

**UNDER CHAPTER 11 OF THE NAFTA AND UNCITRAL
ARBITRATION RULES**

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

- and -

GOVERNMENT OF CANADA

Respondent/Party

**REPLY MEMORIAL OF THE GOVERNMENT OF CANADA ON
PRELIMINARY JURISDICTIONAL OBJECTIONS**

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**PART I
OVERVIEW**

1. The crux of Canada's motion on jurisdiction is that Chapter 11 of the NAFTA provides no recourse to UPS for the complaints it has raised. Canada is thus being called on to defend a claim that UPS has no right to make. Fairness requires that Canada not be required to defend such a claim.

NAFTA Article 1116, Article 1501, Article 1502(3)(d)

2. UPS, itself, describes this as a case of "unfair, discriminatory anti-competitive conduct" by Canada Post, and the failure of Canada to ensure that "Canada Post does not engage in anti-competitive practices". Such allegations are not arbitrable by an investor under the NAFTA. In an effort to avoid this jurisdictional bar, UPS attempts to force, these non-arbitral grievances concerning anti-competitive conduct into certain obligations over which the Tribunal has jurisdiction. It does this through expansive and unsustainable interpretations of specific Articles, and

through the studious evasion of the plain meaning of others. In so doing, it invites this Tribunal to negate the clear expression of intent of the NAFTA Parties that anti-competitive conduct was not the subject of investor recourse under Chapter 11 of the NAFTA.

UPS Counter-Memorial, paras. 1, 8

3. To achieve the desired result, UPS advances the theory that recourse for breaches of 1502(3)(d) (anti-competitive conduct) can be found in Articles 1102, 1105, 1502(3)(a) and 1503(2). There are a number of errors with this theory, not the least of which is to negate the clear intention of the Parties set out in Articles 1116 and 1117 as to when the conduct of a monopoly can be challenged by an investor.
4. The clear wording of Article 1116(1)(b) provides that a claim can *only* be made for a breach of 1502(3)(a) “where the monopoly has acted in a manner inconsistent with the Party’s obligations *under Section A*”[emphasis added], and then only in the limited circumstances where it is exercising delegated “governmental authority” and even then only where the monopoly is acting in a certain limited capacity, such as a regulator.
5. Anti-competitive conduct of monopolies is expressly addressed in 1502(3)(d), which is not in Section A of Chapter 11. The challenge for UPS, therefore, is to establish, as a matter of law, that an independent obligation in the nature of a 1503(2)(d) complaint can be found somewhere in Section A, so as to activate an investor remedy. In straining to make this argument, UPS disregards basic interpretative principles and makes a number of fundamental errors. These include:
 - a) Ignoring the plain text of the NAFTA, and in particular, the express terms of Article 1116(1)(b) limiting recourse for conduct of monopolies to circumstances only where the monopoly has

acted inconsistently with section A of Chapter 11 and excluding the conduct complained of;

- b) According an expansive meaning to the term delegated “governmental authority” by ignoring the limiting words so as to craft a case that Canada should not be called on to defend;
- c) Converting the objectives in the NAFTA into obligations which then form the basis of a claim;
- d) Using the objectives to contradict the plain meaning of the scope of 1502(3)(a) and 1116 when read in their context; and
- e) Using the Draft Articles on State Responsibility to circumvent the text of 1502(3)(a) and 1503(2).

Recognizing that its complaints about anti-competitive conduct do not fit within the scope of 1502(3)(a) and 1503(2), UPS attempts to force its grievances into 1105 and to a lesser extent, 1102. In doing so, it invites this Tribunal to disregard the Free Trade Commission’s binding Notes of Interpretation; and embark on an unsustainable interpretation of customary international law. UPS gives no rationale for this, other than to say that it “does not accept” that the Note of Interpretation identifies the applicable law. Moreover, the assertion of a breach of 1105 is, *prima facie*, without merit. UPS fails to establish any of the elements necessary to constitute a breach of Article 1105, and does not explain how anti-competitive conduct if proven, would amount to a breach of customary international law.

6. Further, there are three overarching errors which pervade all of UPS’ arguments. First, UPS relies on the principle that there can be “overlap” of obligations to avoid limitations imposed by the clear words of Article 1502(3)(d) and Article

1116. Second, UPS argues that the questions raised by Canada are not of a jurisdictional nature. It then argues in the alternative that, if they are, they cannot be answered in the absence of a full evidentiary record.

7. Turning to the issue of “overlap”, UPS mischaracterizes Canada’s argument. Canada is not saying that any particular conduct can never be a breach of more than one provision of the NAFTA. What Canada is arguing, however, is that not only does 1116 exclude breaches of Article 1502(3)(d) from those that can be challenged by an investor, but the alleged conduct, in any event, cannot be forced into Article 1102 and Article 1105, when examined and measured in light of the specific obligation and standards they set.
8. In sum, the existence or application of overlapping obligations is neither in issue, nor does it advance UPS’ argument. UPS’ argument only masks the fact that *none* of the Articles in issue, when viewed individually and in the context of the NAFTA as a whole, can sustain, as a matter of law, the grievances raised by UPS.
9. UPS’ second position, simply put, is that these jurisdictional questions cannot be answered as they are not jurisdictional in nature. In so doing, it takes what can only be described as a dogmatic approach to the question of jurisdiction, stating that if it is “what the Investor has pleaded, the Tribunal must exercise its jurisdiction”.
10. The third systemic error in UPS’ argument is in its alternative submission to the effect that the scope, ambit and content of the legal obligations, whether “customary international law” or that of 1502(3)(a) and 1503(2), are incapable of determination until the evidence is heard. To quote UPS:

The exact scope or ambit of those provisions [1102, 1105, 1502(3)(a)] can only be determined once the evidence has been heard.

UPS Counter-Memorial, para. 65

11. UPS misconceives the nature of a jurisdictional challenge. The issue is not whether the evidence will sustain a finding of a breach or of a liability; rather, the question is whether, on the facts as pleaded, the NAFTA provides investor recourse for the alleged grievances in issue. The exclusive question on this motion is the scope of a legal obligation. By definition, evidence is irrelevant to answering this question. The content of the law, as opposed to its application, is and must be knowable or capable of being discerned in the absence of evidence, and not vary from case to case as UPS suggests.

PART II

PRINCIPLES OF INTERPRETATION

Introduction

12. NAFTA provisions, including those conferring jurisdiction on Chapter 11 Tribunals, are interpreted according to the principles enunciated in the *Vienna Convention*. Both Parties have referred to these interpretative principles.

UPS Counter-Memorial paras. 43-48; Canada's Memorial,
paras. 45 to 49

13. The *Vienna Convention* requires that an interpreter examine the text in its context and in light of the object and purpose of the agreement. NAFTA Tribunals have applied these principles in several of their decisions. However, UPS cites no support either in the *Vienna Convention* or in the jurisprudence to support its position which amounts to:

- (1) elevating the objectives of the treaty into independent legal obligations forming the basis for a claim;¹ and

¹ There is nothing surprising in the fact that NAFTA Tribunals have referred to the object and purpose of the treaty in interpreting the NAFTA provisions before them. This is consistent with the Vienna Convention. UPS argues at paragraphs 42-48 of its Counter-memorial that object and purpose should be taken into account in interpreting the NAFTA. This is not contested by Canada. However, UPS cites no support for its use of the NAFTA objectives as an independent basis for a claim or as a way to contradict the plain meaning of the words of the provisions at issue.

(2) relying on general objectives of the treaty to contradict the plain words of the provisions read in their context.²

14. In addition, apart from making vague allegations, UPS has not established how the interpretation of the relevant provisions put forward by Canada would, in any way, contradict the object and purpose of the treaty.

The text is the best expression of the NAFTA Parties' intent

15. Article 1116 of the NAFTA limits the Tribunal's jurisdiction to breaches of Section A of Chapter 11, Article 1503(2) and 1502(3)(a) "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A".
16. In its Counter-Memorial, UPS ignores the plain meaning of the words "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A", and invites the Tribunal to adopt an interpretation contrary to the clear meaning of these words based only on the objectives of the NAFTA.
17. UPS cites the following passage from the ICJ in *Competence Of The General Assembly For The Admission Of A State To The United Nations*:

If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.

Competence Of The General Assembly For The Admission Of A State To The United Nations, [1950] I.C.J. 4 at 8 (Advisory Opinion). (para. 40 of the UPS Counter-Memorial.)

