IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

AND

THE GOVERNMENT OF CANADA

Respondent/Party

INVESTOR'S OBSERVATIONS ON THE APPLICATION OF THE COUNCIL OF CANADIANS AND THE CANADIAN UNION OF POSTAL WORKERS FOR LEAVE TO FILE *AMICUS CURIAE* SUBMISSIONS

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I. Overview

1. On October 20, 2005, the Canadian Union of Postal Workers ("CUPW") and the Council for Canadians ("Council"), jointly referred to as the "Applicants", filed an Application for Leave to File *Amicus Curiae* Submissions. The Application does not meet the test for amicus standing and should be denied.

2. An *amicus curiae* means, literally, a friend of the court. The Applicants, however, are no friends of this Tribunal. They view this Tribunal as illegitimate and inherently biased. They do not wish to offer the Tribunal an interpretation of the text of NAFTA that is made in good faith and in light of its object and purpose. Rather, they oppose the objects and purposes of NAFTA. Their complaints should remain before the legislatures and courts of the NAFTA Parties and not before a Tribunal established under this Agreement.

3. While an *amicus curiae* is entitled to put forward a vigorous opposition to a disputing party's position, under the rules of international law governing this Tribunal, such opposition must consist of a good faith interpretation of the treaty in light of its object and purpose. The Applicants' complete repudiation of the NAFTA Chapter 11 process in which they now seek participation, coupled with their repeated misrepresentations regarding the UPS claim, require this Tribunal to dismiss their applications as irrelevant and unhelpful. Canada's own courts have rebuffed similar applications by the Council on these grounds.

II. The Applicants Oppose the Very Objects and Purposes of NAFTA

A. Opposition to Trade Liberalization

4. CUPW and the Council oppose the very objectives of the NAFTA and all other free trade agreements. CUPW's website refers to free trade as a "menace" and its publications advise citizens to "fight the free trade agenda".[1] CUPW describes all free trade agreements as extensions of capitalism that oppress workers' rights.[2] It seeks "to expose and dismantle all free-trade agreements".

5. The Council is also opposed to all free trade agreements and is recognized as "free trade foes".[3] A principal objective of its work is to advance alternatives to "corporate-style" free trade.[4] It describes the fight against free trade as one of its core campaigns.

B. Rejection of the Legitimacy of Investor-State Tribunals

6. CUPW and the Council not only oppose NAFTA, but also reject the legitimacy of NAFTA Chapter 11 investor-state arbitration procedures. CUPW has distributed postcards for citizens to send to the government, which request the government to "use whatever means necessary to eliminate Chapter 11 of NAFTA."[5]

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[1] Perspective Online, " Not Another #^*! Trade Agreement!" (March 21, 2001), Brief of Documents and Authorities (Tab 1).

[2] CUPW Changes to National Policies - Convention 2005, Policy C-11, Brief of Documents and Authorities (Tab 2).

[3] H. Scoffield, "UPS jeopardizing rural mail: CUPW Union says suit filed against Ottawa", Report on Business, Globe & Mail (May 10, 2000), Brief of Documents and Authorities (Tab 3).

[4] Council of Canadians website "About Us", Brief of Documents and Authorities (Tab 4).

[5] CUPW, Resolution: NAFTA and Public Postal Services dated April 12, 2002, Brief of Documents and Authorities (Tab 5).

7. In their latest news article,[6] the Applicants argued that NAFTA investor-state tribunals are inherently biased in favour of the United States, noting that it has not lost a NAFTA case to date and that the *Methanex* Tribunal awarded the United States higher costs than it sought. They failed to mention that, in their earlier publications, they feared the opposite result: namely, that an award in favour of *Methanex* would trigger a flood of NAFTA claims against domestic environmental policies.[7]

8. In March 2001, the Applicants launched a Canadian lawsuit challenging the constitutionality of NAFTA investor-state procedures. The Applicants sought a declaration that NAFTA's investor-state procedures violated the *Canadian Charter of Rights and Freedoms*. The lawsuit was ultimately unsuccessful, although the Council and CUPW have filed an appeal.[8] The Applicants have said their ultimate goal is not to win the constitutional challenge nor to open up the NAFTA Chapter 11 process, but rather to eliminate the investor-state procedures in their entirety.[9]

C. Misrepresentations Regarding the UPS Claim

9. The Council and CUPW have been waging a public relations campaign against the UPS claim. They have repeatedly misinformed the public and mischaracterized the nature of the UPS claim. A few of the more blatant mischaracterizations from press releases and news articles are excerpted below:

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[6] D. Bourque & M. Barlow, "So remind us again why Canada had to sign NAFTA?" in the Globe and Mail (September 1, 2005), Brief of Documents and Authorities (Tab 6).

