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

MEXICO' SUBMISSION UNDER NAFTA ARTICLE 1128

I. INTRODUCTION

1. Pursuant to NAFTA Article 1128, the United Mexican States ("Mexico") hereby files this Submission regarding Canada's Preliminary Jurisdictional Objections.
2. In Mexico's respectful view, a Tribunal has a duty at the preliminary stage to strike claims that obviously do not and, regardless of the facts, cannot fall within its jurisdiction *ratione materiae*. This gives effect to the NAFTA Parties' shared intention, plainly stated in Article 1116, to permit claims to be advanced in respect of a limited class of NAFTA obligations only. It will also contribute to the orderly administration of Chapter Eleven proceedings and relieve respondents from having to mount costly defenses against claims that cannot succeed (and for which an eventual award of costs will not make them whole).
3. Even where a Tribunal declines to strike a claim, its preliminary decision on jurisdiction can provide important guidance to the disputing parties in the subsequent conduct of the claim. For example, the Tribunal in *Marvin Roy Feldman Karpa v. United Mexico States*, ICSID Case No. ARB/AF/99/1, considered the fact that the Claimant had alleged breaches of Mexican

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domestic law, violations of general international law, and violations of the NAFTA before it entered into effect. The Tribunal provided guidance to the disputing parties in its Interim Decision on Preliminary Jurisdictional Issues.¹

4. With respect to the alleged breaches of the NAFTA prior to its entry into force, as well as alleged breaches of international law generally, the Tribunal held that the express language of Chapter Eleven limited its jurisdiction *ratione materiae*:

61. The Tribunal...observes that its jurisdiction under NAFTA Article 1117(1)(a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law. Both the aforementioned legal systems (general international law and domestic Mexican law) might become relevant insofar as a pertinent provision to be found in Section A of Chapter Eleven explicitly refers to them, or in complying with the requirement of Article 1131(1) that "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Other than that, the Tribunal is not authorized to investigate alleged violations of either general international law or domestic law.²

5. Thus, the Tribunal recognized that its jurisdiction was defined by a particular part of NAFTA (Section B). While it left open the possibility of referring to general international law in applying Section A, it did not view itself as having a broad mandate to determine questions of general international law.

6. It went on to observe that its jurisdiction *ratione materiae* became jurisdiction *ratione temporis* as well because of its reliance on Section A of Chapter Eleven:

... Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.³

¹ Dated December 6, 2000. (See Annex 1 for the relevant excerpt.)

² *Id.*, at paragraph 61.

³ *Id.* at paragraph 62.

7. The Tribunal's direction in this regard had an important salutary effect on the subsequent conduct of the case by keeping the case within the bounds circumscribed by Articles 1116 and 1117.

8. Mexico's specific submissions on the issues raised by Canada's motion are restricted to three issues: the Tribunal's jurisdiction *ratione materiae* under Article 1116, the Claimant's description of the scope of Article 1105, and the nature and content of customary international law.

9. The fact that Mexico has chosen not to address any other matter raised by Canada's Preliminary Jurisdictional Objection should not be taken to constitute agreement or disagreement with any argument advanced by either of the disputing parties.

A. Article 1116 Circumscribes This Tribunal's Jurisdiction *Ratione Materiae*

10. The Tribunal's jurisdiction *ratione materiae* in this case is circumscribed by Article 1116: the Claimant cannot allege a breach of any provision of the NAFTA other than those set out in Section A of Chapter Eleven and Articles 1502(3)(a) and 1503(2). With the exception of Chapter Nineteen, all other NAFTA obligations (to the extent that the Parties have subjected them to dispute settlement) are subject to State-to-State dispute settlement only.⁴

11. Since the NAFTA Parties did not consent to the submission of alleged breaches of obligations not listed in Article 1116, a tribunal that applies such articles will act outside the scope of the submission to arbitration:

Section B of Chapter 11 establishes a separate arbitration procedure [separate from general State-to-State dispute settlement under Chapter Twenty]. It allows investors to a NAFTA Party (who are not themselves a party to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other than the obligations imposed under Section A of Chapter 11 and the two Articles of Chapter 15, the investor would have to prevail upon its country to espouse an arbitration on its behalf.

