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**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

UNITED PARCEL SERVICES OF AMERICA

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

**MEMORIAL ON COMPLIANCE WITH
THE AWARD ON JURISDICTION**

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OVERVIEW

1. Canada does not lightly submit this Memorial on Compliance with the Award on Jurisdiction. Canada respects the Tribunal's Award on Jurisdiction, and will not repeat objections that have been dismissed or joined to the merits. Such outstanding objections will be raised in the Statement of Defence, as ordered by the Tribunal. However, Canada submits that the Revised Amended Statement of Claim does not comply with the Tribunal's Award. UPS of American [hereinafter UPS] has failed to strike claims that the Tribunal ordered struck; has shifted other claims around without demonstrating any basis for retaining them; and has raised a number of entirely new claims without leave or justification. All of these claims should be struck before this arbitration proceeds.

2. UPS' Amended Statement of Claim made numerous claims under Chapters 11 and 15 alleging that Canada Post has engaged in anticompetitive conduct, including cross-subsidization and predatory pricing. Canada objected to many of these claims, on the basis that UPS was attempting to bring obligations into Chapter 11 that were excluded from investor-State arbitration, in an attempt to make them arbitrable.

3. The Tribunal upheld certain of these objections. It found that claims of anticompetitive conduct under 1502(3)(d) were outside its jurisdiction because the relationship between Chapters 11 and 15:

excludes the possibility that any provision of article 1502(3) other than subparagraph (a) can be the subject of investor-State arbitration.¹

¹ *United Parcel Service of America Inc. v. Government of Canada*, (November 22, 2002) (Award on Jurisdiction) para. 98 [hereinafter *Award on Jurisdiction*].

Further, it found that such claims of anticompetitive conduct cannot be brought under Article 1105; as a result, the Tribunal struck, *inter alia*, paragraphs 22, 33(b) and 34 of the Amended Statement of Claim. Finally, the Tribunal directed that:

it is incumbent on UPS to demonstrate, in the first instance by a further amended statement of claim, that the claims made in paragraphs 27, 28 and 30-32 and the related allegations of fact can be based on a provision of Section A other than article 1105.²

4. UPS has now filed its “Revised” Amended Statement of Claim. The revisions do not comply with the Tribunal’s Award in three respects. First, UPS has failed to strike all the paragraphs the Tribunal ordered struck. UPS continues to allege that a lack of regulatory supervision and transparency can constitute a violation of Article 1105 (for example, RASC para. 41). Second, UPS has failed to abide by the condition the Tribunal imposed on retaining paragraphs 27 and 28 of the Amended Statement of Claim. Where the Tribunal required UPS to “demonstrate” that those claims could be “based on” another article, UPS simply changed them to claims under Article 1102 (RASC paras. 28 and 30). Third, UPS has taken advantage of the Tribunal’s leave to file a further amended claim by introducing new claims relating to Fritz Starber (RASC paras. 37-39), and new claims relating to Articles 1103 and 1104 (RASC paras. 32-35).

5. In order to make out a claim under Article 1102, an investor would have to show that the conduct violates national treatment independent of whether it is anticompetitive. UPS has failed to do this. The Revised Amended Statement of Claim continues to make claims based on alleged anticompetitive conduct that fall under Article 1502(3)(d). In its Award on Jurisdiction, the Tribunal found that claims of anti-competitive conduct falling under Article 1502(3)(d) are outside the jurisdiction of the Tribunal. While an investor might make a claim that conduct that

² *Ibid.*, para. 134.

is otherwise anti-competitive conduct under 1502(3)(d) also violates Article 1102, the investor could *not* rely on the alleged anti-competitive character of the conduct as a basis for the claim under Article 1102. In other words, an investor cannot make the claim that conduct violates Article 1102 as anti-competitive conduct *per se*.

6. As a result, Canada is facing a claim that, for the third time, raises issues outside the Tribunal's jurisdiction. With each filing, UPS has re-packaged its earlier claims slightly, without changing their true substance. Indeed, press reports indicate that a UPS spokesperson has claimed that the Award on Jurisdiction changed nothing:

Everything stands. Nothing is off the table. All it really means to the case is we have some retooling to do.³

7. No amount of retooling can change the substance of the UPS claim. Canada therefore requests that the claims identified in this Motion be struck, and that UPS be denied any further opportunity to amend its pleadings.

