

**AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN

UNITED PARCEL SERVICE OF AMERICA INC

AND

GOVERNMENT OF CANADA

AWARD ON JURISDICTION

THE TRIBUNAL:

**Dean Ronald A Cass, Arbitrator
L Yves Fortier CC, QC, Arbitrator
Justice Kenneth Keith, President**

Eloïse Obadia, Secretary to the Tribunal

22 November 2002

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The proceedings

1. United Parcel Service of America, Inc (UPS or the Investor) has brought a claim against the Government of Canada (Canada) alleging that Canada has breached its obligations under the North American Free Trade Agreement (NAFTA or Agreement) with the result that it and its subsidiaries have suffered damage. Canada challenges the jurisdiction of the Tribunal over significant parts of the claim as elaborated in the Amended Statement of Claim (ASC or Claim, set out in Appendix 1). This Award rules on that challenge.

2. The ASC was filed on 30 November 2001, after the Tribunal had ruled in a decision given on 17 October 2001 that Canada's Notice of Motion objecting to the jurisdiction of the Tribunal under the original Statement of Claim be addressed at that stage of the proceedings, that is before Canada was required to file its Statement of Defence.

3. In accordance with the timetable fixed by the Tribunal on 30 December 2001, Canada filed its memorial and reply memorial and UPS its counter memorial and rejoinder memorial between 14 February 2002 and 19 April 2002. Mexico and the United States of America then made written submissions under article 1128 of NAFTA, and UPS and Canada responded to those submissions on 21 May 2002.

4. The hearing on jurisdiction was held on 29 and 30 July 2002 in Washington DC, with the assistance of the Secretariat of the International Centre for the Settlement of Investment Disputes which the Tribunal has appointed to administer the arbitration. Ms Eloïse Obadia, counsel at ICSID, acted as Secretary to the Tribunal. The representatives of the parties who appeared at the hearing are listed in Appendix 2. Oral submissions were made on behalf of Canada by Donald Rennie, Patrick Bendin, Michael Peirce, Sylvie Tabet and Alan Willis (Department of Foreign Affairs and International Trade, Department of Justice, Trade Law Bureau) and on behalf of UPS by Michael Carroll, QC (Davis & Company) and Barry Appleton (Appleton & Associates).

5. Mexico and the United States, which were also represented at the hearing, requested the opportunity under article 1128 to make written submissions relating to issues concerning the interpretation of the Agreement arising out of the oral submissions made by the disputing parties. The Tribunal agreed to the requests and fixed a timetable. In accordance with the timetable, Mexico and the United States made their post hearing submissions on 23 August 2002 and Canada and the Investor made their replies on 3 September 2002.

The parties

6. UPS is incorporated under the laws of the State of Delaware. Its Claim refers to four wholly owned US Subsidiaries – UPS Internet Services, Inc, UPS Worldwide Forwarding, Inc, United Parcel Service, Inc (New York), and United Parcel Service, Inc (Ohio) (US Subsidiaries). UPS also owns United Parcel Service Canada Limited (UPS Canada or the Investment), a company organized under the laws of Ontario.

7. UPS Canada provides courier and small package delivery and assorted services and secure electronic communication services both throughout Canada and, with UPS and its related companies (including the US Subsidiaries), worldwide.

8. Canada Post Corporation (Canada Post) is a Crown corporation established in 1981 under the Canada Post Corporation Act. According to the Act, Canada Post is an "agent of Her Majesty in right of Canada" and an "institution of the Government of Canada". Under the Act, Canada Post has the sole and exclusive privilege of collecting, transmitting and delivering first class mail letters to addressees within Canada. The privilege is subject to certain exceptions. With the approval of the Government of Canada, it may make regulations which, among other things, prescribe what is a letter and determine postal rates.

9. Canada Post also operates in the non monopoly postal services market in Canada and in that market it is in competition with UPS Canada.

The dispute in brief

10. At the centre of UPS's Claim are its allegations of anticompetitive conduct by Canada and Canada Post in the non monopoly postal services market and of Canada's failure to ensure that such conduct did not occur. Its ASC summarises conclusions reached by a Commission appointed in 1995 by Canada to carry out an independent review of Canada Post and its mandate, including its non monopoly business activities, and Canada's role in supervising and recognising those activities (para 25). According to the Investor's summary, the Commission concluded in late 1996 that Canada Post was an unregulated government monopoly engaged in unrestrained competition with the private sector and in particular that

- a. Canada Post's practices raised serious concerns of fairness and appropriateness;
- b. Canada Post is not subject to any effective accountability mechanisms and lacks the necessary supervision to ensure that its actions are fully consistent with the public interest;
- c. Canada Post has resisted repeated calls to adopt a satisfactory accounting system that identifies actual costs and revenues for specific products and continues to carry out its competitive

activities on the basis of costs accounting processes that lack transparency;

- d. Canada Post is an unfair competitor in ways detrimental to private sector companies in the non-monopolized postal market in Canada;
- e. Canada Post's misallocation of costs constitutes a form of cross-subsidization;
- f. Canada Post's ability to leverage a network built-up with public funds on the strength of a government granted monopoly gives it a pricing advantage over competitors that is seriously unfair;
- g. Canada Post has developed a reputation as a "vicious competitor" whose predatory practices have led corporations to refrain from criticisms for fear of retaliation; and
- h. the competitive activities of Canada Post, based as they are on the foundation of the corporation's postal monopoly and of the network it has built with public funds, are incompatible with basic principles of fairness.

11. Canada, on 23 April 1997, determined not to implement measures to redress those findings.

12. UPS, in the overview in its Claim, alleges that by virtue of the facts it sets out:

14. ... Canada has breached NAFTA Articles 1102 and 1105, and NAFTA Articles 1502(3)(a) and 1503(2), all in a manner such that UPS is entitled to bring this claim for compensation under Section B of Chapter 11 of NAFTA. More particularly, Canada has:

- a. Breached its obligations under NAFTA Article 1102 by not providing UPS and UPS Canada with the best treatment available to domestic competitors in the Non Monopoly Postal Services Market, and in particular, to Canada Post;
- b. Breached its obligations under NAFTA Articles 1502(3)(a) and 1503(2) by failing to ensure that Canada Post not act in a manner inconsistent with Canada's obligations under the NAFTA; and

- c. Breached its obligations under NAFTA Article 1105 by failing to accord UPS Canada treatment in accordance with international law including fair and equitable treatment.