18. Yet UPS fails to follow this approach.

² The Investor relies at par. 47 of its Counter-Memorial on the *Metalclad* case in which the Tribunal turned the objective of transparency of the NAFTA into a legal obligation and found Mexico in breach. This approach was however clearly set aside by the B.C. Superior Court application. *Mexico v. Metalclad Corp.*, [2001] B.C.J. No. 950 (B.C.S.C).

19. The proper approach to interpretation was enunciated in *Japan Alcoholic Beverages* by the WTO Appellate Body, subsequently referred to by other panels.³

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty".¹⁸ The provisions of the treaty are to be given their ordinary meaning in their context.¹⁹ The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions.²⁰

Ftn 18: *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, (1994) *I.C.J. Reports*, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, (1995) *I.C.J. Reports*, p. 6 at 18.

Ftn 19: See, e.g., *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)* (1950), *I.C.J. Reports*, p. 4 at 8, in which the International Court of Justice stated: "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 and in the context in which they occur".

Ftn 20: That is, the treaty's "object and purpose" is to be referred to in determining the meaning of the "terms of the treaty" and not as an independent basis for interpretation: Harris, *Cases and Materials on International Law* (4th ed., 1991) p. 770; Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-1) 159 *Recueil des Cours* p. 1 at 44; Sinclair, *The Vienna Convention and the Law of Treaties* (2nd ed, 1984), p. 130. See e.g. Oppenheims' *International Law* (9th ed., Jennings and Watts, eds., 1992) Vol. I, p.1273; *Competence of the ILO to Regulate the Personal Work of the Employer* (1926), P.C.I.J., Series B, No. 13, p. 6 at 18; *International Status of South West Africa* (1962), *I.C.J. Reports*, p. 128 at 336; *Re Competence of Conciliation Commission* (1955), 22 *International Law Reports*, p. 867 at 871.

Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R
(October 4, 1996), (WTO Appellate Body) at 12.

20. Moreover, in interpreting the NAFTA, one should keep in mind that the common intention of the parties is best expressed in the words of the agreement.⁴ In this regard, Sinclair noted:

³ See Canada - Term of Patent Protection, WT/DS170/AB/R (Sept 18, 2000) at para. 53: "In addressing this issue, we look first, as always, at the text of the treaty provision, in accordance with the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"). (...) We have previously confirmed this approach in Appellate Body Report, United States - Standards for Conventional and Reformulated Gasoline, WT/DS2/AB/R, adopted 20 May 1996, p. 23; Appellate Body Report, Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 12; and, most recently, in Appellate Body Report, Argentina - Safeguard Measures on Imports of Footwear ("Argentina - Footwear Safeguards"), WT/DS121/AB/R, adopted 12 January 2000, para. 81."

⁴ See for example *Case Concerning The Arbitral Award of 31 July 1989 (Guinea-Bissau and Senegal)*, (1991) *I.C.J.* 53 p. 72, para. 56 (Award): "[I]n short, although the two states had expressed in general terms...their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by article 2". See also Brownlie, I., *Principles of Public International Law*, (5th ed. 1998) p. 632: "The Commission and the Institute of International Law have taken the view that what matters is

“The text is the *expression* of the intention of the parties; and it is to that expression of intent that one must first look.”

Sinclair, I., *The Vienna Convention on the Law of Treaties*,
(2nd ed. 1984) at 131.

21. The *Canadian Statement of Implementation* confirms this relationship between the NAFTA objectives and scope provisions and the other provisions of the Agreement:⁵

“In effect, it provides the guiding principles for the interpretation of the Agreement as a whole. These principles – non-discrimination, transparency, cooperation and due process – are then worked out in detail in the chapters that follow.”

22. The French version reads:

“Il fournit effectivement les principes directeurs pour l’interprétation de l’Accord dans son ensemble. Ces principes – non-discrimination, transparence, coopération et application régulière de la loi – sont ensuite **explicités** dans les chapitres qui suivent.” [emphasis added]

23. Chapter 11 and Chapter 15 detail the specific obligations that the NAFTA Parties undertook to implement the general objectives listed in Article 102(1)(b).

The object and purpose of the treaty do not constitute an independent basis for a claim

24. At paragraph 3 of its Counter-Memorial, UPS argues that the conduct of Canada and Canada Post ‘wholly undermines’ the objectives of the NAFTA. In so doing, it attempts to elevate the objectives of the treaty into independent legal obligations. In support of its position, the investor relies on the *Metalclad* case in which the Tribunal imported certain objectives into substantive Chapter 11 obligations.

UPS Counter-Memorial para. 47 .

the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties.”

⁵ At p. 75.

25. This approach was set aside by the B.C. Superior Court.

Mexico v. Metalclad Corp., [2001] B.C.J. No. 950 (B.C.S.C).

26. Moreover, the *Oil Platforms* case on which UPS relies clearly recognizes that the objectives of the treaty cannot carry legal obligations:

[T]he Court concluded that article 1 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.

UPS Counter-Memorial at para. 18.

27. In a decision on jurisdiction over claims by Iranian banks against alleged United States banking institutions, the Iran-U.S. Tribunal also stressed that the object and purpose “do not form any independent basis for interpretation, but rather are factors to be taken into account” in determining the meaning of the terms of the treaty.

The United States of America v. The Islamic Republic of Iran,
[1985] 8 Iran-U.S. C.T.R. 189 (Decision) at para. 9.

Canada’s interpretation of the NAFTA provisions does not conflict with the objectives of the Treaty

28. UPS attempts to portray Canada’s interpretation of Articles 1116, 1105, 1502(3)(a), 1503(2) and 1502(3)(d) as contradicting the object and purpose of the treaty. This is not the case.

UPS Counter-Memorial, para. 51

29. The Parties’ objective of “creat[ing] effective procedures for... the resolution of disputes” in the NAFTA area was implemented in several ways:

- First, through the general state-to-state dispute settlement mechanism; (Chapter 20)
 - In the case of investment related obligations, through investor-state dispute settlement; (Chapter 11)
 - Finally, by a bi-national panel review mechanism in the case of anti-dumping or CVD determinations. (Chapter 19)
30. The NAFTA Parties defined the scope of each of the dispute settlement mechanisms and defined the applicable procedures. The objective of fair competition is multi-faceted, which the Parties intended to fulfil in different ways. This makes clear that not every provision of the NAFTA has to result in a remedy for an investor.

Other Principles of Interpretation

31. The principles referred to by Canada, such as *expressio unius et exclusio alterius* and *ejusdem generis*, are recognized tools of treaty interpretation and are fully consistent with the *Vienna Convention*.⁶ Canada's reliance on them does not, as UPS suggests, serve to undermine the purpose and object of NAFTA.
32. Rather, it is the interpretation proposed by UPS that leads to an untenable result by making all obligations under NAFTA subject to investor-state dispute settlement, effectively ignoring the text of the NAFTA and depriving Articles 1116 and 1117 of any effect.⁷

⁶ As Brownlie explains: "The doctrine of ordinary meaning involves only a presumption; a meaning other than the ordinary meaning may be established, but the proponent of the special meaning has a burden of proof." He further points out that there exist other logical presumptions in treaty interpretation outside the *Vienna Convention*: "Thus general words following or perhaps preceding special words are limited to the genus indicated by the special words (the *ejusdem generis* doctrine); and express mention excludes other items (*expressio unius est exclusio alterius*)." Brownlie, I., *Principles of Public International Law*, (5th ed. 1998) p. 634. See also Aust, A., *Modern Treaty Law and Practice*, (2000) p. 200-201.

⁷ An interpretation denying the purport or effect of NAFTA provisions would also violate the principle of effectiveness as described in *Corfu Channel Case (United Kingdom v. Albania)*, (1949) I.C.J. 4 page 24.

PART III
JURISDICTION

The Facts alleged must be capable of falling within the jurisdiction of the Tribunal

33. In considering whether it has jurisdiction, the Tribunal's underlying objective is the expeditious and fair settlement of disputes that the parties have agreed to arbitrate, while minimizing costs and resources and relieving litigants of unnecessary burdens.
34. Both parties agree that at this stage the Tribunal must assess whether the pleadings *prima facie* fall within the jurisdiction of this Tribunal.⁸
35. Contrary to the assertion made by UPS – and subsequently contradicted by its own use of such sources – ICJ jurisprudence is generally relevant in assessing jurisdictional objections. Moreover, it is consistent with the approach taken by both arbitral and NAFTA Tribunals.
36. UPS claims that in *Oil Platforms* the ICJ did not comment on the principles to be applied in determining jurisdiction but only stated (at paragraph 15 of its Counter-Memorial), that it was required to decide whether the allegations “do or do not fall within the provisions of the treaty”. This ignores the majority's comments that in order to answer the question of jurisdiction:

“the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists and the other denies it. It must ascertain whether the violations of the Treaty...pleaded...do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain...”