I. ARGUMENT

A. UPS HAS NOT COMPLIED WITH THE TRIBUNAL'S RULING ON ARTICLE 1105

8. UPS' arguments under Article 1105 simply re-formulate claims the Tribunal ordered struck. Canada objects to the following paragraphs of the Revised Amended Statement of Claim:

- Paragraphs 40 to 42, which allege a lack of transparency and supervision over Canada Post. These issues were previously raised in paragraphs 33(b) and 34 of the Amended Claim and were ordered struck pursuant to paragraph 134 (a) of the Award on Jurisdiction.
- Paragraphs 43 and 51, which allege that the facts pleaded with respect to Article 1102 also amount to a breach of Article 1105. Apart from the impossibility of determining the

³ See, for example, I. Jack, "Ottawa Claims Lawsuit Under NAFTA Has Narrowed: Courier to Keep Case Alive," *National Post* (23 November 2002) at 6. Annex 1.

facts to which UPS refers, the only possible implication arising from these claims is an allegation of anticompetitive conduct, notwithstanding the concluding language in each paragraph.

1. The Tribunal has ruled that supervision and transparency issues are not covered by Article 1105

9. The Tribunal rejected UPS' allegation that Article 1105 obligates Canada to ensure the existence of a transparent and effective regime for the supervision of Canada Post. The Tribunal therefore struck both paragraphs 33(b) and 34 of the Amended Statement of Claim. This decision followed from two of the Tribunal's conclusions. First, the Tribunal concluded there is no rule of customary international law prohibiting or regulating anticompetitive behaviour.⁴ Second, the Tribunal concluded that Article 1105 does not itself provide a basis for claims challenging anticompetitive behaviour and the failure to prohibit or control it.⁵

10. Paragraphs 40 to 42 raise virtually identical issues to the paragraphs ordered struck, and seem to be an attempt to circumvent the Tribunal's ruling. Paragraph 40 alleges a lack of transparency in the regulatory framework governing the conditions of competition between Canada Post and UPS. The only difference from the earlier paragraphs is that UPS now styles this as a "denial of justice". This does not alter the substance of the allegation, namely that Canada is not properly supervising Canada Post or its allegedly anticompetitive conduct. Paragraph 41 alleges that Canada Post has implemented new business plans to compete with UPS; this is somehow inherently "unfair" to UPS. Paragraph 42 essentially repeats the allegation in paragraph 40, and suffers from the same fatal flaw.

11. Alternatively, if UPS is arguing that Article 1105 obliges NAFTA Parties to provide investors with sufficient information to allow them to identify breaches of other NAFTA provisions, Canada asserts that such a transparency obligation is unknown to customary

⁴ *Award on Jurisdiction, supra* note 1, para. 92.

⁵ *Ibid.*, para. 99.

international law. It has no place in the Article 1105 minimum standard of treatment, particularly in the concept of “fair and equitable treatment” cited by UPS.⁶ Indeed, the Supreme Court of British Columbia, in reviewing the award in *Metalclad v. The United Mexican States*, rejected the possibility that Article 1105 included a transparency obligation.⁷ The NAFTA Chapter 11 Tribunal in *Feldman v. United Mexican States* agreed with the British Columbia court, saying it found “this aspect of their decision instructive.”⁸

12. Canada also adopts and relies upon the arguments it raised during the course of its first jurisdictional objection with respect to the scope and meaning of Article 1105. The reference to “equity” in Article 1105 is made in a specific legal context, and does not establish an equitable jurisdiction for the Tribunal. The question therefore is not whether Canada’s legal system provides a framework that meets someone’s concept of what is “fair” or “equitable”. The question is whether Canada’s conduct has risen to the level of an international wrong.⁹ The transparency “obligation” UPS raises can in no way meet the high standard required for rising to this level. There thus can be no such obligation in Article 1105, and paragraphs 40 to 42 should be struck.

