal

1. The Chamber's submissions will assist the Tribunal by providing expertise and knowledge not provided by the parties. The Applicant can provide perspective to the Tribunal about the object and purpose of the treaty. The Chamber has experience and expertise in the matter of providing US investors with conditions for fair competition abroad.

2. The Chamber and its members have particular experience with the challenge of providing a level playing field in countries where private sector companies compete with state-owned enterprises, and ensuring that governments provide equal competitive opportunities to foreign and domestic investors alike. It can assist the Tribunal with the consequences of discriminatory conduct by state-owned enterprises. Such conduct distorts international trade and investment flows and undermines market access benefits. Finally, the Chamber can demonstrate how such discriminatory conduct permits Canada to circumvent its NAFTA obligations and is contrary to the objects and purposes of the NAFTA.

C. Scope of Dispute

3. The Chamber will address issues concerning the effects of discriminatory conduct by state-owned enterprises and the importance of ensuring that governments meet their international treaty obligations to provide equal competitive opportunities. The Chamber's submissions in this regard are clearly within the parameters of this claim, which is about the discriminatory conduct of Canada Post and the NAFTA obligations of the Government of Canada.

D. Direct & Significant Interest

4. The Chamber and its members have a direct interest in ensuring that the trading partners of the United States abide by their international commitments. They have an interest in ensuring that the signatory governments provide foreign and domestic investors with equality of competitive opportunities in accordance with their international treaty obligations. When state-owned enterprises engage in discriminatory conduct, such conduct violates Canada's NAFTA obligations. The Applicant has a direct interest in ensuring that such discriminatory conduct is halted and redressed, in accordance with international law.

5. The Chamber also has a significant interest in the international trade and investment implications of this claim.

E. Public Interest

6. This Tribunal has already concluded that there is a public interest in the subject-matter of the arbitration.[8] It has also agreed that NAFTA Chapter 11 process could benefit from the perception of being more open or transparent.

F. Undue Burden

7. There is no undue burden on either of the disputing parties. The Chamber's submissions will not add to the evidentiary record, but will assist the Tribunal with issues of legal interpretation and provide the unique perspective of foreign investors.

IV. Corporate Disclosure Statement

8. The Chamber is a non-profit corporation. It has no parent corporation and no subsidiary corporations. The membership of the Chamber consists of 3 million businesses, 2,800 state and local chambers, and 830 business associations, and 102 American Chambers of Commerce abroad.

9. UPS is a member of the Chamber. In 2004, UPS contributed $100,000 to the Chamber. This amount

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[8] UPS Decision on Petitions for Intervention and Participation as *Amici Curiae* dated October 17, 2001 at para. 70.

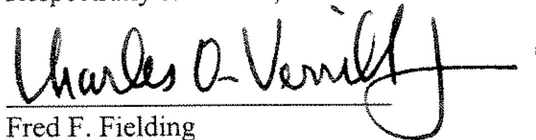
represents .12 per cent of the Chamber's annual budget.

10. The Chamber routinely files amicus briefs setting out its own views in cases for which one or more of its members are parties. Given the size and breadth of the Chamber's membership, nearly every case of interest to the US business community will directly involve one of its members. In such cases, the Chamber is not precluded from representing the interests of its entire membership by filing *amicus curiae* submissions.

V. Conclusion

11. For all of the foregoing reasons, the Chamber respectfully requests that this Tribunal exercise its discretion to allow the Chamber to participate in this arbitration as *amicus curiae*.

Respectfully submitted,



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BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

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AMICUS CURIAE SUBMISSION

BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations. Chamber members operate in every sector of the economy and transact business throughout the world, including the United States, Canada and Mexico. A central function of the Chamber is to represent the interests of its members in important matters before the Courts, Congress and international organizations.

2. The business community relies upon the framework of protection contained in international economic treaties such as the North American Free Trade Agreement ("NAFTA"), the World Trade Organization ("WTO") Agreements, the Dominican Republic-Central American Free Trade Agreement ("DRCAFTA"), and bilateral

3. l investment treaties ("BITs"). The Chamber has been a longstanding champion of these international treaties that provide a predictable basis for business to engage in commercial activities around the globe. It has provided congressional testimony on numerous occasions in support of such treaties.[1]

4. This *amicus* submission provides legal analysis to assist the Tribunal to address two important issues relating to the interpretation of NAFTA:

