

**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

**INVESTOR'S REPLY TO THE SUBMISSIONS OF
THE UNITED STATES OF AMERICA AND
THE UNITED MEXICAN STATES
(Jurisdiction Phase)**

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I. INTRODUCTION

1. The Investor submits this Reply to the interpretive submissions made by the Government of the United States of America (“United States”) dated May 13, 2002, and the Government of the United Mexican States (“Mexico”) dated May 14, 2002, under NAFTA Article 1128 and the directions of this Tribunal.
2. The Investor maintains its submissions contained in its Counter-Memorial and Rejoinder. This Reply will only address those points not previously dealt with by the Investor.
3. At the jurisdictional phase, this Tribunal must address one simple question – has Canada established that there is no possibility, on a *prima facie* basis,¹ that the facts alleged by the Investor are “capable of having the effect” of violating the obligations of NAFTA Chapter 11? The Investor unequivocally says that Canada has not.
4. This Reply will address the following arguments of the United States and Mexico:
 - a. The argument of the United States that, under NAFTA Articles 1502(3)(a) and 1503(2), “governmental authority” must be interpreted in a narrow and formalistic manner, and establishing “governmental authority” as a jurisdictional requirement;
 - b. The argument of the United States supporting a broad exception for taxation measures;
 - c. The arguments of Mexico and the United States regarding the binding nature and applicability of the Free Trade Commission Note of Interpretation (“FTC Note of Interpretation”);

¹ Based on the submissions of the Investor and the three NAFTA Parties, there is a basic agreement that the jurisdictional test to be applied in this arbitration is set out by the NAFTA Chapter 11 Tribunal in the *Ethyl Corporation and Canada*, Award on Jurisdiction, June 24, 1998 (as cited in the Investor’s Counter-Memorial (Jurisdiction Phase) at para. 10, and agreed to by Canada in its Reply Memorial at para. 34), and by the ICJ in the *Oil Platforms* case (as addressed by the Investor in its Rejoinder (Jurisdiction Phase) at paras. 10-12). See Investor’s Book Authorities, Vol. I, Tabs 3 and 6.

- d. Whether this Tribunal is required to determine, as a matter of jurisdiction, that anti-competitive conduct cannot give rise to a breach of customary international law; and
 - e. The misstatements of the non-disputing NAFTA Parties concerning the Investor's position.
5. In summary, both the United States and Mexico urge this Tribunal to address matters of interpretation that can only be addressed during the merits phase of these proceedings. In response to these arguments, the Investor maintains that it has met the jurisdictional requirements under NAFTA Chapter 11, and that this Tribunal should proceed to the next phase of this arbitration.

II. REPLY TO THE NAFTA ARTICLE 1128 SUBMISSIONS OF THE UNITED STATES AND MEXICO

A. Reply to the United States' Submission on Governmental Authority

6. The Investor does not agree with the United States' submissions concerning the interpretation and treatment of the term “regulatory, administrative or other governmental authority” in NAFTA Article 1502(3)(a), or its submissions concerning the Investor's claim respecting taxation measures.
7. At paragraphs 7 and 8, the United States asserts that, if a claim is made pursuant to NAFTA Articles 1502(3)(a) or 1503(2), additional jurisdictional requirements must be met by the Investor. In particular, the United States asserts that the delegation of “governmental authority” is a jurisdictional requirement. If this means simply that the Investor must plead the existence of such delegated authority, as the Investor plainly has in paragraphs 1 and 2 of the Amended Statement of Claim, then the Investor does not disagree. Whether, however, such a delegation in fact exists, and whether the delegation is of “regulatory, administrative or other governmental authority” is a question of the substantive obligation created by

NAFTA Articles 1502(3)(a) and 1503(2). To hold otherwise would determine that virtually every obligation created by the NAFTA is jurisdictional. Thus, if the United States interpretation were correct, one could equally argue that the requirement under NAFTA Article 1102, that investors be in "like circumstances" with domestic investors is a jurisdictional requirement. Plainly, that is not something that could be resolved at such an early stage in the proceedings.²