2. Paragraphs 43 and 51 are unclear and by implication could only raise anticompetitive conduct

13. In paragraphs 43 and 51 UPS attempts to raise violations of Article 1105 without specifying the facts on which it relies. Both paragraphs purport to incorporate all the facts pleaded and claims made with respect to Article 1102, “to the extent that they do not assert an independent breach of anti-competitive conduct *per se*”. Which claims and which alleged facts

⁶ “Notes of Interpretation of Certain Chapter 11 Provisions”, NAFTA Free Trade Commission, July 31, 2001 at paras. B(1) and (2). Tab 2.

⁷ *United Mexican States v. Metalclad Corp.* [2001] B.C.S.C. 664 at paras. 68-74. Tab 3.

⁸ *Feldman v. United Mexican States*, Case No. ARB(AF)99/1, Award of December 16, 2002, at para. 133. Tab 4.

⁹ *Myers Inc. v. Canada*, (November 13, 2000), (Interim Award), paras. 261-263.

are included or excluded is entirely unclear, in part because so many of UPS' 1102 allegations do "assert an independent breach of anti-competitive conduct *per se*". Canada submits that these paragraphs are insufficiently clear to establish the Tribunal's jurisdiction. In the Award on Jurisdiction, the Tribunal found that a statement of claim must be:

... specific enough to put the respondent properly on notice so that it can reply adequately in its statement of defence.¹⁰

Canada submits that because neither paragraph provides it with sufficient information to formulate a defence, they should be struck on that ground alone.

14. In any event, both paragraphs attempt to revive claims of anticompetitive conduct, in spite of their final provisos. The allegations and claims under Article 1102 largely consist of the claims of anticompetitive conduct that the Tribunal ordered removed from the Amended Statement of Claim's section on 1105. In Canada's view, paragraphs 43 and 51 are a transparent attempt to circumvent the Tribunal's Award, and should be struck.

B. UPS HAS NOT DEMONSTRATED ITS CLAIMS CAN BE BASED ON ARTICLE 1102

15. At paragraph 134(b) of the Award on Jurisdiction the Tribunal stated:

it is incumbent on UPS to demonstrate, in the first instance by a further amended statement of claim, that the claims made in paras 27, 28 and 30-32 and the related allegations of fact can be based on a provision of section A of chapter 11 other than article 1105.

UPS has not complied with this direction. Instead, it has created a new grouping of claims purporting to allege direct breaches of Article 1102 by Canada Post, making no attempt to *demonstrate* that these claims can be based on that article.

¹⁰ *Award on Jurisdiction, supra* note 1, para. 127. See also para. 132.

16. Paragraphs 27 and 28, for example, of the Amended Statement of Claim remain in the new claim, almost without change. UPS has included words such as “discriminatory” and “more favourable”, but UPS has pleaded nothing to demonstrate that Canada Post accords it less favourable treatment than it accords, in like circumstances, to domestic investors. The pleading amounts to a simple reordering of the Amended Statement of Claim, and does nothing to establish the Tribunal’s jurisdiction. The NAFTA does not allow Chapter 11 claims to be brought in respect of the conduct of monopolies or state enterprises unless they can be brought within specific elements of Article 1116, and UPS’ claims do not in any event come within the scope of Article 1102. They fall within Article 1502(3)(d), which the Tribunal has already ruled is not subject to investor-state arbitration.

1. Chapter 11 claims cannot be brought in respect of the conduct of monopolies and state enterprises

17. Paragraphs 26-31, as well as paragraph 52(a), do not allege facts capable of sustaining a claim that conduct of a monopoly or state enterprise has caused a violation of an obligation in Chapter 11. Article 1116(1) requires that Chapter 11 claims in respect of the conduct of monopolies and state enterprises be brought through either 1502(3)(a) or 1503(2). Under either article, claims must include an allegation that the monopoly or state enterprise was exercising delegated governmental authority with respect to the conduct that is the subject of the claim. There is no such allegation in the Revised Amended Statement of Claim. This absence is not simply a failure in form that might be corrected by yet another revision of the claim. Rather, because the impugned conduct could never be characterized as an exercise of governmental authority, UPS’ claims should be struck as falling outside the jurisdiction that the NAFTA confers on the Tribunal.

- a) *Claims involving the conduct of Canada Post must be brought through either Article 1502(3)(a) or Article 1503(2)*

18. The requirement to bring claims in respect of the conduct of monopolies or state enterprises through either 1502(3)(a) or 1503(2) is consistent with the Tribunal's conclusions on the relationship between Chapters 11 and 15. In the Award, the Tribunal determined that its jurisdiction is defined by Article 1116.¹¹ Paragraph 1 of that Article reads:

An investor of Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

- (a) Section A or Article 1503(2) (State Enterprises), or
- (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A.