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[1] US Chamber of Commerce, US Mexico Relations, Senate Committee on Foreign Relations (April 16, 2002) 2002 *WL* 596080; Statement of James D. Fendell, US-Dominican Republic-Central America Free Trade Agreement, Committee on House Ways and Means (April 21, 2005) 2005 *WL* 928924; Statement of John Murphy, Dominican Republic Central America Free Trade Agreement, Committee on House Energy and Commerce (April 28, 2005) 2005 *WL* 1023596.

a. Whether the Tribunal should maintain the proper meaning to be given to the NAFTA national treatment obligation in Article 1102 as articulated by the NAFTA Chapter 20 Cross *Border Trucking* Tribunal;, and

b. Whether the Tribunal should follow existing international law rules which ensure that governments cannot avoid international responsibility by taking treaty inconsistent measures by state enterprises.

The Chamber is concerned that the Government of Canada's approach to these issues would reduce predictability in international commercial relations by giving different meanings to similar international economic law obligations, such as national treatment, used in international economic treaties like the NAFTA, the WTO and bilateral investment treaties.

5. In its opposition to Canada's approach, the Chamber makes the following points:

a. There is a need to provide a predictable and uniform meaning of important international law obligations used in many different international economic law treaties. As a result, the national treatment obligation contained in NAFTA Chapter 11 should be interpreted in a manner that is consistent with the national treatment obligations contained in the WTO agreements and other NAFTA chapters; and

b. Governments must not be able to evade the operation of their existing treaty obligations by taking measures through state enterprises that they control.

II. THE PROPER MEANING OF THE NATIONAL TREATMENT OBLIGATION

6. NAFTA article 1102 is one of many international treaty provisions obliging countries to provide national treatment. It states:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. 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."

7. These obligations are not unique to NAFTA. For example, the General Agreement on Tariffs and Trade ("GATT"), several other WTO treaties and many BITs also require the provision of national treatment for trade in goods, services and investment. Although these treaties address a broad range of activities, businesses operating under the protection of such treaties expect national treatment articles to provide, at the least, a core level of protection: the ability to compete on an equal footing with local firms.

A. The Agreed Meaning of National Treatment in the *Cross Border Trucking* Case

8. The Chamber takes note of the documentation of the existence of agreement by each of the three respective NAFTA governments on the meaning of national treatment. This agreement was presented before the NAFTA Chapter 20 state-to-state arbitration on *Cross Border Trucking.* In that Tribunal's award, it made reference to the fact that the three NAFTA governments all agreed that the words "like circumstances" in NAFTA Article 1202 have the same meaning as words such as "like service providers" in the GATS or other WTO agreements. The NAFTA Chapter 20 Tribunal 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.[2]

The Chamber supports the view that the term "like circumstances" in NAFTA's investment and cross-border services chapters should be given the same meaning as the terms "like investors" or "like services and service providers" in Article XII of the GATS. Such an approach would enhance predictability in commercial relations and give effect to the trade liberalizing objectives of the NAFTA.

9. The *Cross Border Trucking* Tribunal also made reference in its award to the "long-established doctrine under the GATT and WTO" and that "GATT Article III (requiring national treatment of goods) is interpreted to protect expectations regarding competitive opportunities between imported and domestic products….."[3]

10. The NAFTA Chapter 20 Tribunal in *Cross Border Trucking* established a clear purposive test for the meaning of national treatment with respect to investment and cross border services trade in the NAFTA, namely the protection of equality of competitive opportunities. The Chamber supports the application of this clear test in the instant case which would avoid the existence of confusion over the meaning of essential investment protections, such as national treatment. Such confusion could undermine existing investments in the over one hundred and ten countries where there are bilateral investment treaties with national treatment obligations. Maintaining the *Cross Border Trucking* definition of national treatment would avoid uncertainty and maintain unity among international economic law obligations contained in the NAFTA, bilateral investment

[2] *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-Mex. S8-2008-01) Final Report of the Panel. at para. 249, copy filed in Investor's Book of Authorities, Tab 106.

treaties and the various WTO Agreements.

11. The Chamber has been supportive of the important NAFTA Chapter 20 award in *Cross Border Trucking* and was pleased when the Bush Administration and the Congress reached an agreement that will allow the US to live up to its NAFTA commitments.[4]

12. The consistent interpretation of national treatment provisions facilitates predictability in international commerce. Businesses can operate in foreign countries confident in the knowledge that they will enjoy equal competitive opportunities, regardless of whether they are selling goods, services, investing or engaging in other international activities protected by trade and investment treaties. Businesses do not need to waste resources determining the interpretation of various national treatment provisions. Businesses are not exposed to subjective interpretations of national treatment provisions and do not need to forego activities because the risk of an adverse interpretation is too great.

