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AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

B E T W E E N

UNITED PARCEL SERVICE OF AMERICA INC

AND

GOVERNMENT OF CANADA

**DECISION OF THE TRIBUNAL ON
PETITIONS FOR INTERVENTION AND PARTICIPATION
AS AMICI CURIAE**

THE TRIBUNAL:

Dean Ronald A Cass
L Yves Fortier CC, QC
Justice Kenneth Keith (Chairman)

17 October 2001

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The requests

1. The Canadian Union of Postal Workers (the Union) and the Council of Canadians (the Council) have petitioned the Tribunal requesting
 - (i) standing as parties to any proceedings that may be convened to determine the claim made by UNITED PARCEL SERVICE OF AMERICA, INC. (UPS) in this matter;
 - (ii) in the alternative, should the status as party be denied to one or both Petitioners, the right to intervene as *amicus curiae* in such proceedings to be accorded on terms that are consistent with the principles of fairness, equality and fundamental justice;
 - (iii) disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal;
 - (iv) the right to make submissions concerning the place of arbitration;
 - (v) the right to make submissions concerning the jurisdiction of this Tribunal, and, once they are fully known, the arbitrability of the matters the disputing investor has raised; and,

- (vi) an opportunity to amend this Petition as further details of this claim become known to the petitioners.
2. In accordance with its Procedural Decision No. 2 the Tribunal has received briefs in support of the petition from the Petitioners and briefs in opposition from United Parcel Service of American Inc (the Investor or UPS) and the Government of Canada (Canada). In terms of article 1128 of NAFTA the Governments of Mexico and the United States of America have also made submissions.
3. The Petitioners give the following grounds in support of their request:
- (i) Both Petitioners respectively have a direct interest in the subject matter of this claim, and may be adversely affected by the award of this Tribunal. Accordingly it would be contrary to both national and international principles of fairness, equality and fundamental justice to deny them the opportunity to defend their interests in these proceedings;
 - (ii) Both Petitioners also have an interest in the broader public policy implications of this dispute. These not only implicate the full array of Canada Post services, but many other public service sectors as well. Notwithstanding its reliance upon UNCITRAL procedures, this dispute is not essentially private in character, but rather is likely to have far reaching impacts on a broad diversity of non party interests. Accordingly it would be unfair and inconsistent with the principles of equality, fairness and fundamental justice to exclude from these proceedings those who wish to address these issues and are uniquely qualified to do so. Moreover, allowing such participation will provide this Tribunal with an important and different perspective on the questions before it and the broader consequences that may follow from its determination of those questions;

- (iii) Both Petitioners share two further interests in this matter. The first is to ensure judicial oversight by the appropriate Canadian court of these proceedings in accordance with Canadian constitutional principles and the rule of law. The second is to address the lack of transparency that has historically attended international arbitral processes. Under UNCITRAL Arbitration Rules only the parties have the right to make submissions concerning the place of arbitration, the arbitrability of the issues in dispute, or the in-camera nature of the proceedings. Conversely, non-parties have no right under these rules to invoke judicial review of the tribunal's award. Accordingly, a failure to accord the Petitioners standing as parties to these proceedings would effectively deny or limit their opportunity to make submissions concerning these key questions or to invoke the supervisory jurisdiction of a Canadian court and consequently deny the treatment in accordance with fairness, equality and fundamental justice;
- (iv) By reason of these interests, the Petitioners have a unique and distinct perspective and expertise concerning the issues that have been raised by this claim that would be of assistance to this Tribunal; and, on the grounds that,
- (v) This Tribunal has the authority pursuant to Article 15(1) of the UNCITRAL Arbitration Rules to accord standing to third parties on whatever terms it deems appropriate subject only to the requirement that all parties are treated with equality and given the full opportunity of presenting their case. In exercising this discretion it is incumbent on the Tribunal to have regard to all applicable rules of international law including those set out in human and labour rights conventions and treaties which establish the right of all persons to equal and fair treatment before the law.

4. They seek the following orders:
- (i) the Petitioners be made parties to these proceedings;
 - (ii) in the alternative, the Petitioners be accorded standing as *Amicus* interveners, but nevertheless with the full right to present and to test any and all of the evidence which may be introduced in these proceedings;
 - (iii) the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal, be disclosed publicly;
 - (iv) the Petitioners be accorded the right to make submissions concerning the place of arbitration;
 - (v) the Petitioners be accorded the right to make submissions concerning the jurisdiction of this Tribunal, and, once they are fully known, the arbitrability of the matters the disputing investor has raised; and,
 - (vi) the Petitioners be allowed to supplement these submissions to reflect the additional information made available by reason of such disclosure.

The positions of the disputing parties and of Mexico and the United States of America

5. The Investor's position is that:
- (i) The Tribunal does not have jurisdiction to grant "party" status to strangers to the arbitration.