Canada's challenge to jurisdiction

13. Canada's jurisdictional challenge relates primarily to (b) and (c). Its principal contention is that anticompetitive behaviour and its regulation and control do not fall within the scope of articles 1105, 1502(3)(a) and 1503(2), read with the jurisdictional provisions of article 1116(1)(b). Article 1116 enables an investor of a Party to submit to arbitration a claim that another Party has breached certain obligations under Chapters 11A and 15:

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
 - (a) Section A [of chapter 11] or Article 1503(2) (State Enterprises), or
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A.and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

14. Canada in its Memorial sets out the issues in its challenge to jurisdiction as follows:

- (i) whether the UPS claim under paragraphs 16(f) and (g), 22, 23, 27, 28, 29, 30, 31, 32 and 34 of the Amended Statement of Claim for violations of Article 1501(l) and Article 1502(3)(d) of the NAFTA should be dismissed as outside the jurisdiction of the Tribunal;
- (ii) whether the UPS claim under paragraph 18 of the Amended Statement of Claim that the Publications Assistance Program breaches NAFTA Article 1102 should be dismissed as outside the jurisdiction of the Tribunal;

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- (iii) whether the claim under paragraph 33(a) relating to the Goods and Services Tax (GST) should be struck as taxation measures exempt under Article 2103; and
 - (iv) whether the UPS Amended Statement of Claim should be struck in whole or in part, for failing to satisfy NAFTA requirements including the failure to establish:
 - (a) that the investor's non-Canadian subsidiaries or related foreign companies are investments in the territory of Canada; and
 - (b) all alleged breaches of obligations under Chapter 11 and the damages associated therewith.

In relation to (i) Canada also identified para 33(b) at the hearing. In relation to (iii), as will appear, UPS abandoned this pleading at the hearing.

15. It is convenient to indicate at this stage Canada's obligations under the four provisions of NAFTA which UPS invokes. Articles 1102 and 1105 appear in Chapter 11, headed **Investment**. Article 1102, headed **National Treatment**, requires each Party, here Canada, to accord to the investors of another Party, here UPS, and their investments, treatment no less favourable than it accords to its own investments with respect, among other things, to the conduct and operation of investors and their investments. Article 1105, headed **Minimum Standard of Treatment**, requires each Party "to accord investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".

16. Articles 1502(3)(a) and 1503(2) appear in Chapter 15, headed **Competition Policy, Monopolies and State Enterprises**. Article 1502 is concerned with monopolies (both privately owned and governmental) and Article 1503 with state enterprises. (A government monopoly, like Canada Post, accordingly falls under both provisions.) The two provisions cited require each Party, here Canada, to ensure "through regulatory control, administrative supervision or the application of other measures", that their monopolies and state enterprises do not breach certain obligations. (Paragraph 14(b) of the ASC does not repeat the quoted phrase.) More specifically, each Party shall ensure that any monopoly (private or public)

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. (article 1502(3)(a))

and any state enterprise

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. (article 1503(2))

17. The emphasised words indicate the differences between the two provisions. What is common to them is that if a Party has delegated governmental authority to a monopoly or a state enterprise, the Party is to ensure, putting it broadly, that the monopoly acts consistently with the Party's obligations under the Agreement (as a whole) and the state enterprise acts consistently with the Party's obligations under chapters 11 and 14. That is to say a Party cannot avoid its obligations by delegating its authority to bodies outside the core government. In chapter 14, **Financial Services**, article 1402 similarly obliges a Party which requires financial institutions of another Party to be subject to a self regulatory organisation to ensure that the organisation observes the obligations of chapter 14.

18. The other provisions of articles 1502(3) and 1503 are not directed to exercises by monopolies or enterprises of authorities delegated to them by a Party which breach NAFTA obligations. Rather they focus on the actions of the monopolies and state enterprises in their commercial activities. Both require each Party to ensure that the bodies do not discriminate. Article 1503(3) relating to state enterprises reads as follows:

Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party.

19. The related provision for monopolies appears in article 1502(3)(c) which we set out with paras (b) and (d):

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:

- (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.

20. Those provisions impose substantive obligations on the State Parties. They do not however set up procedures for the resolution of disputes arising out of the provisions. In particular, they do not themselves enable an investor to bring proceedings against a Party. We now turn to the jurisdictional provisions.

Jurisdiction over disputes and in particular over investor claims

21. The Agreement includes among its objectives, along with substantive matters (such as eliminating barriers to trade and promoting conditions of fair competition within the free trade area), the creation of effective procedures for the resolution of disputes (article 102(1)(e)).

22. In terms of article 102, that objective, along with the other objectives, is "elaborated more specifically through [the] principles and rules [of the Agreement]". This is not the occasion for a full scale account of the procedures for the resolution of

disputes elaborated in the Agreement, but some features of the procedures may be highlighted.

23. Some are to operate at the national level and are designed to protect the rights of nationals of the Parties doing business in, or affected by the actions of, another Party, for instance in respect of intellectual property (eg articles 1714-1717) and more generally in respect of administrative procedures, review and appeal (articles 1804-1805). Other procedures are binational, as with the panels which replace judicial review of final antidumping and countervailing duty determinations (chapter 19). Chapter 20 contains a general set of provisions for the settlement of disputes between the Parties, through consultations; good offices, conciliation and mediation by the Free Trade Commission (a body comprising Cabinet level representatives of the Parties or their delegates); and arbitration. The relevant part of Chapter 20 begins in this way :

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation. (article 2003)

24. Those general provisions are excluded by particular provisions of the Agreement, such as chapter 19 relating to antidumping or countervailing duty matters (article 2004). A limit relevant to the subject matter of this case appears in the first provision of chapter 15 concerning competition policy, monopolies and state enterprises. Article 1501 requires Parties to proscribe anticompetitive business conduct. The effectiveness of the measures they take may be the subject of consultation between the Parties, but no Party, the article says expressly, may have recourse to dispute settlement under the Agreement for any matter arising under that particular provision.

25. To turn to the present situation, it is section B of chapter 11 that provides for the settlement of disputes between a Party and an investor of another Party and which UPS has invoked. Article 1115 states the purpose of the section, beginning with a reference to the State – State settlement procedures of chapter 20:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of

investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

The particular provision of section B of chapter 11 which UPS invokes is article 1116, set out earlier (para 13).

