

**UNDER THE ARBITRATION RULES
OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND UNDER
THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant / Investor

AND:

GOVERNMENT OF CANADA

Respondent / Party

**COUNTER-MEMORIAL OF
THE INVESTOR
(Jurisdiction Phase)**

Appleton & Associates

International Lawyers
1140 Bay Street, Suite 300
Toronto, Ontario, Canada, M5S 2B4

Davis & Company

Barristers & Solicitors
2800-666 Burrard Street
Vancouver, BC, Canada, V6C 2Z7

**Barry W. Appleton, Esq.
Counsel**

Phone: 416-966-8800
Fax: 416-966-8801

**Michael P. Carroll, Q.C.
Counsel**

Phone: 604-643-2958
Fax: 604-605-3702

**** CONFIDENTIAL ****

INDEX

| | Page |
|---|------|
| I. Introduction | 1 |
| II. The Proper Approach to a Jurisdictional Challenge | 3 |
| A. Test to be Applied: Pleadings must simply disclose a Prima Facie Claim | 3 |
| B. Canada's Approach to Jurisdiction is Wrong | 6 |
| C. Authorities Cited by Canada do not Support its Argument | 6 |
| (a) Oil Platforms | 6 |
| (b) Other Cases Cited by Canada | 9 |
| (c) Conclusion | 9 |
| III. The Investor's Claim Establishes the Tribunal's Jurisdiction | 10 |
| A. Relevant Provisions in NAFTA | 10 |
| B. The Investor's Claim | 13 |
| IV. Canada's Arguments are Properly Dealt with at the Merits Phase | 14 |
| V. Principles to be followed in Interpreting the NAFTA | 14 |
| A. The Vienna Convention | 14 |
| B. Approach Taken by Prior NAFTA Tribunals | 15 |
| C. Reliance on Rules of Construction Raised by Canada | 17 |
| D. Caution Should be Exercised in Reviewing Canada's Approach to Interpretation of the NAFTA | 19 |
| VI. Investor's Response to Specific Submissions of Canada | 19 |
| A. Overview of Canada's Arguments | 19 |

| | | |
|-----|---|----|
| B. | Reply to Canada's submission that Allegations relating to Anti-Competitive Conduct are not arbitrable under Chapter 11 | 20 |
| (a) | Overview of Investor's Reply | 20 |
| (b) | Reply to Canada's Claim that Complaints of Anti-Competitive Conduct are Covered Only under Articles 1501 and 1502(3)(d) | 24 |
| C. | Reply to Canada's submission concerning Article 1105 | 28 |
| (a) | Overview of Canada's Argument on the Interpretation of Article 1105 | 29 |
| (b) | NAFTA Chapter 11 Tribunals have Previously Rejected Canada's Restrictive Interpretation of NAFTA Article 1105 | 30 |
| (c) | Neer Test does not Define all Action Inconsistent with International Law | 32 |
| (d) | Customary International Law has Evolved since 1926 | 32 |
| (e) | Interpretation of NAFTA Article 1105 can only be dealt with at the Merits Phase | 34 |
| D. | Reply to Canada's Submission on the Relationship between Article 1502(3)(a) and Chapter 11 obligations | 35 |
| (a) | Reply to Submission that Canada Post is not exercising Delegated Regulatory, Administrative or Other Governmental Authority | 36 |
| (b) | International jurisprudence does not support Canada | 38 |
| (c) | Definition of "Measure" does not support a Restrictive Interpretation of Governmental Authority | 41 |
| (d) | Conclusion | 42 |
| E. | Article 1502(3)(a) extends to all obligations under the Agreement | 42 |
| F. | Taxation Measures | 45 |

| | | |
|------|--|----|
| G. | Publications Assistance Program | 46 |
| | (a) Canada's Challenge | 46 |
| | (b) Relevant Facts | 47 |
| | (c) The Cultural Industries Exception | 47 |
| | (d) The Subsidy Exemption | 49 |
| H. | The Statement of Claim complies with the UNCITRAL Rules | 50 |
| | (a) The Tribunal has jurisdiction to adjudicate the Claim for Harm to the US Subsidiaries | 50 |
| | (b) Minimum Requirements of a Pleading | 53 |
| | (c) Particularity of Pleading | 53 |
| | (d) Remedy | 57 |
| | (e) Summary | 58 |
| VII. | Conclusions and Relief Sought | 58 |

I. Introduction

1. This is a case about unfair, discriminatory and anti-competitive conduct by the Government of Canada (“Canada”), through its delegated agent, Canada Post Corporation (“Canada Post”), and Canada’s failure to ensure that such conduct not occur. An independent review, commissioned by Canada, concluded after lengthy public hearings:

- Canada Post’s activities, built on the foundation of its postal monopoly and publicly funded network, are incompatible with basic principles of fairness;
- Canada Post is not subject to any effective accountability mechanisms and lacks the necessary supervision to ensure that its actions are fully consistent with the public interest; and
- Canada Post has resisted repeated calls to adopt a satisfactory accounting system that identifies actual costs and revenues for specific products and continues to carry out its competitive activities on the basis of cost-accounting processes that lack transparency.

Despite these findings, Canada has allowed this conduct to continue, to the detriment of the Investor and in violation of Canada’s obligations under the NAFTA.

2. For the purposes of this motion, these facts and the other allegations set out in the Amended Statement of Claim must be accepted as true.¹

3. The conduct of Canada and of Canada Post is inconsistent with the objectives of the NAFTA and incompatible with the relationship between the Parties which it sought to ensure. A critical objective of the NAFTA is to promote “conditions of fair competition in the free trade area” and “to increase substantially investment opportunities in the territories of the Parties”. Its aim is to “present to investors the kind of hospitable climate that would insulate them from

¹ Canada accepts this to be the case: Memorial of the Government of Canada on Preliminary Jurisdictional Objections, (“Canada’s Memorial (Jurisdiction Phase)”) at para. 16.

political risks or incidents of unfair treatment”². This case will establish that the conduct of Canada and of Canada Post, rather than advancing these objectives, wholly undermines them.

4. This submission replies to the Memorial of the Government of Canada on Preliminary Jurisdictional Objections dated February 14, 2002, and is made in accordance with the Tribunal’s Procedural Order of December 30, 2001.

5. Canada seeks an order of this Tribunal declaring that all or certain portions of the Amended Statement of Claim submitted by United Parcel Service of America, Inc. (“UPS”) are outside the jurisdiction of the Tribunal, and a further order striking all, or alternatively certain portions, of the Amended Statement of Claim.

6. UPS submits that Canada’s motion must be dismissed. In brief, UPS submits that Canada has both misstated the test the Tribunal is to apply and mischaracterized the claim being advanced. If the Tribunal applies the correct test, UPS submits that the claim falls squarely within the Tribunal’s jurisdiction.

7. Canada asserts that this Tribunal lacks jurisdiction because:

- (a) “the thrust”³ of the UPS Claim concerns alleged breaches by Canada of its obligations under Chapter 15 of the NAFTA to proscribe anti-competitive conduct by a government monopoly;
- (b) “the breaches of obligations pleaded by UPS are clearly not subject to investor-state dispute settlement”⁴ and are beyond the consent of the Parties to arbitration;

² *Pope & Talbot, Inc. and Canada*, UNCITRAL/NAFTA Arbitration, Award on the Merits of Phase 2, April 10, 2001 at para. 116.

³ Canada’s Memorial (Jurisdiction Phase) at para. 1.

⁴ Canada’s Memorial (Jurisdiction Phase) at para. 2.

- (c) the allegations concerning the Publications Assistance Program are barred by the cultural exemption in NAFTA Article 2106, and the allegations concerning the enforcement of a taxation measure are barred by NAFTA Article 2103⁵; and
- (d) UPS has failed to meet the requirements of NAFTA Chapter 11 to bring a claim, by failing to sufficiently particularize its claim and by failing to “establish” that UPS’s non-Canadian subsidiaries are “investments in the territory of Canada”⁶ as allegedly required by NAFTA Article 1101.

UPS submits that each of these arguments is without merit.

8. At the outset, it is important to emphasize that Canada has misunderstood the fundamental basis of the Investor’s claim. The Investor is not claiming, as suggested by Canada, for a breach of NAFTA Article 1501, questioning the enforcement decisions of Canada in applying its competition laws and policies. The Investor is claiming that Canada, as owner of Canada Post, failed and is failing to ensure that Canada Post does not engage in anticompetitive practices. That failure constitutes a breach of NAFTA Articles 1502(3)(a) and 1503(2), and is within the jurisdiction of this Tribunal pursuant to Article 1116. That claim is in addition to the other breaches of Section A of Chapter 11 of NAFTA which are set out in the Amended Statement of Claim.

II. The Proper Approach to a Jurisdictional Challenge (Canada’s Memorial, par. 37-42)

A. Test to be Applied: Pleadings must simply disclose a *Prima Facie* Claim

9. Where a disputing party alleges that an arbitral tribunal does not have jurisdiction over the matter submitted to it, the tribunal is bound to examine only whether the claimant’s pleadings

⁵ Canada’s Memorial (Jurisdiction Phase) at para. 4.

⁶ Canada’s Memorial (Jurisdiction Phase) at para. 9(i).

disclose an issue upon which the parties have consented to arbitrate. The task of the tribunal is not to examine whether the claimant's case will ultimately succeed or fail.⁷

10. This is the approach consistently taken by NAFTA Tribunals when addressing jurisdictional challenges in other Chapter 11 cases.⁸ For instance, in *Ethyl Corporation and Canada*, Canada raised jurisdictional objections similar to those raised here. In rejecting Canada's plea, the Tribunal articulated the proper approach as follows:

On the face of the Notice of Arbitration and the Statement of Claim, Ethyl states claims for alleged breaches by Canada of its obligations under Article 1102 (National Treatment), Article 1106 (Performance Requirements) and Article 1110 (Expropriation and Compensation). The Claimant indisputably is an "investor of a Party", namely the United States, and alleges that it has "incurred loss or damage by reason of, or arising out of," such breaches, all as required by Article 1116(1). It likewise is beyond doubt that Claimant has acted within three years of the time when it "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] incurred loss or damage as stipulated in Article 1116(2). *Claimants Statement of Claim satisfies prima facie the requirements of Article 1116 to establish the jurisdiction of this Tribunal.* As was stated in Administrative Decision No. II (1922), Decisions and Opinions, Mixed Claims Commission, United States and Germany (1925) 6-7, quoted in K.S. Carlston, *The Process of International Arbitration* 77 (1946): "*When the allegations in a petition...bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches.*" See also *Ambatielos Case*

⁷ This is consistent with the approach taken by other international Tribunals. For instance, in *AMCO v. Indonesia*, (1983) 1 ICSID Rep. 389 (Decision 25 September, 1983) at 405, para. 38, the ICSID Tribunal put it this way:

The Tribunal is of the view that in order for it to make a judgement at this time as to the substantial nature of the dispute before it, it must look firstly and only at the claim itself as presented to ICSID and the Tribunal in the Claimants' Request for Arbitration. If on its face (that is, if there is no dispute by the Claimants) the claim is one "arising directly out of an investment", then this Tribunal would have jurisdiction to hear such claims. *In other words, the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.* (Emphasis added).

⁸ To date, there have been three separate NAFTA Tribunals that have rendered Awards in Chapter 11 cases involving the Canadian government: (1) *Ethyl Corporation Canada*; (2) *S.D. Myers and Canada*; and (3) *Pope & Talbot and Canada*. Many of the arguments advanced by Canada in the present case have previously been rejected by these Tribunals.

(Greece v. United Kingdom), merits: obligation to arbitrate, 1953 I.C.J. Rep. 10,11-12 (Judgment of May 19) (“[T]he words ‘claims...based on the provision of the Treaty of 1886...’ can only mean claims depending for support on the provisions of the Treaty of 1886...*The fact that a claim purporting to be based on the Treaty may eventually be found by the Commission of Arbitration to be unsupported under the Treaty, does not of itself remove the claim from the category of claims which, for the purpose of arbitration, should be regarded as falling within the terms of the Declaration of 1926...*”)(Emphasis added)⁹

11. This same approach was adopted by the NAFTA Investor-State Tribunal in the *Pope & Talbot Claim*.¹⁰ There, the Tribunal said:

In its Statement of Claim the Investor claims that the breaches described above relate to the Investor or the Investment, and that in each case it or the Investment has sustained loss or damage by reason of those breaches. For the purposes of the present Motion, the Tribunal must take those assertions of fact as true. Upon that basis it cannot be said that there is no investment dispute between the Investor and Canada. The Investor claims breaches of specified obligations by Canada which fall within the provisions of Section A of Chapter Eleven. In the view of the Tribunal, the Investor and Canada are disputing parties within the definition in Article 1139. Whether or not the claims of the Investor will turn out to be well founded in fact or law, at the present stage it cannot be stated that there are not investment disputes before the Tribunal.
(Emphasis added)

12. It is also the approach that was adopted by the Tribunal in the NAFTA Chapter 11 claim advanced by the *Loewen Group, Inc.*¹¹ There, the Tribunal deferred to the merits phase those matters which required an assessment of the factual context in order to be properly determined, and also deferred consideration of those issues which might, but did not clearly, go to jurisdiction. The Tribunal determined the appropriate course would be to consider such arguments at the merits phase.¹²

⁹ *Ethyl Corporation and Canada*, UNCITRAL/NAFTA Arbitration, Award on Jurisdiction, June 24, 1998 at para. 61.