⁴ Within Chapter Fifteen, for example, the Parties have agreed that Article 1501 shall not be the subject of even State-to-State dispute settlement.

United Mexican States v. Metalclad Corporation, 89 B.C.L.R. (3d) 359 at 377, at para. 58.

12. Accordingly, a claimant must establish that its claim concerns one or more of the obligations expressly listed in Article 1116. If the allegation is in fact one of breach of another NAFTA obligation not so listed, it cannot be the subject of an investor-State claim.

13. The NAFTA Parties specifically turned their minds to which of the Chapter Fifteen obligations they wished to be arbitrable in a Chapter Eleven claim. Only two paragraphs were included with a tribunal's jurisdiction *ratione materiae*. Article 1502(3)(d), which underlies the Amended Statement of Claim, is not so included.

14. Article 1502(3) sets out four separate obligations where a Party maintains or designates a government monopoly:

3. Each Party shall 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;

(b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;

(c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.

15. Mexico respectfully directs the Tribunal's attention to the following points of interpretation of Article 1502(3):

- 1) Subparagraphs (a) to (d) of paragraph 3 address different aspects of a monopoly's behavior. Subparagraph (a), like Article XVII:1 of the General Agreement on Tariffs and Trade (GATT), is designed to ensure that a State does not use a monopoly that exercises delegated powers to take action that would be inconsistent with the Agreement if such action were taken directly by the State itself;
- 2) Subparagraph (b) replicates an obligation found in GATT Article XVII:1(b) to act solely in accordance with commercial considerations when the monopoly engages in purchase or sale of the monopoly good or service;
- 3) Subparagraph (c) elaborates upon an obligation found in Article XVII:1(a) of the GATT to accord non-discriminatory treatment to investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and
- 4) Subparagraph (d), which has no counterpart in the GATT, sets out a prohibition against the monopoly engaging in anticompetitive practices in a non-monopolized market in its territory. Obviously, the subparagraph does not reach the activities in the monopolized market, because by definition, a monopoly does not have competitors in the monopolized market.
- 5) Only one of the above four subparagraphs (namely (a)), has been incorporated into the Tribunal's jurisdiction *ratione materiae* by Article 1116(1)(b); the remaining three forms of proscribed behavior fall outside of the Tribunal's jurisdiction and cannot directly or indirectly form the basis for a Chapter Eleven claim;
- 6) Subparagraph (a) itself is not arbitrable in a Chapter Eleven proceeding *unless* it is proven that the monopoly is exercising regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service. This establishes a condition precedent to the taking of jurisdiction. The claimant must prove that such authority has been delegated to the monopoly. If the condition precedent is not satisfied, there is no case to answer. In the absence of such delegated authority, subparagraph (a) is not arbitrable;

- 7) Mexico agrees with Canada that the plain language of Article 1502(1) and subparagraph (a) distinguishes between the grant of the monopoly and the grant of any regulatory, administrative or other governmental authority to the monopoly and it is important not to confuse the two.⁵ The Parties are clearly able to designate monopolies. Under subparagraph (a), the actions of the monopoly in the absence of any delegated governmental authority are not arbitrable as an alleged breach of that subparagraph;
- 8) Article 1116(1)(b) narrows the scope of subparagraph (a) further: assuming that a claimant satisfies the condition precedent of proving a delegation of governmental authority to the monopoly, the claimant cannot allege that the monopoly has breached any obligation under the Agreement. By the express terms of Article 1116, it can allege only that the monopoly has "acted inconsistently with the Party's obligations *under Section A*". By contrast, a State may allege in a Chapter Twenty proceeding that the monopoly has acted inconsistently with *any* obligation of the Agreement;
- 9) This is fully consistent with the NAFTA Parties' plain intention to restrict investor-State arbitration to a limited class of obligations. The scope of arbitrable subject-matter under Article 1116 for an investor is much narrower than for a State which alleges a breach of Article 1502(3).