26. Article 1117 contains a virtually identical provision for claims by an investor of a Party on behalf of an enterprise that the investor owns or controls. Other provisions of section B elaborate the disputes settlement process, including arbitration. Article 1120 gives the disputing investor a choice among arbitration regimes. In exercise of that choice, UPS submitted its claim under the UNCITRAL Arbitration Rules. Those Rules are relevant to a submission made by Canada about the claimed inadequacy of the ASC, a matter considered later. Article 1131, headed **Governing Law**, is also considered later.

27. Those two provisions apart, the only significant issues in this case relating to Section B of chapter 11 arise from article 1116(1) itself. Under that provision the investor has three possible heads of claim:

- (1) The Party has breached an obligation under Section A – here UPS claims that Canada has breached article 1102 (national treatment) and article 1105 (minimum standard of treatment).
- (2) The Party has breached an obligation under article 1503(2) – here UPS claims that Canada has breached its obligation by failing to ensure that Canada Post not act in a manner inconsistent with Canada's obligations under NAFTA.
- (3) The Party has breached an obligation under article 1502(3)(a) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A – here UPS claims that Canada has breached its obligations by failing to ensure that Canada Post not act in a manner inconsistent with Canada's obligations under NAFTA.

28. At this stage it is enough to note two matters about UPS's pleading –
- (1) Article 1503(2) does not refer to the Party's obligations under the Agreement in general, but only to those under chapters 11 and 14 (the latter of which is not relevant in this case).
 - (2) While article 1502(3)(a) does refer "to the Party's obligations under this Agreement", article 1116(1)(b) enables an Investor to submit to arbitration a claim that the Party has breached article 1502(3)(a) "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A [of chapter 11]". On the face of it at least, the State – State jurisdiction under chapter 20 is wider, not being subject to that final qualifying clause.

29. It will be recalled that Canada's major challenge is to the jurisdiction of this Tribunal over the anticompetitive behaviour alleged by UPS. It says that UPS cannot bring that behaviour within articles 1105, 1502(3)(a) and 1503(2), read, in the case of article 1502(3)(a), with the additional requirement of article 1116(1)(b) which is invoked as a basis of the Tribunal's jurisdiction.

Basis for determining jurisdictional disputes

30. International judicial practice has long recognized that challenges to jurisdiction may be able to be determined in advance of the hearing of the merits of the claim. So article 21(4) of the UNCITRAL Arbitration Rules provides:

In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

31. This power both supports the efficient and effective administration of the arbitral process and reflects the fact that parties, notably State parties, to arbitration processes are subject to jurisdiction only to the extent they have consented.

32. What is the test to be applied to resolving disputes about jurisdiction? The parties were agreed from the outset of the written submissions on one matter. For the

purpose of Canada's challenge to jurisdiction, the facts alleged in the ASC (such as those quoted in paras 10 above and 72-76 and 119 below) are to be accepted as correct. While Canada accepts that proposition, it does contend however that the legal inferences to be drawn from the facts are another matter : the Tribunal must be free to decide questions of law which are relevant to its jurisdiction.

33. In the course of their written argument the parties formulated the test the Tribunal is to apply in determining jurisdictional disputes in various ways. They made extensive references to decisions of the International Court of Justice and of NAFTA tribunals, as well as of other tribunals. The differences between their positions appeared to narrow through that written process and, at the oral hearing, counsel for UPS accepted the test stated by Canada in its Reply Memorial:

[The Tribunal] 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. (original emphasis)

34. That formulation rightly makes plain that a claimant party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive. It is the Tribunal that must decide. The formulation also importantly recognizes that the Tribunal must address itself to the particular jurisdictional provisions invoked. There is a contrast, for instance, between a relatively general grant of jurisdiction over "investment disputes" and the more particularised grant in article 1116 which is to be read with the provisions to which it refers and which are invoked by UPS. Those provisions impose "obligations", as the test proposed by Canada and accepted by UPS indicates.

35. The International Court of Justice in the *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)* 1996 ICJ Reports 803, para 16 puts the test in this way:

[The Court] must ascertain whether the violations of the Treaty . . . pleaded by Iran 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, pursuant to Article XXI, paragraph 2.

That paragraph gave the Court jurisdiction over any dispute between the Parties about "the interpretation or application" of the Treaty.

36. The reference to the facts alleged being "capable" of constituting a violation of the invoked obligations, as opposed to their "falling within" the provisions, may be of little or no consequence. The test is of course provisional in the sense that the facts alleged have still to be established at the merits stage. But any ruling about the legal meaning of the jurisdictional provision, for instance about its outer limits, is binding on the parties.

37. Accordingly, the Tribunal's task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state? It may be that those formulations would differ in their effect in some circumstances but in the present case that appears not to be so.

38. Before we turn to those provisions we consider briefly the approach we should adopt to interpreting the relevant provisions of the Agreement.

Approach to interpretation

39. Paragraph (2) of article 102 of the Agreement – the statement of objectives – directs

The Parties [to] interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 [mentioned in para 21 above] and in accordance with applicable rules of international law.

Article 1131(1) gives a similar direction to this Tribunal:

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

(Article 1131(2) is set out in para 41 below.)

40. The "applicable rules of international law" include the "general rule of interpretation" of treaties set out in article 31 of the Vienna Convention on the Law of Treaties along with article 32 which states supplementary means of interpretation. Those provisions, as UPS and Canada agree and as ample international and national authority confirms, state customary international law; see eg *Oil Platforms* 1996 ICJ

Reports 803, para 23; and *In the Matter of Tariffs applied by Canada to certain US-origin Agricultural Products* Final Report of the NAFTA Arbitral Panel, December 2, 1996 at 33, para 119, citing ICJ and WTO Appellate Body decisions to the same effect (n107). UPS made passing reference to preparatory work of NAFTA (the *travaux préparatoires*), the subject of article 32 of the Vienna Convention. On the record before us there is no indication that there are *travaux préparatoires* that would affect the interpretation of the relevant provisions of NAFTA. Accordingly, it is sufficient for present purposes to set out article 31:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

That general rule, as we understand it, requires neither a broad nor a restrictive approach.

41. One particular feature of the interpretation process under NAFTA arises from one of the functions of the Free Trade Commission. Under article 2001(2) the Commission shall:

- ...
- (c) resolve disputes that may arise regarding [NAFTA's] interpretation or application.