¹⁰ *Pope & Talbot, Inc. and Canada*, Measures Relating to Investment Motion, January 26, 2000, at para 25.

¹¹ *Loewen Group, Inc. and United States of America*, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, January 5, 2001 at para.37, ICSID Case No. ARB (AF)/98/3.

¹² *Loewen Group, Inc.* at para. 74-76

B. Canada's Approach to Jurisdiction is Wrong

13. Canada, however, urges upon this Tribunal a different approach, relying upon an interpretation of authorities of questionable value and from different contexts. Canada argues for a restrictive approach to jurisdiction, and that the Tribunal can proceed only if the claims “clearly fall within the parameters of Chapter 11.”¹³ Canada’s proposition is that the Tribunal’s jurisdiction “cannot depend solely on the wording of the claim”¹⁴, but rather, that the Tribunal must somehow go behind the Amended Statement of Claim to “ensure that, measured objectively, the claim is arbitrable”¹⁵ and must do so not only before any evidence is heard, but before there is even a statement of defence filed. That is not the proper approach, nor do the cases relied upon by Canada support its application here.

C. Authorities Cited by Canada do not Support its Argument

(a) Oil Platforms

14. Rather than rely upon the jurisdictional awards of other NAFTA Chapter 11 Tribunals, Canada relies primarily upon the International Court of Justice jurisdictional decision in *Oil Platforms*.¹⁶ Canada asserts that this case supports the proposition that “to engage a tribunal's jurisdiction, a claim must clearly fall within the parameters of Chapter 11” and that it is not sufficient that the claim be "plausibly" or "arguably" connected to the Chapter 11 obligations

¹³ Canada’s Memorial (Jurisdiction Phase) at paras. 37- 42.

¹⁴ Canada’s Memorial (Jurisdiction Phase) at para. 41.

¹⁵ Canada’s Memorial (Jurisdiction Phase) at para. 42.

¹⁶ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, cited at paragraph 39 of Canada’s Memorial (Jurisdiction Phase). In *Oil Platforms*, the International Court of Justice was called upon to determine whether it had jurisdiction under a 1955 U.S.-Iranian Treaty of Amity, Economic Relations and Consular Rights to adjudicate a proceeding commenced by Iran “arising out of the attack [on] and destruction of three offshore oil production complexes” by United States warships. The U.S. challenged the jurisdiction of Iran’s application claiming it bore “no relation” to the Treaty, as the claim dealt with allegations of unlawful use of armed force, under Treaty with “wholly commercial and consular provisions.” See *Oil Platforms* at para. 40.

relied upon.¹⁷ The case does not support that submission, and Canada's reliance upon it is misplaced.

15. In *Oil Platforms*, the International Court of Justice did not comment on the principles to be applied in approaching a jurisdictional application, except to say that in the particular circumstances of that case, the question it was required to address was whether the allegations made “do or do not fall within the provisions of the Treaty.”¹⁸ It gave no further explanation as to how such an analysis ought to be undertaken. And, as the Court concluded that it had jurisdiction on one of the bases argued by Iran, it was unnecessary to conduct any further analysis or provide further exposition of the jurisdictional test.

16. Indeed, despite Canada's submission at paragraph 39 of its Memorial, nowhere in the majority judgment is there any discussion of the need for the claim to be more than "plausibly" or “arguably” connected to the obligations relied upon.¹⁹ The majority decision only required that the facts alleged by Iran be “capable of having [the] effect” of violating the obligations contained in the treaty.²⁰ Given that they could, the Court ruled that it had jurisdiction and that “*the possibility must be entertained that [the claimant's rights] could actually be impeded as a result of acts [of the state].*”²¹

17. In any event, the question for the Court in *Oil Platforms* was different than the question this Tribunal must address. In *Oil Platforms*, the Court had to determine whether Iran could

¹⁷ Canada's Memorial (Jurisdiction Phase) at para. 39

¹⁸ *Oil Platforms* at para. 16.

¹⁹ The approach advanced by Canada seeks to rely on Judge Higgins' Separate Opinion. The conclusions of Judge Higgins are not those of the majority and cannot be relied upon as such.

²⁰ At para. 51. [emphasis added] Moreover, in her separate opinion, Judge Higgins explained that the Court should see “if, on the facts as alleged by Iran, the United States actions complained of *might violate* the Treaty articles.” Higgins Sep. Op. at para. 50. [emphasis added]

²¹ At para. 50 [emphasis added]

found its claim upon any of three specific provisions of the Treaty. With respect to two of them, the Court concluded it could not.

18. In particular, the Court concluded that Article 1²² of the Treaty did not create any legal obligation, but was only a statement of objective. As such, it could not possibly found jurisdiction in favour of Iran. The Court concluded that Article IV(1) of the Treaty, which provided certain rights to nationals and companies of the Parties likewise could not support jurisdiction, because it protected only nationals and companies of the Parties, and not the Parties themselves.

19. Neither of these conclusions assists Canada in asserting that the Tribunal does not have jurisdiction to address the allegations made by UPS under specific provisions of the NAFTA which impose obligations upon Canada enforceable by the Investor.²³

20. Accordingly, any reliance upon *Oil Platforms* is misplaced, and this Tribunal ought to follow the practice of previous NAFTA Chapter 11 Tribunals.

²² Article I provides: "There shall be firm and enduring peace and sincere friendship between the United States ...and Iran."

²³ The provision under which the Court obtained its jurisdiction in *Oil Platforms* is also very different than that under which this Tribunal obtains its jurisdiction. In *Oil Platforms*, the relevant provision was Article XXI (2), which provided:

Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

The source of jurisdiction for a NAFTA Chapter 11 Tribunal is NAFTA Article 1116. There is no analogous provision relating to investor-state disputes under the NAFTA Chapter 11. If the requirements of that provision are met by the Investor's claim, then this Tribunal has jurisdiction to address the merits of that claim. For this reason as well, the *Oil Platforms* case is distinguishable from the present case, because the basis upon which the ICJ obtained jurisdiction, on a plain reading of the relevant provisions of the Treaty, is different from the basis upon which this Tribunal obtains its jurisdiction.

(b) Other Cases Cited by Canada

21. The *Case Concerning Certain German Interests in Polish Upper Silesia*²⁴ is equally unhelpful. Read carefully, it is also inconsistent with the proposition for which Canada asserts *Oil Platforms* stands. In that case, the Permanent Court of International Justice determined that it need not come to a final determination of the meaning of the Treaty at the jurisdictional phase, but rather, that was something to be done at the merits phase. The Tribunal obtained jurisdiction as soon as there was a disagreement between the Parties, including a disagreement as to what the Treaty terms meant:

It follows that the differences of opinion contemplated by Article 23, which refers to Articles 6 to 22, may also include differences of opinion as to the extent of the sphere of application of Articles 6 to 22 and, consequently, the difference of opinion existing between the Parties in the present case. (emphasis added)²⁵

22. The *Fisheries Jurisdiction Case (Spain v. Canada)* also does not support the proposition advanced by Canada²⁶, that this Tribunal need not confine itself to the terms of the claim in determining jurisdiction. In that case the International Court of Justice said, at paragraph 33:

In order to decide on the preliminary issue of jurisdiction which arises in the present case, the Court will ascertain the dispute between Spain and Canada, taking account of Spain's Application, as well as the various written and oral pleadings placed before the Court by the Parties. (Emphasis added)

(c) Conclusion

23. Thus, the question the Tribunal is to address at this stage is whether the Investor has pleaded a case which, if the facts are accepted as true, falls within the jurisdiction of the Tribunal to consider. It is not an inquiry into whether the claim is bound to succeed or to fail. On that basis, for the reasons outlined below, it is clear that UPS has met the jurisdictional requirements for this Tribunal to be seized of this matter and proceed to the merits phase.

²⁴ Relied upon by Canada in its Memorial (Jurisdiction) at para. 40.

²⁵ *Case Concerning Certain German Interests in Polish Upper Silesia*, Series A. No. 6 (1925) PCIJ 4 at 16.

²⁶ Canada's Memorial (Jurisdiction) at para. 40.

III. The Investor's Claim Establishes the Tribunal's Jurisdiction

A. Relevant Provisions in NAFTA

24. NAFTA is an agreement between three sovereign states, Canada, the United States and Mexico, dealing with a vast range of matters relating to the liberalization of trade, including the trade in goods and services, and investment.

25. NAFTA Article 102(2) sets out the manner in which it is to be interpreted and applied by the Parties:

Article 102: Objectives

2. The Parties shall interpret and apply the provisions of this Agreement *in the light of its objectives* set out in paragraph 1 and *in accordance with applicable rules of international law*. (Emphasis added)

26. Interpretation in accordance with *both* the objectives of the NAFTA and the applicable rules of international law is confirmed in the direction to Tribunals constituted under Section B of Chapter 11 of NAFTA contained in Article 1131(1) that they:

shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

27. The objectives of the NAFTA, critical to the interpretive task, are set out in Article 102(1), as follows:

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:
 - (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
 - (b) *promote conditions of fair competition in the free trade area;*
 - (c) *increase substantially investment opportunities in the territories of the Parties;*
 - (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

- (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement. (Emphasis added)

28. Part Five of the NAFTA, containing Chapters 11 through 16, is entitled “Investment, Services and Related Matters”. The Investor brings this claim under Chapter 11, entitled “Investment.” Chapter 11 comprises three sections. “Section A - Investment” sets out various substantive obligations assumed by the Parties to the NAFTA, (Articles 1101-1114). “Section B - Settlement of Disputes between a Party and an Investor of Another Party,” sets out the procedural mechanism by which an investor can bring a claim directly against a NAFTA Party (Articles 1115 to 1138). “Section C - Definitions,” defines certain relevant terms for the purposes of Chapter 11 (Article 1139).

29. The relevant obligations for the purposes of this proceeding are:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

and:

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

30. This claim is specifically brought pursuant to NAFTA Article 1116(1). That provision grants an Investor the right to submit a claim for harm caused to the Investor by a Party in certain defined circumstances:

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
 - (a) Section A or Article 1503(2) (State Enterprises), or
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) *where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,*and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (Emphasis added)

31. NAFTA Article 1116(1)(b) permits a claim to be brought against Canada where Canada has breached NAFTA Article 1502(3)(a) and the government monopoly has acted inconsistent with Canada's obligations under Section A of Chapter 11. NAFTA Article 1502(3)(a), by its own terms, specifically imports an obligation on the Party, to ensure that its government monopoly acts consistently with the **entire** NAFTA, and not just a part of it:

Article 1502: Monopolies and State Enterprises

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; (Emphasis added)

32. Since "Party's obligations under this Agreement" in NAFTA Article 1502(3)(a) is unqualified, the obligations necessarily include the obligations assumed by a Party under NAFTA Article 1502(3)(d). This is more fully explained below. For present purposes, it is sufficient to set out the text of NAFTA Article 1502(3)(d), as follows:

Article 1502: Monopolies and State Enterprises

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:
- ...
- (d) does not use its monopoly position to engage, either directly or indirectly, including through 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.

33. NAFTA Article 1116(1)(a) permits a claim to be brought against Canada where Canada has breached NAFTA Article 1503(2). In contrast to NAFTA Article 1502(3)(a), NAFTA Article 1503(2) is a more narrow provision, specifically importing an obligation on the Party to ensure that its state enterprises act consistently with NAFTA Chapter 11 and NAFTA Chapter 14. The Article reads:

Article 1503: State Enterprises

2. Each party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

B. The Investor's Claim

34. Against that background, the disposition of this application is clear. The Investor has pleaded that Canada has breached specific obligations under Articles 1102 (National Treatment), 1105 (Treatment in Accordance with International Law), and 1502(3)(a) and 1503(2) (Monopolies and State Enterprises). The Investor has also pleaded that as a result of those breaches, it has suffered loss or damage. That is a full and complete answer to Canada's motion. Whether the Investor is ultimately successful in establishing those breaches is not a question for the Tribunal to address at this stage. The only question is whether a plea, sufficient to sustain

jurisdiction, has been made. The Investor submits that it has. Accordingly, the Investor's Amended Statement of Claim satisfies the requirements of NAFTA Article 1116 to establish the jurisdiction of this Tribunal.

IV. Canada's Arguments are Properly Dealt with at the Merits Phase

35. The remainder of Canada's arguments are focussed on matters that, if relevant, cannot be addressed in the jurisdictional phase. They are matters for the merits phase where the Tribunal will hear all relevant evidence, and argument based on that evidence. It is inappropriate for a disputing party, under the guise of a jurisdictional motion, to ask this Tribunal to define, in the abstract and without the benefit of evidence, the scope and content of the relevant treaty provisions, including the meaning of "international law" in NAFTA Article 1105. Nor can the Tribunal assess, without a full evidentiary hearing, whether the Investment and Investor have been accorded "fair and equitable treatment" or even the nature and scope of the "anti-competitive conduct" of Canada Post, and the implications of that conduct if proved. The Tribunal must decline Canada's invitation to embark upon such a task at this stage.