13. The NAFTA recognizes the importance of fostering such predictability. For example, the NAFTA preamble notes the NAFTA Parties' "resolve to ensure a predictable commercial framework for business planning and investment." The preamble to the NAFTA says that the NAFTA Parties "resolved to build on their respective rights and obligations under the GATT and other multilateral and bilateral instruments of cooperation." The preamble also recognizes the NAFTA Parties' commitment to "enhance the competitiveness of their firms in global markets." Article 102(1)(b) says that the objectives of the NAFTA include increasing "substantially investment opportunities in the territories of the Parties" and the promotion of "conditions of fair competition in the free trade area."

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[3] *In the Matter of Cross-Border Trucking.* at para. 289 copy filed in Investor's Book of Authorities (Tab 106).
[4] Statement of the US Chamber of Commerce, US Mexico Relations, Senate Committee on Foreign Relations (April 16, 2002) 2002 *WL* 596080.

14. Canada seeks to strip global commerce of this predictability by giving the NAFTA Chapter 11 national treatment obligation a unique meaning. Canada denies that the NAFTA national treatment provision fulfills its core function of protecting equality of competitive opportunities. Instead, Canada claims Article 1102 must be defined in a way that allows exclusion of the national treatment obligation based on vague public policy considerations that preclude comparison of the treatment given to domestic and Party investors in the same business and sector. This cannot be accepted.

15. Extraordinarily, Canada claims that within an agreement designed to increase liberalization beyond that provided by the WTO agreements, the NAFTA drafters chose a national treatment provision that would reduce liberalization below that level. Canada supports an interpretation that means an American investor in Canada is protected by two different levels of national treatment obligations when operating in the same country.

16. Furthermore, Canada strips business of any confidence by failing to explain the content of the standard. Canada accepts that competition might sometimes be useful in determining if foreign and local investors are in like circumstances but fails to say in what circumstances. Canada claims that public policy is also relevant but fails to say when.

17. Canada's interpretation provides extensive scope to NAFTA Parties to discriminate against foreign investments. NAFTA Parties can escape liability by ensuring that any measure discriminating against foreign investments also discriminates against one local investment, no matter how small. So long as the NAFTA Party can point to an identical local investment treated exactly the same, it can continue to discriminate in favour of massive national champions in contravention of the purposes for which the NAFTA was created.

18. US businesses did not expect that the NAFTA, designed to enhance liberalization within the region, would strip the national treatment obligation of any real meaning. US businesses expect that when operating under the protection of a national treatment obligation, they enjoy the same protection provided by national treatment obligation in other international agreements: guaranteed equality of competitive opportunity.

B. Historical Development of National Treatment

19. This common meaning of national treatment emerges from the history of the modern national treatment obligation. The modern national treatment obligation arose out of the global increase in tariffs following the First World War. Concerned that these increased tariffs contributed to the Great Depression and the Second World War, governments negotiated tariff reductions within the Havana Charter. Negotiators also banned protection such as import quotas, to prevent countries achieving the same protection of tariffs through other means.

20. Negotiators were also concerned to prevent countries protecting local industry in a similar fashion to a tariff or a quota by discriminating against foreign goods after they arrived in the country. The GATT national treatment obligation was created to address this concern. The GATT prevents countries from discriminating against foreign goods after they arrive in a country in two ways. It proscribes discriminatory taxes in GATT Article III(2) and it proscribes discriminatory regulations in GATT Article III(4).[5]

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[5] GATT Article III(1) states:
The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

GATT Article III(4) says:

> 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.

21. Over the second half of the 20th century, GATT Article III helped ensure that foreign goods enjoyed equality of competitive opportunities after they had passed the border. Panels interpreting GATT Article III(2) applied the direction to compare the treatment of the foreign goods with their domestic substitutes. Although there is no such direction regarding the interpretation of GATT Article III(4), panels considering this provision interpreted it in the same way. This interpretation crated an objective standard that accomplished the Article's purpose of countering economic protectionism without relying on subjective inquiries into the motivations for the measure.[6]

22. After the success of the GATT in facilitating international trade in goods, focus turned to other areas of international commerce, such as international trade in services. Recognizing the benefits of liberalizing trade in services, countries began negotiating the General Agreement on Trade in Services (GATS).