Under article 1131(2)

An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

42. Those provisions may be seen in the context of the first article of the general dispute settlement provisions of NAFTA, article 2003 (para 23 above), and more broadly in the context provided by the customary international law of the "authentic" interpretation of treaties, declared now in para (3) of article 31 of the Vienna Convention. Those aspects of the approach to the interpretation of the NAFTA provisions are essentially agreed between the parties.

43. Where the parties appear to disagree is on the relative balance and importance of the components of article 31. So UPS, referring to a number of decisions of NAFTA tribunals, stresses the importance of interpreting the Agreement in light of its object and purpose. The very first chapter 20 Panel for instance said that "any interpretation adopted by [it] must ... promote rather than inhibit the NAFTA's objectives" (*In the Matter of Tariffs Applied by Canada to certain US - Origin Agricultural Products* Final report of the Panel, December 2, 1996 at 34, para 122). UPS also challenges an Interpretation of article 1105 issued by the Commission under article 2001(2)(c).

44. Canada does accept that what is required is an examination of the treaty in the light of the entirety of the Agreement, including its preamble and objectives. It contends however that UPS is elevating the objectives of the treaty into independent legal obligations forming the basis for a claim and is relying on general objectives of the treaty to contradict the plain words of the provisions read in their context. UPS denies that it is asserting that a NAFTA objective is an independent basis for a claim; rather the objectives simply inform the interpretation of the substantive provisions of articles 1102, 1105, 1502(3)(a) and 1503(2), and are part of the relevant context. Any interpretation of those provisions must be undertaken having full regard for the objective of investment promotion identified in article 102(1)(c), together with the objective of trade liberalization.

45. The parties also disagree – or appear to – over the role that certain so called rules of interpretation (such as the “plain meaning” rule, *ejusdem generis*, *noscitur a sociis* and *expressio unius est exclusio alterius*) might play.

46. The “general rule” (the singular in that heading is deliberate) stated in article 31 of the Vienna Convention is at the center of the Tribunal’s task. We have to interpret the relevant provisions in good faith in accordance with the ordinary meaning to be given to the terms of NAFTA in their context and in the light of its objectives, particularly as stated in article 102. The differences between the parties may be more of emphasis; they may be more apparent than real when we come to give meaning to the provisions in dispute. We now turn to those provisions.

Relationship between chapter 11 and chapter 15

47. There are two interactions between chapter 11 and chapter 15. First, chapter 11 (article 1116(1)), which defines our jurisdiction, allows a claim by an investor for certain violations of chapter 15. Second, the obligations of Parties under chapter 15 are in part dependent on obligations under chapter 11. This relationship is made express in article 1503(2). That article requires Parties to ensure that their state enterprises (when exercising certain delegated authority) act in a manner that is not inconsistent with the Parties’ obligations under chapter 11 (and also chapter 14). This is one of two provisions of chapter 15 for which investor claims are specifically permitted. Hence, the interaction of this provision together with chapter 11 essentially provides authorization for investors to challenge violations of chapter 11 in two circumstances. A challenge can be brought by an investor when the violations of chapter 11 obligations flow from the direct action of one of the Parties to NAFTA or when they flow from conduct of state enterprises in effect acting in the place of a Party. This much is agreed by both UPS and Canada.

48. Canada and UPS disagree, however, over the relationship for jurisdictional purposes between article 1502(3)(a) and chapter 11. Canada argues that the relationship parallels that with respect to state enterprises. That is, Canada asserts that investor claims under article 1502(3)(a) are permitted only to the extent that they claim a failure of a Party to assure that a monopoly acts consistently with chapter 11.

This provides a backstop to the other two provisions, extending beyond direct actions by a Party or by an enterprise that is owned or controlled by a Party to reach similar actions by a private or government monopoly acting under authority delegated from the government. In Canada's view, that is all that article 1502(3)(a) provides.

49. UPS contends that jurisdiction over investor claims is not so limited. Rather, UPS says, NAFTA confers jurisdiction on tribunals such as this one over claims predicated on the violation of *any* NAFTA undertaking so long as two conditions are satisfied. First, the investor must assert a colorable violation of chapter 11; and, second, the investor also must assert a violation of article 1502(3)(a). UPS takes the position that those assertions, so long as they are sufficiently pleaded, permit an investor to submit to arbitration claims that a Party has violated any NAFTA obligation not specifically excluded from investor-State arbitration.

50. The dispute turns on the particular language in articles 1502(3)(a) and 1116(1)(b). Unlike article 1503(2), article 1502(3)(a) requires each Party to ensure that their monopolies, when exercising certain delegated authority, act in a manner that is not inconsistent with the Party's obligations under the Agreement. The language used in article 1502(3)(a) reaches the Party's obligations under NAFTA as a whole and not only under chapter 11 or chapter 15 (or, as in article 1503(2), chapter 14).

51. The dispute settlement provision of article 1116(1)(b), however, qualifies the grant of jurisdiction over claims of a breach by a Party of its obligations under article 1502(3)(a). It limits jurisdiction over these claims to cases "where the monopoly has acted in a manner inconsistent with the Party's obligations under section A, and the investor has incurred loss or damage by reason of, or arising out of, that breach".

52. UPS reads the language just quoted from article 1116(1)(b) as setting conditions in the disjunctive. On this reading, once jurisdiction is established, for instance by way of an alleged breach of both articles 1502(3)(a) and 1102 (for breach of national treatment), the jurisdiction would also extend -- by way of the general reference in article 1502(3)(a) -- to NAFTA as a whole. Thus, a tribunal convened under chapter 11 of NAFTA would have jurisdiction over an allegation of breach of, say, article 1502(3)(d) based on cross subsidization or other anticompetitive acts alone

and not involving any breach of national treatment or other violation of chapter 11. UPS contends that, in this proceeding, our jurisdiction does extend to that additional allegation. On this view, the alleged breach of article 1102 will have served the purpose of opening the door to alleged breaches of any provision of NAFTA.

53. Canada submits that UPS cannot bring other claims through this door. One reason asserted by Canada is that anticompetitive conduct is excluded from the scope of dispute resolution specifically in article 1501. This article does preclude recourse to dispute settlement to challenge a Party's failure "to adequately adopt or maintain measures to proscribe anticompetitive business conduct." UPS states that it is not challenging any deficiency under article 1501 but instead is challenging conduct that, even if it might be characterized as a violation of Canada's obligation under that article, also violates other NAFTA provisions, such as article 1502(3)(d). In the course of the hearing counsel for Canada accepted that a single set of facts could come within more than one provision, for instance within both para (a) and para (d) of article 1502(3) – even if it was difficult to envisage such a set of facts. We accordingly accept that a single set of facts can indeed be the basis for claims under more than one provision.