36. While the Investor submits that it is unnecessary for the Tribunal to address the remainder of Canada's argument, for the purposes of this motion, the Investor makes the following submissions.

V. Principles to be followed in Interpreting the NAFTA

37. If the Tribunal is to proceed further on this motion, regard must be had for the applicable rules of treaty interpretation, which Canada articulates at a general level in its Memorial at paragraphs 43 through 59.

A. The Vienna Convention

38. Article 1131 of the NAFTA refers the Tribunal to both the Treaty and the "applicable rules of international law". The Disputing Parties agree that the "applicable rules of international law" are set out in Articles 31 and 32 of the *Vienna Convention*. Article 31(1) requires a treaty to

be interpreted in good faith in accordance with the ordinary meaning of the words used, in their context, and in light of the treaty's object and purpose.

39. The objects and purposes of the NAFTA are set out in Article 102(1). They include trade liberalization, the promotion of conditions of fair competition and increasing substantially investment opportunities between the Parties.

40. The interpretive task has been described by the International Court of Justice in this way:

The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.²⁷

41. Thus, it is not simply the terms of the Treaty that must be considered, but rather, the terms of the Treaty, *in the context in which they occur*. "Context", as defined in Article 31(2) of the *Vienna Convention*, includes the Preamble to the Treaty, its text and annexes.

B. Approach Taken by Prior NAFTA Tribunals

42. Prior NAFTA Tribunals have recognized the importance of interpreting the NAFTA in light of its objects and purposes.

43. Thus, in the very first NAFTA decision, *Canadian Marketing Practices*, the Chapter 20 panel said:

The Panel also attaches importance to the trade liberalization background against which the agreements under consideration must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favoured nation

²⁷ *Competence of the General Assembly For The Admission Of A State To The United Nations*, [1950] I.C.J. Rep. 4 at 8 (Advisory Opinion).

treatment and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit the NAFTA's objectives.²⁸

44. In *Ethyl Corporation and Canada* (Award on Jurisdiction), the Chapter 11 Tribunal rejected Canada's arguments that the NAFTA should be interpreted narrowly, saying this about the approach to interpretation:

The Tribunal considers it appropriate first to dispose with any notion that Section B of Chapter 11 is to be construed "strictly". The erstwhile notion that "in case of a doubt a limitation of sovereignty must be construed restrictively" has long since been displaced by Articles 31 and 32 of the Vienna Convention.²⁹

45. The Chapter 11 Tribunal in *S.D. Myers and Canada*, in discussing the approach to interpreting the NAFTA, considered that the appropriate place to begin was with the Preamble, which asserted the Parties resolve to:

Create an expanded and secure market for the goods and services produced in their countries...to ensure a predictable commercial framework for business planning and investment...and to do so in a manner consistent with environmental protection and conservation.³⁰

46. The *Pope & Talbot* Tribunal similarly interpreted the specific obligations under NAFTA Chapter 11 in light of its liberalizing objectives set out in Article 102. In rejecting an argument advanced by Canada concerning the interpretation of the national treatment obligation under NAFTA Article 1102, the Tribunal concluded:

...Indeed, the recognition that national treatment can be denied through *de facto* measures has always been based on an unwillingness to allow circumvention of that right by skillful or evasive drafting. Applying Canada's proposed more onerous rules to *de facto* cases could quickly undermine that principle. That result would be inconsistent with the investment objectives of NAFTA, in

²⁸ NAFTA Arbitration Panel Established Pursuant to Article 2008. *In the Matter of Tariffs Applied by Canada to Certain US - Origin Agricultural Products* (Secretariat File No. CDA-95-2008-01). Final Report of the Panel, December 2, 1996 at 34, para. 122.

²⁹ *Ethyl Corporation and Canada*, UNCITRAL/NAFTA Arbitration, Award on Jurisdiction, June 24, 1998 at para.55.

³⁰ *S.D. Myers and Canada*, Partial Award, November 13, 2000, at para. 196.

particular Article 102(1)(b) and (c), to promote conditions of fair competition and to increase substantially investment opportunities.³¹

47. The Chapter 11 Tribunal in *Metalclad* also confirmed the importance of the NAFTA objectives in concluding that Mexico had breached its obligation to accord fair and equitable treatment under NAFTA Article 1105:

An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives...

Prominent in the statement of principles and rules that introduces the Agreement is the reference to “transparency” (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.³²

48. Thus, NAFTA Tribunals in *Ethyl Corporation, Pope & Talbot, Metalclad* and *S.D. Myers* have all interpreted the specific obligations contained in NAFTA Chapter 11 as fitting within the broad liberalizing context of the treaty and its objectives. Accordingly, any interpretation of the NAFTA Articles 1102, 1105, 1116, 1502(3) or 1503(2) must be undertaken having full regard for the objective of investment promotion identified in Article 102(1)(c), together with the objective of trade liberalization.

C. Reliance on Rules of Construction Raised by Canada

49. Canada urges this Tribunal to resort to various “rules”, such as the so-called “plain meaning” rule to assist in interpretation. While there may be some value in doing so, reliance upon “rules” or “principles” of construction cannot be allowed to obscure the real task for the

³¹ *Pope & Talbot, Inc. and Canada*, UNCITRAL/NAFTA Arbitration, Award on the Merits of Phase 2, April 10, 2001 at para 70.

³² *Metalclad and Mexico*, ICSID/NAFTA Arbitration, Final Award, April 25, 2000 at paras. 75-76.

Tribunal: “giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*”³³

50. When Canada relies (as it does at paragraph 58) on various “interpretive principles”, each identified by a well known Latin phrase: *expressio unius et exclusio alterius*; *noscitur a sociis*; and *eiusdem generis*, the Tribunal might consider that the ideas embodied within those phrases are not without utility, but must always be cautious about applying a maxim when the real task is interpretation. Such maxims can only play a limited role.

Another result of this activity is that today for many of the so-called rules of interpretation that one party may invoke before a tribunal the adverse party can often, by the exercise of a little ingenuity, find another rule to serve as an equally attractive antidote. One party invokes a rule of liberal construction; the other promptly counters with a rule that an obligation created by a treaty should be interpreted restrictively, that is, so as to impose the least restriction upon the freedom or sovereignty of the State undertaking this obligation. Thus, a danger exists that a tribunal may be diverted from its true task of ascertaining what the parties meant by the words they used, into a wilderness of conflicting decisions of tribunals and opinions of writers. We are amongst those who are sceptical as to the value of these so-called rules and are sympathetic to the process of their

³³ McNair, *Law of Treaties* at 366-7. The danger of reliance solely upon a “plain meaning” approach, without regard to the applicable context, was described by McNair this way:

Many references are to be found in judgments, opinions, and other documentary sources (British and others) to the primary necessity of giving effect to the ‘plain terms’ of a treaty, or construing words according to their ‘general and ordinary meaning’ or their ‘natural signification’ and so forth, and of not seeking *aliunde* for a meaning ‘when the terms are clear’. But this so-called rule of interpretation like others is merely a starting-point, a *prima facie* guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties *in using the language employed by them*. An instance may be taken from another sphere of legal interpretation. A man, having a wife and children, made a will of conspicuous brevity consisting merely of the words ‘All for mother’. No term could be ‘plainer’ than ‘mother’, for a man can only have one mother. His widow claimed the estate. The court, having admitted oral evidence which proved that in the family circle the deceased’s wife was always referred to as ‘mother’, as is common in England, held that she was entitled to apply for administration with the will annexed, which in effect meant that she took the whole estate. ‘Mother’ is, speaking abstractly, a ‘plain term’, but taken in relation to the circumstances surrounding the testator at the time when the will was made, it was anything but a ‘plain term’. In short, it is submitted that while a term may be ‘plain’ *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used.

gradual devaluation, of which indications exist. The many maxims and phrases which have crystallized out and abound in the text-books and elsewhere are merely prima facie guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case. If they are allowed to become our masters instead of our servants these guides can be very misleading.³⁴

D. Caution Should be Exercised in Reviewing Canada’s Approach to Interpretation of the NAFTA

51. Accordingly, the Tribunal should reject the approach advanced by Canada, as being excessively focussed upon a narrow, textual basis, and as not being in accordance with the customary international law rules of treaty interpretation which have been observed consistently in the practice of prior NAFTA Chapter 11 Tribunals. Canada’s approach runs counter to well established rules of treaty interpretation, ignores the purpose of the NAFTA, and undermines its objectives. Indeed, one can assume that Canada is driven to rely on its approach, for the very reason that the appropriate approach, as adopted by other Chapter 11 Tribunals, would result in the failure of Canada’s motion.

VI. Investor’s Response to Specific Submissions of Canada

A. Overview of Canada’s Arguments

52. Canada has argued that three parts of the Investor’s claim should be struck as being beyond the scope of NAFTA Chapter 11:

1. claims concerning the anti-competitive practices of Canada Post;
2. claims with respect to Canada’s failure to properly enforce its own laws with respect to the collection of fees by Canada Post; and
3. claims concerning Canada’s Publications Assistance Program (“PAP”), at paragraph 18 of the Amended Statement of Claim;

Each of these are dealt with in turn, commencing with Canada’s submissions concerning the relationship of Canada Post’s anti-competitive behaviour and claims advanced under Chapters 11 and 1502(3)(a) and 1503(2) of the NAFTA.

³⁴

McNair at 365-6

B. Reply to Canada’s submission that Allegations relating to Anti-Competitive Conduct are not arbitrable under Chapter 11

(a) Overview of Investor’s Reply

53. One matter must be dispensed with immediately. Contrary to the assertions of Canada³⁵, the Investor has not advanced a claim under NAFTA Article 1501 (although that Article becomes relevant to the analysis, as outlined below). And, while Canada has attempted to recast the Investor’s claim into one not advanced by the Investor, the task for this Tribunal is to assess the case which UPS has plead, and not some imputed arguments which Canada ascribes to the Investor. As confirmed by NAFTA Note 43, no Investor-State arbitration is available for a breach of Article 1501.³⁶

54. Canada’s submission, particularly those portions advanced in paragraphs 60 through 79, appears to proceed on three fundamental premises. Those premises, and the Investor’s brief response, are as follows:

1. Canada says that the Investor has advanced claims which relate to anti-competitive conduct by its delegated agency, Canada Post and to the failure of Canada to ensure such conduct does not occur. That conduct, which for the purposes of this motion is admitted, is covered by Articles 1501 and 1502(3)(d) of the NAFTA. Canada submits that complaints about such conduct under NAFTA Articles 1501 and 1502(3)(d) are amenable either to consultation under NAFTA Article 1501 or to State to State resolution under Chapter 20. Because NAFTA Article 1116 does not refer to either NAFTA Article 1501 or 1502(3)(d), Canada submits that resolution of a claim respecting any conduct which might fall within those Articles is not permitted under Chapter 11. In other words, if anti-competitive conduct is covered by NAFTA Articles 1501 or 1502(3)(d) then, *ipso*

³⁵ Canada’s Memorial (Jurisdiction Phase) at para. 74.

³⁶ Note 43 provides: “**Article 1501 (Competition Law)**: no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article.”

facto, it cannot be covered by any other NAFTA provision, including NAFTA Articles 1102 or 1105 (paragraphs 60-64).

The Investor disagrees. The correct question is not whether misconduct falls within either NAFTA Article 1501 or 1502(3)(d), but whether the misconduct, on the evidence, establishes a breach of any of the Articles under which the Investor is entitled to advance a claim. Have the Investor or investment been discriminated against, or treated in a sufficiently unfair or inequitable manner so as to be entitled to advance a claim for harm caused as a result? This is a question that must be determined on the evidence. The mere fact that certain misconduct may *also* be sanctioned by other provisions of the NAFTA cannot be used as a basis for denying an Investor its right to make a claim, or excluding that conduct from coverage under the relevant provisions of NAFTA Chapter 11.

Canada's argument on this point is similar to that advanced in *Ethyl*, - where Canada argued that if a measure is covered under Chapter 3, it somehow could not be covered under Chapter 11. As in *Ethyl*, Canada has cited no authority, nor elaborated any argument as to why government conduct cannot be covered by multiple provisions. The *Ethyl* Tribunal determined that this issue was not one that could be determined on the jurisdictional phase, and, like in *Ethyl*, the same result should prevail here. The *Pope & Talbot* Tribunal, however, determined that the issue was so well-settled that it could be determined during the jurisdictional phase - in favour of the Investor.³⁷

2. Under the heading "A Claim Under Article 1501 or Article 1502(3)(d) is Prohibited" (paragraphs 65-69), Canada argues at length the uncontentious proposition that an Investor may not make a direct claim under Articles 1501 or

³⁷ *Pope & Talbot, Inc. and Canada* Decision on Motion to Dismiss Relating to NAFTA Article 1101 January 26, 2000 at paras. 27-34.