19. The Tribunal found that Article 1116(1) is divided into three parts:

In all three parts of this provision then, a violation of chapter 11 is the substantive failing to be addressed. Only the mechanism for the violation differs in the three parts. In one part, the Party assertedly violates that substantive obligation directly, in the second part the Party acts through a state enterprise, and in the third part through a monopoly sanctioned by the State.¹²

20. The Tribunal also found that allegations brought under the second or third parts must incorporate a violation of either 1503(2) or 1502(3)(a), as well as a violation of Chapter 11. Thus, the Tribunal found that the requirements in Article 1116(1)(b) form a "substantial, conjunctive limitation on the scope of jurisdiction ...".¹³ Similarly, a violation of Article 1503(2) must incorporate a violation of either Chapter 11 or Chapter 14.¹⁴

21. In Canada's submission, these conclusions describe a compulsory framework through which a Chapter 11 claim must be brought. A claim brought against a Party's violation of

¹¹ *Ibid.*, paras. 47, 62.

¹² *Ibid.*, para. 67.

¹³ *Ibid.*, para. 66.

¹⁴ *Ibid.*, para. 67.

Chapter 11 *must* be brought through the first part of Article 1116(1)(a), and need only allege a violation of Section A of Chapter 11. A claim brought against the Party in respect of the conduct of a state enterprise or a monopoly *must* be brought through the second part of 1116(1)(a) or through 1116(1)(b). In either case, the claimant must make out an allegation that encompasses a violation of **both** Chapter 11 and either 1502(3)(a) or 1503(2). In other words, the complaint must consist of an allegation that the Party breached 1502(3)(a) or 1503(2) by failing to prevent certain conduct by the monopoly or state enterprise that itself violated an obligation in Section A of Chapter 11. There is no provision for bringing a claim against a monopoly or state enterprise directly under Chapter 11.

22. This requirement to plead through Chapter 15 when bringing allegations in respect of the conduct of monopolies or state enterprises is confirmed by the terms of Articles 1502(3) and 1503(2). Article 1502(3) sets out all the obligations of the Parties relating to the conduct of government and private monopolies. In sub-paragraph (a) it subjects them to the whole NAFTA, when they are exercising delegated governmental authority, but not otherwise. Sub-paragraphs (b) through (d) create additional obligations governing the commercial conduct of monopolies. Similarly, Article 1503(2) subjects state enterprises to the terms of Chapters 11 and 14, when they are exercising delegated governmental authority, and 1503(3) governs their commercial conduct. These provisions are the *lex specialis* applicable to the conduct of monopolies and state enterprises; claims in respect of such conduct must fall within them.

23. UPS' Chapter 11 claims in respect of the conduct of Canada Post must therefore be brought through either Article 1502(3)(a) or Article 1503(2). This conclusion follows from the Tribunal's previous analysis of Article 1116(1), and from the ordinary meaning of Articles 1116(1), 1502(3) and 1503(2).

b) Claims under Articles 1502(3)(a) and 1503(2) must assert an exercise of governmental authority

24. Both Articles 1502(3)(a) and 1503(2) limit a Party's obligation to ensure that monopolies and state enterprises act in a manner consistent with Chapter 11 to situations in which they are exercising a delegated governmental authority. For example, Article 1502(3)(a) requires a Party to ensure that a monopoly:

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.

25. This means not all acts by monopolies and state enterprises are capable of engaging the Party's liability under Articles 1502(3)(a) and 1503(2), and in turn under Chapter 11. Only those acts involving such an exercise of delegated governmental authority can be the subject of an investor-state claim. Put another way, for an investor to claim that a monopoly has taken a "measure" adopted or maintained by Canada within the meaning of Article 1101, that measure must have been taken by the monopoly in the exercise of delegated governmental authority. Placed into the context of Article 1102, the "treatment" complained of must also result from such an exercise of delegated governmental authority.