- (ii) The Tribunal may have jurisdiction to grant *amicus curiae* status to strangers to the arbitration, in appropriate circumstances, on receipt of adequate material warranting the grant of such status.
- (iii) On the basis of the material filed by the Petitioners, *amicus curiae* status should not be granted at this time, but the Tribunal might consider granting leave to reapply in the future, on proper material being submitted. If *amicus curiae* status is granted, the *amicus* cannot be entitled to attend hearings or to be provided access to any of the material filed with the Tribunal, but ought instead to be limited to providing the written submission, limited to no greater than ten pages, on the specific issue on which the Tribunal might determine to receive such a brief.

6. The Investor accordingly submits

- (i) that the petition requesting that the Petitioners be given standing as a disputing party be dismissed, and
- (ii) that the application to provide an *amicus* brief should be dismissed at this time, but that the Tribunal might determine that the Petitioners could be granted leave to make an application to submit an *amicus curiae* submission, in the manner and at the time determined by this Tribunal in its discretion pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.

7. Canada's position is similar to the Investor's:

- (i) The Tribunal has no jurisdiction to add the Petitioners as parties to the arbitration or to grant them rights of parties.
- (ii) The Tribunal has discretion to receive written *amicus* briefs based on publicly available information.
- (iii) In exercising its discretion, the Tribunal should consider whether:

- (a) There is a public interest in the arbitration;
 - (b) The Petitioners have sufficient interest in the outcome of the arbitration;
 - (c) The Petitioners' submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and
 - (d) The Petitioners' submissions can be received without causing prejudice to the disputing parties.
- (iv) The Tribunal should examine the circumstances of each Petitioner separately.
 - (v) However, on the issue of jurisdiction, place of arbitration and procedural issues generally, there is no basis or reason for the Tribunal to receive submissions from the Petitioners.

8. Canada accordingly submits that the Tribunal:

- (i) Dismiss the Petitioners' application to be added as parties to the arbitration; and
- (ii) Dismiss the Petitioners' application to make submissions concerning the Tribunal's jurisdiction, place of arbitration and procedural issues generally.

It further submits that:

- (i) The Tribunal has discretion to receive written *amici* briefs prepared on the basis of publicly available information as permitted under the confidentiality order which will govern the arbitration.
- (ii) The Tribunal should exercise its discretion on whether to receive written *amici* briefs in accordance with the criteria developed by

international tribunals and domestic courts for deciding the issue;
and

(iii) The Tribunal should only consider receiving written *amici* briefs at the merits phase of the arbitration.

9. The United States of America joins Canada in the view that arbitral tribunals are not authorized under the NAFTA to grant requests of third parties such as Petitioners to intervene as parties in Chapter 11 arbitral proceedings, but that, in proceedings governed by UNCITRAL Arbitration Rules, tribunals are authorized to accept written submissions of such third parties as *amici curiae*.
10. Mexico supports the disputing parties' opposition to the Petitioners' request for : (1) status as parties; (2) the right to have all documents and pleadings in the proceeding disclosed to them; and (3) the right to make submissions on jurisdiction and the place of arbitration. The Tribunal, it says, has no jurisdiction to accede to these requests. Mexico submits that these issues are reserved to the submissions of the disputing parties and to the other NAFTA Parties with respect to the interpretation of the treaty. Mexico does however differ from the disputing parties and the United States of America on the matter of *amicus* briefs. It contends that the Tribunal has no power to authorise the reception of such briefs.
11. It is convenient to discuss separately the two issues of adding a party and the *amicus curiae* role.

The submissions on adding a party

12. The Petitioners in their submissions elaborate on what they say are their direct and unique interests in the proceedings, their expertise and unique perspective on the broader public interest issues raised by the dispute, and their interest in making submissions on matters that are exclusively reserved to those with the status of parties to the proceedings.
13. The direct interests relate to the possible consequences of the proceedings for Canada Post employees, including those who are members of the Union, and for

members of the Council, as for others, who depend on the mail and other services provided by Canada Post.

14. Apart from those impacts on their members, the Petitioners contend that the claim raises issues of broad public interest which extend well beyond postal services to other public and social services. Further, the expansive interpretation of NAFTA urged by the Investor would dramatically expand the scope for foreign investor claims and put at risk a broad diversity of government measures that should not be vulnerable to such claims. They refer in particular to the Investor's invoking of articles 1503(3)(d) and 1502(3)(a) of NAFTA, provisions which arguably are not applicable in this case. The Petitioners also wish to raise questions about the application of the UNCITRAL arbitration rules and the New York Convention to disputes arising under NAFTA investment provisions. They say that they are uniquely qualified to contribute a perspective on these matters of broader public interest, a perspective which would otherwise be absent.
15. The matters which are exclusively reserved to parties and in respect of which the Petitioners claim an interest in making submissions include the resolution of the place of the arbitration (which they say is important for the extent of the supervisory jurisdiction of Canadian or other courts over arbitrations), jurisdiction and arbitrability, and certain procedural matters.
16. On the Tribunal's authority to grant standing, the Petitioners state that this application is one of first impression, except for the award of 15 July 2001 of a NAFTA Tribunal in *Methanex Corporation v United States* where, moreover, the prospective interveners did not seek party standing. They identify two NAFTA provisions as significant. Article 1120(2) provides that

