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TRADE LAW MEMORANDUM

To: Clients and Friends

Re: NAFTA Investment Disputes – Ongoing Developments

Date: November 29, 2001

The UPS Arbitration

Another important NAFTA Chapter 11 investment dispute is slowly gathering momentum. It involves a claim for US\$160 million by UPS against the government of Canada, asserting that Canada is giving unfair preferences and special advantages to Canada Post and, indirectly, to Purolator, Canada Post's in-house courier service. UPS says that as a result, its own Canadian operations are being commercially harmed.

The main UPS argument is that Purolator is being cross-subsidized by Canada Post, providing it with an unfair advantage over UPS in the commercial courier business. The claim revolves around the Canadian government's NAFTA obligations (applicable to Canada Post, as a Crown corporation) to treat U.S. investors fairly and to accord "national treatment" to such investors, meaning treatment on a par with that accorded Canadian enterprises.

The case has important implications for the commercial operations of federal and provincial Crown corporations. Depending on the outcome, it could restrict the extent of their dealings in the private sector part of the market where they operate.

But while Canadians may be concerned about the impact of Chapter 11 here, the UPS claim equally has implications for publicly-owned or controlled enterprises in the U.S., many of which are shielded from public gaze but which operate through a maze of state and municipal laws and regulations. The UPS arbitration should therefore be watched carefully on both sides of the border.

Third Party Involvement

The case can be expected to move ahead now that a key issue has been resolved regarding the request by the Canadian Union of Postal Workers and the Council of Canadians to be added as third parties. CUPW and the Council applied to the arbitrators last spring to be granted intervenor status. Their submission was that because the case involved broad public policy and other points of law that directly affected them, they should be given full status as third parties, including the right to obtain documentation and make submissions.

This was rejected by the arbitration tribunal in mid-October. In its interim decision of October 17th, the panel said that there is no provision for this in NAFTA Chapter 11, which in turn applies the arbitration rules developed by the United Nations Commission on International Trade Law or UNCITRAL. The only way this could be done was if the two parties to the arbitration consented, which was not the case here.

Citing a similar decision in the Chapter 11 *Methanex* case (involving the restrictions imposed by California on a gasoline additive called MTBE, produced from methanol, the main product made by Methanex, a Canadian company), the panel said that it (the panel) was created under the NAFTA and derived its authority from the NAFTA and neither the NAFTA nor the applicable UNCITRAL Rules gave it the right to add parties to a Chapter 11 arbitration. In fact, the panel noted that the NAFTA and UNCITRAL provisions point to the precise opposite conclusion, that these Chapter 11 arbitrations are private between a government and an investor. End of story.

Amicus Curiae Briefs

However, the panel did agree with the alternative request by CUPW and the Council to submit third-party or *amicus* briefs. The panel said that under its procedural authority in the NAFTA, it was empowered to receive such briefs. This is the first such Canadian Chapter 11 decision to permit these but it follows the same approach in the *Methanex* case in the United States.

The panel conditioned these briefs in a common sense way, saying it would restrict submissions to specific issues that the panel would later determine appropriate. In other words, the panel was not prepared to allow open-ended third party submissions. It said that the length and subject matter would be carefully controlled. It decided to leave the details to another day closer to the arbitration hearing when it would issue an order specifying the issues to be addressed and the length of the briefs.

On CUPW's and the Council's additional request to have access to all confidential documents, the panel said "no", these are only available if the parties to the arbitration consent. There was no such agreement and so no such documents therefore can be

disclosed. It was not a matter of opposing transparency – which the panel endorsed – it was a matter of following the strict legal rules that the NAFTA lays down.

Results Open the Door Ever So Slightly

The result is that Chapter 11 cases will continue to be controlled by the NAFTA and UNCITRAL Rules as private commercial disputes involving two sides only. Whether this is desirable or appropriate in these important Chapter 11 cases may be debatable but that is what the NAFTA lays down and, as the UPS panel has shown, arbitrators have to follow this restriction.

That being said, the UPS ruling is important in that it opens the door to third party involvement on key issues by way of written submissions. While more limited than what was sought, this should not lightly be dismissed. While CUPW and the Council of Canadians did not succeed in their quest for full third-party rights, they did manage to get a foot in the door.

If the right to make these submissions is used responsibly and not simply as a vehicle for rhetorical argument, it will help focus the panel on points of broader public character that may not be made by the two sides themselves. Indeed, the ruling indicates recognition by panels, as in the *Methanex* case, that there are issues at stake in these Chapter 11 cases that extend beyond the precise claims of the investor.

The UPS ruling should be read together with the decision of the NAFTA Commission on August 1, 2001, to make publicly available all relevant and non-proprietary Chapter 11 documents in these disputes as a means of ensuring transparency and public awareness

(see: www.dfait-maeci.gc.ca/nafta-alena/menu-e.asp). The trend in Chapter 11 is toward disclosure and openness and the interim UPS ruling follows that trend.

Canada's Objections in the UPS Arbitration

A final point of note. We said that this case is slowly gathering momentum. "Slowly" may be the operative word. The government of Canada has raised a host of jurisdictional objections to the UPS claim, arguing that many go beyond the competence of the tribunal and are not *prima facie* substantiated as within Chapter 11 of the NAFTA. In a separate ruling, the tribunal had said it would hear full argument on these objections before proceeding further. That has yet to take place.

Footnote on Canfor's Chapter 11 Claim

In a previous memo, we reported on the Chapter 11 arbitration claim filed by Canfor Corporation on November 5th in the softwood lumber dispute (see: www.canfor.com/resources/6000/n011105a.pdf). Canfor is using Chapter 11 to claim that the U.S. commerce Department's anti-dumping and countervailing duty determinations were made in an arbitrary, discriminatory and capricious manner, contrary to American obligations under the NAFTA.

One noteworthy aspect of the Canfor arbitration is that it indirectly responds to the Canadian critics of Chapter 11, who argue that these investment provisions are a sell-out of Canadian sovereignty. Contrary to being a sell-out, if Canfor succeeds in its claim, it will demonstrate that Chapter 11 can be an effective tool for protecting Canadian

interests at home and abroad. This adds an interesting new dimension to the Chapter 11 debate.

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