⁸ Paragraph 9 of the UPS Counter-Memorial and paragraph 39 of Canada's Memorial on jurisdiction. The *AMCO* decision on which UPS relies in its submission simply supports this approach. Canada is not asking the Tribunal to assess the claim in detail to determine whether there is merit to any of the factual allegations made by UPS. In fact, Canada agrees that, for the purposes of this motion, the Tribunal should assume that the facts alleged in the amended statement of claim are true. Rather, Canada asks whether, assuming the facts to be true, the Tribunal has jurisdiction to hear the claim.

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), (1996) I.C.J. 803 (Preliminary Objection) at para. 16.

37. The ICJ has consistently applied this approach to questions of jurisdiction. Only a few months before its decision in *Oil Platforms* it applied the same reasoning in the *Application of the Genocide Convention Case*.

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), (1996) I.C.J. 595 (Preliminary Objection).

38. The ICJ then adopted and re-applied the same test again in 1999 in *Legality of the Use of Force (Yugoslavia v. Canada)*, as well as in other cases brought against NATO countries by Yugoslavia at the time. In rejecting the request for provisional measures against the bombing campaign, the Court put the question on jurisdiction as follows:

“[I]n order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, **the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court would have jurisdiction *ratione materiae* to entertain pursuant to Article IX. (cf. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 810, para. 16)**” (emphasis added)

Legality of the Use of Force (Yugoslavia v. Canada), (June 2, 1999) I.C.J. List No. 106 at para. 37

39. These cases clearly support Canada’s position that the mere assertion by UPS that certain of its allegations amount to breaches of Chapter 11 is insufficient to establish jurisdiction. UPS’ view that it is sufficient that “the investor has pleaded that Canada has breached specific obligations...[and] has pleaded that as a result

of those breaches it has suffered loss or damage”⁹ is not consistent with the jurisprudence.¹⁰

40. UPS argues that 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...”. This argument has no merit.
41. The position of the applicant is that, until all the evidence and argument is in, it would be premature to rule on jurisdiction. That would mean that preliminary objections to jurisdiction in a treaty context could never succeed. This could not be reconciled with the wording of Article 21(4) of the UNCITRAL rules: “In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question”. The ICJ rules recognize (as do the UNCITRAL rules) that there may be cases where the issue of jurisdiction must be joined to the merits because the objection is not of an “exclusively preliminary character”, and this has been done in a couple of recent cases. However, the general approach is that if the matter can be dealt with at the preliminary stage it ought to be.
42. Recent NAFTA decisions support this interpretation. In *Ethyl*, for example, the Tribunal was able to deal with the issue of whether the draft legislation at issue

⁹ UPS counter-memorial, para. 34. The UPS position implies that the scope and content of the rule is not fixed, that it can somehow vary from case to case. A legal rule must be capable of definition and interpretation in the abstract. It must have a content that is independent of any particular factual situation. It is true—and obvious—that in many instances no final determination can be made as to the effects of a rule, or whether it has been violated, in a given fact situation until all the facts are known. All that means is that it would be inappropriate to anticipate the outcome *on the merits* before all the evidence is in. But nothing in our argument requires the tribunal to go that far. All that is needed is a determination as to whether the subject matter of the allegations is covered by the subject matter of the provisions upon which jurisdiction must be based.

¹⁰ Nor does the *Fisheries Jurisdiction Case (Spain v. Canada)*, (1998) I.C.J. 432, (Jurisdiction of the Court) on which UPS relies at para. 22 of its Counter-Memorial support the proposition that the Tribunal needs to confine itself to the terms of the claim in determining jurisdiction. The Court was obviously referring to the materials before it at the preliminary stage, including the application as well as the various written and oral submissions. Nowhere does the Court say that it cannot go beyond the allegations that are made therein. Canada is not suggesting that the Tribunal not take into account the written statements submitted by the parties.

constituted a ‘measure’ for the purposes of Article 1101 without looking at evidence. Similarly, in *Loewen*, the Tribunal decided certain objections to jurisdiction at the preliminary stage and without recourse to evidence – for example on the question of whether judicial acts could constitute ‘measures’. On other jurisdictional objections the Tribunal determined that it required additional facts and that therefore it would leave the question of jurisdiction to the merits phase.¹¹

43. In the present case, Canada has not raised any jurisdictional issues that require additional factual evidence in order to be decided.
44. Nor does Canada agree with UPS’ contention that the Tribunal is being asked to decide a question “in the abstract”. Canada is not suggesting that the issue should be decided in a factual vacuum. The factual allegations, which are taken as true for the purposes of the motion, provide a context in which the application of the relevant provisions can be evaluated. It is on this basis that the Tribunal can determine whether the allegations of breach fall within its jurisdiction as set out in Article 1116.
45. The analysis undertaken by courts is indicative of how the jurisdictional test should be understood in practice. For instance, in the *Oil Platforms* case the Court analysed and reached definite conclusions about a number of provisions in the treaty that had been invoked as a basis for jurisdiction. The object of the exercise was to determine whether the scope of the subject matter of those provisions was broad enough to cover the factual allegations made by the applicant – whether there was what the Higgins opinion refers to as a “sufficiency of subject-matter connection”. Canada is requesting that the Tribunal adopt the same approach and that it analyse the provisions invoked as a basis for jurisdiction in order to

¹¹ For instance, it felt that it required evidence as to the parties attempts at appealing the jury judgment in order to determine whether or not it was a final act and therefore a measure under Chapter 11.

determine whether the subject matter scope of those provisions is broad enough to cover the facts as alleged by UPS.

46. Previous NAFTA Tribunals have followed the same approach.
47. Neither the *Ethyl* nor the *Pope & Talbot* cases cited by UPS support the proposition that the tribunal should take the question of its jurisdiction lightly.¹² Nor do they support UPS' assertion that the content of a claim is sufficient to establish the jurisdiction of the tribunal.
48. Therefore, it is not sufficient for UPS to claim simply that the alleged conduct may amount to a breach of Articles 1502(3)(a), 1102 or 1105. The Tribunal has to consider the question in order to determine whether it has jurisdiction. This is particularly important in this case given that the Tribunal does not have jurisdiction to consider a breach of Article 1502(3)(d) of the NAFTA. In assessing whether the claim is capable of falling within its jurisdiction, the Tribunal must examine the alleged facts and assume that they are true¹³. For example, the Tribunal can, for the purpose of this motion, assume that Canada Post cross-subsidizes its courier business. Evidence is therefore unnecessary and would not assist the Tribunal in its task.
49. Contrary to UPS' assertions, the Tribunal must not however assume the legal conclusions that UPS draws in its Amended Statement of Claim. It must conduct a *prima facie* analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are *capable of constituting a violation* of these obligations.

¹² *Ethyl Corp. v. The Government of Canada* (June 24, 1998), (Award on Jurisdiction), *Pope & Talbot, Inc. v. The Government of Canada* (January 26, 2000), (Preliminary Motion). The Ethyl Tribunal extensively analysed the claim as well as the requirements of article 1116 to satisfy itself that, *prima facie*, the jurisdictional requirements were met. For example, in assessing whether a 'measure' was met, the Tribunal went into detailed legal analysis of the text and context to determine the definition of "measure" and whether the alleged actions could constitute a measure; paras. 65 to 69.

50. The jurisdictional issue is ripe and appropriate for determination on a preliminary motion. All that is required is an analysis of the NAFTA Articles conferring and defining the Tribunal's jurisdiction and the legal obligations invoked by UPS. This analysis is dependent neither on facts nor on evidence.

PART IV
CHAPTER 15

The UPS Allegations of Anti-Competitive Conduct Are Not Arbitrable

Introduction

51. UPS does not dispute that its allegations relate to the obligation that government monopolies not engage in anti-competitive practices, as required in NAFTA Article 1502(3)(d). In turn, UPS concedes, as it must, in paragraph 64 of its Counter-Memorial, that "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)...". Accordingly, UPS acknowledges that allegations of anticompetitive practices constituting a breach of Article 1502(3)(d) are not arbitrable, *as such*. This non-arbitrability, flowing inevitably from the limiting language of Article 1116, is consistent with sound policy reasons, existing at the time the NAFTA was negotiated.
52. Specifically, there is no international consensus on the content of competition law. Competition law reflects national economic priorities and addresses the governance of business conduct through the regulation of economic activity in the national marketplace.¹⁴ Accordingly, each NAFTA Party has developed a unique competition law, varying from their Partners' in both substance and procedure.