The applicable arbitration rules shall govern the arbitration except to the extent modified by this section [B].
17. The Petitioners say that several provisions of section B modify the application of the UNCITRAL Model Rules, among them article 1131(1):

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

18. That provision, they say, applies to both matters of substance and procedure. Referring to the “authoritative definition” of the sources of international law set out in article 38(1) of the Statute of the International Court of Justice, they contend that the *Methanex* Tribunal, which said it was bound by article 15 of the UNCITRAL Rules and did refer to some tribunal and court decisions, failed to have regard to some of the sources of international law. Article 38(1) is as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

19. In terms of the first matter listed in article 38(1), “international conventions”, the Petitioners state that

While the issue of third party intervention in arbitral proceedings is not without precedent, it has very rarely arisen in the modern era of international commercial arbitration. In fact, the issue of third party intervention has either been ignored, or given very low priority by those crafting the international and domestic regimes providing for international commercial arbitration.

20. This indifference to third party rights, they say, appears to derive from certain assumptions that have guided the development of the conventions – assumptions which no longer hold. Except for the formal Parties, they continue, the provisions

of NAFTA are silent on third party rights, as is the New York Convention. While the UNCITRAL Rules offer little guidance, article 15 does provide the Tribunal with considerable latitude subject only to the requirement for equality in the treatment of the parties and other specific requirements of the Rules. Moreover it is generally regarded as a restriction on the principle of party autonomy. It provides

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

21. While the requirement for equality of treatment or fairness was not established with third party interests in mind, the rule does not prohibit the extension of the principle to them, especially in the new era of investor-state arbitration. The Petitioners mention as reasons for a broader reading of article 15 the public character of disputes like the present and the diverse interests that may be affected.
22. The Petitioners next refer to international conventions concerning human rights and labour rights, quoting articles 14 and 26 of the International Covenant on Civil and Political Rights about equality before courts and the right to a fair and public hearing and equality before the law generally, and provisions of the Universal Declaration of Human Rights and International Labour Conventions about union rights:

We recite these conventions, not to suggest that they establish a formal right of participation in these proceedings, but rather as an important source of international law from which guidance can be taken in determining the exercise by this Tribunal of its discretion with respect to the Petition before it. In our submission, these Conventions articulate applicable rules of international law which support the extension of the principle of equality and equal treatment before the law to third persons who may be affected by, or have a substantial interest in, claims arising under the NAFTA investment rules.

23. When they turn to international custom and jurisprudence, the Petitioners acknowledge the great weight accorded to the doctrine of party autonomy but

that guiding principle, they say, derives from the fundamental characterisation of arbitration as a private and not a public function.

24. The Petitioners then develop a number of reasons for rejecting that characterisation in this case with the consequence, as they see it, of allowing for third party rights. First, this arbitration arises from a treaty base and not from a private contract. Secondly, by contrast to the typical UNCITRAL award, the investor-state claim, the scope of the issues are virtually unbounded and may include broad issues of public policy and law. A related, third matter is the public character of the disputes that may arise under Chapter 11; here the entire framework of Canadian public policy relating to the provision of postal services is put in issue in a dispute which has no foundation in contract and no private character. Fourthly, investor-state claims can be seen as more analogous to the judicial review applications than to private contract disputes. Finally, Canada has consented unilaterally to arbitration which may be initiated by unknown foreign investors concerning broad spheres of public policy and law.
25. The Petitioners next mention the practice of the Appellate Body of the World Trade Organisation. It has accepted *amicus* submissions noting the “ample and extensive authority to undertake and control the process by which it informs itself both of relevant facts of the dispute and of the legal norms and principles applicable to such facts” (*United States – Import Prohibition of Certain Shrimp and Shrimp Products* Report of the Appellate Body of 12 October 1998, WT/DS58 AB/R, para 106). The Petitioners acknowledge that the Appellate Body has distinguished between the right to make submissions and its authority to receive them; further, the decisions are not particularly helpful on allowing intervention as an added party. But, they continue, a clear distinction is to be drawn between state to state dispute settlement under the WTO and the investor-state apparatus under NAFTA.

While the former is justifiably limited to the Parties to the WTO, the latter explicitly invites non-Party participation by allowing foreign investors to invoke the dispute resolution machinery created by this treaty. Accordingly, in the case of investor-state claims, for reasons of equality and fairness, third party intervention is warranted in our submission.