1502(3)(d) of the NAFTA. That proposition is supported by two arguments. First, Canada argues, at paragraph 67, that NAFTA Article 1116 is “exhaustive”. Second, Canada argues that, while the NAFTA Parties have established as an objective the promotion of conditions of fair competition, the means (and presumably the only means) by which they have chosen to achieve that objective is through State to State resolution of disputes related to NAFTA Articles 1501 and 1502(3)(b), (c) and (d).

If Canada’s argument that NAFTA Article 1116 is “exhaustive” means that an investor can only bring a claim for those matters that are set out in NAFTA Article 1116 - i.e., where the facts establish a breach of Section A of Chapter 11, a breach of NAFTA Article 1503(2) (which itself by reference incorporates breaches of Section A of Chapter 11 by a State Enterprise), or a breach of NAFTA Article 1502(3)(a), where the Government Monopoly has acted in a manner inconsistent with the obligation of a Party under Section A of Chapter 11 - then the Investor concurs. That is also what the Investor has claimed. But that does not assist in answering the primary question this Tribunal will have to address at the merits phase of this proceeding, namely, on the evidence, do the facts alleged and proved establish a breach of Section A of NAFTA Chapter 11 or the relevant provisions of Chapter 15 - NAFTA Articles 1502(3)(a) and 1503(2)? If so, then the Investor is entitled to succeed.

If Canada is submitting that the NAFTA objective of ensuring “conditions of fair competition” is to be accomplished only by means of state-to-state consultation on matters arising under NAFTA Article 1501 (under which the Investor is not claiming) or Chapter 20 Dispute Resolution on matters arising under NAFTA Article 1502(3)(d), that submission should be given no credence. Other provisions clearly advance the objective of promoting fair competition, including, for instance, the various specific national treatment provisions of the Agreement,

such as NAFTA Article 1102. The very purpose of a national treatment provision is to promote conditions of fair competition (i.e. to guarantee an effective equality of competitive opportunity for investors and investments). By including NAFTA Article 1102 within Section A of Chapter 11, the NAFTA drafters made clear their intent that Investor-State proceedings are one way in which that objective can be achieved. Moreover, Canada's approach is inconsistent with the specific interpretive direction given to the Tribunal in NAFTA Article 102 that the *entire* Treaty must be interpreted as a whole, in a manner that promotes, rather than undermines, its objectives, and with the interpretive "principle of effectiveness".

3. Next, Canada argues (paragraphs 70-79) that if the Investor's claim includes or relates in some way to anti-competitive conduct, then such claims are not permitted under either NAFTA Article 1502(3)(a) or 1503(2). While this appears to simply be a restatement of the first argument described above, it is supplemented by the assertion that, if a contrary interpretation were to prevail, then it would render meaningless the words used in NAFTA Article 1116 defining the scope of permissible claims, and somehow this would result in greater claims being available against Government monopolies and State Enterprises than against the State itself.

Again, this is an argument that proceeds on the basis that, if conduct is circumscribed by NAFTA Articles 1501 or 1502(3)(d), then it cannot be also remediable under the Investor-State dispute resolution procedures. And, it is not correct that the Investor's interpretation would result in greater claims being available against an entity like Canada Post than against Canada itself. Regardless of whether Canada Post is a department of government or a crown corporation, Canada is still responsible for its conduct.

The proper question for this Tribunal is whether the conduct of Canada and Canada Post violates the relevant provisions of Chapter 11 and Chapter 15. If so, that is the end of the matter, unless there is some express *inconsistency* or *conflict* such that the paramountcy rules in NAFTA Article 1112³⁸ apply. Absent such conflict, there is no reason why conduct cannot run afoul of multiple provisions of NAFTA. Prior NAFTA Tribunals have consistently held that a matter may be covered under more than one provision of the NAFTA (ie. *Pope and Talbot*: Chapter 3 and Chapter 11; *S.D. Myers*: Chapter 12 and Chapter 11).

(b) Reply to Canada’s Claim that Complaints of Anti-Competitive Conduct are Covered Only under Articles 1501 and 1502(3)(d)

55. The Investor has advanced claims alleging that Canada has breached Articles 1102, 1105, 1502(3)(a) and 1503(2) of the NAFTA. Canada submits that the Investor cannot do so, because that impugned conduct is, instead, a breach of Articles 1501 or 1502(3)(d) of the NAFTA. While it may well be that Canada Post’s conduct would violate Canada’s obligations under NAFTA Articles 1501 and 1502(3)(d), this fact does not in any way detract from the reality that the same conduct might also constitute a breach of any other NAFTA obligation, including those relied upon by the Investor.

56. The fundamental premise underlying Canada’s argument appears to be that no claim can be made by an investor for harm caused by the anti-competitive conduct of Canada’s delegated agency, Canada Post, or out of Canada’s failure to ensure such conduct not occur, because to allow such claims would somehow be inconsistent with the proper interpretation of the NAFTA.

57. Canada seems to assert that, if conduct alleged by the Investor amounts to a clear violation of NAFTA Articles 1501 and 1502(3)(d), an Investor is thereby deprived of any effective remedy for such unlawful conduct because its inclusion in NAFTA Article 1501 and

³⁸ NAFTA Article 1112(1) provides: “In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.”

1502(3)(d) somehow removes that conduct to beyond the scope of Section A of Chapter 11 and NAFTA Articles 1502(3)(a) or 1503(2). Canada argues that because the Parties have agreed to State to State consultation or dispute resolution for breaches of NAFTA Articles 1501 and 1502(3)(d), that compels the conclusion that a Tribunal may not consider whether such conduct violates a NAFTA provision that is subject to Investor-State dispute settlement - no matter how manifest it is that such conduct is contrary to a provision such as NAFTA Article 1102 or Article 1105.

58. The jurisprudence is clear that a NAFTA Chapter 11 claim is permitted, even if there is an overlap between the conduct which violates Canada's obligations under NAFTA Articles 1102 and 1105, and conduct which Canada is obliged to ensure does not occur under NAFTA Article 1502(3)(d). Where there is an overlap between treaty obligations, there is a requirement to comply with both obligations.³⁹

59. The issue of overlapping treaty obligations was explored by the WTO Appellate Body in *EC - Regime for the Importation, Sale and Distribution of Bananas ("EC-Bananas")*⁴⁰, where the Appellate Body had to determine the legal consequences of an overlap between obligations

³⁹ The fact that provisions of treaties may overlap without creating inconsistencies or redundancies can be seen in the example of expropriation under NAFTA Chapter 11. It is commonly held that the law of expropriation is part of international law, whether described as a custom or principle. NAFTA Article 1110 sets out to clarify in the NAFTA how this part of customary international law applies in the NAFTA Chapter 11 context. There is no doubt, however that in the absence of NAFTA Article 1110, a breach of the expropriation obligation could otherwise be claimed under NAFTA Article 1105. In that respect, the obligation reflected in Article 1110 is equally an obligation that arises under Article 1105 (or presumably, under Article 1103 to the extent other Treaties contain similar expropriation provisions).

Likewise, when Canada argues at para. 103 obligations under NAFTA Chapter 11, such as NAFTA Article 1105, cannot also provide redress if anti-competitive conduct is involved, because that would make the provisions of Chapter 15 redundant, the WTO jurisprudence does not support Canada's submission. For instance, in the Panel decision in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, the Panel held that anti-competitive conduct in the nature of "cross-subsidization" also violated the national treatment obligation in GATS Article XVII (Panel Report, WT/DS27/R/USA, May 22, 1997 at para. 7.339, 7.340-7.341).

⁴⁰ WT/DS27/AB/R, September 9, 1997.

contained in the GATT 1994 and the General Agreement on Trade in Services (GATS). The Appellate Body concluded that, with broadly worded obligations, it was likely some overlap would occur.⁴¹

60. The point that conduct may violate more than one provision of the NAFTA is made clear by the text of the NAFTA itself. NAFTA Article 1112(1) provides specific guidance as to the resolution of conflict between its provisions:

Article 1112: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

If a specific matter could fall within only one Chapter of the Treaty, NAFTA Article 1112 would clearly have been drafted differently.

61. Two previous NAFTA Chapter 11 Tribunals have rejected the same argument Canada appears to advance here: that NAFTA Chapter 11 provisions are not applicable because of an overlap with other provisions of the NAFTA. In *Pope & Talbot*, the Tribunal said, with respect to the overlap of NAFTA Chapter 3 (with respect to trade), and NAFTA Chapter 11:

... the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not relate to investment or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. But it is clear from the terms of Article 1105 that it is also a measure relating to investment insofar as it might affect an enterprise owned by an investor of a Party.⁴²

62. And in *S.D. Myers*, the Tribunal cited *Pope & Talbot* with approval and concluded:

The view that different chapters of the NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict, was accepted by the

⁴¹ *EC-Bananas*, WT/DS27/AB/R, September 9, 1997 at 97. Referring to *Canada - Periodicals*, Appellate Body Report, WT/DS31/AB/R July 30, 1997 at 19.

⁴² *Pope & Talbot, Inc. and Canada*, NAFTA/UNCITRAL Tribunal, Decision on Motion to Dismiss Relating to NAFTA Article 1101 January 26, 2000 at para. 33.

decision of the Arbitral Tribunal in *Pope & Talbot*. The reasoning in the case is sound and compelling. There is no reason why a measure which concerns goods (Chapter 3) cannot be a measure relating to an investor or an investment (Chapter 11).⁴³

63. Even the US *Statement of Administrative Action* acknowledges the point⁴⁴, confirming that NAFTA Article 1502 “requires Mexico and Canada to impose several specific disciplines on its state-owned and privately-owned monopolies.”⁴⁵ Moreover, the Statement goes on to confirm that the overlap between obligations under NAFTA Article 1502 and Chapter 11 was contemplated by the US government:

... in exercising any delegated governmental authority in connection with the monopoly good of service (such as the power to grant import licenses), such monopolies must act in a manner consistent with the government’s NAFTA obligations. Under Article 1106, this obligation – as well as the similar obligation [Article 1503] discussed above imposed on state enterprises generally – may be enforced through NAFTA’s investor-state arbitration procedures.

64. Accordingly, while the NAFTA does not permit an Investor to bring an Investor-State claim on the sole basis of a violation of NAFTA Article 1502(3)(d), there is nothing in the NAFTA that compels the conclusion that conduct by a government monopoly which is prohibited under Article 1502(3)(d) cannot also form the basis of an Investor-State claim under the plain meaning of NAFTA Articles 1502(3)(a) and 1105.

⁴³ *S.D. Myers and Canada*, NAFTA/UNCITRAL Arbitration, Partial Award, November 13, 2000 at para.294.

⁴⁴ The *US Statement of Administrative Action*, like the *Canadian Statement of Implementation*, was published at the time of the promulgation of the NAFTA to describe the administrative actions necessary for the domestic implementation of the Treaty.

⁴⁵ See Section Headed “Statement Concerning State Trading Enterprises” at 1. The section notes that Chapter 15 “imposes significant disciplines on state enterprises”.

C. Reply to Canada’s submission concerning Article 1105 (Canada Memorial, para 87-105)

65. Section A of Chapter 11 of the NAFTA sets out the obligations of NAFTA Parties to provide a certain standard of treatment to the investors of another Party. Section A includes the obligation to grant national treatment to investors⁴⁶ and to provide treatment in accordance with international law.⁴⁷ NAFTA Article 1502(3)(a) requires Canada to ensure NAFTA inconsistent conduct is not undertaken by its government monopoly, Canada Post. The exact scope or ambit of those provisions is something that can only be determined once the evidence has been heard, the scope of “international law” delineated, and the facts found. Only then is it possible to ask the question whether the requisite threshold - whatever that turns out to be - has been met.

66. Yet, on this motion, Canada attempts to argue that the Tribunal should, in the abstract, determine that the Investor’s claims do not fall within the ambit of NAFTA Article 1105, all without ever considering the underlying conduct which the Investor says violates that Article. The Tribunal ought not to be drawn into a determination of the highly fact dependant merits of the dispute, under the guise of defining, without evidence, the scope of Canada’s obligation to the Investor under NAFTA Article 1105.

67. In any event, Canada concedes in paragraph 97 of its Memorial that the Tribunal has the jurisdiction to determine whether Canada’s conduct towards UPS violated the customary international law minimum standard of treatment of aliens under NAFTA Article 1105.

68. Regardless, the Investor submits that Canada has posed the wrong question. The real question is whether the conduct of Canada and Canada Post has violated the provisions of any of NAFTA Articles 1102, 1105, 1502(3) or 1503(2). Canada’s remaining submissions constitute

⁴⁶ NAFTA Article 1102.

⁴⁷ NAFTA Article 1105.

nothing more than an attempt to engage the Tribunal in prejudging the merits of the dispute. It ought not to do so.

69. However, in the event the Tribunal considers it necessary to deal with these submissions, the Investor makes the following observations.