8. In paragraphs 8 and 9, the United States urges an excessively narrow interpretation of "governmental authority" that is both inconsistent with the customary international law of state responsibility,³ and contrary to the plain meaning of NAFTA Articles 1502(3)(a) and 1503(2). The United States articulates a requirement that, in a claim related to NAFTA Articles 1502(3)(a) and 1503(2), the conduct at issue must be "inherently governmental", and asserts that, if such conduct could legally be performed without governmental authority, it would not be covered by these provisions. At paragraph 9 the United States argues that "an affirmative government act is called for to establish a 'delegation of authority'" under NAFTA Articles 1502(3)(a) and 1503(2) and that the conduct at issue in a claim must "involve the exercise of governmental authority that has been specifically delegated to it by act of the respondent NAFTA Party."⁴ The United States' arguments with respect to the

² As noted in the Investor's Counter-Memorial (Jurisdiction Phase) at para. 92, the exercise of 'governmental authority' is fact dependent and relates directly to obligations of the NAFTA Parties under these provisions.

³ The United States confirms at footnote 6 of its submission that the principles set out in the ILC Draft Articles reflect customary international law. In the *Loewen and United States* NAFTA Chapter 11 arbitration, the Tribunal, in its Decision On Hearing of Respondent's Objection to Competence and Jurisdiction, January 5, 2001 at para. 70, described the ILC Draft Articles as expressing the "modern view" of state responsibility and as "a highly persuasive statement of the law of state responsibility as it presently stands." See Investor's Book Authorities, Vol. I, Tab 5.

⁴ For example, the United States goes on to say that there is no jurisdiction if the conduct in question was "arrogated [by the state monopoly] to itself without an affirmative transfer of governmental authority to it by the NAFTA Party."

scope and application of the term “governmental authority” must be rejected for at least three reasons.

9. First, they are contrary to customary international law as expressed in the ILC Draft Articles of State Responsibility. The United States is attempting to narrow the application of state responsibility under the NAFTA. If successful, this argument would allow governments to evade state responsibility through the simple delegation of any authority to quasi-governmental bodies.⁵ Such an interpretation of the international law of state responsibility should be avoided as it would be inconsistent with the objectives of the NAFTA itself. The Investor repeats and relies upon its submissions at paragraphs 21 to 24 of its Rejoinder, made in response to similar arguments made by Canada in its Reply Memorial at paragraph 62.
10. Second, taken to their logical conclusion, the United States’ arguments would severely restrict the ability to advance a claim under NAFTA Article 1502(3)(a). If, as the United States argues, a claim can only strictly relate to a specific, formally delegated monopoly function, there would rarely if ever be a circumstance in which a competing and affected investment (which by definition would never be able to operate in the monopoly field) could make a claim. It would be contrary to the object and purpose of the NAFTA if these provisions were interpreted so as to impose liability only for actions specifically mandated to be performed by NAFTA Parties, but which breach obligations such as NAFTA Article 1105 – rather than imposing liability whenever a designated enterprise uses delegated authority in a manner that breaches NAFTA Chapter 11 provisions regardless of whether it had been mandated specifically to act in such a manner. The narrow interpretation advanced

⁵ The United States states, in footnote 6, that its conclusion in paragraph 8 is “consistent with the customary international law of state responsibility”. The United States cites Article 5 of the International Law Commission’s Draft on State Responsibility in support of its conclusion. It should be noted that Article 5 references those entities which are not organs of state, and that state responsibility only attaches to those elements of its conduct which result from the governmental authority. As Canada Post is clearly an organ of the Canadian Government, Article 4 of the ILC Draft Articles would more appropriately apply, not Article 5 (see Investor Rejoinder at footnote 14 on this point).

by the United States would render NAFTA Article 1502(3)(a) an empty vessel and must be rejected.

11. Finally, it is inconsistent with the position advanced elsewhere by the United States. For instance, in the *WTO Japan-Film* dispute the United States articulated a far broader view of what constitutes 'governmental authority' and how far state responsibility extends. Specifically, the United States submitted:

The United States responds that it is not challenging private business practices, but measures of the Japanese Government. The term "any measure" in Article XXIII:1(b) is broad enough to include not only actions of the government, but measures designed, promulgated, or applied by a number of Councils, Committees, Centres, trade associations, and other quasi-governmental entities that have included private sector participants, acting under the authority of or in concert with Japanese Government ministries and agencies. In each of the principal areas in which Japan applied liberalization countermeasures, i.e. distribution countermeasures, the Large Stores Law and related measures, and the promotions countermeasures, the Japanese Government made extensive use of quasi-governmental agencies to implement government policy. These entities are not acting independently of governmental authority or direction. Measures adopted or applied by these entities are measures within the meaning of Article XXIII:1(b).⁶