[7] M. Dobbin for The Council: NAFTA's Big Brother, Brief of Documents and Authorities (Tab 7).

[8] *R. v. Council of Canadians*, 2005 CanLII 28426 (ON S.C.), Brief of Documents and Authorities (Tab 8); CUPW and The Council: Media Release "Groups launch appeal on constitutionality of NAFTA" (August 12, 2005), Brief of Documents and Authorities (Tab 9).

[9] 38th Parliament, 1st Session, February 16, 2005 at 28 and 35, Brief of Documents and Authorities (Tab 10).

a. The UPS challenge is significant because it contends that the very existence of our postal system constitutes unfair competition.[10]

UPS is not alleging that Canada Post's infrastructure, standing alone, constitutes unfair competition. It only alleges that Canada has granted special privileges to Canada Post that permit its competitive services, including Purolator, to access that infrastructure on more favorable terms than those provided to foreign competitors.

b. The UPS challenge is about acquiring the infrastructure of Canada Post in lucrative areas like the Quebec Windsor Corridor. They are not interested in delivering courier packages to remote parts of the country where access is difficult and expensive.[11]

Both statements are incorrect. UPS is not interested in acquiring Canada Post's infrastructure. While access to some aspects of the infrastructure on equal terms would be of interest to UPS, UPS is not even demanding that Canada Post be required to grant access. It merely asks that Canada Post's competitive services pay the market price for their access. In addition, UPS currently delivers to all points in Canada. Its claim is that Canada Post's current favoritism of its competitive services undermines rather than advances its ability to provide basic services to remote areas.

c. The case is especially egregious because ... it uses NAFTA strategically as part of its international objective to expand its corporate empire by limiting or eliminating public-sector competition for mail, parcel and courier services.[12]

UPS is not trying to eliminate public sector competition for mail, parcel or courier services, nor is it challenging the public sector monopoly on mail. UPS simply asks Canada Post to compete fairly in the courier market.

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[10] Council of Canadians, *CUPW and Council of Canadians Take NAFTA to Court* dated March 28, 2001, Brief of Documents and Authorities (Tab 11).

[11] Council of Canadians, *US Courier Giant Using NAFTA to Grab Lucrative Canadian Courier Market* dated May 9, 2000, Brief of Documents and Authorities (Tab 12).

[12] Council of Canadians, *NAFTA's Big Brother*, Brief of Documents and Authorities (Tab 7).

III. The Applicants Do Not Meet the Test for Participation as Amicus Curiae

A. The Test for Amicus Standing

10. The test for participation as *amicus curiae* in investor-state arbitration requires this Tribunal to consider the following questions:[13]

a. Will the submissions assist the Tribunal by providing views, expertise or material not provided by the disputing parties?

b. Will the submissions address matters within the scope of the arbitration?

c. Does the applicant have a direct and significant interest in the arbitration?

These considerations are to be balanced against the risk of unduly burdening or unfairly prejudicing either disputing party or disrupting the Tribunal process.

B. Assistance to Tribunal

11. The disputing parties have accepted that this Tribunal must decide issues in accordance with international law, which includes the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Article 31(1) of the *Vienna Convention* provides that:

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[13] See, e.g. *Methanex v. United States* - Decision on Petitions From Third Persons To Intervene As *Amici Curiae* (January 15, 2001) 2001 *WL* 34786163, Brief of Documents and Authorities (Tab 13); *United Parcel Service of America, Inc. v. Government of Canada* - Decision on Petitions for Intervention and Participation as *Amici Curiae* (October 17, 2001) 2001 *WL* 34804267, Brief of Documents and Authorities (Tab 14); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* - Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005) 2005 *WL* 1458630, Brief of Documents and Authorities (Tab 15); *Glamis Gold, Inc. v. United States* - Decision on Application and Submission by Quechan Indian Nation (September 16, 2005), Brief of Documents and Authorities (Tab 16). These decisions are consistent with the non-binding *Free Trade Commission's Statement on Participation of Non-Disputing Parties* (October 7, 2003), Brief of Documents and Authorities (Tab 17).