26. As a preliminary matter, therefore, UPS' Article 1102 claim must depend on an allegation that it has been the victim of "treatment" at the hands of Canada Post, and that Canada Post in according this treatment was engaged in activities such as granting import or export licences, approving commercial transactions or imposing quotas, fees or other charges. Absent this allegation, there is no "measure" by Canada Post capable of sustaining an investor-state claim, and no jurisdiction for the Tribunal.

27. The allegations made in paragraphs 26 through 31 and paragraph 52(a) of the Revised Amended Statement of Claim do not allege that Canada Post was acting in the exercise of delegated governmental authority. Instead, UPS alleges only that Canada Post failed to accord national treatment to UPS, in violation of Article 1102. In some instances UPS alleges that Canada Post failed to supervise *itself* adequately (*e.g.*, paras. 27 and 30); in other instances, UPS simply asserts that Canada Post has violated Article 1102 (*e.g.*, para. 28). In no instance does UPS allege that Canada violated either 1502(3)(a) or 1503(2) by failing to ensure that Canada Post acted in a manner consistent with Article 1102, in the exercise of delegated governmental authority.

c) UPS cannot allege an exercise of governmental authority

28. UPS' failure to allege an exercise of governmental authority is no mere failure in form. The facts pleaded by UPS cannot sustain an allegation that Canada Post was exercising any delegated governmental authority with respect to the matters at issue. UPS' claims are based on Canada Post's accounting or costing decisions and on other internal matters that bear no relation to such governmental authority as the granting of import or export licences, the approval of commercial transactions or the imposition of quotas, fees or other charges. As a result, neither Article 1502(3)(a) nor Article 1503(2) applies to the facts alleged in paragraphs 26-31, and there can be no Chapter 11 jurisdiction created.

29. UPS assumes that Canada Post, as a state enterprise, always exercises delegated governmental authority. This argument cannot be sustained. The NAFTA clearly defines a Party's liability for the actions of monopolies and state enterprises for the purposes of Chapter 11 in Articles 1502(3)(a) and 1503(2), which specify that the monopoly or state enterprise must be engaged in the exercise of delegated governmental authority. If UPS were correct, that requirement would be redundant, and large sections – indeed, a substantial majority – of Articles

1502(3)(a) and 1503(2) would be reduced to inutility. Such a result would fly in the face of the basic rules of treaty interpretation, and cannot have been the intention of the NAFTA Parties.

30. Canada therefore submits that paragraphs 26 to 31 of the Revised Amended Statement of Claim be struck, as they do not allege an exercise of delegated governmental authority.

Furthermore, they cannot be corrected to make such an allegation, because the facts pleaded cannot sustain one. The paragraphs are therefore beyond the jurisdiction of the Tribunal.

31. Paragraph 52(a) similarly alleges violations of Articles 1502(3)(a) and 1503(2) without alleging that Canada Post was exercising delegated governmental authority. It too should be struck, because the facts pleaded cannot sustain an allegation that Canada Post was engaged in such an exercise.

2. In any event, UPS' claims of anticompetitive conduct do not come within the scope of Article 1102

32. Canada further submits that UPS' allegations of anticompetitive conduct, including cross-subsidization and predatory conduct, in paragraphs 27-30 and 52(a) of the Revised Amended Statement of Claim are not capable demonstrating a breach of Article 1102. UPS does not even allege the facts necessary to establish the basic legal elements of that Article. Thus, regardless of whether Canada Post was exercising delegated governmental authority, UPS has not made out a claim under Article 1102. This is hardly surprising, as the allegations simply do not raise national treatment issues. UPS itself must recognize this, or it would have pleaded these claims under Article 1102 in the first instance.

33. Canada submits that the following paragraphs of the Revised Amended Statement of Claim are not capable of constituting a violation of Article 1102:

- Paragraph 27, which reincarnates certain elements of the former paragraph 22. It alleges that Canada Post has “failed to use appropriate accounting devices to properly allocate costs ...”, claiming that such failures allow for “discriminatory and unfair behaviour”. This is a straightforward allegation of anticompetitive conduct in the form of cross-

subsidization, made possible by inadequate supervision, lifted directly from a paragraph that the Tribunal ordered struck. The allegation has been moved from 1105 to 1102, with only a token effort made to relate it to the text of 1102.