26. Under the heading, general principles of law (reflecting article 38(1)(c) of the ICJ Statute), the Petitioners refer to the well established right in Canadian law to intervene in civil proceedings as a party or *amicus curiae*. Also mentioned are the requirements of natural justice and the law of standing in judicial review cases.
27. The final heading in this part of the submission, referable to article 38(1)(d) of the ICJ Statute, is judicial decisions and expert opinion. The Petitioners begin with the judgment of the British Columbia Supreme Court in *The United Mexican States v Metalclad Corporation*, 2001 BCSC 664, 2 May 2001. The limited scope for judicial review recognised by that court underscores for the Petitioners the importance of providing those with an interest in these proceedings participatory rights commensurate with their interest. If those rights are denied, it is extremely unlikely that they would be given a voice in any application that might be made to review the award.
28. The Investor and Canada (the disputing parties) present essentially the same arguments against this part of the Petition. The governments of Mexico and the United States of America agree with their position. Both disputing parties emphasise the relevant provisions of NAFTA and the UNCITRAL rules, in particular article 15. Under article 1122 each NAFTA Party consents to investors submitting claims to arbitration in accordance with the provisions of Chapter 11. None of those provisions gives the Tribunal power to add parties to the proceedings, nor, according to Canada, to grant them the rights of parties. In their response, the Petitioners state that they are not seeking such rights. Accordingly, we take that issue no further.
29. The arbitration, says the Investor, is conducted on the basis of the consent of the disputing parties. Under article 1121 the Investor confirmed its consent to the arbitration while article 1122 confirms that each of the NAFTA Parties have consented to claims being submitted by Investors under the procedures set out in Chapter 11. Further, the Investor makes it clear that it does not consent to the participation of the Petitioners or any other third party as a disputing party or with

any analogous status. Nor does it consent to the disclosure to the Petitioners of the material provided to the Tribunal or to their making submissions on the place of arbitration, jurisdiction or any other matters. Both disputing parties refer to the *Methanex* award as recognising that the Tribunal has no power to add the Petitioners as parties. They also refer to that Tribunal's discussion of article 15 of the UNCITRAL rules.

30. Next, the disputing parties point out that the Petitioners are seeking greater rights than the other (non-disputing) NAFTA Parties have under article 1128, their rights of participation (as the provision is headed) being confined to the interpretation of NAFTA. And, the Investor adds, the Petitioners are seeking greater rights than those accorded to the subnational governments of NAFTA Parties.
31. The *Methanex* decision, Canada continues, is also consistent with the approach of the common law under which neither arbitration tribunals nor the courts have the power to compel a party to arbitrate with a non-party. The only exception provided for under NAFTA is where more than one claim has been submitted and they raise common questions of law and fact and the Tribunal decides to hear and determine them together in the interests of fair and efficient resolution of the claims (article 1126(2)).
32. As indicated (para 9), the United States of America joins Canada in the view that arbitral tribunals are not authorised under NAFTA to grant requests of third parties, such as the Petitioners, to intervene as parties in Chapter 11 arbitral proceedings.
33. Mexico agrees with the position of the Investor, Canada and the United States of America that no other person may be allowed to intervene. It also calls attention to the fact that:

even an enterprise of a Party that is a juridical person owned or controlled, directly or indirectly, by an investor of another Party – and that, by definition, is an entity that has a legal personality separate and distinct from that of the investor – may not submit a claim to arbitration on its own against the Party under whose law it is

established or organized, and it is also not afforded a right of intervention, even though it would have an interest in the dispute.

Thus, Section B limits the participation to the Investor who submits a claim to arbitration and the NAFTA Party against whom the claim is made.

Significance is also to be seen in the confined scope of the power of the Tribunal to receive expert advice (article 1133).

34. The Petitioners in their response call attention to the failure of the disputing parties and of Mexico to comment on several of the substantive arguments they made in support of the petition or to refute the authority offered in support. With the exception of Canada's "somewhat terse recognition" that there is public interest in Chapter 11 disputes, no one addresses the truly unique and unprecedented dimensions of the NAFTA investment dispute procedures (see paras 21 and 24 above). Nor had the submissions addressed the more fundamental question of the role of international law in general and international conventions and covenants in particular. Of particular relevance are the scholarly works cited. They also emphasise significant developments in the law supporting far greater transparency in respect of arbitral tribunals – a matter under the *amicus curiae* heading in the petition, and accordingly considered later in this decision.

The Tribunal's opinion and conclusion on the power to add parties

35. The Tribunal is established under and has the powers conferred by NAFTA, particularly Section B of Chapter 11. Under that Section an investor of a Party may submit to arbitration a claim that another Party has breached certain obligations. Certain conditions are to be satisfied, including the Investor consenting to arbitration and waiving other proceedings. Once the conditions are satisfied, the disputing investor may, in terms of article 1120, submit the claim to arbitration under one of three sets of provisions – here the UNCITRAL arbitration rules. Under article 1122 each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in NAFTA. As

noted, Section B provides for consolidation where claims submitted under article 1120 have a question of law or fact in common (article 1126, para 31 above), for Parties at *their* option to make submissions to the Tribunal on a question of interpretation of NAFTA (article 1128, headed *Participation* by a Party, para 30 above), for the governing law (article 1131, para 17 above) and for the preparation of expert reports at the request of a disputing party or at least without their objection (article 1133, para 33 above).