12. In *Japan-Film* one of the issues that was raised was whether the acts of the Retailers Council, a voluntary organ that is self regulating, were attributable to Japan. The Panel concluded as follows:

...we find that in light of the JFTC [referring to the Japan Fair Trade Commission] approval of the Fair Competition Code and the Retailers Council and the JFTC sanctioning of actions taken by the Retailers Council under the Fair Competition Code, those actions have sufficient connection to administrative guidance of and approval by the Japanese Government to warrant a finding that they are measures attributable to the government...**we note that a finding to the contrary would create a risk that WTO obligations could be evaded through a Member's delegation of quasi-governmental authority to private bodies.** In respect of

⁶ *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, March 31, 1998 at para.6.107 ("*Japan-Film*"). See Investor's Book Authorities, Vol. II, Tab 30.

obligations concerning state trading, the provisions of GATT explicitly recognize this possibility...⁷ [emphasis added]

13. In any event, for the purposes of this jurisdiction motion, the Investor has clearly satisfied the jurisdictional threshold of alleging a delegation of governmental authority. Canada Post is operating under the delegated authority of the Canada Post Corporation Act ("CPCA"). It is an agent of the Crown and an institution of government. Accordingly, there is a *prima facie* basis on which this Tribunal may accept jurisdiction to proceed with this arbitration.⁸

⁷ *Japan-Film* at para. 10.328.

⁸ A cursory examination of the CPCA shows that Canada Post has exercised delegated governmental authority in relation to the conduct described in the Amended Statement of Claim. The CPCA mandates the objects, administration, powers and conduct of the Canada Post. Section 24 of the CPCA defines the status of Canada Post as an "agent" of Her Majesty in right of Canada. The CPCA delegates Canada Post broad authority to do more than make rules to regulate simple letter mail delivery. The enumerated objects for Canada Post contained in the CPCA specifically provides for Canada Post to engage in operations beyond its lettermail postal monopoly. Section 5 of the CPCA states:

- 5.(1) The objects of the Corporation are
- (a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;
 - (b) *to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; ...*
- 5.(2) While maintaining basic customary postal service, the Corporation, in carrying out its objects, shall have regard to
- (a) the desirability of improving and *extending its products and services* in the light of developments in the field of communications;[emphasis added]

Moreover, under s. 19(1) of the CPCA, Canada Post is authorized to make regulations, with the approval of the Canadian Federal Cabinet, for the efficient operation of the business of the Corporation and for carrying out the objects and purposes of the CPCA. Canada Post has been authorized by the CPCA to prescribe, regulate and operate its own business operations. As well, s. 19(1) provides, in a non-exhaustive listing, that:

19. (1) The Corporation may, with the approval of the Governor in Council, make regulations for the efficient operation of the business of the Corporation and for carrying the purposes and provisions of this Act into effect, and, without restricting the generality of the foregoing, may make regulations

- (r) dealing with any matter that any provision of this Act contemplates being the subject of regulations; and
- (s) providing for the operation of any service or systems established pursuant to this Act.

The extent to which the operations of such a monopoly can found a claim under NAFTA Chapters 11 and 15 will depend upon the nature of the proven conduct and how this Tribunal characterizes it following a full examination of the evidence. It would, however, be premature at this stage to do so.

B. Reply to the United States' Submission with respect to taxation measures

14. In its submissions at paragraphs 13-15, the United States argues that a broad exception should be applied to taxation measures from the purview of NAFTA obligations. International law provides a special rule governing the interpretation of exceptions. This rule is expressed in Latin as *exceptio est strictissimae applicationis*, which holds that exceptions to treaty obligations are to be construed restrictively.⁹ Similarly, within the decisions of the GATT/WTO, exceptions to trade obligations have been narrowly interpreted.¹⁰ If the NAFTA Parties had intended that the failure to apply their tax laws would constitute a taxation measure, certainly the NAFTA Parties would have made this explicit in the NAFTA. For example, the NAFTA governments provided such an exception in NAFTA Article 1114(2) providing that relaxing domestic health, safety or environmental measures should not occur.¹¹

Additionally, the definition of "mail" and "mailable matter" in Section 2 of the Act, and as referenced in section 19, can be considered to be so broad that it includes all items that can be posted, even products outside the monopoly. These non-monopoly products are clearly subject to Canada's delegated authority permitting Canada Post to engage in activities beyond its lettermail monopoly

⁹ *Interpretation of Article 79 of the 1947 Peace Treaty* (French/Italian Conciliation Commission) XIII, UNRIIAA 397. *Case Concerning Certain German Interests in Upper Silesia* PCIJ, Series A, No. 7, at 38-39.