¹³ UPS has had the opportunity to amend its statement of claim. The tribunal must assume that the points at issue and key facts given rise to the claim have been laid out therein (according to Article 18 of the UNCITRAL Arbitration Rules).

¹⁴ This is in contrast to trade agreements which are fundamentally international, focussing on the economic conduct of sovereign states.

Consistent with this national autonomy, the NAFTA Parties consciously reserved to themselves in NAFTA Article 1501(1) the sovereign and exclusive right to adopt, maintain and enforce competition law as they saw fit in accordance with their own domestic priorities. Consequently, decisions of the Parties' respective competition authorities remain in the national domain and are not subject to supranational review. While safeguarding the sovereignty of domestic decision-makers, the NAFTA provides two options for the Parties (but not investors) to explore concerns which may arise from their domestic competition laws. First, questions of the adoption, maintenance and enforcement of competition law may be the subject of consultation among the Parties. Second, state-to-state dispute settlement is available under NAFTA Chapter 20 where, for example, one Party considers that another Party has failed to ensure that its monopolies not engage in anti-competitive practices.

53. Notwithstanding the foregoing, UPS argues that prohibitions against anti-competitive conduct can also (i) be read into Article 1502(3)(a) or Article 1503(2); or (ii) be read into the obligations of Article 1102 and/or Article 1105. There are three fundamental errors in this argument.
54. First, the UPS attempt to convert non-arbitrable Article 1502(3)(d) claims into "arbitrable" claims contravenes the applicable rules of treaty interpretation. For the reasons that follow, reading the distinct obligations in Article 1502(3)(d) into Article 1502(3)(a), Article 1503(2), Article 1102 or Article 1105, ignores the provisions' plain meaning derived from the context of the NAFTA as a whole.
55. Second, there is no authority for overriding the plain and ordinary meaning of the NAFTA so as to create an arbitration right in circumstances where it has been specifically withheld by the Parties. Treaty objectives are indeed relevant to the treaty interpretation, but cannot serve as a source of jurisdiction.

56. Third, UPS and Canada *agree* that no relief is available to UPS for a breach of Article 1502(3)(d).
57. In such circumstances, UPS correctly notes that the question the Tribunal must answer is whether, notwithstanding the fact that there is no investor right to arbitrate an Article 1502(3)(d) breach, a Tribunal has jurisdiction under “any of the Articles under which the Investor is entitled to advance a claim”. The challenge for UPS, therefore, is to manoeuvre itself within a provision of the NAFTA under which it is entitled to advance a claim. In its effort to appear successful, UPS first mischaracterizes Canada's argument, and then relies on the principle of "overlapping obligations" to rebut the argument Canada never made.
58. UPS mischaracterizes Canada's argument at, *inter alia*, paragraph 57 of its Counter-Memorial:

“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” (para 57).

59. This is not Canada's argument. Canada's argument is that the provisions of the NAFTA, when read in accordance with the governing principles of interpretation, do not provide *an investor* with a remedy for anti-competitive business conduct. The fact that such conduct is not included in Article 1116 is a very persuasive, if not dispositive factor, but Canada's argument is not predicated on it alone. Specifically, UPS concedes the limitations imposed by Article 1116:

“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 NAFTA Article 1502(3)(a), where the Government Monopoly has acted in a manner inconsistent with the obligations of a Party under Section A of Chapter 11 – then the Investor concurs.”

UPS Counter-Memorial, para. 54

60. Having misstated the Canadian position, UPS seeks to bring its claim within the jurisdiction of the Tribunal on the basis that obligations can arise from multiple provisions of the NAFTA. As a very general proposition, Canada does not dispute this. However, in the present case, it is Canada's position that investor recourse for anti-competitive conduct by a monopoly cannot, on the face of these pleadings, be rooted in the provisions relied upon by UPS. This is not due to any theory denying "overlap", but rather because the Parties have designed the NAFTA in this fashion.

The Obligations in Article 1502(3)(d) Are Not Included in Article 1502(3)(a)

61. Article 1502(3)(a) has a content and reach independent from that of Article 1502(3)(d). Its content must be determined from its plain meaning, in the context of the NAFTA. Particularly relevant to understanding the content of Article 1502(3)(a) are the existence of, and interaction among, Article 1501, the balance of Article 1502(3) (in particular, Article 1502(3)(d)), and Articles 1116 and 1117.
62. First, Article 1502(3)(a) does not deal with anti-competitive conduct, but rather with situations in which the monopoly is exercising governmental authority, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges. In addition, Article 1502(3)(a) only applies when the monopoly is exercising governmental authority "in connection with the monopoly good or service". Pursuant to its clear terms, 1502(3)(a) only deals with the *monopolized* market.
63. Second, each subarticle within Article 1502(3) imposes different obligations on monopolies, in different contexts, as applicable:

1502(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;
- b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;
- c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and
- d) does not use its monopoly position to engage, either directly or indirectly, including through its 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. [emphasis added]

64. The plain and ordinary meaning of Article 1502(3)(a) precludes any interpretation which would import the independent obligations of Articles 1502(3)(b), 1502(3)(c) or 1502(3)(d). With respect to Article 1502(3)(d) in particular, there is absolutely nothing in Article 1502(3)(a) to support an argument that it covers “anticompetitive practices” in a “non-monopolized market”. Of course, to interpret Article 1502(3)(a) as if it *did* include such an obligation, would render Article 1502(3)(d) redundant, contrary to the interpretive rule of effectiveness. Moreover, there is no foundation, as a general interpretive matter, which supports reading Article 1502(3)(a) as an umbrella provision so as to incorporate the various obligations spelled out in the different subarticles of Article 1502(3).
65. Third, the terms of Articles 1116 and 1117 confirm the discrete nature of the obligations in Articles 1502(3)(a) and 1502(3)(d). Articles 1116 and 1117 provide for limited investor claims under Article 1502(3)(a), but no investor claims at all under Article 1502(3)(d). The fact that Article 1116 renders 1502(3)(a), not

Article 1502(3)(d), subject to investor challenge, thereby making those provisions subject to different remedies confirms that the correct interpretation distinguishes between the obligations in Article 1502(3)(a), on the one hand, and those in Article 1502(3)(d) on the other. The Parties' intention to differentiate between the obligations, and to subject only a subset of them ((a)) to arbitration, precludes an interpretation that Article 1502(3)(d) obligations can be read into Article 1502(3)(a).

66. Accordingly, Canada submits that it is preposterous to suggest that the Parties "intended" that Article 1502(3)(a) would capture the conduct of the non-monopolized market obligations to which Article 1502(3)(d) alone is specifically addressed. UPS cannot collapse Article 1502(3)(d) obligations into Article 1502(3)(a).

Article 1502(3)(d) Obligations Are Not Arbitrable as "obligations under the Agreement" in Article 1502(3)(a)

67. Alleged breaches of Article 1502(3)(a) are arbitrable, but only in the limited circumstances prescribed by the clear terms of Article 1116. Specifically, Article 1116 permits an investor claim under Article 1502(3)(a) only where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11. While a breach of an Article 1502(3)(d) obligation could, in appropriate circumstances, be arbitrable as between *States*, it could never satisfy the requirements for investor complaint, as prescribed by Article 1116.

68. UPS recognizes this limitation¹⁵:

"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 NAFTA Article 1502(3)(a), where the Government Monopoly has acted in a manner inconsistent with the obligations of a Party under Section A of Chapter 11 – then the Investor concurs."

¹⁵ At para. 54, p. 22.

69. UPS nonetheless embarks on a long argument to establish that Article 1502(3)(a) extends to all obligations under the Agreement¹⁶. While this is true, it is beside the point. Article 1502(3)(a) requires that a Party ensure that its monopoly, when exercising governmental authority, does not act in a manner inconsistent with all of the obligations of the Parties under the Agreement. However, for the purpose of an investor challenge, Article 1116 limits the investor's recourse for an Article 1502(3)(a) violation to cases "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A" of Chapter 11. For those breaches of article 1502(3)(a) where the monopoly has acted in a manner inconsistent with other obligations in the NAFTA, the only recourse is state-to-state dispute settlement.
70. Accordingly, not *all* NAFTA obligations are triggers for investor-arbitrability. Specifically, Article 1502(3)(d) obligations cannot serve as triggers, since to read NAFTA as if they were would deprive the qualifying words of Article 1116 of any meaning.
71. Where the plain and ordinary meaning in the context of the agreement "makes sense", there is no justification for the UPS approach of resorting to "objectives" to contradict the Parties' intent to limit investor rights of dispute settlement.