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

12. The *Vienna Convention* mandates international tribunals to interpret the provisions of NAFTA in good faith and in accordance with its object and purpose. CUPW and the Council cannot provide a good faith interpretation of the NAFTA provisions at issue in this arbitration. They are opposed to all free trade agreements, deny the legitimacy of the investor-state procedure set out in NAFTA Chapter 11 and remain committed to its abolition. As a result, they do not seek a good faith interpretation of NAFTA but rather one that denies NAFTA's obligations of any meaning.

C. Scope of Arbitration

13. The Applicants respond to pension claims allegedly made by UPS,[14] which have since been dropped. This aspect of the submission is beyond the scope of the arbitration.

14. The Applicants' concerns about social services are also not at issue in this arbitration because these services are not subject to the national treatment obligation. Canada has taken a broad reservation in Annex II-C-9 that immunizes the social services of concern to the Applicants from the scope of NAFTA Article 1102.[15]

15. In addition, Canada provides very few public services through "investments" that are in competition with the investments of the private sector. Canada Post is one of only three Crown Corporations that earn a return on equity and operate in a competitive

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[14] See Applicants' submission at paras. 52 - 54.

[15] Annex II-C-9 reads:

> Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

environment.[16] It is unlikely that many other public institutions meet the definition of "investment" in NAFTA Article 1139. Public institutions that are not "enterprises", interests in enterprises, property used for business purposes, etc. do not serve as comparators for the purpose of NAFTA Article 1102 as they are not "investments".

16. Similarly, UPS' claim does not "impugn the validity" of the *Publications Assistance Program*;[17] the claim merely impugns Canada's choice of Canada Post as the exclusive carrier for publications under the Program.

D. Direct & Significant Interest

17. Canada's own courts have repeatedly denied similar attempts by the Council to intervene in reviews of NAFTA arbitrations. In *Canada v. S.D. Myers*, the Federal Court of Canada dismissed the Council's application to intervene in Canada's request for annulment of a NAFTA Award.[18] It held that the Council could not offer a perspective on the issues that was materially different from that of the parties and that the social policy concerns of the proposed intervenors would not assist in the determination of the legal issues in the proceedings.[19] The Federal Court awarded costs against the Council because it had raised the same arguments in the British Columbia Supreme Court case of *Mexico v. Metalclad*, and its application had been dismissed for almost identical reasons.[20]

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[16] *Financial Administration Act*, R.s. 1985, C.F.-11, Schedule III (Tab U298)

[17] Under the heading, "Why the Tribunal should accept these submissions," the Applicants mistakenly say at para. 21: "There is ... the potential of this claim to impugn the validity of an important Canadian cultural program."

[18] *Canada (AG) v. S.D. Myers Inc.* [2001] F.C.J. No. 567 (Fed. Ct. T.D.), Brief of Documents and Authorities (Tab 18).

[19] *Canada (AG) v. S.D. Myers Inc.* [2001] F.C.J. No. 567 (Fed. Ct. T.D.) at para. 18.

[20] *Canada (AG) v. S.D. Myers Inc.* [2001] F.C.J. No. 567 (Fed. Ct. T.D.) at para. 22.

18. On appeal, the Federal Court of Appeal upheld the lower court's decision:

> It is apparent that the issues on which the appellants sought leave to intervene were essentially "jurisprudential". This Court has held that such interests alone are not sufficient to justify leave to intervene.[21]

19. CUPW and the Council have failed to demonstrate a direct and significant interest in this claim. Their interests are jurisprudential at best.

IV. Conclusion

20. For all of the foregoing reasons, the Investor respectfully requests that this Tribunal exercise its discretion to dismiss the applications of CUPW and the Council to participate in this arbitration as *amicus curiae*.

Respectfully Submitted this 1st day of November, 2005

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[21] *Canada (AG) v. S.D. Myers Inc.* [2002] F.C.J. No. 125 (FCA) at para. 5, Brief of Documents and Authorities (Tab 19).