23. Foreign investment is closely related to international trade. Foreign investment enables the business community to provide goods and services directly in a foreign country, instead of merely providing them from beyond the border. Consequently, the GATS drafters defined trade in services as including the supply of service through a foreign investment.[7]

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[6] The GATT and WTO case law in this regard is summarized in the Investor's Memorial at pages 183-185.
[7] GATS Article I(2)(c) says: "For the purposes of this Agreement, trade in services is defined as the supply of a service by a service supplier of one member, through commercial presence in the territory of any other member."

24. At the same time that the GATS was being negotiated, representatives from the US, Canada and Mexico were drafting the NAFTA. The US, Mexico and Canada are all signatories to the GATT, and would later become signatories to the GATS. They were aware of those agreements' ability to facilitate international trade in goods and services between their countries. The benefits of the NAFTA include the elimination of trade barriers for exports, enhanced protection for investments overseas, and stronger and more competitive companies. The NAFTA is about reciprocity. It levels the playing field for workers and businesses.[8]

25. NAFTA negotiators were also aware of the implications of the GATS for investments. The three countries were not content with the liberalization provided by these agreements and decided to increase liberalization among their three countries.

26. Instead of including a similar provision to GATS Article I(2)(c) in the NAFTA, the NAFTA drafters decided to include a separate chapter on investment. NAFTA drafters wanted to protect investment in ways additional to the GATS (through, for example, provisions on fair and equitable treatment) and decided to include its investment national treatment provision in the chapter providing those additional protections. Thus, unlike the GATS, the provision of a service by means of a local presence was excluded from NAFTA Chapter 12 and left for NAFTA Chapter 11.[9]

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[8] Statement of James D. Fendell, on behalf of the US Chamber and the Association of American Chambers of Commerce in Latin America, Committee on House Ways and Means (April 21, 2005).

[9] NAFTA Article 12 13(2) states that "cross border provision of a service or cross border trade in services means the provision of a service: *(...)* but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment-Definitions), in that territory".

27. By drafting the new agreement, the NAFTA Parties ensured that areas of trade in goods and services would be subject to both NAFTA and WTO agreements. Consequently, an American service provider's activities by its local presence in Canada are protected by the national treatment obligations in both the GATS and NAFTA Chapter 11.

28. The NAFTA drafters could not have intended that the national treatment protection enjoyed by an American investor be different, depending on the international agreement which applies. Furthermore, the NAFTA drafters could not have intended that the NAFTA national treatment obligation in Chapter 11 would mean something completely different to national treatment obligations in the other NAFTA chapters. Thus, they used the same "in like circumstances" language in both the trade in services and the investment chapters.[10]

29. GATT Article III(2) says that a contracting party to the GATT fails to provide national treatment when it imposes a higher tax on a foreign product than it imposes on "a directly competitive or substitutable product." Those WTO national treatment obligations that do not specifically say that they protect equality of competitive opportunities have been interpreted by WTO panels and the Appellate Body in this way. These obligations include GATT Article III(4), Article 5 of the GATS Annex on Telecommunications, Article III of the TRIPS and Article III of the Agreement on Government Procurement. Article 5 of the GATS Annex on Telecommunications in fact uses the same "like circumstances" language of NAFTA Articles 1102 and 1202.

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[10] NAFTA Article 1202(1) reads "Each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers".

30. The drafters of NAFTA Article 1102 were certainly aware of decisions interpreting Article III(4) of the GATT as ensuring equality of competitive opportunities. Aware of this jurisprudence, the NAFTA drafters followed almost precisely the wording of Article III(4).[11]

31. In extending the concept of national treatment to investment for the first time, the NAFTA drafters chose to substitute the words "like products" in GATT Article III(4) with the words "investments of investors.., in like circumstances." There is nothing to indicate that, through this choice of words, the NAFTA drafters chose to abandon the core protection provided by national treatment obligations: equality of competitive opportunities.

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[11] 10 GATT Article 111(4) says:

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.

NAFTA Article 1102 says:
Each Party shall accord to investors [or investments of investors] of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors [or investments of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

III. STATE RESPONSIBILITY RULES MUST PREVENT STATE ENTERPRISE LOOPHOLES

32. Foreign monopolies and state enterprises are uniquely placed to harm businesses operating abroad by abusing their monopoly privileges. The Chamber is particularly concerned that international law prevents foreign monopolies abusing such privileges and that US businesses operating abroad can, therefore, operate fairly.