- Paragraph 28, sub-paragraphs (c), (e) and (h), which repeat almost verbatim the allegations formerly in paragraph 27. Again, these are straightforward claims of anticompetitive conduct in the form of cross-subsidization and predatory pricing, re-characterized as violations of 1102. UPS alleges that Canada Post competes in non-monopoly sectors “without fairly charging or disclosing the appropriate costs”¹⁵; that Canada Post developed its e-post products using revenues from monopoly products, allowing it to sell them below cost;¹⁶ and that Canada Post has not properly attributed the costs of its pension plan to non-monopoly products, allegedly permitting Canada Post to price those products below their properly attributable costs.¹⁷
- Paragraph 28, sub-paragraphs (a) and (f), which contain allegations of anticompetitive conduct in the form of the restrictive trade practices of exclusive dealing and refusal to deal, respectively.
- Paragraph 29, which in the claimant’s alternative pleading revives elements of the former paragraph 29 relating to anticompetitive conduct. UPS alleges Canada Post has “failed to ensure, through accounting, regulatory and/or structural measures” that it does not employ its monopoly infrastructure so as to affect conditions of competition in non-monopoly sectors. This allegation is simply dropped into the section on Article 1102 with no link to the legal elements necessary to establish a violation of the article.
- Paragraph 30, which is a near verbatim reproduction of former paragraph 28, with the insertion of a few token key-words from Article 1102. The second and third sentences contain allegations of anticompetitive conduct in the form of cross-subsidization and predatory conduct, respectively, without pleading the legal elements of Article 1102.
- Paragraph 52(a), which makes an allegation of anticompetitive conduct in the form of cross-subsidization.

34. The fact that UPS has superficially re-characterized its claims as coming under Article 1102 does not suffice to create the Tribunal’s jurisdiction. As the Tribunal stated in its Award on Jurisdiction, UPS’ pleadings must “demonstrate” that the allegations raised are capable of sustaining a violation of a provision in Section A.¹⁸ UPS has chosen Article 1102 for this purpose, but has failed to make the necessary demonstration.

¹⁵ Revised Amended Statement of Claim, para. 28(c), chapeau.

¹⁶ *Ibid.*, para. 28(e).

¹⁷ *Ibid.*, para. 28(h).

¹⁸ *Award on Jurisdiction*, *supra* note 1, para. 134(b).

35. Article 1102 provides in part:

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

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

36. This is a relative obligation, requiring specific allegations to raise even the possibility of a violation of Article 1102. UPS must allege that Canada has accorded treatment to a Canadian investor or investment that it has not provided, in like circumstances, to a foreign investor or investment. One of the most basic elements of Article 1102 is thus a simple comparison: whether a Party has accorded better treatment to its own investors than to those of another Party. UPS has failed to meet even this elementary standard in its pleadings relating to anticompetitive conduct.

37. UPS' argument amounts to the following: Canada Post is a monopoly that also engages in non-monopoly business. It does not properly account for its monopoly and non-monopoly costs. This results in UPS being disadvantaged in comparison to Canada Post.

38. Even if we assume *arguendo* that UPS' allegations are true, they cannot demonstrate that UPS has received less favourable treatment than that accorded, in like circumstances, to domestic investors or their investments. There is no allegation that Canada Post has purported to dictate the accounting or costing practices of UPS or other investors. There is no allegation that Canada Post has created one system for Canadian investors and another for foreign investors.

There is not even an allegation that Canada Post has the power or purports to have the power to do either of these things, or to exercise any other control over UPS.

39. In the absence of these allegations, which are required elements of Article 1102, UPS' allegations cannot amount to "treatment" under any circumstances. Canada Post's accounting or costing practices are not "treatment" of UPS, or anyone else. They are internal decisions relating only to Canada Post. In short, UPS is not complaining of any treatment it has received at the hands of Canada Post; it is complaining about the presence of a monopoly in a non-monopoly market.

40. This argument simply does not raise any question of the treatment UPS receives at Canada's hands, let alone the treatment UPS receives from Canada Post in the exercise of delegated governmental authority. The argument is entirely limited to Canada Post's internal operations as they relate to its role as a competitor in the market place. Canada Post's competitive activities cannot in and of themselves result in a violation of Article 1102, because a competitive relationship is by definition one in which enterprises seek to establish a superior market position.