54. Canada also contests UPS's reading of article 1116(1), asserting that it requires a specific showing that the facts claimed come within the scope of the limiting clause of article 1116(1)(b). Only conduct that violates article 1502(3)(a) and also violates an obligation under chapter 11 is within the provision according to this view. All other claims are excluded.

55. UPS responds that the text of NAFTA nowhere excludes anticompetitive matters from investor-State jurisdiction and says that the objectives included in article 102 militate in favor of finding claims respecting these matters within dispute resolution jurisdiction. In particular, UPS points to the objectives of promoting conditions of fair competition in the free trade area and creating effective procedures for the resolution of disputes (articles 102(1)(b) and (e)), and the principles and rules of national treatment, most-favoured-nation treatment and transparency stated at the outset of the article.

56. Given those objectives, principles and rules, UPS contends, an exclusion from jurisdiction would have to be expressly stated. UPS does not find such an exclusion in the terms of the Agreement, even though there are many places in the Agreement where such an exclusion logically could have been expressed. The exclusion could have been stated in five places – in article 1112 which gives priority to other provisions of the Agreement which conflict with chapter 11; in article 1108 which with voluminous annexes itemizes specific exemptions and reservations; in article 1101 which states the scope of chapter 11; in chapter 15 itself; and in the exceptions to, and exclusions from, NAFTA in chapter 21. In none of these was anticompetitive behaviour excluded. Why, UPS asks, was that? It answers, because that was not the intent of the drafters of NAFTA.

57. The same inference, says the Investor, is also to be drawn from note 43, a note to article 1501, which says that no investor may have recourse to investor-State arbitration under the Investment chapter for any matter arising under article 1501. Counsel for UPS assert that this note was necessary to prevent alleged breaches of article 1501 from being actionable under chapter 11. If that is so, the NAFTA Parties' failure to include a similar note to article 1502 must, UPS says, give rise to an inference that investors may broadly contest violations of obligations imposed by article 1502 in investor-State arbitration.

58. The Investor also emphasises that, had the drafters intended to exclude certain claims from those that could be advanced under article 1502(3)(a), the provision would have been drafted differently. It would not have imposed the very broad obligation on each Party to ensure that the monopolies covered by the provision act in a manner that is not inconsistent with Party obligations *under this Agreement*. Instead, it would have imposed a much narrower obligation on each Party.

59. Canada's response to this point is supported by Mexico and the United States. Canada says that while it agrees that its obligations as a Party under article 1502(3)(a) extend to the whole Agreement, the scope of investor-State jurisdiction is another matter. That jurisdiction is conferred only in terms of article 1116(1)(b) and that provision requires, if jurisdiction is to exist, that the monopoly allegedly act in a manner inconsistent with the Party's obligations under chapter 11A. Questions of compliance with other provisions of the Agreement may be subject to State-State

dispute procedures including arbitration (subject to exceptions as in article 1501(3)) but not to investor-State arbitration. Any other reading would ignore the plain limiting words of article 1116(1)(b).

60. Certainly, Canada is correct in stating that the extent of substantive obligation is one thing; the extent of jurisdiction quite another. Jurisdiction is conferred by article 1116(1)(b) and is subject to its terms. Article 1116 concerning investor-State disputes, like the similar article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party. Other provisions may shed light on this article, but substantive terms of other provisions will not necessarily state obligations subject to dispute resolution unless they fall within the purview of article 1116.

61. The meaning of article 1116 is not clarified by a possible adverse inference from note 43 to article 1501 or by other exclusions and exceptions. The NAFTA Parties quite plainly viewed article 1501 as a potentially open-ended obligation that could be a basis for complaint in a wide array of settings. For that reason, although adopting an obligation that could be addressed in State-State *consultations*, the Parties expressly excepted article 1501 obligations from State-State dispute settlement procedures (article 1501(3)). Note 43 evidences the drafters' caution. NAFTA authorises a broader scope for State-State arbitration than for investor-State arbitration and nowhere confers express authorisation to bring claims respecting article 1501 under investor-State proceedings. The natural inference, then, would be that there is no such jurisdiction; but, given the evident concerns over possible invocation of article 1501 obligations, the drafters added a note to make plain that investor-State arbitration also cannot be used to enforce this article.

62. Similarly, we are not persuaded by UPS's reading of article 1112, providing for precedence of other chapters in the case of conflicts between their provisions and chapter 11. There is no conflict between article 1116(1) and chapter 15, in particular articles 1501 and 1502(3)(d). Rather it is article 1116 that establishes investor-State jurisdiction – a matter with which those substantive provisions of chapter 15 are not concerned – and confers it in para (1)(b) by reference to article 1502(3)(a) and section A of chapter 11. Whatever the contours of article 1116(1)(b), this is the provision that confers jurisdiction. Substantive terms elsewhere in the Agreement do not contradict

the grant of jurisdiction even if they provide obligations broader than the scope of investor-State dispute resolution.

63. This is not to disagree with UPS's statement that the grant of jurisdiction must be interpreted – as must other provisions in the Agreement – in light of the objectives in article 102(1) of promoting conditions of fair competition and creating effective dispute resolution procedures. But, as article 102(1) says, the objectives are “elaborated more specifically through its principles and rules”. The critical relevant rule in this case is defined by article 1116(1)(b).

64. The relevant statement in article 1116(1)(b) is that a claim by an investor can be predicated on a Party's failure to assure that a monopoly or state enterprise does not act in a manner inconsistent with that State's obligation under NAFTA “where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A [of chapter 11]”

65. The first word in the qualifying phrase quite plainly limits the Parties' consent to investor-initiated actions. UPS reads that word as being synonymous with “so long as” while Canada reads that word as synonymous with “only to the extent that.” The other official texts of NAFTA, besides the English text, are in Spanish and French. The words used in these versions are *cuando* (in the Spanish text) and *lorsque* (in the French).