16. It is a basic rule of treaty interpretation that each provision must be given effect and each must have a different meaning from the others.⁶ It is contrary to this basic rule for Article 1502(3)(a) to be read as having the same meaning as Article 1502(3)(d). The former is arbitrable in certain conditions; the latter is not. Article 1502(3)(d)'s content cannot be 'read into' Article 1502(3)(a) in order to circumvent Article 1116's exclusion of Article 1502(3)(d) from investor-State arbitration. The proper definition of the Tribunal's subject matter jurisdiction is of fundamental importance to the proper functioning of the Agreement and the Parties' plain intent must be respected.

17. Similarly, as shall be seen below, Article 1502(3)(d) does not have the same content as Article 1105.

⁵ See Reply at paragraphs 76-77.

⁶ *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products*, December 14, 1999, WT/DS98/AB/R. (WTO Appellate Body), at 27-28. Canada's Authorities, Tab 17.

B. Article 1105's Content Does Not Extend to the Obligations Set Out in Article 1502(3)(d) or in Other NAFTA Provisions

18. Article 1131(2) of the NAFTA, entitled "Governing Law", states that:

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

19. After the *Metalclad, S.D. Myers, and Pope & Talbot*⁷ Awards were issued, the Free Trade Commission issued a binding interpretation on the meaning of Article 1105. This interpretation confirms that:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. 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).

20. It is the *Note of Interpretation*, not a non-binding award that pre-dated it⁸, that forms the governing law of a Chapter Eleven proceeding and must be applied by a Tribunal. Mexico observes that at paragraphs 70-71 of the Counter-memorial and 36 of its Rejoinder, the Claimant indicates that it does not "accept" the *Note of Interpretation*. The Claimant's views as to the acceptability of the Note are, with respect, irrelevant. There is no lawful basis for a claimant to urge a Tribunal to ignore or not to accept the *Note of Interpretation*. The Note was promulgated pursuant to Article 1131(2) and accordingly became part of the governing law. There is no question of a Tribunal deciding whether or not to apply the Note.⁹

⁷ At paragraphs 71 and 73-76 of the Claimant's Counter-memorial.

⁸ Article 1136(1) confirms that an award made by a Tribunal "shall have no binding force except between the disputing parties and in respect of the particular case."

⁹ In the leading ICSID *ad hoc* annulment committee decision in *MINE v. Guinea*, that committee said:
... the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a

C. Customary International Law Lacks the Specificity Alleged by the Claimant

21. The obligations contained in Chapter Fifteen are purely a creature of conventional (or treaty) law. That is, like the vast majority of the NAFTA's provisions, they would not exist as binding international legal obligations had the NAFTA Parties not negotiated them. The customary international law on the minimum standard of treatment of aliens contains no such legal disciplines and, contrary to the assertion made in the Claimant's Counter-memorial, it will not be possible for the Claimant to adduce evidence of a customary international law rule dealing with cross-subsidization or other like activities by a monopoly.¹⁰

22. Thus, the allegation at paragraph 22 of the Amended Statement of Claim is unsustainable as a matter of customary international law. Paragraph 22 states that:

...The obligations under NAFTA Article 1105 include not engaging in anti-competitive practices while exercising governmental authority, such as the type of authority delegated to Canada Post. Examples of such anti-competitive practices include:

- a. cross-subsidization;
- b. predatory conduct and predatory pricing;
- c. using a monopoly infrastructure and network developed for the delivery of monopoly letter mail to benefit non-monopoly products in an unfair manner; and
- d. failing to allocate a fair and equitable portion of the cost incurred to each of its non-monopoly products which benefit from the monopoly infrastructure and network and pricing such non-monopoly products below those allocated costs.