¹⁰ For example see the restrictive positions taken by GATT/WTO panels in *United States - Restrictions on Imports of Tuna*, DS21/R-315/155, September 3, 1991, at para. 5.22 ("Tuna I"), and *United States - Restrictions on Imports of Tuna*, Report of Panel, DS29/R, June 16, 1994, at para. 5.38 ("Tuna II"); and *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS/2/AB/R, April 29, 1996, at 18, 23.

¹¹ In addition, a further example is Annex 34 of the *North American Agreement on Environmental Cooperation* ("NAAEC"), agreed to by all three of the NAFTA Parties, which contains provisions stating that during a monetary enforcement assessment, the panel should take into account "The pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its environmental law". Had the NAFTA Parties intended a similar effect in relation to taxation measures, they would have specifically included such an exception.

15. A review of the merits is required in the present circumstances to permit the Tribunal to determine whether the failure in question is a taxation failure or a more general action that is discriminatory, unfair or unequal. Moreover, it would be contrary to the objectives of NAFTA to permit a government to style a measure as a taxation measure in order to avoid an impartial and independent review.

16. For example, in the WTO *US-FSC* case, the WTO panel accepted that it could deal with a claim concerning certain tax rules, despite the fact a treaty provision stated that WTO Members should in the first instance have recourse to another forum outside of the WTO. The WTO panel held that a tribunal should not lightly infer a restriction on dispute settlement unless the restriction is “clear and unambiguous”.¹² Just as with the WTO, dispute settlement is a basic right under NAFTA, and so restrictions on this right should not be inferred unless they have been stated in clear and unambiguous treaty language.¹³

17. The term “taxation measures” used in NAFTA Article 2103 does not clearly and unambiguously exclude from dispute settlement under NAFTA Chapter 11, a claim made under NAFTA Article 1105 simply because the wrongful *treatment* of the investor takes place in a factual context that involves taxation. There is no provision of the NAFTA that clearly and unambiguously states that unfair and inequitable treatment that would otherwise be actionable under NAFTA Chapter 11 is unactionable merely by virtue of a taxation dimension to the facts of such mistreatment.

¹² *United States -Tax Treatment for “Foreign Sales Corporations”*, Report of the Panel, WT/DS108/R, October 8, 1999, at paras. 7.17-7.18.

¹³ The Appellate Body neither upheld nor reversed this finding, thus making it an adopted finding of the WTO Dispute Settlement Body.

C. Reply to the United States' and Mexico's submissions on the Note of Interpretation of the NAFTA Free Trade Commission ("FTC")

(I) The FTC Note of Interpretation does not define Customary International Law

18. The United States (at paragraphs 10-12) and Mexico (at paragraphs 18-20) both rely in their submissions upon the FTC Note of Interpretation to identify the applicable law and standard under NAFTA Article 1105. The Investor rejects these arguments made regarding the FTC Note of Interpretation.

19. As the Investor has argued at paragraphs 78-84 of its Counter Memorial, the FTC Note of Interpretation does not define what is encompassed by the "customary international law minimum standard of treatment of aliens". This interpretive question is a merits issue that involves arguments of both law and fact that are largely dependent upon evidence-gathering and document production. It is therefore not suitable for final determination in a jurisdictional hearing. It will require, amongst other things, a consideration of the development of the modern regulatory economy and the economic integration between states before any standard can be articulated in the context of NAFTA Chapter 11 and this case in particular.

20. Moreover, even if the FTC Note of Interpretation is relevant and binding in this dispute, it does not by its own terms preclude the Tribunal from considering and applying rules of international law other than those that have the status of custom. The interpretive statement only purports to establish the customary international law "standard" of treatment of aliens as the appropriate standard. Even if the standard of treatment to be applied to the host state's conduct derives from customary law, a central task of this tribunal is to determine whether, in the circumstances, the behavior of the host state towards the investor has fallen below that standard; other rules of international law, including treaty obligations between the parties,

may be highly relevant to assessing whether a particular course of conduct meets or falls short of the applicable standard.

(ii) FTC Can only Interpret NAFTA - It Cannot Amend it.