(a) Overview of Canada's Argument on the Interpretation of Article 1105

70. Canada's argument, at paragraphs 88 through 105 of its Memorial, seeks to have this Tribunal define what NAFTA Article 1105 means. It does so by two main arguments. First, Canada urges the Tribunal to have regard to the "Note of Interpretation" issued by the Free Trade Commission on July 31, 2001 (and which is already under consideration by the NAFTA Tribunals in the *Pope & Talbot*, *Loewen* and *Methanex* claims) as establishing the applicable law that the Tribunal ought to apply. However, even if that Note of Interpretation identifies the law the Tribunal is to apply, (which the Investor does not accept), that does not assist Canada on this motion, because the Note of Interpretation does not define what is meant or encompassed today within "the customary international law minimum standard of treatment of aliens". Nor is it remotely possible to assess whether the Investor has been accorded "fair and equitable treatment", (whatever that term is ultimately determined to mean) in the absence of the evidence to be produced during the merits phase.

71. Second, Canada attempts to articulate the content of the term of art "international law" in NAFTA Article 1105 and the "customary international law minimum standard of treatment" referred to in the Note of Interpretation, by relying upon various authorities from a different context and a different era. Canada's view is inconsistent with the interpretive principles the Tribunal is bound to apply and has been soundly rejected by earlier NAFTA Tribunals.

72. In that regard, at paragraph 96 of its submission, Canada relies upon the *Neer* and *Chattin* decisions of the Mexico - US General Claims Commission, as establishing that NAFTA Article 1105 requires treatment that amounts to:

... an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable person would readily recognize its insufficiency.⁴⁸

It is submitted that even if this is the correct standard to apply (and the Investor submits it simply cannot be), it is impossible to assess the sufficiency of government action in the abstract. It is only possible to make such a determination based on a detailed analysis of the evidence to be submitted in support of the claim.

(b) NAFTA Chapter 11 Tribunals have Previously Rejected Canada’s Restrictive Interpretation of NAFTA Article 1105

73. Three NAFTA Chapter 11 Tribunals, rendering awards considering the scope and content of NAFTA Article 1105 have rejected Canada’s approach. For instance, in the *Metalclad v. Mexico* arbitration, the Tribunal held Mexico had not met the NAFTA Article 1105 standard through conduct that included:

- a) the denial of the right to a fair hearing;⁴⁹
- b) lack of sufficient evidence on the record;⁵⁰
- c) breach of legitimate expectations;⁵¹
- d) absence of transparency rules and processes;⁵²
- e) acting on the basis or irrelevant considerations;⁵³ and

⁴⁸ Canada’s Memorial (Jurisdiction Phase) at para. 96, citing *Neer v. Mexico*, *Chattin v. Mexico* and the domestic judicial review decision in *Mexico v. Metalclad Corp.* As noted by Canada, the NAFTA Tribunal’s ruling that Mexico had breached NAFTA Article 1105 due to a lack of transparency was not agreed with by the British Columbia Supreme Court, although the Tribunal’s award was substantially upheld in the result. There was no appeal to the British Columbia Court of Appeal. The Investor submits that the decision of the British Columbia court of first instance is of no assistance to this Tribunal, as the Tribunal is bound, by NAFTA Article 1131 to “decide the issues in dispute in accordance with this Agreement and applicable rules of international law”, and not in accordance with municipal law.

⁴⁹ *Metalclad* at para. 51.

⁵⁰ *Metalclad* at paras. 51 and 88.

⁵¹ *Metalclad* at para. 80.

⁵² *Metalclad* at para. 88.

⁵³ *Metalclad* at para. 92.

f) acting beyond the scope of lawful authority.⁵⁴

74. In the *S.D. Myers* claim, the NAFTA Chapter 11 Tribunal found that a violation of Article 1105 had occurred. The conduct that was found to have violated NAFTA Article 1105 involved the adoption, by Canada, of a ban on the exportation of PCB wastes to the United States for destruction. The policy adopted by Canada followed a vigorous internal government debate, but was ultimately adopted because of the Government's clear desire to protect and promote the market share of Canadian competitors of S.D. Myers. Neither the facts of the case, nor the reasoning of the S.D. Myers Tribunal in its Partial Award, offer any support for the proposition that egregious or outrageous conduct is required to support a breach of NAFTA Article 1105. In fact, the Tribunal's focus on the language of NAFTA Article 1105 expressing an "overall concept" that must be "read as a whole," and its recognition that a breach of a rule of international law intended to protect investors will weigh in favour of finding a breach of NAFTA Article 1105 support the contrary conclusion.⁵⁵

75. And, finally, in the *Pope & Talbot* Chapter 11 arbitration, the Tribunal explicitly rejected the same argument advanced here, and concluded that the requirements of NAFTA Article 1105 imposed upon NAFTA parties the obligation to apply the "fairness elements under the ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be 'egregious', 'outrageous' or 'shocking'".⁵⁶

76. Accordingly, it cannot be correct that an act of outrage is a necessary precondition for a finding of a violation of a NAFTA Party's obligations under NAFTA Article 1105, even if one accepted the Free Trade Commission's interpretation as valid.

⁵⁴ *Metalclad* at paras. 86 and 95.

⁵⁵ *S.D. Myers*, Partial Award, particularly at paras. 262, 264 and 265

⁵⁶ *Pope & Talbot, Inc. and Canada, Award on the Merits of Phase 2*, April 10, 2001 at para. 118.

(c) Neer Test does not Define all Action Inconsistent with International Law

77. Moreover, the *Neer* test, as advocated by Canada, has not been considered to apply to the complete range of governmental acts which are inconsistent with international law. The *Neer* claim is about a particular type of act inconsistent with a State's international law obligation regarding the sufficiency of the judicial process. At no time did the US-Mexican Claims Tribunal find that the high threshold of the "*Neer* test" should be applied to all breaches of international law – indeed the terms of the decision itself are restricted to only dealing with the issue of denial of justice and not any other international law issues.⁵⁷ The US-Mexican Claims Tribunal referred to the *Neer* standard in only three other cases. In each of them, it was made clear that the standard was being applied only in situations involving allegations of denial of justice.⁵⁸

(d) Customary International Law has Evolved since 1926

78. Further, even if the "*Neer* test" may be a statement upon the extent of the customary international law as it was in 1926, it does not reflect the many developments in international economic law which have taken place since it was decided.

79. There have been many significant developments in international economic law since *Neer* was decided. The advent of the United Nations system and the Bretton Woods Agreements (which created institutions such as the IMF and the World Bank) have increased the level of treatment that states accord foreign investors. Multilateral and plurilateral agreements such as

⁵⁷ *American Journal of International Law* 555 (1927) at 556 (esp. para. 4). It is also important to note that the American judge on the Tribunal dissented from the high threshold test for the finding of a denial of justice in the *Neer* claim.

⁵⁸ *Walter Faulkner v. Mexico* (1928) IV RIAA 67 at 71 (regarding arrest and imprisonment); *B.E. Chattin v. Mexico* (1927) IV RIAA 282 (regarding denial of justice and illegal arrest.); and *Gertrude Massey v. Mexico* (1927) IV RIAA 155 at 160. (Especially see paragraph 21 which specifically indicates the narrow circumstances in which the US-Mexican Claims Tribunal used the *Neer* test.).

the WTO/GATT have had the significant effect of increasing legal and economic security, and hence the level of protection offered to foreign investors operating in other states.

80. Agreements such as the NAFTA itself have significantly increased the types of international protections accorded to international investors and their investments. While the *Neer* decision may have been important in its time, that time was before these international economic developments. It therefore cannot reasonably be said to constitute an authoritative statement on the treatment of required of investors and investments as international law has evolved today. Indeed, as described in further detail above, an application of the applicable rules of interpretation would suggest that it could not be.

81. The Tribunal is mandated to interpret the NAFTA in accordance with its objectives and purposes. The NAFTA's context includes the Parties resolve to "ENSURE a predictable commercial framework for business planning and investment"⁵⁹, "increase substantially investment opportunities in th[eir] territories", and "create effective procedures for ... the resolution of disputes."⁶⁰

82. In Canada's NAFTA *Statement on Implementation*⁶¹, published in 1994, the Government of Canada reasserted its support of a rules-based system of international law. From Canada's perspective, the Government's aim must be to:

... broaden the scope of rules-based international trade and investment and increase the opportunities for Canadian traders and investors around the world
.... We must trade in order to prosper, and in order to trade we need an international trading system that is fair and open.⁶²

⁵⁹ NAFTA Preamble.

⁶⁰ NAFTA Article 102(1)(c) and (e).

⁶¹ Canadian *Statement on Implementation*, Canada Gazette, Part I, January 1, 1994, 68.

⁶² At 69, 71.

83. Part of the benefit of the Canadian approach to international trade and investment, articulated outside the context of its defence to this NAFTA claim, is that it provides stability and predictability for business. As Canada's *NAFTA Statement on Implementation* acknowledges:⁶³

For the business sector, Canadian tradecraft involves establishing a more stable and more predictable economic climate at home and abroad. It recognizes that business thrives in an orderly setting and stagnates when there is sudden and unpredictable change. Only by having a set of rules which treat all traders the same, which are widely known and uniformly applied and which provide for the orderly and equitable resolution of disputes will entrepreneurs have the confidence to compete, invest in the future and look beyond their own shores. And only if we can have a business sector that has confidence about its future can we expect it to invest, innovate and generate jobs with a future.

84. Canada's restrictive interpretation of NAFTA Article 1105 is not only contrary to the way in which international law has evolved since 1926, but is also contrary to Canadian "tradecraft" and its stated policy in favour of a rules based system governing international trade and investment. Its approach ought not to be accepted.

(e) Interpretation of NAFTA Article 1105 can only be dealt with at the Merits Phase

85. In any event, the Investor submits that these issues relating to the scope, content and interpretation of NAFTA Article 1105 can only be dealt with during the merits phase of the arbitration. To properly interpret this provision it must be considered in light of the facts of the case and any evidence of custom or international law principles lead by the parties⁶⁴. NAFTA Tribunals have determined issues regarding the scope, content and interpretation of NAFTA Article 1105 only in light of the specific findings of facts in the particular claim.⁶⁵

⁶³ Canadian *Statement on Implementation*, Canada Gazette, Part I, January 1, 1994, 68 at 72.

⁶⁴ Even if, as Canada argues, it was correct that the NAFTA Article 1105 standard is the "egregious" standard, this surely supports the Investor's argument that this Tribunal must have the full evidence before it to be able to apply that standard. It is not appropriate to make a final determination at this early stage as to what the standard is or how it is to be applied.

⁶⁵ In para. 263 of the *S.D. Myers* Partial Award, the NAFTA Tribunal was careful to stress how it must consider treatment in accordance with international law against the elements of Canada's specific regulatory regime. In the *Pope & Talbot, Inc. and Canada* Award on the Merits of Phase

D. Reply to Canada's Submission on the Relationship between NAFTA Article 1502(3)(a) and Chapter 11 obligations

86. The Investor has pleaded in its Amended Statement of Claim that Canada, either directly or through its delegated monopoly, Canada Post, has breached its obligations to UPS under NAFTA Article 1105. The Investor has also pleaded that Canada has breached its obligation under NAFTA Article 1502(3)(a) to ensure that Canada Post, as a government monopoly, does not act in a way inconsistent with Canada's obligations under the NAFTA, and under NAFTA Article 1503(2) to ensure that Canada Post, as a state enterprise, acts consistently with Canada's NAFTA Chapter 11 obligations.

87. Canada asserts that it is possible, without evidence, for this Tribunal to determine that Canada Post has not acted inconsistently with Canada's obligations under the NAFTA, in part because (1) Canada Post was not exercising any delegated regulatory, administrative or governmental authority, and, (2) arbitrable claims under NAFTA Article 1502(3)(a) are limited to those pertaining to a breach of Section A of Chapter 11. Canada makes this latter point despite the fact that the obligation under NAFTA Article 1502(3)(a) is for the State to *ensure* that the government monopoly acts consistently with Canada's obligations under the *Agreement*, and not just those under Section A of Chapter 11.

88. For the reasons outlined below, it is submitted that any consideration of these issues ought to be deferred to the Merits phase of this proceeding. However, if the Tribunal finds it necessary to consider them here, then the Investor's submission is that Canada's arguments cannot be maintained.

2, at paras. 119-185, the NAFTA Tribunal tested the fair and equitable treatment standard against its specific findings of facts on the various aspects of Canada's implementation and administration of its softwood lumber export control regime.

(a) Reply to Submission that Canada Post is not exercising Delegated Regulatory, Administrative or Other Governmental Authority

89. At paragraphs 80 through 86 of its Memorial, Canada advances the argument that Canada Post is not exercising “Delegated Regulatory, Administrative or Other Governmental Authority”, and accordingly, the Investor is not entitled to advance this claim under Articles 1502(3)(a) or 1503(2) of the NAFTA. It does so by narrowly construing the phrase “governmental authority”, present in both articles, even though it is not defined in the NAFTA. Any decision on this issue should only be made at the merits phase of this proceeding.

