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Our File: ORO 2-594339-2
Notre dossier:

Your File:
Votre dossier:

January 18, 2012

VIA COURIER

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✓ Attention: Nadia Effendi

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Attention: John Terry

Dear Madam/Sir:

**Re: The United Mexican States v. Cargill, Incorporated and AGC
Court File No.: 34559**

Please find enclosed the Response of the Intervener, Attorney General of Canada, to the application for leave to appeal, served upon you pursuant to the *Rules of the Supreme Court of Canada*.

Yours truly,

Roger Flaim
Counsel
RF:jt

Enclosure

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

THE UNITED MEXICAN STATES

Applicant (Appellant)

and

CARGILL, INCORPORATED

Respondent (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Intervener (Intervener)

**RESPONSE OF THE INTERVENER, THE ATTORNEY GENERAL OF CANADA
TO THE APPLICATION FOR LEAVE TO APPEAL**

(Pursuant to Supreme Court Act, R.S.C. 1985, c.-S26, Sections 25 and 27)

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**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

THE UNITED MEXICAN STATES

Applicant (Appellant)

and

CARGILL, INCORPORATED

Respondent (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Intervener (Intervener)

**MEMORANDUM OF ARGUMENT OF THE INTERVENER,
THE ATTORNEY GENERAL OF CANADA**
(Pursuant to Supreme Court Act, R.S.C. 1985, c.-S26, Sections 25 and 27)

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PART I – OVERVIEW

1. Chapter Eleven of the *North American Free Trade Agreement* (the “NAFTA”) promotes investment in the territory of a NAFTA Party by investors from other NAFTA Parties. To protect such foreign investments, the NAFTA Parties granted limited and exceptional remedies under Chapter Eleven to individual investors. By granting damages for Cargill’s investments in its home state the tribunal and appellate court below failed to discern and apply the limited and exceptional jurisdiction intended by the NAFTA Parties for Chapter Eleven. This issue of jurisdiction is of public importance because it significantly expands the scope of damage claims that can be asserted by investors, and provides protections to investments without any corresponding benefit to the host NAFTA State. This interpretation may also undermine the legitimacy and stability of Canada’s extensive network of international investment protection, whose provisions mirror those of Chapter Eleven. The Attorney General of Canada therefore supports the granting of leave to appeal respecting the jurisdictional limits of Chapter Eleven.

A. FACTS

2. Canada adopts the facts, including the summary of the disposition of the appeals by the lower Courts, as set forth in the appellant’s Memorandum of Argument at paragraphs 3-6 and 8-28.

PART II – QUESTIONS IN ISSUE

3. Canada concurs with Mexico that this appeal raises the following question of public importance: do the NAFTA Parties owe obligations to investors with respect to their operations and investments in their home States?

PART III – STATEMENT OF ARGUMENT

4. As a general rule, the NAFTA creates rights and obligations only between the NAFTA Parties, thus allowing a NAFTA Party to bring a case against another NAFTA Party where those obligations have been breached (known as state-to-state dispute settlement). Chapter Eleven departs from this rule by granting investors direct access to arbitral proceedings in which alleged breaches of Chapter Eleven obligations are adjudicated and from which a monetary award enforceable against a NAFTA Party can be obtained. By their very nature, these are exceptional and limited rights. No other chapter of the NAFTA permits a claim for damages against a NAFTA Party. Because the rights granted by Chapter Eleven are exceptional, correctly identifying the limits of the Chapter is critical to guard against direct claims against a NAFTA Party for a matter that is not in fact an investment dispute, and is therefore to be dealt with, if at all, by state-to-state dispute settlement.

5. The public importance of the jurisdictional limits of Chapter Eleven is illustrated by the consequences for Canada of the *Cargill* decision. Investors from Mexico and the United States could obtain the benefits of Chapter Eleven based only on a limited investment in Canada while retaining substantial elements of their investment (such as production facilities) in their home State or elsewhere in the world. Through that foothold investment, Canada could be exposed to

significant liability under Chapter Eleven for the claimant's investments outside of Canada, wherever situated, despite the almost total absence of any investment benefit to Canada. Canada's economic interests are harmed by an interpretation of Chapter Eleven that does not balance the benefit obtained by a NAFTA Party with the liability Canada may face for it. This was not the scope of protection Canada or the other NAFTA parties intended, and in the present case more than doubled the liability imposed under Chapter Eleven.

6. The jurisdictional limits of Chapter Eleven is also a question of public importance because provisions identical to Chapter Eleven of the NAFTA are found in three other free trade agreements to which Canada is a party¹ and in Canada's twenty three Foreign Investment Promotion and Protection Agreements.² The potential consequences of this decision therefore go well beyond the NAFTA. Interpreting the scope of Chapter Eleven as allowing for damages with respect to investments made in a claimant's home state may serve as a precedent for claimants under those Agreements.

PART IV – SUBMISSIONS ON COSTS

7. Consistent with its position as an intervener in this proceeding (by operation of Rule 21(1)(c)(i) of the *Rules of the Supreme Court*), the Attorney General of Canada submits it should neither be awarded its costs nor be liable for them.

¹Free Trade Agreements with Columbia, Peru, and Chile: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en&view=d#free>

² Twenty four Foreign Investment Promotion and Protection Agreements have entered into force but the operation of one of them, with Peru, has been suspended in favour of the Canada-Peru Free Trade Agreement, which provides for investment protection: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en&view=d#foreign>

PART V – ORDER SOUGHT

8. The Attorney General of Canada supports the granting of an order allowing this application for leave to appeal, without costs to Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 18th day of January, 2012.



Roger Flaim
Counsel for the Intervener

PART VI - TABLE OF AUTHORITIES

Cases cited

None

Cited at paragraph

Statutory provisions

North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No. 2, 32 ILM 289, Chapter Eleven

Cited at paragraph

1