36. None of those provisions confers authority to add parties to the arbitration either generally or in the present circumstances. The disputing parties have consented to arbitration only in respect of the specified matters and only with each other and with no other person. Canada, along with the other NAFTA Parties, has given that consent in advance in article 1122 and the Investor has given it in the particular case by consenting under article 1121. (There is a separate issue, raised by Canada's challenge to jurisdiction, whether the Investor has met some of the other conditions in Section B.) It is of the essence of arbitration that the tribunal has only the authority conferred on it by the agreement under which it is established, considered in context. NAFTA itself does not provide any basis for the addition as parties of persons such as the Petitioners in this matter. Quite apart from the absence of any positive general power to authorise the addition of such parties, NAFTA itself would also support an adverse inference opposing any such power. The Agreement does contemplate some role for parties other than those whose dispute is the subject of a particular arbitration but only in two confined circumstances : (1) if they are disputing parties whose dispute has something in common with the original dispute (article 1126), or (2) if they are NAFTA Parties and then only in respect of the interpretation of the Agreement (article 1128).
37. The Petitioners do not of course attempt to discover the Tribunal's authority in particular provisions of NAFTA itself. Rather, they resort to article 15(1) of the UNCITRAL rules, broader international law arguments and what they see as the particular character of Chapter 11 disputes.

38. In its own terms, article 15(1) (set out in para 20 above) is about procedure. It comes at the beginning of the section of the rules headed *Arbitral proceedings*. It does two critical things. First, it gives the arbitral tribunal power to conduct the arbitration in an appropriate manner. That power is essential to the very process of dispute settlement by way of arbitration and might be thought to be inherent even if not expressly stated. Secondly, in its two sets of limits it recognises both the fundamental procedural rights of the parties to a fair proceeding, natural justice or due process, and the other particular requirements of the rules. The parallel provisions in the UNCITRAL Model Law on International Commercial Arbitration (articles 18 and 19(2)) have the same characteristics. They too affirm the power of the tribunal to conduct the arbitration in such manner as it thinks fit and the rights of the parties to be treated equally and to be given a full opportunity to present their cases. They appear at the beginning of a chapter headed *Conduct of Arbitral Proceedings*. The analytic commentary on the text which became articles 18 and 19 said this:

“Magna Carta of Arbitral Procedure”

Article 19 may be regarded as the most important provision of the Model Law. It goes a long way towards establishing procedural autonomy by recognising the parties’ freedom to lay down the rules of procedure (paragraph (1)) and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings (paragraph (2) [article 15(1) first part]), both subject to fundamental principles of fairness (paragraph (3) [article 15(2) final part]). Taken together with the other provisions on arbitral procedure, a liberal framework is provided to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place.

39. While the provision is plainly important, it is about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by including subject matter in its arbitration additional to what which the parties have agreed to confer. In this regard we fully agree with the opinion expressed by the *Methanex* tribunal:

As a procedural provision ... [article 15(1)] cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. ...

The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules.

40. We do not consider that the broader international law arguments assist the Petitioners. As they indeed acknowledge, international law and practice and related national law and practice have either ignored or given very low priority to third party intervention (para 19 above). Of the treaty provisions they cite, the one which is nearest to being applicable – article 14 of the International Covenant on Civil and Political Rights – is about persons whose rights and obligations in a suit at law are being determined by a court or tribunal. That is not the present case. The Petitioners' rights and obligations are not engaged in that way or indeed at all.
41. The Investor claims that Canada is in breach of its obligations under NAFTA with resulting loss or damage to it. The Investor and Canada are the parties whose rights and obligations are to be determined by the arbitration, and no one else's. The Petitioners indeed acknowledge that none of the treaty provisions establish a formal right of participation in these proceedings; rather they are to be seen as guiding the exercise by the Tribunal of its discretion (para 22 above). But if the Tribunal not does not have the relevant power – to add parties – then matters claimed to bear on the exercise of the power can have no significance.
42. Nor does the Petitioners' characterisation of the arbitration as being different from the private, contract based, narrowly focused norm assist their argument.

They must still be able to point to a power in the Agreement read in its context which authorises the Tribunal to add parties. They have not been able to do that.

43. It follows that the Tribunal rejects the request of both Petitioners to be granted standing as parties.

The submissions on the participation of *amici curiae*

44. The Petitioners submit that the *Methanex* tribunal correctly concluded that it had authority to allow third parties to make submissions on the issues before it. But, they continue, the narrow view it adopted about the rights that might be accorded is unsupported by general principles or judicial authority. The concept of *amicus curiae* is a flexible one and, even when construed narrowly, the rights commonly include access to the record and attendance at the proceedings. They cite Canadian and United States of America authority and practice in support of those propositions. The critical issue in determining the point along the continuum of participation is the nature and extent of the intervener's interest. In their opinion, the Tribunal's discretion under article 15, when read in accordance with the applicable principles of international law, is broad enough to engender a wide range of options including according an intervenor standing as a full party.
45. The Petitioners submit that *Methanex* tribunal in particular misunderstood the nature of the limits imposed by the "in camera" requirement in article 25(4) of the UNCITRAL rules. While that provision implies that the proceeding is closed to the general public, it does not proscribe the persons who might be admitted.
46. The Petitioners recall their interests as identified earlier in their petition (eg para 3 above) and highlight issues which they say are among those on which they would introduce a perspective and evidence that would not otherwise be available:
 - (i) the costing of mail, package and courier services is one with respect to which [the Union] has particular interest, expertise and a point of view that has often been distinct from that of Canada Post;

