IN THE 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-

GOVERNMENT OF CANADA,

Respondent/Party.

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America makes this submission on certain questions of interpretation of the NAFTA. Those questions are raised in connection with the jurisdictional objections of the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

Relationship Between Chapters Fifteen And Eleven

2. As discussed below, the United States agrees with Canada that, in an investor-State arbitration under Chapter Eleven such as this one,[1] an investor may submit a claim

[1] Because there is no issue in this case of a breach of a Chapter Fourteen obligation, this submission does not address the relationship of Chapter Fourteen to claims alleging a breach of a Chapter Fifteen obligation.

to arbitration under Article 1116 or Article 1117 only if the investor alleges a breach of an obligation of Chapter Eleven. An allegation of such a breach is necessary even for claims based on either of the two provisions of Chapter Fifteen specified in Articles 1116 and 1117: *i.e.*, Articles 1502(3)(a) and 1503(2).[2] Moreover, a claim alleging a breach of either Article 1502(3)(a) or Article 1503(2) may be submitted to arbitration only where the alleged breach was caused by an exercise of delegated governmental authority by a state enterprise or certain monopolies. Finally, an affirmative governmental act is called for to establish such a delegation of governmental authority.

3. Articles 1116 and 1117 set forth a closed list of NAFTA provisions the alleged breach of which by a NAFTA Party may be submitted to arbitration by an investor of another NAFTA Party.

4. First, by the terms of Articles 1116 and 1117, an investor of a NAFTA Party may submit a claim to arbitration alleging that a monopoly identified in Article 1502(3) breached Article 1502(3)(a) "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A" of Chapter Eleven. NAFTA arts. 1116(1)(b), 1117(1)(b). Thus, a necessary element of jurisdiction in any claim, whether under Article 1116 or Article 1117, that a monopoly identified in Article 1502(3) breached Article 1502(3)(a), is an allegation that the monopoly breached an obligation under Section A of Chapter Eleven. A mere allegation that a monopoly breached a provision of the NAFTA other than an obligation embodied in Chapter Eleven is not sufficient to establish jurisdiction under either Article 1116 or Article 1117.

5. Second, with respect to state enterprises, by its own terms, Article 1503(2) obligates a NAFTA Party to "ensure . . . that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) . . . ." NAFTA art. 1503(2). Thus, as with a claim based on action by a monopoly, for a claim, such as the one here, based on action by a state enterprise, a necessary element of jurisdiction under

[2] Article 1502(3)(a) obligates each NAFTA Party to "ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates: (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever 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." Article 1503(2) obligates each NAFTA Party to "ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapter Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."

Article 1116 or Article 1117 is an allegation that the state enterprise breached an obligation under Chapter Eleven. A mere allegation that a state enterprise breached a provision of the NAFTA other than an obligation embodied in Chapter Eleven is not sufficient to establish jurisdiction under either Article 1116 or Article 1117.

6. Thus, where, as here, an investor-State claim is based on an alleged breach of Article 1502(3)(a) or Article 1503(2), to establish jurisdiction under Article 1116 or Article 1117, it is not sufficient merely to allege that a monopoly or state enterprise violated any provision of the NAFTA, such as Articles 1502(3)(b)-(d) or 1503(3).[3] The claimant must allege that the monopoly or state enterprise breached an obligation embodied in a provision of Section A of Chapter Eleven.

7. Moreover, an investor submitting a claim to arbitration under either Article 1116 or Article 1117 based on an alleged breach of either Article 1502(3)(a) or Article 1503(2) must meet jurisdictional requirements that are in addition to those that must be met by a Chapter Eleven claimant that does not allege a breach of Article 1502(3)(a) or Article 1503(2). One such requirement is that the actions of the monopoly or state enterprise that are the subject of the claim involve an exercise of "regulatory, administrative or other governmental authority that the Party has delegated to it . . . ." NAFTA arts. 1502(3)(a), 1503(2). Article 1502(3)(a) provides as examples of "government authority" "the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges." Article 1503(2) includes "the power to expropriate" as an additional example of "governmental authority."

8. Consistent with the settled interpretive rules of *noscitur a sociis* ("a word is known by the company it keeps") and *ejusdem generis* (general words are limited by the meaning indicated by specific words, such as examples),[4] the examples in Articles 1502(3)(a) and 1503(2) make clear that the term "governmental authority" means the authority of the NAFTA Party in its sovereign capacity: a monopoly or state enterprise is not exercising "governmental authority" merely because it acts as a commercial participant in the marketplace. Each of the examples refers, in this context, to acts that are inherently governmental in nature, not to acts that commercial enterprises could legally perform absent a delegation of governmental authority.[5] Thus, for jurisdiction to

---

[3] With respect to Article 1501, we note that Note 43 of the NAFTA states that "no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article [1501]."

[4] *See, e.g., Northern Cameroons (Cameroons v. UK),* 1963 I.C.J. 15, 19 (Dec. 2) (sep. op. Spender, J.); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (Courts use these principles "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth'" to the language. (citations omitted)); PIERRE-ANDRÉ COTE, INTERPRETATION OF LEGISLATION IN CANADA 241-49 (1984).