23. To determine the content of customary international law, the International Court of Justice looks to the *opinio juris* of States: that is, whether States by their conduct evidence a

decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.

Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment ...

ICSID Case No. ARB/84/4, Ad Hoc Committee Decision of December 22, 1989, 5 ICSID Rev. FILJ 95 (1990).

¹⁰ Claimant's Counter-memorial at paragraph 85.

willingness to be bound by the rule of law that is being propounded.¹¹ This requires the survey of many States and many different legal systems. While complete uniformity is not required, substantial uniformity of State practice is. Thus, only settled and well-accepted principles of law fall within this category of international law.

24. There is simply no basis in law to assert that the customary international law regarding the treatment of aliens under the minimum standard has developed rules of such specificity with respect to the conduct of a governmental monopoly. Mexico observes that neither the GATT (1994) nor the WTO Agreement contains an equivalent provision to Article 1502(3)(d) (this underscores the purely conventional nature of the obligation). Moreover, the WTO Members are only now beginning to address the possibility of negotiating competition rules in the Doha Round of Multilateral Trade Negotiations.

25. The Ministerial Declaration taken at the WTO Ministerial meeting in Doha (the "Doha Declaration")¹² states with respect to competition policy:

Interaction between trade and competition policy

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of

¹¹ See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, (3rd ed., Stevens & Sons Limited: London, 1957) at pp. 38-43. Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford University Press, 1998) at pp. 7-11.

¹² WT/MIN(01)/DEC/1, adopted 14 November 2001 (Attached 2.) Available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, consulted on 9 May 2002.

competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

26. It is clear from the Doha Declaration that the negotiation of competition issues in the WTO is in its infancy. Many issues remain unresolved, including the identification and clarification of core competition principles, let alone the development of a multilateral consensus on how to negotiate them or the rules that may ultimately emerge from such negotiations.

27. Competition issues have been addressed in the WTO Agreement only to a very limited extent both substantively and in scope of application. Article XVII of the GATT 1994 governs state trading enterprises but only applies to limited aspects of competition, for example, monopolies' duties with respect to the importation of goods.

28. Canada's Reply makes the point that there is no authority for the assertion that customary international law even addresses competition law.¹³ This is correct. Many States do not even have a competition law.¹⁴ Thus, the first element of a customary rule, namely, evidence of a widespread practice is not present in this case. Nor is there any evidence that States consider that there is the necessary *opinio juris* to require them to formulate and enact a competition law. Since there is no customary international law rule on the very existence of competition law, it follows that there is no rule dealing with the actions of government monopolies, cross-subsidization, predatory conduct or discriminatory provision of a good or service.

29. Mexico also respectfully points out that the claimant's references to the Bretton Woods Agreements and the WTO/GATT as having "had the significant effect of increasing legal security and hence the level of protection offered to foreign investors"¹⁵ should not be taken to support any inference that those conventional international law rights and obligations have become part of customary international law relating to the treatment of investment and hence part of Article 1105.¹⁶ The proof, if any is needed, that the WTO is conventional international law, is

¹³ Reply at paragraphs 100-104.

¹⁴ When Mexico enacted its competition law in 1992 it did so, not out of a sense that it was so required by customary international law, but rather because it considered that it was in the best interests of the Mexican economic policy.

¹⁵ Counter-memorial at paragraphs 79-80.