- (ii) the history, details and other arrangements concerning the management of Canada Post pension funds, are also issues with respect to which [the Union] as the beneficiaries of this pension plan, have a unique interest and perspective;
- (iii) the importance of integrated postal, package and courier services to the viability of public postal services, the well being of Canadian communities and in particular those in rural Canada is germane to the issues UPS has raised. For example, the interpretation of Canada's obligations under Article 1105 must take a sufficiently broad view of international law so as to include the rights of affected third parties. This is an issue with respect to which both Petitioners have a particular interest but also specialized knowledge and expertise; and,
- (iv) the Petitioners also share an interest in having the provisions of Chapter Eleven ... accorded a strict and limited application in light of the extraordinary nature of these provisions as detailed more fully elsewhere in this brief. This certainly distinguishes their interest and perspective from Canada's, which is one of the authors of this regime, and certainly from UPS that would have the Tribunal accord these disciplines [too] expansive an application.

47. The Petitioners say that they are prejudiced in being able to describe the full nature of their interests and potential contribution by not knowing the Investor's particular claims and the arguments it has brought forward. They also seek the right to make submissions on jurisdiction and arbitrability. They are aware of no provisions in the UNCITRAL rules precluding the Tribunal from considering objections by non-parties to its jurisdiction – jurisdiction being a matter which the Tribunal can, they say, determine on its own motion.

48. The Investor does not dispute that the Tribunal may have the procedural power to receive an *amicus* submission from a third party under article 15 of the UNCITRAL Rules. The power is however limited, for example by article 25(4) providing for *in camera* hearings. Further, the Tribunal should not receive submissions unless it is confident that they will provide a particular insight, an assessment which is to be made in the context of the assumption made by the *Methanex* Tribunal that the disputing parties will provide all the assistance and materials that the Tribunal needs to resolve the dispute. Next, any decision to accept *amicus* briefs ought not to permit strangers to the arbitration to have

greater rights than those afforded to NAFTA Parties under article 1128 (para 30 above). The Investor also calls attention to the prospect of the proceedings becoming unmanageable if *amicus* briefs were allowed liberally. That would be unfair and costly to the disputing parties. Any submission would have to be helpful as well as relevant.

49. Applying these tests, the Investor says that it would be premature for the Tribunal to receive *amicus* briefs from either of the Petitioners and, if so, to decide the terms on which it should receive them. It then states the matters that should be addressed in an *amicus* leave application:

- (i) a description of the relevant expertise and experience of the applicant and the nature of the applicant's interest in the arbitration;
- (ii) an outline of the specific issues in the arbitration that the applicant wishes to address;
- (iii) a description of the way in which the applicant will make a contribution that is not likely to be repetitive of what has been already submitted (by the disputing parties or other *amici*); and
- (iv) the disclosure of the nature of the third party's relationship with either of the disputing parties or the NAFTA Parties.

50. The Investor adds that any brief ought to be strictly limited in length and confined to the specific issues permitted. The *amicus* should not be allowed to make oral submissions, to attend the hearing or to receive any material related to the proceedings except that which the parties consent to being made public. In accordance with the *Methanex* ruling, *amici* should not be able to adduce any factual or expert evidence. The rights of the parties and the efficient advancement of the proceedings are not to be prejudiced.

51. Canada begins its submission by stating its support for greater openness in NAFTA Chapter 11 proceedings and its appreciation of the contribution that transparency brings to building public confidence in the investor-state dispute settlement process. Referring to article 15(1) of the UNCITRAL Rules and the ruling in the *Methanex* case, it agrees that the Tribunal has a discretion to receive *amicus* briefs where appropriate. Following a consideration of the *Methanex*

ruling, a WTO Appellate Body ruling (*European Communities – Measures affecting Asbestos and Asbestos Containing Products* WT/DS 135/9, AB-2000-11, November 7, 2000) and Canadian court practice it proposes that a NAFTA Tribunal should take into account the following factors when deciding whether to receive *amicus* briefs:

- (a) Is there a public interest in the arbitration?
- (b) Do the Petitioners have sufficient interest in the outcome of the arbitration?
- (c) Will the Petitioners' submissions assist in the determination of a factual or legal issue related to the arbitration by bringing a different perspective or particular knowledge to the issues on which they wish to make submissions?
- (d) Can the Petitioners' submissions be received by the Tribunal without causing prejudice to the disputing parties?