21. The Investor further argues that, contrary to the submissions of United States and Mexico, this NAFTA Tribunal is not bound by any part of the FTC Note of Interpretation that attempts to amend the explicit text of NAFTA Article 1105.¹⁴
22. The FTC Note of Interpretation relating to the meaning of NAFTA Article 1105 is a re-writing of its text and therefore constitutes a “modification” or “addition” rather than an interpretation. Under NAFTA Article 2202 such amendments must be made by the three parties and must be approved by each party’s local legislature.
23. Given that the NAFTA Parties cannot amend the NAFTA, and can only interpret it, the FTC, just as any NAFTA Chapter 11 panel, is obliged to meet two requirements in interpreting the NAFTA. The NAFTA sets out the two requirements in NAFTA Article 102(2), which provides:

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

Therefore, the FTC must interpret the NAFTA (1) in light of its objectives in NAFTA Article 102(1) and (2) in accordance with the “applicable rules of international law”.¹⁵

¹⁴ See Investor’s Rejoinder Memorial (Jurisdiction Phase) at para. 36.

¹⁵ In its *Award on Jurisdiction, in Ethyl Corp and Canada* (Jurisdiction Award) at para. 56, the *Ethyl* Tribunal took a broad view of the objectives of NAFTA and stated that: “The Tribunal reads Article 102(2) as specifying that the “object and purpose” of NAFTA within the meaning of those terms in Article 31(1) of the Vienna Convention are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the Vienna Convention.”

24. A fundamental rule of international law which applies to the interpretation of a treaty such as NAFTA is Article 31(1) of the *Vienna Convention* which states:

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

25. The Investor submits that given what NAFTA Article 1105 actually provides, it is impossible to reach the “interpretation” that the NAFTA parties make, if they had followed these interpretive principles. NAFTA Article 1105(1) provides:

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

26. The key phrase for the purposes of interpreting this provision is “treatment in accordance with international law”. The concept of “international law” is well-established in international legal practice. The widely accepted definition of the sources of the rules of “international law” is set out in Article 38 of the *Statute of the International Court of Justice*.¹⁶ Article 38 of the *ICJ Statute* states that there are four sources of international law: (1) treaties, (2) custom, (3) general principles, and (4) case law and academic treatises (as a subsidiary source to the first three sources).

27. To limit the scope of international law to any one of these sources, or more particularly only to a narrow part of one of these sources (i.e., not merely customary international law, but only “the customary international law minimum standard of treatment of aliens”) would not be a reasonable interpretation of the plain meaning of NAFTA Article 1105, especially given NAFTA’s “object[s] and purpose[s]” which include the objective to “increase substantially

¹⁶ The *Statute of the International Court of Justice* is a part of the *United Nations Charter* and the Court is the principal judicial organ of the United Nations according to Article 92 of the *U.N. Charter* (“*ICJ Statute*”).

investment opportunities in the territories of the Parties”¹⁷ and “create effective procedures for the implementation and application of this Agreement, for its joint administration and the resolution of disputes.”¹⁸

(iii) MFN Principle is Relevant to Review of the FTC Note of Interpretation

28. Finally, if one of the NAFTA Parties accords a better treatment to a third party under a bilateral investment treaty than is articulated under either the FTC Note of Interpretation or NAFTA Article 1105, then by virtue of the Most Favoured Nation (“MFN”) treatment obligation and interpretive principle, a NAFTA tribunal must apply the higher standard available to investors under the other treaty.
29. Under NAFTA Article 102(1), the NAFTA Parties specifically articulated the MFN principle as one of the principles and rules that must inform the interpretation of the NAFTA’s provisions, in light of their context and the NAFTA’s objectives. Further, NAFTA Article 1103 also specifically requires that MFN treatment be accorded to investors and investments from other NAFTA Parties.
30. The MFN obligation is proactive in application, ensuring that although times may change, the equity of treatment extended to MFN partners never weakens by comparison to the treatment provided to anybody else.¹⁹ Thus, in *Maffezini v. Spain*²⁰ the Tribunal determined that an Argentine claimant was entitled to rely upon a provision from an investment treaty

¹⁷ NAFTA Article 102(1)(c).

¹⁸ NAFTA Article 102(1)(e).

¹⁹ George Schwarzenberger, “The Most-Favoured-Nation Standard in British State Practice” (1948) *British Yearbook of International Law* 96 at 99-100.