¹⁶ There is no basis for arguing that GATT's rules on state trading enterprises and monopolies (GATT Article XVI) are the kind of norm-creating rules recognized by the ICJ in the *North Sea Continental Shelf Cases* as being capable of evidencing a customary international law rule. See I.C.J. Reports (1969) at paragraphs 66-77. This is evident from the fact that paragraph 3 of GATT Article XVI recognizes that the activities of state trading enterprises (including monopolies) might "create serious obstacles to trade" and therefore "negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade". This text thus recognizes the sovereign right of States to maintain state trading enterprises and to establish monopolies and of their right to limit trade in the absence of a conventional obligation negotiated with other GATT Contracting Parties.

provided by the Organization's extremely detailed procedures for the approval of a State's accession and the length of time that States take to negotiate accession.¹⁷ If the WTO's Members were obliged by customary international law to extend the detailed protections contained in the WTO agreements to goods and services of other States, there would be no need for a non-Member to negotiate a Protocol of Accession and non-Members would be equally bound by customary international law rules. This is not the case, as evidenced by the recent accession of the People's Republic of China, Taiwan and the proposed accession of Russia, Saudi Arabia and other States.

30. Moreover, with two narrow exceptions, the subject matter of the WTO agreements does not address investment disciplines. First, there is a *WTO Agreement on Trade-Related Investment Measures (TRIMs)*, which has a counterpart in NAFTA Chapter Eleven (in Article 1106), but the focus of that agreement and Article 1106 is preventing governments from imposing conditions on investment that would result in discriminatory treatment of internationally traded goods – for example, requirements that an investment use only domestic origin materials. The TRIMs Agreement does not address the treatment of foreign investment generally. Second, under the 1995 *General Agreement on Trade in Services (GATS)*, member countries agreed, with respect to certain sectors, to allow foreign investors to establish local companies to provide specific types of services. The GATS obligations also do not establish any type of comprehensive regime for the protection of investment. Moreover, under the GATS, each WTO Member chooses whether it will undertake commitments for particular services, if any, and therefore it is beyond dispute that the GATS rules are purely conventional and are the antithesis of norm-creating treaty rules that could also amount to rules of customary international law.¹⁸

31. The Doha Declaration establishes that the WTO, as it currently stands, does not address investment issues other than the limited provisions just mentioned:

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in

¹⁷ See the Ministerial Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization. (Annex 2).

¹⁸ The ICJ made this point in connection with the ability of States to take reservations from conventional rules in the *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands)* I.C.J. Reports (1969) 4: A treaty provision which permits reservations to be taken from it is unlikely to be able to be a rule of customary international law: "speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted: -whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour" (at paragraph 63).

this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.¹⁹

32. Again, this demonstrates that the WTO is in the very early stages of developing conventional rules on the relationship between trade and investment. It warrants noting that *no* decision has even been taken as to how to address the issues in negotiation. Paragraph 20 requires that the Members take a decision by "explicit consensus" as to the "modalities" of any negotiations. The fact that the WTO Members are at a nascent stage of even considering the negotiation of conventional legal rules demonstrates that the WTO has *not* had, to use the Claimant's words previously quoted, "the significant effect of increasing legal security and hence the level of protection offered to foreign investors".

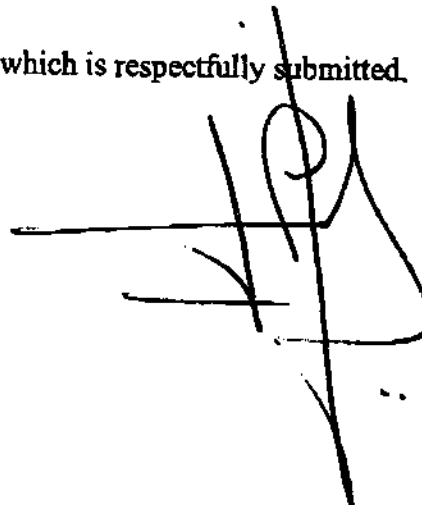
¹⁹ *Supra* note 12.