52. The burden is on each Petitioner to demonstrate that it meets the criteria. So far as the first criterion is concerned, Canada does recognise that there is a public interest in Chapter 11 disputes.

53. According to Canada, the Petitioners cannot introduce new issues and take the case away from the disputing parties. There is no basis to accept submissions by *amici* on jurisdictional issues for that would accord to the Petitioners the substantive rights of NAFTA Parties under article 1128, which is beyond the power of the Tribunal. In any event on that issue they have no particular or unique expertise beyond that of the disputing parties and the Tribunal. The Petitioners' concerns about the application of the UNCITRAL Rules and the New York Convention are beyond the Tribunal's jurisdiction. And there is no basis or reason for receiving submissions from them on the place of arbitration.

54. Canada avers that to avoid prejudice to the disputing parties, any *amicus* submissions should be written so as to minimise the burden on the disputing parties and avoid disrupting the arbitration. For example, in addition to being limited to issues raised by the disputing parties, the briefs should not exceed 20 pages. Finally, in accordance with procedural equality and fairness the disputing parties should be given the opportunity to respond to *amicus* briefs.

55. As indicated (para 9 above), the United States of America joins Canada in the view that the Tribunal is authorised to accept written submissions from third parties as *amici curiae*.
56. Mexico, by contrast, submits that NAFTA does not authorise this Tribunal to accept unsolicited submissions, such as *amicus* briefs. It points out that while the power of a court to receive *amicus* briefs is well recognised in the law of Canada and the United States of America it is not recognised under Mexican law. Concepts or procedures alien to its legal tradition and which were not agreed to in Section B should not be imported into NAFTA dispute settlement proceedings and set a precedent for cases where Mexico is the disputing party. Even if the UNCITRAL Arbitration Rules are silent on the matter or, as the *Methanex* Tribunal found, Article 15 authorises a tribunal to conduct the arbitration so as to accept such submissions, in Mexico's view, the absence of express language in the international treaty means that the Tribunal cannot take it upon itself to authorize actions that sovereign States party to the Treaty did not authorise.
57. Mexico disagrees with the *Methanex* Tribunal's conclusion that allowing a third party to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration within the general scope of article 15(1) of the UNCITRAL rules. The acceptance of *amicus* briefs under article 15(1) is beyond the jurisdiction of a Tribunal because it could oblige the disputing parties to respond to such arguments. Thus, the grant of an apparently minor procedural right could create a substantive legal issue in dispute. Mexico considers that nothing in the NAFTA nor in the UNCITRAL Arbitration Rules restrains a disputing party such as Canada in this case from consulting parties such as the petitioners and adopting their views as its own arguments in order to support its case. In fact, Mexico itself has done this in cases in which it has been the respondent. It completes its submission by emphasising the implications of articles 1128 and 1133.
58. In their response, the Petitioners reaffirm their initial submissions and state that the provisions of Mexican law referred to by Mexico are relevant only if they

reflect general principles of law, international custom or some other source of international law which the Tribunal is obliged to consider under article 1131(1).

The Tribunal's opinion and conclusion on the participation of *amici curiae*

59. The submission by Mexico raises a threshold issue : does the Tribunal have any power at all to allow third parties to participate in these proceedings? The Tribunal has already ruled that they cannot participate as parties to the proceedings. But is a lesser, *amicus curiae* role, permitted?
60. As all those making submissions agree, the answer is to be found in the powers conferred by article 15(1), read of course in its context. Those powers are limited to matters of procedure and they are constrained by other relevant rules and NAFTA provisions and by the principles of equality and fairness. They cannot be used to turn the dispute the subject of the arbitration into a different dispute, for instance by adding a new party to the arbitration. Rather, the powers are to be used to facilitate the Tribunal's process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it in accordance with the consent of the disputing parties.
61. Is it within the scope of article 15(1) for the Tribunal to receive submissions offered by third parties with the purpose of assisting the Tribunal in that process? The Tribunal considers that it is. It is part of its power to conduct the arbitration in such manner as it considers appropriate. As the *Methanex* Tribunal said, the receiving of such submissions from a third person is not equivalent to making that person a party to the arbitration. That person does not have any rights as a party or as a non-disputing NAFTA Party. It is not participating to vindicate its rights. Rather, the Tribunal has exercised its power to permit that person to make the submission. It is a matter of its power rather than of third party right. The rights of the disputing Parties are not altered (although in exercise of their procedural rights they will have the rights to respond to any submission) and the legal nature of the arbitration remains unchanged.