²⁰ *Emilio Agustin Maffezini and the Kingdom of Spain*, ICSID Case No. ARB/97/7, January 25, 2000, Decision of the Tribunal on Objections to Jurisdiction (“*Maffezini Case*”). See Investor’s Book Authorities, Vol. II, Tab 43.

between Chile and Spain because this provision accorded more favourable treatment to the claimant than he would have received under the treaty between Argentina and Spain:

... if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle.²¹

31. Because each NAFTA Party has entered into free trade agreements and bilateral investment treaties since the NAFTA was brought into force,²² each has potentially offered different levels of treatment to other investors which is available in the Commission's now modified version of NAFTA Article 1105.²³

²¹ *Maffezini* at 56.

²² In NAFTA Annex IV, each of the NAFTA Parties have taken reservations for obligations entered into under international agreements in force or signed prior to the date of entry into force of the NAFTA (1 January 1994). They have also taken identical, sector-specific reservations concerning future international treaty obligations. Accordingly, in relation to all other international economic treaties not limited, or pertaining exclusively to, those sectors, the NAFTA Parties will be required to provide MFN treatment (i.e. extend terms as favourable to the investors and investments of the other NAFTA Parties as they have extended to any other investor or investment since the NAFTA came into force).

In cases where United States measures are the subject of a NAFTA claim, an investor may be able to turn to provisions such as Article II:3 of the *United States - Albania* BIT (which came into force on 4 January 1998), requiring that:

- a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment that required by international law;
- b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation and sale or other disposition of covered investments;

²³ This scenario was actually alluded to by the *Pope & Talbot* Tribunal in its consideration of how the fair and equitable treatment standard should be considered additive to whatever level of treatment must be required under international law (which it did not address). The Tribunal apparently considered that if it did not adopt the interpretation of NAFTA Article 1105 that it chose, it was likely that Article 1103 could be used to bring about such a result in any event. *Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2*, at para's. 117-118. See Investor's Book Authorities, Vol. I, Tab 1.

Thus, the question for this Tribunal may become whether any such treaty provision properly interpreted,

32. This issue becomes relevant if the interpretation of the United States and Mexico's approach to the FTC Note of Interpretation is correct. In other words, if Canada has entered into bilateral investment treaty which provides the investor a remedy analogous to Chapter 11 of the NAFTA, if 'international law' under that Treaty encompasses all sources of international law or if 'fair and equitable' is a stand-alone concept, then the Tribunal must apply the higher standard available to investors under the other Treaty.

D. Reply to the United States' and Mexico's submissions regarding customary international competition law

33. Both Mexico²⁴ and the United States²⁵ have addressed the question of whether anti-competitive conduct can be regulated under customary international law. Mexico and the United States seem to be laboring under the misapprehension that this question is essential for the success of the Investor's claim. This is not correct. More importantly, however, this Tribunal is not required to make such a determination at this preliminary stage of the arbitration. What the Investor has argued²⁶ is that the exact "scope, content and interpretation of NAFTA Article 1105" is properly dealt with at the merits phase and must

considered the 'fair and equitable treatment' obligation as a standalone concept. If so, by virtue of the MFN principle and NAFTA Article 1103, Investors with a claim against the United States or Mexico would be entitled to "fair and equitable treatment" as a stand alone concept, in addition to whatever treatment might be found to exist under "international law" as more narrowly defined. If that argument is accepted, that provides further support for the argument that the additive standard of "fair and equitable treatment" espoused by the *Pope & Talbot* Tribunal can be applied within the context of a claim against the United States or Mexico.

²⁴ Submission of Mexico at paras. 21-32. At paragraph 21 of its submission, citing paragraph 85 of the Investor's Counter-Memorial, Mexico incorrectly states that "contrary to the assertion made in the Claimant's Counter-memorial, it will not be possible for the Claimant to adduce evidence of a customary international law rule dealing with cross-subsidization or other like activities by a monopoly". Nowhere at paragraph 85 of the Investor's Counter-Memorial does the Investor make such an assertion.

²⁵ The United States argues at paragraph 12 of its submission that it "is aware of no support for the proposition that customary international law imposes obligations with respect to the promulgation or enforcement of national competition laws."