66. The most plausible reading of these texts is that the condition being stated is a substantial, conjunctive limitation on the scope of jurisdiction rather than a disjunctive condition. That is most consistent with the usual meaning of “where” and “when” (or its equivalents) when they are being used metaphorically. Typically, the meaning would be the conjunctive reading asserted by Canada and the other Parties to NAFTA.

67. Moreover, the reading urged by Canada also is more consistent with the structure of the remainder of the jurisdictional grant in 1116. That provision grants investors the right to bring a claim for a violation of Section A of chapter 11 or a violation of article 1503(2) (which incorporates a violation of chapter 11 (or chapter 14) as a precondition). Canada's reading of 1116(1)(b) would allow investors to seek

the grant of jurisdiction even if they provide obligations broader than the scope of investor-State dispute resolution.

63. This is not to disagree with UPS's statement that the grant of jurisdiction must be interpreted – as must other provisions in the Agreement – in light of the objectives in article 102(1) of promoting conditions of fair competition and creating effective dispute resolution procedures. But, as article 102(1) says, the objectives are “elaborated more specifically through its principles and rules”. The critical relevant rule in this case is defined by article 1116(1)(b).

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dispute resolution for a violation of 1502(3)(a) if the conduct that violates that provision consists in failure to prevent conduct that violates an obligation of chapter 11A. 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.

68. The alternative interpretation offered by UPS would allow a far broader scope to investor-State disputes and would make the part of article 1116 dealing with a Party's failures to police delegated conduct of monopolies the vehicle for broad investor review. No obvious reason appears why Parties, having twice confined investor-State dispute resolution to a narrow set of claims, would expand the ambit of disputes dramatically if a state monopoly, instead of the State itself, acts inconsistently with the State's obligations under chapter 11A. UPS's argument strains both the text and the structure of the Agreement.

69. We therefore conclude that, to the extent that a claim is brought under article 1116(1)(a), a breach of Section A must be alleged. UPS's claims under article 1502(3)(a), thus, are limited to claims of violations of obligations associated with claimed failures to abide by terms of chapter 11A. UPS asserts two such bases for such claims, under articles 1102 and 1105. Although the facts asserted by UPS may make out a violation of other provisions of NAFTA as well as a violation of obligations under these articles, our jurisdiction extends to the claims associated with article 1502(3)(a) only so far as they can be brought within one of these provisions.

70. Canada raises no jurisdictional issue in respect of matters falling within article 1502(3)(a) read with article 1102. But it does contend that article 1105 – the other provision of Section A of chapter 11 invoked by UPS along with article 1502(3)(a) – does not extend to the regulation of anticompetitive practices. Accordingly it challenges the Tribunal's jurisdiction over the second head of claim (para 12 above). That contention relates as well to the third head of claim which depends solely on article 1105. We therefore turn to that provision.

Minimum standard of treatment - article 1105

71. Article 1105(1) is as follows:

Minimum Standard of Treatment

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

72. Under the third heading of the Claim, the allegation focuses on Canada's actions alone:

33. Further, Canada is obligated under NAFTA Article 1105 to accord to UPS Canada treatment in accordance with international law, including fair and equitable treatment. Pursuant to NAFTA Article 1105, Canada is obligated to:

...

(b) ensure the existence of a transparent and effective regime for the supervision and regulation of Canada Post in the non-monopoly postal market in Canada.

34. Canada has breached its obligations under NAFTA Article 1105, by *inter alia* failing to provide transparency in the supervision, regulation and operation of Canada Post including through its accounting and financial reporting and by failing to enforce Canadian law including in relation to the issues raised herein when it knew or should have known that by doing so it provided Canada Post with a competitive advantage over UPS Canada in the Non Monopoly Postal Services Market.

73. The pleading under the second heading is more complex but also turns on article 1105 with one exception (in para 29) where the national treatment standard required by article 1102 is invoked. The ASC briefly summarises Canada's obligations under article 1502(3)(a) and 1503(2) and continues:

22. Canada Post is therefore required to act consistently with Canada's obligations under NAFTA Article 1105. The obligations under NAFTA Article 1105 include not engaging in anticompetitive practices while exercising governmental authority, such as the type of authority delegated to Canada Post. Examples of such anticompetitive practices include:

- a. cross subsidization;
- b. predatory conduct and predatory pricing;

- c. using a monopoly infrastructure and network developed for the delivery of monopoly letter mail to benefit non-monopoly products in an unfair manner; and
- d. failing to allocate a fair and equitable portion of the costs incurred to each of its non-monopoly products which benefit from the monopoly infrastructure and network and pricing such non-monopoly products below those allocated costs.

23. In addition, under NAFTA Article 1502(3)(d), Canada is obligated to ensure, through regulatory control, administrative supervision or the application of other measures, that Canada Post acts in a manner that does not use its monopoly position to engage, either directly or indirectly, in anticompetitive practices in the Non-Monopoly Postal Services Market that adversely affect UPS Canada, such as cross-subsidization or predatory conduct. Accordingly, wherever Canada Post engages in anticompetitive conduct in the non-monopolized postal market it is acting inconsistently with Canada's obligation to ensure that Canada Post not engage in such conduct.

74. The ASC sets out alleged breaches of articles 1502(3)(a) and 1503(2) by drawing on the findings of the 1996 report of the independent Commission (para 10 above). It states that when Canada did respond to the Commission's findings in April 1997 it determined not to implement measures to redress the findings. Since that date

27. ... Canada Post has engaged in anticompetitive and unfair conduct including predatory conduct, predatory pricing, tied selling, cross-subsidization and the unfair use of its monopoly infrastructure and network, which conduct is inconsistent with Canada's obligations under NAFTA.

75. The ASC provides many examples, extending over two pages, in support of that general allegation, and further claims that Canada Post's ability to cross subsidize is supported by Canada guaranteeing its borrowings, not requiring a market rate of return and not requiring a return from Canada Post on its capital.

76. This section of the pleading concludes with three brief paragraphs, under the heading Canada's conduct since April 1997:

30. Since April, 1997 Canada has implemented no, or insufficient, measures to ensure that the anticompetitive and unfair practices engaged in by Canada Post would not occur.

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31. As a result, Canada has failed to supervise or exercise control over Canada Post to ensure Canada Post has not acted in a manner inconsistent with Canada's obligations under NAFTA, including from engaging in the unfair, inequitable, or anticompetitive practices described above and has permitted Canada Post to operate as a de facto unregulated monopoly.
 32. Accordingly, Canada has violated Articles 1502(3)(a) and 1503(2) of NAFTA.