The Allegations Cannot Constitute a Prima Facie Violation of Section A of Chapter 11

72. As set out above, an Article 1502(3)(a) arbitrable claim requires the monopoly to have acted in a manner inconsistent with the Party's obligations under Section "A" of Chapter 11. Section A of Chapter 11 includes Article 1102 and Article 1105.

¹⁶ para. 109- 117 of the UPS Counter-Memorial

73. The first analytical step in ascertaining whether the monopoly has acted inconsistently with the Party's obligations under Article 1102 or Article 1105 is to interpret the content of those obligations. This is considered in below. The conduct alleged by UPS is prima facie, not capable of constituting a breach of Articles 1102 and 1105.
74. The relevant context for ascertaining the plain meaning of Articles 1102 and 1105 includes Article 1502(3)(d). The relevant context also includes Article 1116 which, in defining the very narrow scope for investor complaint arbitration, explicitly includes Article 1502(3)(a) and, by necessary implication, excludes Article 1502 (3)(d). Informed by this context, neither Article 1102 nor Article 1105 can be manipulated to create an obligation, identical to that substantively covered in Article 1502(3)(d), and thereby engineer a right of recourse where none was intended.
75. Article 1502(3)(a) expressly contemplates *limited* the circumstances where a monopoly "in the exercise of delegated governmental authority" is subject to Section A of Chapter 11 obligations. Specifically, this would arise if the monopoly were exercising the power to "grant import or export licences, approve commercial transactions or impose quotas, fees or other charges" – the language of Article 1502(3)(a).

Even if a breach of a Section A Chapter 11 Obligation Could be Established, Article 1502(3)(a) Is Not Engaged

76. There can be an arbitrable claim for a breach of Article 1502(3)(a) if and only if the monopoly is exercising a delegated "*regulatory, administrative or other governmental authority that the Party has delegated to it in connection with its monopoly*". Accordingly, even if UPS could establish that an obligation under Article 1102 and/or Article 1105 could arise, so as to satisfy the first threshold requirement for an arbitrable claim in Article 1502(3)(a), no investor right to

bring a claim could lie unless it were established that Canada Post was both exercising a delegated governmental authority, and secondly, that it exercised that “authority” in “connection with its business”.

77. UPS seeks to ignore this second limitation in Article 1502(3)(a) just like the first. Specifically, UPS tries to interpret “governmental authority” over-broadly so as to capture all aspects of monopoly conduct. This interpretation deprives the limiting language included in Article 1502(3)(a), “*whenever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to in connection with the monopoly*”, of any meaning. The language of Article 1502(3)(a) clearly contemplates a *narrower* scope of monopoly conduct than everything it does in carrying on business. It contemplates only the conduct of a monopoly that is “*in connection with*” the monopoly and of a governmental nature.
78. The term “other governmental authority” must be read in its context, which includes: (1) the terms “regulatory” and “administrative”; (2) the rest of Article 1502(3)(a) and the examples provided which illustrate the type of governmental authority that the Article contemplates: “governmental authority...**such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges**”; and (3) the context of the NAFTA as a whole.
79. UPS’ argument overlooks the plain meaning of Article 1502(3)(a) read in its context, and instead relies on the “principles of state responsibility” to circumvent the plain terms of Article 1502(3)(a).
80. UPS confuses the question of attribution of actions to a State with the entirely distinct question of the nature of the delegated authority contemplated by these provisions of the NAFTA. The Articles on State Responsibility deal with attribution to a State of certain actions, including those of organs of state and state

enterprises¹⁷. They do not deal with the obligations of monopolies and state enterprises. In this regard, NAFTA Articles 1502 and 1503 constitute the set of obligations for NAFTA Parties' monopolies and state enterprises.

Article 1502(3)(d) Obligations Are Not Arbitrable Under Article 1503(2)

81. UPS refers only in passing to alleged breaches of Article 1503(2). However, to the extent UPS asserts a claim that Canada is in breach of Article 1503(2), the same analysis applying, to Article 1502(3), set out above, applies, *mutatis mutandis*, to preclude the arbitrability of the UPS claims under Article 1503(2). Article 1503(2) provides:

1503(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.

¹⁷ Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, report of the International Law Commission, at 94: The Draft Articles are not interpretative principles and cannot be used to interpret the terms "governmental authority" in the NAFTA. These terms must be interpreted in accordance with the *Vienna Convention* principles, which do not include recourse to draft articles covering a different subject matter.

In any event, the Articles on State Responsibility do not support the interpretation of "governmental authority" that UPS is advancing. UPS has referred to Article 5 of the ILC Articles on State Responsibility, which does mention the concept of "governmental authority", and has quoted the commentary of the Commission on this article. This article provides for the attribution of state responsibility for entities that are not organs of the state, where such an entity is empowered to exercise elements of governmental authority. To the extent that it is relevant and that it is of some interest by way of analogy, the ILC material in fact supports Canada's position. Article 5 refers to, but does not attempt to define, the concept of "governmental authority". Paragraph 2 of the commentary refers, to "functions of a public character normally exercised by State organs". Paragraph 5 of the Commentary states that the conduct must¹⁷:

[...] concern governmental activity and not other private or commercial activity in which the entity may engage. **Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of state under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).**"

Clearly, then, the commentary of the ILC does not support the UPS contention that any form of activity based on a government mandate will constitute "governmental authority" within the meaning of Article 1502(3)(a).

82. The obligation in Article 1503(2) is therefore limited to ensuring that a state enterprise not act in a manner “inconsistent with the Party’s obligations” under Chapter 11 and 14. The obligation is further limited in that it arises only when “such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it”. Accordingly, there are two thresholds that must be crossed to establish a right to arbitration in Article 1116.

PART V
ARTICLE 1102

83. UPS also seems to argue that anti-competitive conduct by a monopoly can amount to a breach of Article 1102.
84. First, Canada Post as a monopoly is not subject directly to the obligations in Chapter 11.
85. As noted earlier, Article 1502(3)(a) extends to monopolies the Parties' obligations, including national treatment, only when it is exercising regulatory, administrative or other governmental authority in connection with its monopoly. The allegations of anti-competitive practices do not involve the exercise of any such authority by Canada Post.
86. Second, the fact that the Parties chose to expressly cover anti-competitive conduct under Article 1502(3)(d) and not make it arbitrable under Chapter 11, strongly suggests that the subject matter is not covered by Article 1102.
87. Third, *even if* Article 1102 applied to Canada Post, the allegations of anti-competitive conduct are *prima facie* not capable of constituting breaches of Article 1102. Any attempt to shoehorn an obligation by a government monopoly not to engage in anti-competitive practices into Article 1102 would require the monopoly to accord discriminatory treatment as between investors of another

Party and investors of its home state. However, by its terms, Article 1102 is simply not engaged by a monopoly allegedly discriminating in favour of itself which, in essence, is the UPS claim.

PART VI
ARTICLE 1105

Introduction

88. The scope and applicable legal standard of the legal obligation under Article 1105 is a question of law. Contrary to UPS' allegation, no amount of facts or evidence relating to Canada Post's alleged anti-competitive conduct can have a bearing on the scope of the legal obligation under Article 1105.
89. This Tribunal must simply determine whether the facts pleaded by UPS in its Amended Statement of Claim are within Article 1105, or raise elements of a breach thereof. Such a determination does not go to the merits of the claim as suggested by UPS. Rather, it addresses the threshold issue of whether the subject matter of the allegations *are capable of falling within* the provision upon which the jurisdiction of this Tribunal must be based.
90. Canada is not asking that the Tribunal make a determination "in the abstract" as alleged by UPS, but in light of the facts in the Amended Statement of Claim.
91. It is not sufficient for UPS simply to allege that anti-competitive conduct constitutes a breach of Article 1105, particularly given that UPS' claim relates to conduct expressly covered by another NAFTA provision; namely, Article 1502(3)(d)¹⁸. UPS must establish that the subject matter of its allegations comes within the scope of Article 1105.