90. The relevant allegations from the Amended Statement of Claim, which are admitted to be true for the purposes of this motion, are contained in paragraphs 1 through 3:

1. Canada Post Corporation (“Canada Post”) is a Crown Corporation established on October 16, 1981 under the Canada Post Corporation Act (the “CPC Act”). Pursuant to the CPC Act, Canada Post is an “agent of Her Majesty in right of Canada” and an “institution of the Government of Canada”.
2. Canada Post has been delegated by Canada the “exclusive privilege” of collecting, transmitting and delivering first class mail and addressed admail in Canada (the “Postal Monopoly”), and has the power to make regulations including with respect to rates of postage and the definition of letters. **Canada Post exercises delegated government authority in operating the Postal Monopoly and its related businesses.**
3. Canada Post is a government monopoly and state enterprise designated or maintained by Canada within the meaning of NAFTA chapter 15.

91. Accordingly, for the purposes of this motion, the Tribunal must proceed on the basis of the admitted fact that Canada Post indeed does exercise delegated government authority in operating the Postal Monopoly and its related business. On that basis, it is not open to Canada at the jurisdictional level to challenge that proposition, and the Tribunal need proceed no further.

92. Furthermore, the actual determination of whether Canada Post exercises ‘governmental authority’ is fact dependant. A review of all relevant documents, such as inter-departmental

government agreements like the *Postal Imports Agreements* referred to in the Amended Statement of Claim must precede any such determination.

93. If, however, the Tribunal is prepared to consider the merits of this issue at the jurisdiction phase, then it is also apparent that Canada's analysis cannot be sustained. Canada relies upon no authority for the proposition that the phrase "governmental authority" ought to be construed as narrowly as it urges. Instead, Canada argues that the Investor has not, and "could not", identify any exercise of delegated "regulatory, administrative or other governmental authority" (referred more generally as "governmental authority") as required under NAFTA Articles 1502(3)(a) and 1503(2).⁶⁶

94. Canada contents itself to distinguish between what it terms the "regulatory and supervisory functions of government" and "commercial activities," and concludes that Article 1502(3)(a) does not apply to the actual "conduct" of the monopoly or state enterprise at issue if that conduct is a commercial activity.⁶⁷ That, of course, begs the evidential question of what "commercial activity" is, and whether and to what extent an "agent of the Crown" that is an "institution of government" exercising a statutory monopoly to achieve defined governmental objectives can operate immune from the obligations under NAFTA. An interpretation that essentially shields government activity from state responsibility simply because it is performed by a designated monopoly or state enterprise (and is thus transformed into "commercial activity") would be wholly inconsistent with the purpose of NAFTA Articles 1502(3)(a) and 1503(2).

95. On the facts pleaded, Canada Post is a wholly-owned crown corporation of the Canadian federal government⁶⁸ and has been delegated Canada's postal service monopoly under the

⁶⁶ Canada's Memorial (Jurisdiction Phase) at para. 80-86.

⁶⁷ Canada's Memorial (Jurisdiction Phase) at para. 84.

⁶⁸ See *Financial Administration Act (Canada)* R.S.C. 1985, c. F-10 ("FAA"), section 83(1), the definitions section, regarding how Canadian law defines a "crown corporation". Section 6(2) of the *Canada Post Corporation Act* R.S.C. 1985, c. C-54 ("CPCA") provides that all the Directors of Canada Post are appointed by the Minister with the approval of the Governor in Council,

Canada Post Corporation Act and regulations.⁶⁹ It was, until recently, a “department” of government. Furthermore, governmental postal monopolies have a long history as integral elements of the state, both in Canada and abroad. The question for the merits phase is whether Canada Post can truly be characterized as a commercial enterprise as opposed to an integral part of government? Obviously that question cannot be addressed without an examination of the role, mandate and operations of Canada Post, and their relationship to the anti-competitive conduct in issue. Canada has no basis for asserting that Canada Post is carrying out purely commercial operations and is not exercising governmental authority.

(b) International jurisprudence does not support Canada

96. Canada’s argument concerning the term “governmental authority” confuses and misstates the relationship between NAFTA Article 1502(3)(a) and the principles of state responsibility in customary international law.

97. Under those principles, a state is responsible for all of the internationally wrongful acts of its organs. NAFTA Article 105⁷⁰ incorporates, in this respect, that customary international law. NAFTA Article 1502(3)(a) merely reinforces these principles in respect of monopolies, by making it an additional and independent obligation under NAFTA for a Party to take prior action to prevent a private or government monopoly from acting in violation of the NAFTA, where it is exercising delegated regulatory, administrative or other governmental authority.

therefore meeting the definition of “parent crown corporation” as “wholly owned directly by the Crown” as defined in section 83(2)(b) of the FAA.

⁶⁹ See section 14(1)

⁷⁰ NAFTA Article 105 provides:

“The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.”

98. Under the customary international law of state responsibility, a state is also responsible for any internationally wrongful act by an agent that is exercising delegated governmental authority. Thus, were a private or public monopoly exercising such delegated authority and acted in a manner contrary to NAFTA, the Canadian state would be responsible, even if NAFTA Article 1502(3)(a) did not exist. However, by virtue of NAFTA Article 1502(3)(a), the Canadian state may also be responsible for an additional violation of NAFTA, namely, for not having taken prior regulatory control, administrative supervision, or other measures to ensure that the monopoly did not act inconsistently with the other provisions of NAFTA.

99. Indeed, under the principles of state responsibility in customary international law, a state is responsible for the acts of all its organs, regardless of whether there is an explicit delegation of a particular kind of governmental authority to that organ. Thus, according to Article 4 of the International Law Commission Draft Articles on Responsibility for Internationally Wrongful Acts, state responsibility applies to all organs whether they exercise “legislative, executive, judicial *or any other function*” (emphasis added). As the Commentaries to the draft articles adopted by the ILC in 2001 note: “It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as “commercial”...”⁷¹

100. It is the Investor’s claim that facts concerning Canada Post’s origins, status under Canadian law, organizational structure and accountability, all will establish that Canada Post is an organ of the Canadian state. Indeed, the relevant legislation purports to create Canada Post as “an institution of the government of Canada.” Thus, as a matter of state responsibility in international law, the Canadian state is responsible for any conduct of Canada Post that violates the operative provisions of NAFTA Chapter 11. This will be the case whatever the function Canada Post is exercising, whether labelled “commercial”, “regulatory” or otherwise.

⁷¹ Commentary to Article 4 of the ILC Draft Articles, para. 6.

101. In addition, the Investor is also claiming that Canada has not met its obligation in NAFTA Article 1502(3)(a) to take pro-active measures to ensure that Canada Post conducts itself in accordance with all the provisions of the NAFTA. This is a claim additional to the claim that provisions of Chapter 11 itself have been violated, and the Investor admits that this claim does depend on Canada Post exercising delegated regulatory, administrative or other governmental authority. The concept of “governmental authority” as used in NAFTA Article 1502(3)(a), however, must be interpreted, absent any explicit deviation required by the terms of the NAFTA, in accordance with the customary international law of state responsibility.

102. Under Article 5 of the Draft ILC Articles, which are the most authoritative statement of the relevant customary law, state responsibility applies even to an entity which is not an organ of the state but which is empowered by the law of the state to exercise elements of governmental authority. According to the Commentaries to the Draft Articles, “Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.”⁷²

103. Applying these criteria to the facts alleged by the Investor concerning the history and evolution of the post office function in Canada, it is obvious that even if Canada Post were not an organ of the Canadian state, it would nevertheless attract state responsibility as an entity that exercises “governmental authority” conferred by law. Canada Post is accountable to the government and to the Parliament of Canada; the powers it exercises, and particularly its authority to use government property in the operation of a postal monopoly, derive solely from an explicit grant of authority under statute. Thus, there is no question that Canada Post exercises “governmental authority” of the kind relevant to state responsibility under NAFTA Article 1502(3)(a).

⁷²

Commentary to Article 5, para. 6.

104. The acts and omissions of Canada Post alleged by the Investor arise directly from the “governmental authority” conferred by Canada Post to operate a postal monopoly, and especially the authority to determine the terms and conditions on which competing providers of non-monopoly services may have access to the monopoly infrastructure, a public good, for the purposes of delivering non-monopoly products. This is a question of public policy, and is widely understood to be a matter for competition and other related laws, regulations and policies.⁷³ Moreover, as a recent study of the Organization of Economic Cooperation and Development⁷⁴ notes, in Canada “the monopoly or “reserved area” is...enforced...by the postal incumbent.”⁷⁵

105. Accordingly, Canada’s attempt to narrowly circumscribe the scope of state responsibility assumed by Canada under NAFTA Articles 1502(3)(a) and 1503(2) must be rejected.

(c) Definition of “Measure” does not support a Restrictive Interpretation of Governmental Authority

106. One of the requirements of bringing a NAFTA Chapter 11 claim is that there must be a measure relating to investors and investments. Under NAFTA Article 201, a “measure” includes “any law, regulation, procedure, requirement or practice.” This definition clearly covers a broad range of governmental activity, and, by including “practice”, focusses clearly on “conduct”. Since governments are responsible for a measure that breaches NAFTA Chapter 11, anything that

⁷³ OECD, Draft Council Regulation Concerning Structural Separation in Regulated Industries, 5 April 2001.

⁷⁴ OECD, Directorate 101 For Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, Promoting Competition in Postal Services, DAFPE/CLP (99) 22.

⁷⁵ The jurisprudence and practice of other trade agreements, such as the WTO treaties, confirms the understanding of state responsibility discussed above. For instance, in the recent Brazil-Canada Aircraft dispute, it was not contested that the Export Development Corporation was a “public body” that attracted state responsibility, regardless of the apparently “commercial functions” of the EDC. (See: *Canada - Measures Affecting the Export of Civil Aircraft* - Report of the Panel, WT/DS70/R, April 14, 1999, at para. 9.160). See also: *Canada - Measures Affecting The Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, October 13, 1999, at paras. 93-94, 7.78, 100; *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, March 31, 1998 at para.10.328. This issue was addressed before the Iran-US Claims Tribunal in *Hyatt International Corporation v. Iran*, 9 Iran-US Rep. at 88.

can be characterized as a measure (ie. a practice) for which an Investor is entitled to advance a claim, is by definition the exercise of governmental authority. To the extent that Canada Post engages in practices that Canada would not be permitted to engage in if it were operating Canada Post as a department of government, then that conduct would amount to an exercise of governmental authority and ought equally to be sanctioned when carried out by a government monopoly or state enterprise.

(d) Conclusion

107. Canada cannot evade its obligations under NAFTA Chapter 11 and 15 with the blanket assertion that the acts complained of by the Investor are beyond the purview of this Tribunal simply because they are not the exercise of delegated governmental authority. The law of state responsibility simply does not allow such an approach. Canada Post is a crown corporation that is wholly owned by the Government of Canada and regulated by the *Canada Post Corporation Act*, an Act of the Parliament of Canada. Canada Post's use of the monopoly infrastructure, which has been established and maintained as part of its delegated governmental authority to deliver mail, is being leveraged for the benefit of its non-monopoly products. Canada Post is using its delegated statutory monopoly to engage in a campaign of anti-competitive activities to harm companies such as the Investor and its Investment. Such activity cannot be free from obligations under NAFTA Chapters 11 and 15 simply because, without any evidence on the point, Canada declares that these activities are "commercial."

108. Accordingly, it is the Investor's submission that Canada has attempted to too narrowly circumscribe the words used in NAFTA Articles 1502(3)(a) and 1503(2), and that Canada cannot avoid liability for the acts of its own enterprise, whether directly under the principles of state responsibility, or by application of NAFTA Articles 1502(3)(a) or 1503(2).

E. Article 1502(3)(a) extends to all obligations under the Agreement

109. Canada asserts that the Investor is only entitled to claim under NAFTA Articles 1116 and 1502(3)(a) when the conduct in issue is also a breach of an obligation under Section A of Chapter

11. There are two reasons why this analysis is unsustainable, and why, provided that an Investor is able to establish any breach of Section A of Chapter 11, the Investor is entitled to advance a claim for breaches of other provisions of the NAFTA.

110. First, if the Drafters of the NAFTA had intended to exclude certain claims from the scope of those that could be advanced under NAFTA Article 1502(3)(a), then that Article would have been drafted differently. If a narrow obligation was intended, NAFTA Article 1502(3) would not have imposed an obligation to ensure that the government monopoly “acts in a manner that is not inconsistent with the Party’s obligations *under this Agreement*”. The Drafters, had they intended more narrow coverage, would have specifically identified those obligations with which the Party was obliged to ensure the government monopoly complied.

111. Indeed, there are a number of drafting techniques that could have been used had a more narrow obligation been intended. For instance, the NAFTA includes many provisions that explicitly provide for the exception of other parts of the NAFTA, as well as provisions for clarifying the relationship between different provisions. Limitations could have been included under NAFTA Article 1108, which sets out reservations and exceptions to Chapter 11 provisions. An exception could have been included that, for the purpose of disputes under NAFTA Chapter 11, all breaches under NAFTA Article 1502(3)(a) are restricted to NAFTA Chapter 11 obligations.

112. NAFTA Article 1101(3) is an example in of an explicit limiting of the application of another chapter of the NAFTA, in that case NAFTA Chapter 14. NAFTA Article 1401 on “scope and coverage” is an example of how the drafters of the NAFTA explicitly carved out the application of provisions in NAFTA Chapter 11. There is no such limit to the scope and coverage of NAFTA Chapter 11 in NAFTA Chapter 15.