77. The very wording of article 1105(1) suggests, according to Canada, that the obligation it states is one that already exists under international law, one that requires each Party, in terms of the heading to the article, to accord a minimum standard of treatment to investors of the other Parties. The reference is to the basic protection conferred on foreign interests by the general body of international law, at least. We say "at least" since the unrestricted reference to "international law" in article 1105 would suggest, as UPS says, that treaty obligations may also contribute to the protection afforded by that article.

78. In another standard usage invoked by Canada, the reference is to the law of state responsibility towards aliens, again a part of customary international law. While counsel for the Investor criticise that terminology, their real criticism is not so much of the label but rather of the content of the obligations which Canada says arise under article 1105. According to Canada, a breach of article 1105 requires treatment that amounts to an outrage, to bad faith, to wilful neglect of duty, or to an "insufficiency" of government action so far short of international standards that every reasonable person would recognize its insufficiency. Further, Canada submits that the obligations under article 1105 do not regulate anticompetitive behaviour. There can be no doubt, it says, that there is insufficient state practice to establish customary international law on matters of competition. That position is also taken by Mexico and the United States.

79. Canada and the other two NAFTA Parties depend as well on an Interpretation of article 1105 issued on 31 July 2001 by the Free Trade Commission under article 2001(2)(c) (para 41 above). The Interpretation reads as follows:

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of

Chapter Eleven in order to clarify and re-affirm the meaning of certain of its provisions:

...

B. Minimum Standard of Treatment in Accordance with International Law

- 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
- 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
- 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

80. The orthodox, even traditional, character of article 1105 also appears on this view from the context in which it appears, in a set of three provisions designed to protect the rights and interests of investors throughout the free trade area. The other two protections are very common in international treaty practice. They require national treatment under article 1102 and most favoured nation treatment under article 1103 (with the better treatment of the two being accorded under article 1104). Those obligations are relative. They depend simply and solely on the specifics of the treatment the Party accords to its own investors or investors of third States. Article 1105, by contrast, states a generally applicable, minimum standard which, depending on the circumstances, may require more than the relative obligations of articles 1102 and 1103. That is also the case with other provisions of chapter 11, notably article 1110 which states limits on the Parties' powers to nationalize or expropriate investments of an investor of another Party.

81. The Investor, by contrast, stresses what it sees as the very general terms of article 1105 and especially its requirement that Canada accord fair and equitable treatment to it. Whether Canada had met that obligation was something that could be decided only when all the relevant evidence had been adduced and fully assessed. These are not matters that could be assessed in the abstract. Canada is attempting to engage the Tribunal in prejudging the merits of the dispute.

82. If however the Tribunal does consider it necessary to deal with these submissions, the Investor rejects the argument based on the Free Trade Commission's interpretation and Canada's attempt to articulate the content of "international law" and the "customary international law minimum standard of treatment". First, the Investor does not accept the Commission's Interpretation, and even if the Interpretation identifies the law the Tribunal is to apply that does not help Canada because the Interpretation does not define what is meant by the standard. Nor is it remotely possible to assess whether the Investor has been accorded "fair and equitable treatment" in the absence of the evidence to be produced during the merits phase. Secondly, Canada is relying on authorities from a different context and a different era. Thirdly, its position is inconsistent with the interpretive principles the Tribunal is bound to apply and has been soundly rejected by NAFTA tribunals.¹

83. As will be apparent from this brief summary, the submissions before the Tribunal range widely. From that material one issue is however critical for the present case. Does article 1105 impose obligations on the Parties to control anticompetitive behaviour as alleged in the passages of the ASC set out in paras 72 to 76 above? We consider the position, first, under customary international law and, second, under relevant treaty provisions (touching in that context on the significance of the Free Trade Commission's Interpretation).

84. To establish a rule of customary international law two requirements must be met : consistent state practice and an understanding that that practice is required by law. "It is of course axiomatic", said the International Court of Justice in the *Libya/Malta Continental Shelf Case* 1985 ICJ Reports 13, 29 (para 27), "that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States". It went on to say that multilateral treaties may have an important role in recording and defining rules deriving from custom, or indeed in developing them. That statement of principle demonstrates that the obligations imposed by customary international law may and do evolve. The law of

¹ UPS refers to *Metalcad v Mexico*, Award 25 August 2000; *S D Myers v Canada*, Partial Award 13 November 2000; and *Pope & Talbot v Canada*, Award on the Merits of Phase 2, 10 April 2001, para 118; see also the *Award in respect of damages*, 31 May 2002, in that case, where following the issuing of the Interpretation the Tribunal preferred to see the Commission's action as an amendment rather than an interpretation but, proceeding on the latter basis, it held that its actual award was not incompatible with the Interpretation and indeed Canada's actions violated the fair and equitable treatment requirement under Article 1105 even using Canada's strict formulation of the requirement.

state responsibility of the 1920s may well have been superceded by subsequent developments. It would be remarkable were that not so. But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law.

85. In their submissions, Canada, Mexico and the United States call attention, in terms of state practice, to studies of national competition laws. Many states do not have competition laws – only 13 out of the 34 Western Hemisphere nations and about 80 of the WTO members do; more than half of the laws have been enacted in the past 10 years. Further, national legislation, for instance that of the three NAFTA Parties, differs markedly, reflecting their unique economic, social and political environment. And there is no indication in any material before the Tribunal that any of that legislation was enacted out of a sense of general international legal obligation. UPS indeed did not attempt to establish that aspect or the practice element of a customary international law rule requiring the prohibiting or regulating of anticompetitive behaviour.

86. Some reference has been made in the present context to the many bilateral treaties for the protection of investments that have been concluded over recent decades as supporting a relevant rule of customary international law. Many of them state an obligation of fair and equitable treatment to be accorded to investors independently of the treatment required by international law. But, again, UPS has not attempted to establish that that state practice reflects an understanding of the existence of a generally owed international legal obligation which, moreover, has to relate to the specific matter of requiring controls over anticompetitive behaviour.