¹⁸ This is evident from a review of paragraphs 14(c), 22, 33(a), (b), and 34 of the Amended Statement of Claim. In these paragraphs UPS simply asserts that the conduct in question is covered under NAFTA Article 1105 but provides no explanation and cites no authorities in support of its position.

Note of Interpretation by the Free Trade Commission

92. The scope and applicable legal standard of the legal obligation under Article 1105 has been clarified and confirmed by the Free Trade Commission (FTC) in its July 31, 2001 Notes of Interpretation. The binding Notes of Interpretation confirm that Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard that must be accorded to investors of another NAFTA Party. Moreover, the Notes confirm what is evident from the use of the word “including” in Article 1105; namely, that “fair and equitable treatment” and “full protection and security” are subsumed in “international law” and do not require treatment in addition to or beyond that required by the customary international law minimum standard of treatment of aliens. The Notes also clarify that, consistent with the principle against redundancy in treaties, a breach of another provision of NAFTA, or of a separate international agreement, does not establish a breach of Article 1105.
93. Bald assertions by UPS that it “does not accept” the Notes of Interpretation as identifying the applicable law and standard under Article 1105 should be rejected out of hand. The NAFTA vests the FTC with the prime and final authority as the interpreter of the NAFTA. Article 1131(2) clearly states that the Commission’s interpretations of the NAFTA are binding on Chapter 11 Tribunals and form part of the governing law that a tribunal established under Section B of Chapter 11, such as this one, is required to apply.
94. UPS’ reliance on the Chapter 11 Tribunal award in *Metalclad v. Mexico* as defining the applicable standard under Article 1105 is misplaced. The *Metalclad* award was rendered before the FTC binding Notes of Interpretation. This Tribunal, by virtue of NAFTA Article 1131(2), is bound to apply the governing law, which includes interpretations by the FTC.
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95. In any event, UPS relies on the reasoning and findings of the *Metalclad* Tribunal¹⁹ which have been set aside by the British Columbia Supreme Court as exceeding the jurisdiction of the Tribunal by importing transparency obligations and objectives found outside Chapter 11 into the substantive legal standard applicable under Article 1105.²⁰ The Court agreed that the applicable standard under Article 1105 is the customary international law minimum standard of treatment of aliens.²¹ The Court's ruling is consistent with the FTC's binding Notes of Interpretation on Article 1105. Hence, the *Metalclad* Tribunal award is of no persuasive value and no weight should be accorded to it.

UPS Counter-Memorial, paragraphs 47 and 73

96. Similarly, both the *S.D. Myers v. Canada* Partial Award on Liability and the *Pope & Talbot v. Canada* Award on the Merits of Phase 2 were issued before the FTC handed down its binding interpretation of Article 1105. As such, these awards, to the extent they diverge from the Notes of Interpretation, should be accorded no

¹⁹ UPS Counter-Memorial, paragraphs 47 and 73. UPS' assertion that the *Metalclad* award was substantially upheld in result by the B.C. Supreme Court is misleading. The award was set aside in its entirety with respect to findings on Article 1105, including the specific passages now being quoted and relied upon by UPS. The only portion of the award surviving the set aside proceedings was the finding that the "Ecological Decree" was tantamount to expropriation. *Mexico v. Metalclad Corp.*, [2001] B.C.J. No. 950, at para. 134: "The finding of a breach in respect of which there is no basis to set it aside is the breach of Article 1110 by the expropriation of the site through the issuance of the Ecological Decree without compensation."

²⁰ *Mexico v. Metalclad Corp.*, *ibid*, paras 70-72. The Court noted that the Tribunal incorrectly stated that transparency was one of the objectives of the NAFTA; the very "objective" relied upon by the Tribunal to come to its conclusion regarding the applicable standard under Article 1105. It is also worth noting that the Tribunal stated in its award that the underlying objective of the NAFTA is to ensure the successful implementation of investment initiatives. Again, nowhere in Article 102 is such an objective listed.

²¹ The court also stated that customary international law is to be distinguished from conventional international law which is comprised of treaties entered into by countries. *Mexico v. Metalclad Corp.*, [2001] B.C.J. No. 950.

weight.²² Moreover, Article 1136(1) provides that the decisions of other Tribunals are not binding.

97. UPS' suggestion that conventional international law informs or sets the applicable standard under Article 1105 is also misplaced. The FTC's binding Notes of Interpretation plainly state that the only applicable standard under Article 1105 is the customary international law minimum standard of treatment of aliens. Moreover, the Notes are clear that a breach of another international agreement does not establish a breach of Article 1105. None of the agreements cited by UPS have attained the level of customary international law. Nor does UPS cite any authorities to suggest otherwise.

UPS Counter-Memorial, paragraphs 79 and 80.

98. This Tribunal should also reject UPS' suggestion that the requirement to accord "fair and equitable treatment" under Article 1105 is somehow additive to the obligation to provide the customary international law minimum standard of treatment of aliens. The international minimum standard in Article 1105 expressly subsumes the concepts of "fair and equitable treatment" and "full protection and security". The binding Notes of Interpretation have confirmed this and made clear that these concepts do not expand the protection afforded by the customary international minimum standard of treatment. UPS cannot be allowed to expand the meaning and applicable standard under Article 1105 simply to suit its purposes.

Article 1105 states "...including fair and equitable treatment and full protection and security" (emphasis added).

²² The *S.D. Myers* Tribunal's finding on the issue of the applicable legal standard is consistent with customary international law. It recognizes that: (1) a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective; and (2) that such a determination must be made in light of the high measure of deference that international law accords to the right of domestic authorities to regulate matters within their borders. See *S.D. Myers* Partial Award on Liability, para. 263.

99. UPS' argument that this question is not of a jurisdictional nature is predicated on its misunderstanding of the substantive content of Article 1105, noting that it is not "remotely possible to assess whether the Investor has been accorded "fair and equitable" treatment ..." in the absence of evidence. In advancing this argument, UPS seeks to create a nebulous standard, unconnected to the international law precepts which define the components of customary international law.

UPS Counter-Memorial, paragraph 70.

No Customary International Competition Law

100. There is currently no field of international competition law.²³ In accordance with the traditional sources of public international law,²⁴ the establishment of such a field would require broad international consensus among the global community of nations, either in the form of treaties or customary international law²⁵.
101. There are no multilateral treaties setting out either substantive or procedural

²³ See Guzman, A.T., "Is International Antitrust Possible?" (1998) 73 N.Y.U.L. Rev. 1501 at 1535 (very little success in international efforts to achieve international cooperation with respect to competition policy). The Section on Antitrust Law of the American Bar Association, in its 1990 study of the issues of harmonization and coordination of the world's competition law, identified as one of two major problems the "serious disharmonies in the substantive law and in enforcement procedures of these various nations ...". ABA Section on Antitrust Law, "Report of the Special Committee on International Antitrust" (26 June 1991) at 1.

²⁴ "Article 38(1) [of the *Statute of the International Court of Justice*] is considered as the authoritative statement of the law-creating processes of international law". Kindred, H.M., *et al.*, *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery: Toronto, 1993) at 78. These processes include treaty law, international custom and general principles of law recognized by civilized nations.

²⁵ See Brownlie at 4-5. The treaties required under Article 38(1) of the *Statute of the International Court of Justice* must be lawmaking treaties, *ie* multilateral instruments creating general norms governing the future conduct of the parties in terms of legal propositions. See Brownlie at 12.

competition law obligations.²⁶

102. In turn, the establishment of customary international law requires two basic elements: (1) a consistent and general international practice among States; and (2) the acceptance of the practice as law by the international community.²⁷ Clearly, the test cannot be met in this case, given the insufficient number of nations with any competition law at all.²⁸ Moreover, while a large number of countries with competition law have a general shared understanding of what constitutes anticompetitive practices, the particulars of that understanding are not the same, nor are they at the same stage of development or articulation.²⁹ That competition law has not attained the level of customary international law has been judicially recognized.³⁰

²⁶ “[N]o multilateral mechanism exists for policing ... anti-competitive practices”. Kennedy, K.C., *Competition Law and the World Trade Organization: The Limits of Multilateralism* (London: Sweet & Maxwell, 2001) at 17. See also, Guzman, *supra* note 23 at 1535. Professor Kennedy is of the view that “the prospects for successfully concluding a multilateral agreement on competition policy seem remote”. See Kennedy at 20-21.

²⁷ See Kindred at 115.