33. In response to such concern, international law holds states responsible for monopolies abusing their monopoly privilege in a governmental capacity. For example, in *Canada -Periodicals,* a WTO Panel decided that the prices Canada Post charged for delivery of periodicals was attributable to Canada and breached the national treatment obligation in Article III:4 of the GATT. The WTO Panel rejected Canada's argument that it could escape responsibility simply because Canada Post's pricing decision was a commercial act.[12] By seeking to escape responsibility by pointing to the commercial nature of the monopoly conduct, states, in effect, seek to escape responsibility because the monopoly acts in both a governmental and commercial capacity. It is precisely this dual role that gives such monopolies capacity to compete unfairly and the WTO Panel was right to prevent Canada escaping responsibility in this way.

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[12] *Canada - Periodicals,* Dispute Settlement Panel Report, WT/DS 31/R (14 March 1997) 1997 *WL* 432125(WTO), at paras. 5.33 *- 5.34.*

34. The Panel's decision was consistent with other international tribunal decisions attributing responsibility to the state, despite the commercial nature of the impugned conduct. For example, in *Salini v. Morocco,* a BIT tribunal decided that an 80 percent government owned corporation's subcontracting of highway construction was attributable to Morocco.[13] For the Chamber, it is important to ensure that governmental objectives pursued through the commercial activities of a state enterprise are confirmed as governmental measures.

35. NAFTA drafters addressed this particular concern of NAFTA businesses by creating three tiers of responsibility for monopolies. The first tier addresses the conduct of entirely private monopolies or state enterprises that are, in some way, affiliated with the state but are acting in a private capacity. This first tier of responsibility lies in the Chapter 15 provisions other than Articles 1502(3)(a) and 1503(2). For example, Article 1502(3)(c) provides that such monopolies must not discriminate in their purchase of monopoly goods and services. The NAFTA does not give investors the right to directly claim against the state for monopolies' failure to act consistently with these provisions.

36. Chapter 11 and the customary international law of state responsibility provides the second tier of responsibility. Under this tier, investors can directly claim against the state for the conduct of state enterprises that are part of the state and for the conduct of monopolies and state enterprises that act for governmental purposes.

[13] *Salini Construttori SPA, and Itaistrade SPA. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001) 2001 *WL* 34774212 at paras. 33 - *35.*

37. NAFTA supplements the obligations under these first two tiers with a third tier of responsibility found in Articles 1502(3)(a) and 1503(2). These provisions confirm states' responsibility for the governmental conduct of monopolies and state enterprises that are state agents rather than state organs.

38. Extraordinarily, Canada suggests that the NAFTA, designed to enhance liberalization in the region, actually reduces states' responsibility for the actions of monopolies under customary international law. Canada argues that Articles 1502(3)(a) and 1503(2) actually replace states' responsibility under Chapter 11 and that the level of responsibility under Articles 1502(3)(a) and 1503(2) is lower than that under customary international law. Canada's interpretation is inconsistent with the NAFTA Parties' resolution, expressed in the preamble to the Agreement, to "build on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation." By undermining, rather than building, on these rights, Canada's interpretation reduces the predictability of global commerce.

39. Under Canada's interpretation, NAFTA Parties could discriminate against foreign companies just as effectively as if they prevented them from crossing the border. Canada's interpretation enables the NAFTA Parties to do precisely what the NAFTA was designed to prevent. Canada's interpretation is inconsistent with the NAFTA Parties' resolution, expressed in the preamble to the Agreement, to "enhance the competitiveness of their firms in global markets." Canada's interpretation is inconsistent with the NAFTA objective, expressed in Article 102(1)(b), to "promote conditions of fair competition in the free trade area".

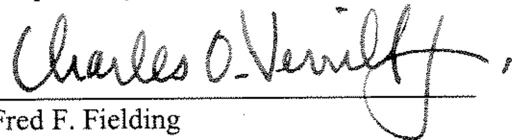
40. Canada's interpretation also enables the NAFTA Parties to evade liability under international law by delegating responsibility to monopolies and state enterprises.

41. US businesses operating abroad do not expect NAFTA Parties to escape responsibility for their actions in this manner. They expect that, consistent with customary international law, states will be responsible for such actions. US businesses expect that the NAFTA provisions fulfill rather than undermine its competition and trade liberalizing objectives.

IV. CONCLUSION

42. As detailed above, this Tribunal should use this arbitration to return to a straightforward interpretation of the national treatment obligation in NAFTA Article 1102 that would promote a cohesive and purposive meaning to this obligation. In addition, this Tribunal should interpret the scope of government responsibility for actions of state enterprises in a manner consistent with international law to ensure that governments cannot use state enterprises to evade their otherwise binding international treaty obligations.

Respectfully submitted,



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