41. UPS' argument therefore relates to commercial activities, not governmental ones. The fact that those commercial activities are undertaken by a monopoly or state enterprise cannot convert them into governmental ones. That is precisely why Articles 1502(3)(a) and 1503(2) distinguish between simple actions of monopolies and state enterprises, and those undertaken in the exercise of delegated governmental authority. To allow UPS to bring a claim exclusively on the basis of commercial activity – even by the state – would be to extend the concept of national treatment beyond all recognition. It would also create an inconsistency in the NAFTA where none need exist – Canada Post's presence in a non-monopoly market is permitted by the NAFTA

in Article 1502(3)(d). Such an inconsistent result cannot have been the intention of the Parties, and ought to be avoided under the standard rules of treaty interpretation.

42. The absurdity of UPS' argument becomes evident when considering the remedies Canada might implement to grant "national treatment" under the UPS definition. Under that definition, Canada Post would be required to respect NAFTA obligations even for its commercial activities in non-monopoly markets. Canada would therefore have to ensure that Canada Post and its subsidiaries never offered contractual terms more favourable than those offered by any of its foreign competitors. Similarly, Canada would have to prevent Canada Post and its subsidiaries from offering services below foreign competitors' prices to attract their market share. In short, Canada would have to prevent Canada Post from competing – although only with foreign couriers. The result would be that Canada Post could never compete in a non-monopoly market. UPS' expansive interpretation of the national treatment obligation cannot be correct.

3. UPS' claims are subject only to Article 1502(3)(d), which is not arbitrable under Chapter 11

43. A simple comparison of the text of Article 1502(3)(d) with the allegations in paragraphs 27, 28 (a), (c), (e), (f) and (h), 29 (where it pleads in the alternative), 30 and 52(a) confirms that UPS' claims are not capable of constituting a violation of Article 1102. The allegations therein all centre on anticompetitive conduct such as cross-subsidization and predatory conduct, which are expressly covered by Article 1502(3)(d).

44. That Article provides that a Party shall ensure any monopoly it maintains or designates:

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.

45. In each of paragraphs 27-30, and 52(a) UPS alleges that Canada Post is not subject to adequate constraints when it competes in the market, allowing it to cross-subsidize non-monopoly services with earnings from monopoly services. Even a cursory reading of these allegations is sufficient to demonstrate this. There are allegations of Canada Post's failure to use appropriate accounting devices (para. 27), its failure to properly allocate costs (paras. 27, 28(c)(e)(h), and 30), and its general failure to regulate its non-monopoly activities (para. 29). In short, UPS is plainly alleging that Canada Post has engaged in anticompetitive conduct such as cross-subsidization and predatory conduct. UPS simply dropped words like "anticompetitive conduct", replacing them with vague references to discriminatory and unfair behaviour, in an attempt to give its arguments the flavour of Article 1102. The change in wording does not change the substance.

46. Subparagraphs 28(a) and 28(f) contain allegations of anticompetitive conduct in the form of restrictive trade practices. In sub-paragraph 28(a), UPS alleges that Canada Post engages in exclusive dealing by preventing its retail franchisees from selling products that compete with Canada Post. In sub-paragraph 28(f), UPS alleges that Canada Post is refusing to deal with UPS by allowing only Purolator to sell stamps at its retail outlets. Both of these claims fall properly within the scope of Article 1502(3)(d).

47. Indeed, all of these claims are squarely within the ambit of Article 1502(3)(d), which expressly governs claims of anticompetitive conduct. As such, they can only be brought under State-to-State dispute settlement. UPS is seeking to undo the Tribunal's clear rejection of its argument that UPS can enforce the terms of Article 1502(3)(d) through Chapter 11:

... the analysis we undertook earlier of the relationship between chapter 11 and chapter 15 excludes the possibility that any provision of article 1502(3) other than subparagraph (a) can be the subject of investor-State arbitration.¹⁹

48. The Tribunal should reject this attempt to evade its Award on Jurisdiction. While the Tribunal's analysis was conducted in the context of Article 1105, the conclusions as to the relationship between Chapters 11 and 15 are not specific to that article. UPS cannot bring the terms of Article 1502(3)(d) into Article 1102 any more than it could into Article 1105. Article 1116 still applies, and still limits the investor's ability to bring Chapter 15 claims to either 1502(3)(a) or 1503(2), and not 1502(3)(d).