²⁸ While there are currently more than 160 sovereign states, only some 80 of them have enacted competition law. Of this legislation, 60 percent of it was introduced in the 1990s. Kennedy, *supra* note 26 at 2.

²⁹ *Eg*, in the NAFTA context, Canada and the United States have had competition law for about 100 years, while Mexico’s competition law dates from the early 1990s. And while the NAFTA parties have enacted laws addressing the basic competition concerns of cartels, abuse of dominance, restrictive trade practices and mergers, each Party’s legislation adopts, maintains and enforces its competition law according to a competition policy developed in the context of its own unique economic, social and political environment.

³⁰ Two U.S. decisions of January 2001 have forcibly made this point: “The dearth of enforceable international antitrust law highlights the inability of the international community to reach a consensus on competition policy. Moreover, no antitrust claim based on customary international law has been recognized in a U.S. court. Without general agreement on standards of international antitrust law, there can be no customary international law of antitrust.” *In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702 at 717, 2001 U.S. Dist. LEXIS 305 at 43 (US Dist. Ct MD, 12 January 2001); and “Plaintiffs’ position [that ‘a broad consensus has developed that certain basic anticompetitive activities, such as ... price-fixing ... are condemned worldwide’ and thus ‘have risen to the level of customary international law’] borders on the frivolous. ... There is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law.” *Kruman et al. v. Christie’s International PLC et al.*, 129 F. Supp. 2d 620 at 628, 2001 U.S. Dist. LEXIS 712 at 18-

103. It is the minimum standard for the treatment of aliens under customary international law that must be applied and against which conduct being challenged by UPS must be measured. UPS has not identified any principle of international law that prescribes a standard of treatment regarding monopolies. There is insufficient state practice to establish customary international law on matters of competition, and in particular, anticompetitive conduct. UPS has failed cite any authorities to the contrary. Unsubstantiated assertions by UPS are clearly insufficient to establish customary international law.
104. Canada's alleged failure to ensure that Canada Post not engage in anti-competitive practices is not a matter covered by Article 1105, but rather one that is covered by Article 1502(3)(d). The plain text of Article 1105 makes clear that it covers "treatment in accordance with international law including fair and equitable treatment...". As noted, UPS' failure to identify any principle of international law that prescribes a standard of treatment that prohibits anticompetitive conduct by monopolies leads to the inevitable conclusion that such matters are not covered under Article 1105.
105. This conclusion is supported by the presumption against redundancy in treaties. Article 1105 must be given a meaning that is independent from the obligations found in Article 1502(3)(d). Again, the FTC binding interpretation confirms this by stating that a breach of another provision of NAFTA, or of a separate international agreement, does not establish a breach of Article 1105.

19 (US S.D. N.Y., 21 January 2001); the customary international law issue was not raised on appeal; see [2002] CA2-QL 79, Docket No. 01-7309 (US CA, 2d Cir., 13 March 2002). The fact that the *Christie's* case found no customary international law for price-fixing is significant: Price-fixing cartels have been described as "the quintessential competition law offence", attracting "near-universal condemnation". M. Barutciski, "The Two Solitudes: Trade and Competition Policy" at 16; paper prepared for presentation at the Canadian Bar Association 1998 Annual Competition Law Conference, Ottawa, Ontario (24-25 September 1998).

106. Articles 1501 and 1502(3)(d), when read together with Articles 1501(3), 1116 and 1117, also provide context that is highly relevant to interpreting what conduct the Parties intended to be covered and not covered by Article 1105.³¹ The fact that the Parties chose to expressly cover anticompetitive practices under Article 1502(3)(d), an Article not arbitrable under Chapter 11, strongly suggests that the subject matter is not covered under Article 1105.
107. The fact that Articles 1501 and 1502(3)(d) proscribe certain conduct and that only certain remedies are available (consultation only for Article 1501 and state-to-state dispute settlement only for Article 1502(3)(d)) also support the inevitable conclusion that the conduct described in these NAFTA Articles is not covered by Article 1105, for which investor/state remedies are available.
108. This interpretation is consistent with the objectives set out in Article 102(1)(b), i.e., promoting “conditions of fair competition”. The Parties deliberately chose to promote this objective through provisions that were subject to consultation only on a state-to-state basis. UPS’ argument proceeds on the incorrect assumption that, simply because investor recourse is not available, the objectives are not being promoted. UPS has failed to advance any persuasive argument or to cite any authority to support this position. Simply stating that Article 1105 covers anticompetitive conduct does not make it so.

PART VII TAXATION

109. Article 2103(1) of the NAFTA states:

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

³¹ Article 31(1) of the *Vienna Convention* requires that the tribunal consider such context in interpreting Article 1105.

110. Article 2103³² specifies what provisions of Chapter 11 may find application in respect of taxation measures. Those provisions are Article 1102 (National treatment), Article 1103 (Most-Favoured-Nation treatment), Article 1106(3), (4), and (5) (performance requirements), and Article 1110 (expropriation).

111. In order to avoid the clear and unequivocal language of Article 2103 UPS argues:

“The Investor does not challenge a taxation measure itself, the Goods and Services Tax or Canadian Customs Duties...”

“...what the Investor challenges is the failure of Canada to apply its laws and ensure such taxes and duties are collected on packages imported through Canada Post...”

UPS Counter-Memorial, at para. 123

112. UPS’ attempt to draw a distinction between a challenge to the taxation measure itself and its application has no merit.

113. Article 2103 refers to taxation *measures*. “Measures”, in turn, is a broadly defined term under Article 201. It includes “any law, regulation, practice, requirement or procedure”²¹. The enforcement of a tax is an integral and fundamental part of a tax measure.

114. Even accepting the Investor’s allegation that the tax is unevenly applied, the application or enforcement of the GST is nonetheless a measure, as it constitutes a procedure, requirement or practice, and falls squarely within Article 2103. The enforcement, application or administration of any taxation law involves the exercise of discretion or judgment as to whether it applies and if so, the extent to which it applies. The Goods and Services Tax (“GST”), is subject to the exercise of discretion and the application of administrative practice and policy. Hence, The distinction between a challenge to the tax itself and its enforcement has no merit. Any other interpretation would be manifestly contrary to the plain reading

³² NAFTA Articles 2103(4)(b), (5) and (6).

and purpose and intent of Article 201 and Article 2013, and would deprive Article 2103 of its full effect.³³

115. Therefore, any claim relating to the application of a taxation measure based on a violation of Article 1105 would be outside the jurisdiction of the Tribunal.

PART VIII PUBLICATIONS ASSISTANCE PROGRAM

116. UPS's challenge to the Publication Assistance Program ("PAP") is not within the Tribunal's jurisdiction as it is a measure with respect to cultural industries and therefore not subject to NAFTA obligations, including those in Chapter 11. Quite apart from the strained meaning it seeks to accord the language of the exemption, there is a more central flaw in the UPS argument. It overlooks the fact that the exemption is for *measures* that with respect to cultural industries, and erroneously focuses on the manner by which it is implemented.
117. It does so by misstating Canada's position. At paragraphs 133 and 134 of its Counter-Memorial UPS states that the issue is whether Canada Post is a "cultural industry" and that "If Canada wishes to assert that Canada Post is a cultural industry, evidence is required."
118. It is clear that Canada did not make this argument. (see paras. 107 - 123 of the Memorial). The PAP, which subsidizes the distribution of magazines, is the measure, and hence wholly exempt from review.

³³ Canada concedes that by virtue of Article 2107, which removes customs duties from the scope of taxation measures in Article 201, there is jurisdiction under the NAFTA to consider whether customs duties breach any of the obligations for which recourse is provided under Articles 1116, and 1117. That being said, the scope of customary international law does not reach so far as to provide for the review of the administration practice or procedure of customs duties.

119. Article 2106 and Annex 2106 of the NAFTA provide that measures adopted or maintained with respect to cultural industries shall be governed by the Canada – U.S. FTA. The language is broad and unequivocal:

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries ... shall be governed under this Agreement exclusively in accordance with the Canada – U.S. Free Trade Agreement.

120. NAFTA Article 2107(a) defines cultural industries to include:

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

121. To avoid the plain meaning of the cultural industries exemption, UPS argues that the word “distribution” does not include the delivery of books, magazines, periodicals or newspapers. This it can no longer do.

122. It should be noted that UPS now seeks to resile from its admission in the Amended Statement of Claim that “distribution” is what is in fact in issue:

Canada has further failed to accord UPS and its investments 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 such companies as UPS Canada.