²⁶ Investor's Counter-Memorial (Jurisdictional Phase) at para. 85.

be considered in light of facts, evidence of custom or principles of international law lead by the Parties.²⁷

34. In any event, it is clear that conduct that is anti-competitive may also be subject to the general provisions of other trade agreements. In this regard, the *Japan-Film* decision is relevant to the argument advanced by Mexico that competition matters are excluded from their coverage. Thus, even to the extent it is established that there is no customary competition law, the United States nonetheless strenuously argued in *Japan-Film* that certain anti-competitive practices were covered by existing general provisions of the GATT, including under the national treatment obligation. While the Panel found that the United States did not prove that such provisions were violated on the facts, the panel also did not consider anti-competitive conduct to be excluded from the ambit of the general provisions, such as national treatment, just because it is not yet the subject of more specific *sui generis* obligations, for instance in a WTO Agreement.²⁸
35. Furthermore, Mexico's overall conclusion as articulated in paragraph 33 clearly shows that Mexico patently misunderstands or has misconstrued the investor's argument in relation to the so-called "anti-competitive conduct of monopolies". Mexico states at paragraph 33 of

²⁷ Moreover, whether a particular instance of state action involving competition laws or policies violates customary international law raises substantive issues of fact and law which can only be determined by establishing the nature of the conduct in question and assessing whether, and in what way, it may violate particular rules of customary international law. The general standard of fair and equitable treatment owed to the Investor under NAFTA 1105 applies regardless of whether the governmental activity in question concerns competition or other matters. Customary international law includes the customary international law of state responsibility, which does not exempt governmental activities related to competition law or policy. It is true that not all countries have adopted competition laws. However, custom can exist bilaterally or regionally--not all states have to accept the idea of government regulation of anti-competitive practices in order for custom to be relevant. The existence of competition law and policy as between the parties is not only a basic assumption of NAFTA, but also a basis of other trade agreements in the Americas (such as MERCOSUR).

²⁸ The *Japan-Film* case involved a series of measures involving the alleged non-enforcement of laws that effected the conditions of competition in the photographic film business. The US argued in the case, as noted at para. 3.8 of the Panel decision, that the anti-competitive measures were covered by more general provisions of the GATT and "work together as an organic whole to violate Article III".

its submission that “. . . it would be nonsensical to hold that the Minimum Standard of Treatment obligation includes the same obligations as those set out in the Monopolies and State Enterprises article”.

36. The NAFTA obligations undertaken by Canada under Articles 1502(3)(a) and 1503(2) are supervisory obligations to “ensure” that government monopolies such as Canada Post do not engage in NAFTA inconsistent behaviour or in anti-competitive conduct in non-monopoly markets. The Investor has not argued that those supervisor obligations are also obligations undertaken by Canada pursuant to NAFTA Article 1105. The Investor’s position is that, under NAFTA Article 1105, Canada cannot engage in the type of conduct referenced in NAFTA Article 1502(3)(d) (if it was operating the postal function as it did until 1980 when it delegated that function to Canada Post) nor can Canada’s delegated agent Canada Post, for whom it is responsible using state attribution rules, engage in such conduct.
37. The fact that a specific factual matrix may result in a violation of that NAFTA Article 1105 obligation and a violation of Canada’s supervisory obligation under Article 1502(3)(d) is hardly “nonsensical” or an “absurdity”. If the Investor is correct in its interpretation of NAFTA Article 1105, and if Canada is responsible for the actions of Canada Post under state attribution rules, and if Canada Post carries out anti-competitive activities prohibited under that Article, Canada would have breached its obligation under NAFTA Article 1105. In addition, if those same activities were the activities listed in NAFTA Article 1502(3)(d), by not supervising Canada Post as required under that Article, it would also violate its obligation under NAFTA Article 1502(3)(a).
38. Moreover, Mexico rightly notes that paragraphs (b) to (d) of NAFTA Article 1502(3) contain supervisory obligations that are not directly subject to investor state dispute settlement. However, the fact that these obligations are not directly subject to investor state dispute settlement in no way implies that a government monopolies *conduct* that could give rise to

breach of these supervisory obligations by the NAFTA Party, is *unactionable* under the separate obligations contained in NAFTA Article 1105. As a general rule international law assumes, unless excluded by clear and unambiguous wording, the possibility of parallel proceedings in different fora which arise out of the same facts but nevertheless engage different legal rules.²⁹

All of which is respectfully submitted this 21st day of May, 2002



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²⁹ *Southern Bluefin Tuna Case - Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility, August 4, 2000 at para. 52.