49. UPS' allegations that Canada Post has violated Article 1102 by engaging in anticompetitive conduct are just not contemplated in the NAFTA, which expressly permits the designation of monopolies and state enterprises (Articles 1502(1) and 1503(1)), implicitly permits monopolies to engage in non-monopoly businesses (1502(3)(d)), and expressly subjects monopolies and state enterprises to Chapter 11 obligations only when they are exercising delegated governmental authority (1502(3)(a) and 1503(2)). UPS therefore seeks use a jurisdiction of the Tribunal that Chapter 11 does not grant, to enforce obligations on Canada Post that Chapter 15 does not create.

C. UPS HAS RAISED NEW CLAIMS UNDER ARTICLES 1103, 1104 AND 1105

50. UPS has raised entirely new claims under Articles 1103 and 1104 in paragraphs 32-35, alleging that Canada provides more favourable treatment to investors of non-NAFTA Parties than that provided to UPS. The claims are repeated under Chapter 15, in paragraph 52(b). Furthermore, UPS has raised new claims concerning Fritz Starber in paragraphs 37-39 that are outside the scope of the original claim. None of these claims were in the Notice of Intent, as

¹⁹ *Ibid.*, para. 98.

required by Article 1119. Canada should not have to face new claims in UPS' *third* iteration of its Statement of Claim.

1. The Article 1103 and 1104 claims are prejudicial to Canada, and do not identify the measures at issue

51. The treaties complained of existed when UPS filed its Statement of Claim, and when it filed its Amended Statement of Claim. When the Tribunal provided UPS with the opportunity to submit a Revised Amended Statement of Claim, it was to permit UPS to correct the deficiencies in its last pleading – deficiencies of UPS' own making. As Canada has shown, UPS did not follow the directions of the Tribunal; instead, it has taken advantage of the Tribunal's grant of leave to further amend its Statement of Claim to file new claims. Canada submits that allowing these changes would be prejudicial to Canada, and requests that they be struck.

52. Canada also objects to the claims in paragraphs 32-35 because they do not identify the measure complained of, let alone the treatment accorded under it. UPS alleges that Canada has entered into treaties that provide better treatment than that available under NAFTA. That is the full extent of the allegation. UPS has not alleged that Canada has taken any *measure* under those treaties. Under the definition in NAFTA Article 201, the treaties themselves are not measures; even if their terms were more favourable in the abstract, which Canada denies, their mere existence does not satisfy the elements of Articles 1103 and 1104. Furthermore, just as UPS has not identified the allegedly inferior treatment it has received, it has not provided any basis for its claim that this alleged treatment caused it any harm.

53. Canada therefore submits that paragraphs 32-35 should be struck in their entirety, along with paragraphs 52(b). The references to Articles 1103 and 1104 in paragraphs 21 and 53 should also be struck.

2. Claims involving Fritz Starber are outside the scope of this arbitration

54. Once again UPS has taken advantage of the Tribunal's order in the Award on Jurisdiction to file entirely new claims. This time, the claims relate to a previously unnamed alleged subsidiary of UPS, and have no connection to the original dispute. UPS' claims in paragraphs 37-39 were not included in the Notice of Intent. Article 1119 requires an investor to identify, *inter alia*, the provisions of the Agreement alleged to have been breached and the issues and factual basis for the claim.

55. Article 20 of the UNCITRAL rules permits a claimant to amend the claim, but imposes a limitation on this ability. The Article provides:

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

UPS' claim concerning Fritz Starber is not within the scope of the original Notice of Intent, and therefore "falls outside the scope of the arbitration clause ..." and should be struck for that reason.

II. ORDER REQUESTED

A ruling by the Tribunal as a preliminary question, pursuant to Articles 21(1) and (4) of the UNCITRAL Arbitration Rules, that the following paragraphs in the Revised Amended Statement of Claim be struck: paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 51, 52(a), 52(b), 52(c).

A ruling that consequential references to Articles 1103, 1104, 1105, 1502(3)(a) and 1503(2) in paragraphs 21, 22 and 53 should also be struck.

Submitted this 7th day of February 2003, at Ottawa, Ontario, Canada.

Of counsel to
the Government of Canada