UPS Counter Memorial, para. 130, 132

123. In its Memorial, Canada alternatively argued that, as a subsidy, the PAP is specifically excluded from the application of the national treatment obligations contained in NAFTA Chapter 11. UPS claims that, to benefit from such an exemption, the subsidy program cannot be designed in a way that discriminates against foreign investors outside those who are meant to be the direct beneficiaries of the subsidy. The argument advanced by UPS ignores the plain

meaning of NAFTA Article 1108(7)(b) which does not condition the subsidy exemption:

124. NAFTA Article 1108 Reservations and Exceptions, states:

[...]

(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.

125. The plain meaning of the words of Article 1108(1) does not contain any limitation and hence does not support the restrictive interpretation that UPS seeks to give it. The subsidy program, not merely some aspects of it, are not subject to Article 1102. Thus, the UPS argument that a subsidy measure benefiting a cultural industry should not discriminate against foreign investors a different industry is moot.

PART IX

MINIMUM REQUIREMENTS OF PLEADING

126. As Canada noted at paragraphs 142, 143, 144 and 145 of its Memorial on Preliminary Jurisdictional Objections, Articles 1116(1), 1116(2) and 1120 require the Applicant to plead alleged measures and alleged breaches of Chapter 11, and the alleged damage arising out of each breach. In addition the Applicant must also plead when it gained knowledge of the alleged breaches and resulting damage or loss.

127. The onus is on the Applicant to ensure that the essential requirements of pleading jurisdiction are met. A Statement of Claim that fails to meet these requirements not only impedes the Tribunal from determining whether a Statement of Claim falls within the terms of Chapter 11, but also fails to give fair notice of the case to

be met, prevent surprise, enable the opposite party to know what evidence ought to be prepared and assist the Tribunal in regulating the proceeding before it.

128. Neither the Tribunal nor the Respondent should be placed in the position of having to deal with possible allegations of which the pleadings fail to give adequate notice and sufficient details. This is precisely what the Applicants seek to do by failing, a) to advise the Tribunal and the Respondent of all the alleged measures, breaches and resulting damage that are in issue, and b) to plead the nexus between the alleged breaches of Chapter 11 and the alleged damage suffered.
129. UPS ignores these minimum requirements and instead asserts, without reference to or discussion of the Amended Statement of Claim, that Canada is seeking a degree of particularity to which it is not entitled under the UNCITRAL Arbitration Rules.
130. At paragraph 151 of its Counter-Memorial UPS argues that a Statement of Claim is not required to provide an exhaustive statement of the facts or the evidence supporting the claim but rather, need only be specific enough to permit the Respondent to reply in the Statement of Defence. In a similar vein, UPS argues at paragraph 154 that 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 term.
131. As a matter of general principle, Canada agrees with these statements of the law. However, UPS mischaracterizes the nature of Canada's objections by suggesting that reliance on these statements of principle alone can advance the inquiry as to whether the Amended Statement of Claim prima facie meets the requirements for submitting a claim to arbitration under Chapter 11.

132. The unresponsiveness of UPS's argument is revealed at paragraph 156 where it argues that "it is no objection to say that paragraphs 16, 22, 27, 34, 35 and 36 of the Amended Statement of Claim do not contain a finite and exhaustive list of all measures and breaches that are subject to the within proceedings". According to UPS, the phrase "including but not limited to" simply identifies that the facts and evidence plead may not be exhaustive and that there can be no question that the nature of the breaches (together with the supporting facts) are clearly identified in each of the paragraphs in which this phrase appears.
133. Canada is not arguing that UPS should exhaustively plead the facts and evidence relating to each of these measures. Rather, Canada is arguing that UPS should comply with Article 1116(1) and plead every alleged measure giving rise to each alleged breach of Chapter 11. In paragraphs in which the phrase "include but not limited to" appears, UPS instead only provides a partial list of the measures that allegedly breach Canada's obligations under Chapter 11.
134. It is no answer to the foregoing to argue that, because the Investor may identify additional measures by the Respondent that allegedly breach obligations under NAFTA Chapter Eleven, that the Investor should therefore not be required to adhere to the pleading requirements of NAFTA Chapter 11 and the UNCITRAL Arbitration Rules. Applications by the Investor to further amend the Statement of Claim to include additional measures will be dealt with on a case by case basis with reference to the principles governing the amendment of pleadings as well as the requirements of NAFTA Chapter 11. For example, leave to amend should not be granted if the opposite party would be prejudiced in such a way that it could not be compensated by costs or if the amendment falls outside the submission to arbitration.³⁴

³⁴ See Article 20 of the UNCITRAL Arbitration Rules and *Re NAFTA Arbitration (Methanex)*, Letter of December 22, 2000 from the Tribunal to the disputing parties.

135. UPS' unwillingness to acknowledge the relevance of, let alone take into account, the requirements of Article 1116(1), is further reflected in its contention at paragraph 161 that a claimant is neither required to plead the specific damage or loss arising out of each measure, nor to plead causal connection between loss and breach. As Canada noted in paragraph 141 of its Memorial on Preliminary Jurisdictional Objections, Article 1116 is clear as to the elements that must be established in a claim submitted for arbitration under Chapter 11 including "that the investor has incurred loss or damage of by reason of, or arising out of, that breach". The ordinary meaning of the terms "by reason of" and "arising out of" in the context of Article 1116(1) incorporates the requirement of causation.³⁵
136. To circumvent these requirements, UPS is forced to argue at paragraph 161 that, since the allegations of fact in the Amended Statement of Claim are presumed to be true for the purposes of this motion, Canada has thereby admitted UPS's assertion that "it has incurred loss or damage by reason of, or arising out of, alleged breaches". UPS confuses conclusions of law with allegations of fact. By repeating the requirement in Article 1116(1) UPS merely asserts a conclusion of law which is unsupported by the allegations of fact in the Amended Statement of Claim.
137. UPS further argues at paragraph 160 that, in any event, sufficient information about the nature of damage claims has been provided in paragraph 35 of the Amended Statement of Claim to enable Canada to ascertain the category of damages that are being claimed and the nature of the documentary and expert

³⁵ In *Hoffland Honey v. National Iranian Oil Co.*, 2 Iran-U.S. Cl. Trib. Rep. 41 (Jan. 26, 1983) (Award No. 22-495-2), the Iran-United States Tribunal was called upon to interpret a similar phrase in the Claims Settlement Declaration between the United States and Iran. Article II(1) of that declaration gave the Tribunal jurisdiction over claims, among others, "that arise out of ... measures affecting property rights ...". The Tribunal held that the phrase "arise out of" reflected not just the requirement of causation, but of proximate causation. The Tribunal examined the pleadings to determine whether the claimant had alleged facts that could establish proximate causation. The claimant, an enterprise that produced honey, contended that its bee colonies had been damaged by certain agricultural products. Although the respondent did not sell these products, it did supply oil as raw material to manufacturers of the chemicals in question. The oil sales were alleged to be measures affecting the claimant's bee colonies. The Tribunal dismissed the claim for lack of jurisdiction, holding that "it is clear from the pleadings and the evidence attached thereto that proximate cause has not been alleged."

evidence required to establish such damages. The absurdity of this contention can be illustrated by considering the allegations made by UPS in paragraphs 27 and 35 of the Amended Statement of Claim in relation to the alleged anti-competitive behaviour.

138. Paragraph 27 of the Amended Statement of Claim begins by positing at least five types of conduct, in respect of which, UPS alleges a minimum of twenty measures that allegedly breach Canada's obligations under Chapter 11. In respect of each measure UPS then alleges in paragraph 35 at least five categories of damage. The listed conduct, measures and categories of damage is described by UPS as including but not limited to what is listed. Even though it is within the unique knowledge of UPS as to how each alleged measure affects its operations, UPS only gives a cursory description of the damages alleged, without addressing, let alone establishing the nature of the alleged losses, the causal relationship between the alleged breaches and the damage suffered. By comparison, Canada has no knowledge of the nature and extent of the alleged damages beyond what is disclosed in the Amended Statement of Claim.
139. UPS' contention that it does not need to plead the specific damages or loss arising out of each alleged breach in this case puts at risk the Tribunal's ability to regulate the arbitration, which involves numerous alleged measures and multiple alleged breaches, and is inconsistent with UPS's obligation to give fair notice of the case that Canada has to meet.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Ottawa, the Province of Ontario, this 12th Day of April, 2002



Of Counsel for the Government of Canada

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