62. We do not see articles 1128 and 1133 of NAFTA as standing in the way of that power. The first is concerned with the *rights* of NAFTA Parties to participate, if in a limited way, and not with the power of the Tribunal to allow third parties to participate. And the second is about the power of the Tribunal to seek the assistance of independent experts on specialised factual matters. The contribution of an *amicus* might cover such ground, but is likely to cover quite distinct issues (especially of law) and also to approach those issues from a distinct position.
63. We consider that article 15(1) supports a power to allow submissions by *amici curiae*.
64. In support of that conclusion, we call attention to the practice mentioned by the *Methanex* Tribunal of the Iran – US Claims Tribunal and the WTO Appellate Body which supports a power (but no duty) to receive third party submissions : *Iran v United States* case A/15 Award No. 63 – A/15 – FT; 2 Iran – US CTR 40, 43; and *Hot Rolled Lead and Carbon Steel*, order of the Appellate Body of the WTO. It is true that in contentious cases in the International Court of Justice only states and in certain circumstances public international organisations may have access to the Court (the latter only to provide information relevant to cases before it.) But that limit appears to result directly from the wording of articles 34, 35 and 61-64 of the Statute of the Court which carefully regulate those matters as well as from the practice under them extending over several decades; see Shabtai Rosenne *The Law and Practice of International Court, 1920-1996*(1997) chs 10 and 26.
65. We do not see as decisive for the existence of the power in article 15 the presence or absence of *amicus* rules in the domestic law of the NAFTA Parties. The matter is to be determined under international law, especially NAFTA incorporating the UNCITRAL rules. Nor do we see the existence of the power as trenching on the rights of the NAFTA Parties. To repeat, the particular matter which is subject to arbitration remains unchanged. The disputant parties' rights remain unchanged. In particular their rights to fairness and equal treatment under article 15(1) remain and the power of the Tribunal to control the arbitral process,

within the limits placed on it by NAFTA and other relevant rules, also provides safeguards. The Tribunal now turns to those provisions, bearing in mind the character of the dispute and issues and the wider public interest in them, as well as the submissions supporting greater openness in Chapter 11 proceedings.

Relevant provisions of NAFTA and the UNCITRAL rules

66. We have already said that articles 1128 and 1133 of NAFTA do not preclude the existence of a power under article 15(1) to allow a third party to make *amicus* submissions. Depending on the possible scope of a proposed *amicus* submission they might however be relevant to the exercise of the discretion in a particular case.
67. The relevant provision of the UNCITRAL rules to which attention is given in the submissions is article 25(4) under which hearings are *in camera* unless the parties agree otherwise. They have not so agreed. The provision does not however prevent the Tribunal receiving written submissions. But it does prevent third parties or their representatives attending the hearings in the absence of both parties agreeing.
68. Next there is the difficult question of the confidentiality of the pleadings and other documents generated in the course of the proceeding including those identified in the Petition (see para 1(iii) above). The privacy of the hearing is perhaps to be distinguished from the confidentiality or availability of documents. Under Chapter 11 and the UNCITRAL Rules provision is made for the communication of pleadings, documents and evidence to the other disputing party, the other NAFTA Parties, the Tribunal and the Secretariat – and to no one else. The matter is also subject to any agreement between the parties or order in respect of confidentiality. That issue has yet to be resolved. While principles of transparency may support the release of some of the documentation, that is not a matter which can be the subject of a general ruling. Some documentation may be available in the public domain, through any agreement or confidentiality order that might be made, or otherwise lawfully.

The requirement of equality and of the full opportunity of parties to present their case

69. The requirement of equality and the parties' right to present their cases do limit the power of the Tribunal to conduct the arbitration in such manner as it considers appropriate. That power is to be used not only to protect those rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner. The power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process. The Tribunal envisages that it will place limits on the submissions to be made in writing in terms for instance of the length. The third parties would not have the opportunity to call witnesses (given the effect of article 25(4)) with the result that the disputing parties would not face the need to cross-examine them or call contradictory evidence. The parties would also be entitled to have the opportunity to respond to any such submissions.

The Tribunal's assessment

70. The Tribunal returns to the emphasis which the Petitioners, with considerable cogency, have placed both on the important public character of the matters in issue in this arbitration and on their own real interest in these matters. It recalls as well the emphasis placed on the value of greater transparency for proceedings such as these. Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties. The Petitioners have made out a case for their being permitted to make written submissions on appropriate matters as determined, on application, by the Tribunal. One governing consideration will be whether the Petitioners are likely to be able to provide assistance beyond that provided by the disputing parties. The Tribunal will also have the power to fix conditions for their exercise of that opportunity. One likely condition is on the length of the written submissions.

71. The Tribunal does not consider that among the matters on which it is appropriate for the Petitioners to make submissions are questions of jurisdiction and the place of arbitration. On both, the parties are fully able to present the competing

contentions and in significant degree have already done so. In any event, it is for the respondent to take jurisdictional points and the parties themselves have the power to fix the place of the arbitration by agreement between them. The Tribunal does not consider that any other procedural matters of which it is aware should be the subject of *amicus* submissions.

72. The circumstances and the detail of the making of any *amicus* submissions would be the subject of consultation with the parties.

The Tribunal's order

73. The Tribunal declares that it has power to accept written *amicus* briefs from the Petitioners. It will consider receiving them at the merits stage of the arbitration following consultation with the parties, exercising its discretion in the way indicated in this decision and in accordance with relevant international judicial practice. In all other respects the Petitions are rejected.



for the Tribunal

17 October 2001