II. CONCLUSION

33. Leaving aside the fact that there is no customary international law rule dealing with anti-competitive conduct of monopolies, it would be nonsensical to hold that the Minimum Standard of Treatment obligation includes the same obligations as those set out in the Monopolies and State Enterprises article. The substantive content of the two provisions is completely different. If the claimant's argument were accepted, all other provisions of the NAFTA outside of those listed in Article 1116 would equally be encompassed by Article 1105. The NAFTA Parties would not have had to draft detailed provisions regarding the many other subjects addressed in the 21 other chapters of the Agreement because they would already be encompassed by Article 1105. Such an interpretation would lead to an absurdity not permitted under the *Vienna Convention on the Law of Treaties*' rules of interpretation.

34. As the Chapter Fifteen obligations exist only as a matter of conventional international law, they cannot fall within the customary international law standards that the Free Trade Commission has confirmed Article 1105 contains. Accordingly, the assertion made in paragraph 22 of the Amended Statement of Claim quoted above cannot be sustained. While a NAFTA Party's alleged failure to prevent cross-subsidization by a designated monopoly, for example, may amount to a breach of Article 1502(3)(d) that can be alleged by a NAFTA Party, it cannot form the basis of a claim under Article 1105.

All of which is respectfully submitted.

A handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke extending downwards.

c.c. Michael P. Carroll
Barry Appleton
Sylvie Tabet
Alan Birnbaum

VI. Relevance of Claims Pre-Dating NAFTA's Entry into Force

60. This issue (Procedural Order No. 4, para. 5 (d)) pertains to whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when NAFTA came into force, and which are alleged to be in violation of NAFTA, general international law, or domestic Mexican law, are relevant for the support of the claim or claims. The issue was addressed by the Claimant in its Memorial (paras. 67-77) as well as in its Additional Observations (paras. 61, 62) and by the Respondent in its Counter-Memorial (paras. 223-266) as well as in its Additional Observations (paras. 44-51). The issue was also addressed by the Government of Canada in its submission (paras. 16-19).

61. The Tribunal has taken due knowledge of the parties' respective allegations and observes that its jurisdiction under NAFTA Article 1117 (1) (a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law. Both the aforementioned legal systems (general international law and domestic Mexican law) might become relevant insofar as a pertinent provision to be found in Section A of Chapter Eleven explicitly refers to them, or in complying with the requirement of Article 1131(1) that "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Other than that, the Tribunal is not

authorized to investigate alleged violations of either general international law or domestic Mexican law.

62. The reliance of the Tribunal on alleged violations of NAFTA Chapter Eleven Section A also implies that the Tribunal's jurisdiction *ratione materiae* becomes jurisdiction *ratione temporis* as well. Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. However, this also means that if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, "became breaches" of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction, as the Government of Canada points out (paras. 18, 19) and also the Respondent concedes (Counter-Memorial, para. 232). Any activity prior to that date, even if otherwise identical to its post-NAFTA continuation, is not subject to the Tribunal's jurisdiction in terms of time.



DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION

 WT/MIN(01)/DEC/1
 20 November 2001

Ministerial declaration

Adopted on 14 November 2001

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1. The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

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Marvin Roy Feldman Karpa

v.

United Mexican States

(ICSID Case No. ARB(AF)/99/1)

Interim Decision on

Preliminary Jurisdictional Issues

1. Procedural Background

1. On April 30, 1999, Mr. Marvin Roy Feldman Karpa (the Claimant) filed, with the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID or the Centre), a Notice of Arbitration against the United Mexican States (the Respondent or Mexico) under Chapter Eleven of the North American Free Trade Agreement (NAFTA), and, simultaneously, sought approval of access to the Additional Facility of ICSID as foreseen under NAFTA Article 1120.

2. By such Notice of Arbitration, the Claimant, as a national of the United States of America, submitted a claim to arbitration under NAFTA Article 1117 on behalf of Corporación de Exportaciones Mexicanas S.A. de C.V. (CEMSA), a

Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

Interaction between trade and competition policy [back to top](#)

23. Recognizing the case for a multilateral framework to enhance the contribution of

competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Transparency in government procurement
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26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. These negotiations will build on the