113. Second, there is a very strong textual indicator that an Investor may advance a claim under NAFTA Articles 1116 and 1502(3)(a) for breaches of provisions of the NAFTA other than

those contained within Section A of Chapter 11. In particular, Note 43, annexed to the NAFTA in section “N” provides, in relation to NAFTA Article 1501:⁷⁶

... no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article.

114. The existence of Note 43 requires the Tribunal to consider why it was drafted and why it forms part of the NAFTA. The Drafters obviously considered it important to explicitly exclude the application of the investor-state arbitration provisions of NAFTA Chapter 11 to potential claims under NAFTA Article 1501. One can conclude that had they not done so, NAFTA Article 1501 would otherwise have been actionable under NAFTA Chapter 11.

115. If it were necessary to explicitly exclude investor-state relief for claims potentially arising under NAFTA Article 1501, it presumably ought to have also been necessary to explicitly exclude investor-state relief for other claims potentially arising under Chapter 15 of NAFTA. Yet, there is no such corresponding exclusion.

116. NAFTA Note 43 would then only make sense if the NAFTA is to be interpreted to permit a NAFTA claim under NAFTA Article 1502(3)(a) for a measure that breaches the requirements of this provision and another part of the NAFTA Agreement - such as NAFTA Article 1502(3)(d). Only in this circumstance would there be any need for the drafters of the NAFTA to issue Note 43.

117. Thus, this Tribunal must accordingly reject Canada's argument that NAFTA Articles 1116(1)(b) limits the meaning of NAFTA Article 1502(3)(a) as such an interpretation would result in an absurd result and would violate the international law rule of effectiveness. Moreover, by failing to account for the architecture of the NAFTA to address exceptions and clarifications of the relationships of provisions, Canada's interpretation is fundamentally flawed.

⁷⁶ NAFTA Article 1501 provides that NAFTA Parties can adopt and maintain their own competition laws. In the Canadian *NAFTA Statement on Implementation*, at 219, it is reiterated that NAFTA Article 2201 “confirms that annexes, appendices and schedules constitute and integral part of the Agreement.”

F. Taxation Measures

118. At paragraphs 7, 105 and 106 of its Memorial, Canada argues that this Tribunal ought to strike paragraph 33(a) of the Amended Statement of Claim, because it is a “taxation measure” exempted from the scope of NAFTA Article 1105 by Article 2103.⁷⁷

119. Paragraph 33(a) provides:

33. Further, Canada is obligated under NAFTA Article 1105 to accord to UPS Canada treatment in accordance with international law, including fair and equitable treatment. Pursuant to NAFTA Article 1105, Canada is obligated to:
- (a) enforce Canadian laws such as in respect of the collection of goods and services tax and customs duties, as alleged herein, when Canada knows or should know that by not enforcing the laws it provides Canada Post with a competitive advantage over its competitors in the Non Monopoly Postal Services Market...

120. Other allegations made in the Amended Statement of Claim concerning the failure to enforce Canadian laws in respect of the collection of goods and services tax and customs duties are referenced in paragraph 33(a), including, for example, paragraph 17:

- 17 Further, Canada has failed to accord UPS and its investment national treatment by either directly or through Canada Customs, failing or neglecting to ensure that Canada Post charges duties and taxes to Canadian importers on packages imported by Canada Post through the postal system for which duties and taxes are payable and has allowed large volumes of packages to be imported into Canada without the collection of such duties and taxes. Where packages are imported by UPS Canada, duties and taxes are appropriately collected. As a result of the differential treatment, Canada Post receives a competitive advantage over UPS Canada, to the detriment of UPS Canada.

121. NAFTA Article 2103(1) provides:

Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

⁷⁷

Note that Canada does not challenge the Investor’s claim under NAFTA Article 1102 with respect to the Goods and Services Tax referred to in paragraph 16(c) of the Amended Statement of Claim.

122. NAFTA Article 2103(4)(b) provides:

Articles 1102 and 1103 (Investment - National Treatment and Most -Favored Nation Treatment), Articles 1202 and 1203 (Cross-Border Trade in Services - National Treatment and Most-Favored Nation Treatment) and Articles 1405 and 1406 (Financial Services - National Treatment and Most-Favored Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains, or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generation skipping transfers and those taxes listed in paragraph 1 of Annex 2103.4.

123. Canada misconstrues the Investor's claim. The Investor's allegation does not challenge a taxation measure itself, the Goods and Services Tax or Canadian Customs duties, which by virtue of the provisions of NAFTA Article 2103(4)(b) it could have done on the basis of NAFTA Articles 1102 or Article 1103. What the investor challenges is the failure of Canada to apply its laws and ensure such tax and customs duties are collected on packages imported through Canada Post, as it does on imports through the Investment. That differential in enforcement of its taxation measures is, it is submitted, a violation of the obligation to accord treatment in accordance with international law, including fair and equitable treatment, as required under Article 1105. That is what the Investor has pleaded, and accordingly, the Tribunal has, and must exercise, its jurisdiction.

G. Publications Assistance Program

(a) Canada's Challenge

124. Canada challenges paragraph 18 of the Amended Statement of Claim on the basis that the Publications Assistance Program "is a measure with respect to cultural industries and therefore not subject to NAFTA obligations including those of Chapter 11."⁷⁸ Canada relies upon the NAFTA Cultural Industries exception (Article 2106 and Annex 2106), and, secondarily, upon the subsidies National Treatment exemption contained in Article 1108(7).⁷⁹

⁷⁸ Canada's Memorial (Jurisdiction Phase) at para. 107.

⁷⁹ Canada's Memorial (Jurisdiction Phase) at para. 118.

(b) Relevant Facts

125. Paragraph 18 reads as follows:

18. Canada has further failed to accord UPS and its investment national treatment in accordance with NAFTA Article 1102, by designing and implementing a Publications Assistance Program, intended to subsidize the Canadian magazine industry, in such a way as to provide financial assistance to the Canadian magazine industry, but only on the condition that any magazines benefiting from that financial assistance are distributed through Canada Post, and not through companies such as UPS Canada.

126. For the purposes of this motion, those facts must be accepted as true. Further, the Tribunal has no other information concerning the design or operation of the Publications Assistance Program upon which to make a jurisdictional determination.

(c) The Cultural Industries Exception

127. The NAFTA mandates that measures relating to cultural industries are covered by the cultural industries exemption of the earlier Canada - US Free Trade Agreement. NAFTA Annex 2106 provides:

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*. The rights and obligations between Canada and any other party with respect to such measures shall be identical to those applying between Canada and the United States.

128. Article 2005 of the *Canada-United States Free Trade Agreement* provides:

1. Cultural industries are exempt from the provisions of this agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.
2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

129. Article 2012 of the *Canada-United States Free Trade Agreement* defines cultural industries as an enterprise engaged in:

The publication, distribution, or sale of books, magazine, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.

130. Article 2012 of the *Canada-United States Free Trade Agreement* does not provide that the *delivery* of books, magazines, periodicals or newspapers is a cultural industry. Rather, “distribution”, as used in Article 2012, following “publication”, but preceding “sale”, contemplates something akin to wholesaling, but cannot be construed as including the commercial or industrial process of door to door delivery of magazines to subscribers. Indeed, by the exception in respect of “printing or typesetting”, it is apparent that the cultural industries exception was not intended to apply to such an industrial process. To argue that Canada Post is a cultural industry when it delivers magazines, newspapers, or books, which do not form part of Canada Post’s monopoly, but not when it delivers mail, packages or other goods, takes the cultural industries exemption far beyond any intended scope and well beyond any reasonable intention that could be ascribed to the Parties. On the basis of the argument advanced by Canada, the daily newspaper carrier and a mail carrier would both be engaged in “cultural industries”.

131. Such an interpretation strains common sense. A mail carrier is as much engaged in a cultural industry when delivering magazines as part of a mail delivery route, as a wall or billboard is when covered with a poster or advertisement for a new play or musical. The mere fact magazines are carried through the mail does not convert the mail delivery system into a cultural industry or protect Canada from claims outside of cultural industries for the effects of their measures.

132. The cultural industries exemption is, presumably, intended for the protection of Canadian cultural industries. It is not a tool by which the Canadian Government can indirectly harm Investments of Investors of another party that are not cultural industries.

133. In any event, it is respectfully submitted that the Tribunal does not have the facts before it sufficient to make a determination that Canada Post is a cultural industry in respect of its delivery of periodicals. The particulars of the program, its scope and extent, its genesis, and its impacts and effects are all matters for evidence on the merits phase of this proceeding.

134. If Canada wishes to assert either that Canada Post is itself a cultural industry, or that it is entitled to rely on the discriminatory ancillary benefits of a measure maintained with respect to cultural industries, then the appropriate place at which to do so is the merits phase of the proceeding, with full evidence concerning the program, rather than Canada's attempt to give evidence through its Memorial.

(d) The Subsidy Exemption

135. Canada's alternate argument is that NAFTA Article 1108(7) exempts the Publications Assistance Program from claims under Article 1102 of the NAFTA⁸⁰. The sole basis for this argument appears to be the text of Article 1108(7), which provides:

7. Articles 1102, 1103 and 1107 do not apply to:
 - (b) Subsidies or grants provided by a Party or a state enterprise including government supported loans, guarantees and insurance.

136. The proposition which Canada asserts is that, because the claim made by UPS has some connection to a subsidy, it is thereby barred by virtue of this Article. But that again misconceives the Investor's claim. The Investor in no way is alleging that Canada is not permitted to subsidize the Canadian magazine industry at the expense of the foreign magazine industry. The Investor's submission is that Canada cannot design a subsidy program to benefit one industry (magazines), but design it in such a way that its implementation discriminates against foreign investments in a different industry. It is not permitted to do indirectly (ie. design a subsidy program in such a way as to result in discriminatory treatment as between Canadian and foreign enterprises who are not

⁸⁰ Canada's Memorial (Jurisdiction Phase) at paras. 118-123.

beneficiaries of the program), that which it cannot do directly (ie. discriminate against foreign investors outside of the provision of subsidies). Accordingly, this is a matter that ought properly to be addressed at the merits phase of the proceeding.

H. The Statement of Claim complies with the UNCITRAL Arbitration Rules

137. Canada, at paragraphs 124 through 155 of its Memorial, has argued that the Investor has failed to meet the minimum requirements for a pleading under the UNCITRAL Arbitration Rules, and in particular that it has not “established” certain conditions precedent required by NAFTA Chapter 11. As a result, Canada asserts that this Tribunal does not have the jurisdiction to adjudicate all or part of the Investor’s claim. Canada asserts that the Investor was required to and has failed to establish *prima facie* that:

- (1) the Investor’s non-Canadian “U.S. Subsidiaries” are “investments” as required under NAFTA Chapter 11; and
- (2) it has incurred loss or damage by reason of, or arising out of, the alleged breaches as set out under NAFTA Article 1116(1).

The former argument is advanced on the basis of Canada’s assertion that “Chapter 11 only covers the “investment of an investor” in the territory of another party.

(a) The Tribunal has jurisdiction to adjudicate the Claim for Harm to the US Subsidiaries

138. To bring a claim, a claimant must be an investor of a Party. NAFTA Article 1139 defines an “investor of a Party” as a:

state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.

139. NAFTA Article 1139 defines an “investment” very broadly as including an “enterprise”, which is in turn defined as follows:

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

140. NAFTA Article 201 defines an “enterprise” as any:

entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

141. The Investor, United Parcel Service of America, Inc. is a corporation incorporated in the State of Delaware in the United States of America. It is the owner of 100% of the shares of UPS Canada Inc., a corporation incorporated in the Province of Ontario, Canada. The definition of “investment” includes an enterprise. United Parcel Service of America, Inc. is an investor in Canada through the ownership of its enterprise, United Parcel Service of Canada Ltd. In paragraph 7 of the Amended Statement of Claim, the Investor has specifically pleaded that the US Subsidiaries are Investments under Article 1139, and that must be taken as true for the purposes of this motion. In paragraphs 19 and 33, the Investor has alleged that it, the US Subsidiaries, and UPS Canada have all suffered harm as a result of Canada’s wrongful action. There is no ambiguity in the pleading.

142. The US Subsidiaries certainly are “enterprises” and therefore “investments” and to the extent they are operating directly in Canada, they would be “investments of investors of another Party in the territory of the Party” as required by NAFTA Article 1101(1)(b). But since it is clear from the wording of NAFTA Article 1116(1) that an investor may claim that it “...has incurred loss or damage by reason of, or arising out of” a NAFTA breach, to the extent that the US subsidiaries are part of the Investor (and damages from those subsidiaries flow to the Investor as a result of NAFTA breaches) damages related to those entities may equally be claimed.

143. The Investor accordingly submits that the extent to which the U.S. Subsidiaries will attract damages is a matter that should properly be left to later phases of the arbitration, to be addressed on proper evidence.

144. Canada, however, appears to be using this motion as an opportunity to assert that there is a territorial limitation to the coverage of NAFTA Chapter 11, or a territorial limitation respecting

the recovery of damages for a Chapter 11 breach. Neither proposition has merit, nor is it necessary to address such questions on this jurisdictional application.