[5] For example, the reference to granting licenses in Article 1503(2) should not be viewed as referring to a contractual license from one private party to another, such as a patent license, but rather to acts that involve the exercise of inherently governmental authority,

attach under either Article 1116 or Article 1117, an investor-State claim based on an alleged breach of Article 1502(3)(a) or Article 1503(2) must assert that the conduct complained of involves an exercise by the monopoly or state enterprise of delegated sovereign authority.[6]

9. Finally, according to Note 45, an affirmative government act is called for to establish a "delegation of authority" within the meaning of Articles 1502(3)(a) and 1503(2). Note 45 provides that a "delegation" under Article 1502(3) "includes a legislative grant, and a government order, directive or other *act* transferring to the monopoly, or authorizing the exercise by the monopoly of, governmental authority." (Emphasis added.) The United States respectfully submits that the term "delegated" has the same meaning in both Article 1502(3) and Article 1503(2). Therefore, in accordance with the interpretive principles of *noscitur a sociis* and *ejusdem generis*, to fall within Article 1502(3)(a) or Article 1503(2), the sovereign authority being exercised must have been transferred to the monopoly or state enterprise by some affirmative act of the NAFTA Party. There is no jurisdiction under either Article 1116 or Article 1117 if the authority under which the monopoly or state enterprise has acted is inherent in the nature of the monopoly or state enterprise or is that which the monopoly or state enterprise has arrogated to itself without an affirmative transfer of governmental authority to it by the NAFTA Party. A claim under either Article 1116 or Article 1117 alleging a breach of either Article 1502(3)(a) or Article 1503(2) must, therefore, allege that the actions of the monopoly or state enterprise that are the subject of the claim involve the exercise of governmental authority that has been specifically delegated to it by act of the respondent NAFTA Party.

---

such as granting a license to export sensitive technology or operate a broadcasting company or an airline. Likewise, the references to approving commercial transactions and imposing fees or other charges are not to activities, such as entering into contracts and setting prices, in which commercial enterprises routinely engage. Rather, these are also examples of activities in which governmental entities routinely engage to regulate the conduct of non-governmental entities, such as determining the lawfulness of proposed mergers, regulating utility rates, and setting import quotas or imposing tariffs or other fees on imports.

[6] This conclusion is also consistent with the customary international law of State responsibility. *See, e.g.*, INT'L LAW COMM'N, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 5, U.N. Doc. No. A/CN.4/L.602/Rev.1 (2001) (stating customary international law rule as follows: "The conduct of a person or entity which is not an organ of the State . . . 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.").

Minimum Standard Of Treatment

10. On July 31, 2001, the NAFTA Free Trade Commission ("FTC") interpreted Article 1105(1) as referring to the "customary international law minimum standard of treatment of aliens" and further stated that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[7]

11. For the reasons explained in the United States submissions in other Chapter Eleven cases, such as *Methanex Corp. v. United States*, the United States agrees with Canada that FTC interpretations are the governing law in all Chapter Eleven arbitral proceedings: Article 1131(2) provides that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[8] In any event, the FTC interpretation is fully consistent with the language of Article 1105(1) and applicable rules of international law, and the interpretation was promulgated in full compliance with the NAFTA Parties' authority.

12. Moreover, the United States is aware of no support for the proposition that customary international law imposes obligations with respect to the promulgation or enforcement of national competition laws.[9]

---

[7] Accordingly, a claim under Article 1105 would not be admissible if it were based only on an allegation of a breach of another provision of the NAFTA, such as Article 1502(3)(d). Similarly, a claim under Article 1102 would not be admissible if it were based only on an allegation of a breach of another provision of the NAFTA, such as Article 1502(3)(d).

[8] *See, e.g.*, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation (Oct. 26, 2001) ("US Post-Hearing Submission on FTC Interpretation") (<http://www.state.gov/s/l/c5823.htm>).

[9] Indeed, many States do not even have competition laws. *See, e.g., Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere*, FTAA – Negotiating Group on Competition Policy, FTAA.ngcp/inf/03/Rev.2 (March 22, 2002) (showing that only 13 of the 34 Western Hemisphere nations participating in ongoing negotiations to establish a Free Trade Area of the Americas have competition laws) (http://www.ftaa-alca.oas.org/publications/cpi3r2p1e.doc); *Trade and Competition Policy*, Working group set up by Singapore ministerial, on the WTO website (undated) (noting that approximately 80 WTO Member countries have adopted competition laws) (http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/16comp_e.htm); *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, International Competition Policy Advisory Committee, at 33-34 (2000) (<www.usdoj.gov/atr/icpac/finalreport.htm>).

Taxation Measures

13. NAFTA Article 2103(1) generally excludes taxation measures from the NAFTA's provisions: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." Article 2103 includes, however, several exceptions to this general exclusion. For example, Article 2103(4)(b) specifically subjects taxation measures to the national treatment and most-favored-nation treatment requirements of Articles 1102 and 1103, and Article 2103(6) specifically subjects, in certain circumstances, taxation measures to the provisions of Article 1110 relating to expropriation. By implication, taxation measures are not subject to any Chapter Eleven obligations, including those embodied in Article 1105, that are not expressly identified as exceptions to the Article 2103(1) general exclusion of taxation measures from the NAFTA.

14. NAFTA Article 201 defines a "measure" as "any law, regulation, procedure, requirement or practice." As a "measure," a "practice" includes a pattern of applying or failing to apply (or enforcing or failing to enforce) another measure, such as a law or regulation. For example, the repeated non-enforcement of a particular law could constitute a "practice" and therefore a "measure."

15. Thus, because a "measure," within the meaning of Article 201, includes a pattern of applying or failing to apply a taxation measure, the United States agrees with Canada that, at least for purposes of Article 2103, no valid distinction exists between a taxation measure and a practice with respect to the application of a taxation measure. Consequently, just as Article 1105 does not apply to challenges to the adoption or imposition of a tax, it does not apply to a practice of applying a tax.

Respectfully submitted,

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Barton Legum
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
Alan Birnbaum
Attorney-Adviser, Office of International Claims and Investment Disputes
United States Department of State
Washington, D.C. 20520

May 13, 2002