145. And, in making that submission, Canada proceeds on the misapprehension that on a motion such as this UPS has an obligation to “establish”⁸¹ that its US Subsidiaries are investments of the Investor in Canada. There is no onus on the Investor to establish anything on this motion. The facts pleaded are taken as true.

146. Regardless, Canada has previously argued for a territorial limitation before other NAFTA Tribunals, despite that none appears in either NAFTA Article 1102 or 1105. That argument was soundly rejected by the *Ethyl* Tribunal during the jurisdiction phase of that arbitration:

Canada asserts that “Ethyl’s claim in respect of expropriation of its intellectual property, reputation, and goodwill throughout the world is not within the scope of NAFTA” since Article 1101(1)(b) applies Chapter 11 only to “investments of investors of another [NAFTA] Party *in the territory* of the Party,” and Article 1110, one of the three provisions alleged to have been breached by Canada, likewise addresses nationalizations or expropriations by a NAFTA Party of “an investment of an investor of another Party in its territory”.

A distinction must be made, however, between the locus of the Claimant’s breach and that of the damages suffered. It is beyond doubt that the MMT Act was adopted, and purports to have, and in fact has, legal force only in Canada. It bans MMT from importation into Canada and prevents its movement between provinces. Ethyl’s claim is premised on the legal force the MMT Act has in relation to its investment in Canada, *i.e.* Ethyl Canada.

Ethyl has argued, however, that the damages resulting to it in consequence of the MMT Act include losses suffered outside of Canada. As Ethyl itself succinctly notes (at Paragraph 97 of its Counter-Memorial on Jurisdiction), “the Investor [Ethyl] claims that an expropriation occurred inside Canada, but the Investor’s resulting losses were suffered both inside and outside Canada.”⁸²

The Tribunal determined it could not agree to the request of Canada to exclude any portion of the claim on the basis of territoriality.

⁸¹ Canada’s Memorial (Jurisdiction Phase) at para. 132.

⁸² *Ethyl Corporation and Canada*, Award on Jurisdiction, June 24, 1998 at para. 70-72.

147. Accordingly, the Tribunal ought either to decline to make any ruling in connection with this aspect of the Respondent's motion, or ought to dismiss it outright.

(b) Minimum Requirements of a Pleading

148. The Investor fundamentally disagrees with Canada's submission (at paragraphs 136 through 155 of its Memorial) that the Investor has not complied with the minimum pleadings requirements under Chapter 11 of the NAFTA and Article 18 of the UNCITRAL Arbitration Rules. Canada's assertions are neither supportable on the applicable legal principles, nor on the facts. Nor, indeed, is there any reasonable basis for granting the extreme remedy sought by Canada.

(c) Particularity of Pleading

149. The UNCITRAL Arbitration Rules grant a broad discretion over the proceedings to the arbitration tribunal. Article 15(1) embodies the two fundamental principles of procedure - flexibility and equality: a tribunal may proceed in whatever manner "it considers appropriate," so long as the "parties are treated with equality".⁸³

150. The requirements of a statement of claim are found in Article 18(2) of the UNCITRAL Arbitration Rules:

2. The statement of claim shall include the following particulars.
 - (a) The names and addresses of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

⁸³ The *Travaux Préparatoires* of the UNCITRAL Arbitration Rules demonstrate that the drafters' belief that "flexibility during the proceedings and reliance on the expertise of the arbitrators" are "two of the hallmarks of arbitration"; the drafters accordingly gave the arbitrators broad discretion: *Revised Draft Report*, Note on the *Travaux*, at 172.

151. The essential requirement of the statement of claim is that it be specific enough that the Respondent can reply adequately in the statement of defence. It does not require an exhaustive statement of the facts or the evidence supporting the claim:

[The Claimant] must include in his statement those particulars listed in subparagraph 1 of Article 18(2): ie., the name and addresses of the parties, a statement of the facts supporting the claim, the points at issue, and the relief or remedy sought. While mandatory, these elements need not be fully elaborated at the time the statement of claim is submitted. Thus, in place of the “full statement of facts and a summary of evidence supporting the facts” envisaged in the Preliminary Draft, a more general description of the alleged facts is sufficient at this stage. The requirement concerning the “points at issue” presupposes explication of the legal arguments “with adequate particularity”, *but does not necessitate a final elaboration of the legal theories supporting the claim*.⁸⁴ (Emphasis added)

152. Thus, while Article 18(2)(d) requires the claimant to identify the “points at issue”, that does not require that they be articulated in a precisely defined form. In fact, the practice has developed that such points in issue are often stated very generally.⁸⁵

153. The Iran-US Claims Tribunal adopted the UNCITRAL Arbitration Rules in their entirety and its decisions serve as a useful source of jurisprudence with respect to the Rules. In *Amoco Iran Oil Company v. The Islamic Republic of Iran*, the Iran-United States Claims Tribunal rejected a challenge to a statement of claim on an application for further particulars:⁸⁶

The Respondents in this case filed with the Tribunal on 14 February 1983 a request that the Claimant be required to provide more detailed explanation not only as to the amount of the claim but also as to the manner in which liability is alleged against both Respondents.

The Tribunal notes that the Statement of Claim contains forty pages of explanation dealing with the demand for arbitration (p. 1); the parties (p. 1 and

⁸⁴ Matti Pellonpää and David D. Caron *The UNCITRAL Arbitration Rules as Interpreted and Applied* (1994) at 388.

⁸⁵ Baker and Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992) at 85.

⁸⁶ Case No. 55, Iran-US Claims Tribunal, Chamber Two, Order of 22 Feb. 1983; also cited in Pellonpää and Caron, at 343-344.

following); the Tribunal's jurisdiction (p. 6); the basis and general nature of the claim (p. 7 to p. 10); the applicable law (p. 11); a statement of facts (p. 12 to p. 37); the points at issue (p. 38); and the relief sought (p. 39 to p. 40). These explanations have since been supplemented by written and oral submissions particularly concerning the issue of jurisdiction.

Article 18 of the UNCITRAL Rules, as modified by the Tribunal, imposes on the Claimant the sole obligation of giving the following particulars: [reproduces Article 18, paragraph 1 of the Tribunal Rules].

It appears that in the present case the Claimant has complied with that Rule.

154. The "points at issue" must only explain the legal arguments "with adequate particularity" but need not set out a final elaboration of the legal theories supporting the claim. The statement of claim should provide enough definition of the issues to allow the arbitral tribunal and the respondent adequate notice of them, but is not expected to be exhaustive in detail or finite in terms. To suggest otherwise would render Articles 20 and 22 of the Rules redundant and meaningless.

155. Flexibility must be afforded in recognition of the reality that the issues and arguments will develop and change as discovery is completed and the case proceeds and that much of the facts and evidence underlying these claims are within the knowledge of Canada and its monopoly, Canada Post. As one text writer notes:

As the arbitration progresses and the evidence emerges, it is not unusual for the parties to adjust the way in which their arguments are presented. Some contention may be abandoned and new ones may be put forward on the basis of, for example, documents or evidence produced by the other party. This is a legitimate and indeed necessary process, provided that the issues before the arbitral tribunal do not become so distorted that they are in substance completely different from those defined when embarking on the arbitration.⁸⁷ (Redfern, *supra* at 304)

156. Thus, with reference to paragraph 153 of Canada's Memorial, it is no objection to say that paragraphs 16, 22, 27, 34, 35 and 36 do not include a finite and exhaustive list of all alleged measures and breaches that are the subject of the within proceeding.

⁸⁷

Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (1999) at 304.

157. Nor can the words “*include, but are not limited to*” be characterized as symptomatic of a lack of particularity, as Canada suggests. That phrase simply identifies that the facts and evidence plead may not be exhaustive. However, there can be no question that the nature of the alleged breaches (together with supporting facts) are clearly identified in each of the paragraphs in which this phrase appears. It cannot reasonably be suggested that the Investor should be precluded from introducing additional facts that may emerge as this case develops.

158. Indeed, it is self evident that the true issues in dispute may not reveal themselves until after a statement of defence is filed.⁸⁸ That full and final elaboration of the issues is neither necessary nor is it intended until later in the proceedings is evident given the Tribunal’s powers to require subsequent written statements and to permit amendments to the pleadings.⁸⁹

159. Similarly, although it is necessary to specify whether monetary damages are sought as a remedy, the exact amount of damages claimed can be determined at a later point in the proceedings.⁹⁰ It is not necessary that further particulars be provided in order to permit Canada to set out its position in a statement of defence.

⁸⁸ Recognizing this, the Iran-United States Claims Tribunal generally did not limit the parties to the issues listed as “in dispute” in the initial filing, nor did it require the amendment of the statement of claim that failed to specify the particular issues in dispute.

Reference to the *travaux préparatoires* here is relevant. Several delegates to UNCITRAL proposed deleting the “points at issue” from the statement of claim, noting that the points actually at issue in the dispute “might not be known to the claimant” at that stage: Rule 18(2)(d): See, *Eighth Session Record, Note on the Travaux*, SR. 164 at 166, SR 165 at 169 (comments of Mr. Guest and Mr. Sumalong). No objection to the proposed deletion was made, and retention of the requirement was never advocated by any delegate: *Id.* SR. 164 at 166-68, SR 165 at 169-72. Nevertheless, the requirement remained in the final version of the Rules. Some suggestion has been made, therefore, that the retention of this requirement was a mistake.

⁸⁹ Barin, Babak, *Carswell’s Handbook of International Dispute Resolution Rules* (1999), at 131 notes that the UNCITRAL Arbitration Rules require at least one exchange of written submissions and presuppose or contemplate that these submissions will be supplemented by further submissions later in the proceedings. The commentary on the 1976 draft rules also makes clear that there is no expectation that a Statement of Claim will be final or conclusive, and indeed contemplates the exchange of many written submissions.

⁹⁰ Pellonpää and Caron, at 338.

160. Regardless, sufficient information about the nature of damage claims has been provided in paragraph 35 to enable Canada to ascertain the category of damages that are being claimed and the nature of the documentary and expert evidence required to establish such damages. Moreover, Canada's submission that insufficient particularity has been provided is wholly unpersuasive in view of the fact that the Amended Statement of Claim was provided in response to Canada's complaint about the original Statement of Claim, which was approximately 100 pages in length.⁹¹

161. With respect to paragraphs 142-143, 146 and 154 - 155 of Canada's Memorial, there is no requirement in the rules that a claimant plead "the specific damage or loss arising out of each measure", nor is there a requirement to plead causal connection between loss and breach. Regardless, the statement of claim has pleaded that there was such a connection which is sufficient for the purposes of Article 18 of the UNCITRAL Arbitration Rules. And, since the applicable test requires that, for the purposes of this motion, the facts alleged are assumed to be true, Canada's assertion that UPS has not established that "it has incurred loss or damage by reason of, or arising out of, alleged breaches" cannot be supported.

(d) Remedy

162. Even if there were merit to the submission that the Investor has failed to plead with sufficient particularity, Canada's motion asserting that numerous paragraphs of the Amended Statement of Claim should be struck fundamentally misunderstands the appropriate remedy. Should the Tribunal conclude that further information is required, the appropriate course is to request either further written statements of particulars under Article 20 or an amendment to the statement of claim under Article 22.

⁹¹ The practice of pleading the category and nature of damages, without specific elaboration has been accepted elsewhere. For instance, in *Ethyl* a case in which Canada also brought a jurisdictional challenge to a Chapter 11 claim, damages were pleaded by listing only the general category of losses, such as "lost profits", "loss of value of the investment", "cost of reducing operations in Canada". Likewise, no objection was raised by Canada in *S.D. Myers*, where the plea on damages was similarly framed.

It is accepted, both in theory and in practice, that a claimant who has submitted a defective statement of claim may cure the shortcomings by submitting supplementary information. This practice is dictated by the most elementary principles of justice, and is rarely prejudicial to the respondent.⁹²

163. Thus, Canada's application, to the extent that it relates to style of pleading, ought to be for further and better particulars. "*Rather than equating a defective submission with non-submission of a statement of claim, the arbitral tribunal should ask the claimant to clarify his position with respect to specified issues.*"⁹³


(e) Summary

164. Thus, the Investor's Statement of Claim meets the necessary requirements for such a pleading under the applicable NAFTA and UNCITRAL Arbitration Rules. Accordingly, Canada's request to strike all or part of the Investor's pleading should be dismissed.

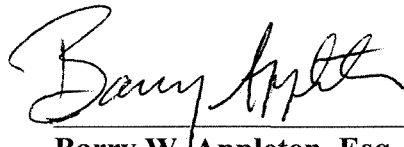
VII. Conclusions and Relief Sought

165. The Investor respectfully requests the Tribunal dismiss Canada's Motion Concerning Preliminary Jurisdictional Objections and award costs of this motion to the Investor.

All of which is respectfully submitted this 26th day of March, 2002.



Michael P. Carroll, Q.C.
Counsel



Barry W. Appleton, Esq.
Counsel

⁹² Pellonpää and Caron at 339.

⁹³ Pellonpää and Caron at 339.