87. The absence of any such rule is also demonstrated by multilateral treaty making and codification processes, one contemporary, the other from 40 years ago. The WTO Ministerial Declaration of 14 November 2001 (the Doha Declaration) shows that WTO Members are only now beginning to address the possibility of negotiating competition rules on a multilateral basis. Ministers recognized the case for a multilateral framework to enhance the contribution of competition policy to international trade and development and the need for enhanced technical assistance and capacity building in the area, and agreed that negotiations would take place after the next session of the Ministerial conference on the basis of a decision taken by

explicit consensus at that session on modalities of negotiations. That process decision is to be related to the absence from the GATT and WTO treaties of any general set of provisions prohibiting or controlling anticompetitive behaviour.

88. The absence of current general obligations as indicated by state practice in national legislation and the agreed process to establish a process reached at Doha can be related to the efforts at progressive development and codification of state responsibility undertaken within the International Law Commission of the United Nations in the early 1960s. The draft articles prepared by the Commission's special rapporteur, F V Garcia Amador, in 1961 at the end of that phase of the work covered denial of justice to aliens, deprivation of liberty, expulsion and other forms of interference with freedom of movement, maltreatment and other acts of inhumanity, negligence in the performance of the duty to protect, and measures affecting acquired rights. That final heading dealt with measures of expropriation and nationalization, non-performance of contractual obligations in general and repudiation of public debts, but the draft articles said nothing at all about regulating anticompetitive behaviour.

89. That gap also appears in the draft convention on the international responsibility of states for injuries to aliens prepared for the International Law Commission by Professor Louis B Sohn and Professor Richard R Baxter of the Harvard Law School in 1961.

90. Like the Garcia Amador text, the Harvard draft, even although it was prepared over forty years ago, is still to be seen as something of a high water mark in the statement of the law for the protection of aliens, particularly their property and other economic rights and interests. That assessment is supported by the facts, first, that it was the subject of serious criticism by some members of the International Law Commission as failing to recognise the existence of two different economic systems and failing to take account of the interests of the states other than the United States and, second, that within a year or two the Commission decided to change direction and to address the general rules of state responsibility rather than the more specific matter of state responsibility towards aliens which until then had been the subject of its attention (see *Yearbooks of the International Law Commission* 1959 vol I, 147-154; 1960 vol I, 264-270, 276-283; and 1963 vol II, 223-224, paras 51-55 of the Commission's Report to the UN General Assembly).

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91. UPS did not refer us to material subsequent to the Harvard draft to demonstrate that general international law had moved in the direction of requiring states to prohibit or regulate anticompetitive behaviour.

92. We accordingly conclude that there is no rule of customary international law prohibiting or regulating anticompetitive behaviour.

93. But is there nevertheless a basis in the text of article 1105 itself or in some other treaty source (possibly admitted by the article's general reference to "international law") for this part of the ASC?

94. UPS says that there is, on the basis of Canada's obligation to accord it "fair and equitable treatment". According to UPS, that obligation is to be seen as additional to the minimum standard and not to be subsumed within it.

95. It invokes the recent *Pope and Talbot* awards in support. The ruling in the earlier award preceded, and the expression of opinion in the later award followed, the FTC's Interpretation. They are inconsistent with the Interpretation, in particular insofar as it says that the obligation to accord fair and equitable treatment is not in addition to or beyond the customary international law standard of minimum treatment.

96. The NAFTA Parties have now submitted to a number of NAFTA tribunals that the "additive" interpretation is not available to the tribunals. By their consistent position they provide, they say, an "authentic" interpretation, in terms of article 31(3) of the Vienna Convention. And in any event the FTC's Interpretation is binding on chapter 11 tribunals including this one.

97. We do not address the question of the power of the Tribunal to examine the Interpretation of the Free Trade Commission. Rather, we agree in any event with its conclusion that the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard. Our reasons in brief are, first, that that reading accords with the ordinary meaning of article 1105. That obligation is "included" within the minimum standard. Secondly, the many bilateral treaties for the protection of investments on which the argument depends vary in their substantive obligations; while they are large in number their coverage is limited; and, as we have already said,

in terms of *opinio juris* there is no indication that they reflect a general sense of obligation. The failure of efforts to establish a multilateral agreement on investment provides further evidence of that lack of a sense of obligation. Thirdly, the very fact that many of the treaties do expressly create a stand-alone obligation of fair and equitable treatment may be seen as giving added force to the ordinary meaning of article 1105(1) and particularly the word "including" ("notamment" and "incluido"). And the likely availability to the investor of the protection of the most favoured nation obligation in article 1103, by reference to other bilateral investment treaties, if anything, supports the ordinary meaning.

98. The remaining possible basis for finding support in article 1105 for the pleading about anticompetitive behaviour is that the expression "international law" in that article may include treaties and in particular article 1502(3)(d). This possible argument is also rejected by the FTC's Interpretation (paras 1 and 3). Again, we need not address the matter of whether this Tribunal may challenge an Interpretation since 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.

99. The Tribunal accordingly concludes that those parts of the ASC, which are based on article 1105, and which challenge anticompetitive behaviour and the failure to prohibit or control it are not within its jurisdiction.

Anticompetitive measures and article 1102

100. Canada challenges the Tribunal's jurisdiction over paras 16(f) and 29 of the ASC. The former, under the heading National Treatment, alleges breaches by Canada of the obligation of "the best in-jurisdiction treatment with respect to ... the ... conduct and operation of investments" (para 15) by giving benefits and privileges to Canada Post which are not made available to competitors, including UPS, in particular

- (f) Allowing non-monopoly products access to and the benefit of the infrastructure built to service Canada Post's monopoly products without appropriate charges being allocated to the non-monopoly product

Canada did not at the hearing pursue a related challenge to para 16(g).

101. Paragraph 29 appears under the Chapter 15 (articles 1502(3)(a) and 1503(2)) heading in the ASC, but appears to be misplaced since it simply alleges a breach of article 1102:

29. Further, Canada Post has also acted inconsistently with Canada's obligations under NAFTA Article 1102 by not allowing similar access to its monopoly infrastructure and network to UPS Canada and its other competitors that it provides to its non-monopoly business.

102. The conclusion we have reached under the previous heading about anticompetitive measures not being subject to article 1105 is not relevant to these two paragraphs. Paragraph 29 should refer to Canada's breach of its obligations rather than to Canada Post's breach of Canada's obligations, but subject to that and its repositioning with the other alleged breaches of the obligation to accord national treatment, the pleading in the paragraph alleges facts which are capable of constituting a violation of article 1102. That is also the case with para 16(f).

103. Accordingly, this challenge to jurisdiction fails.

Publications assistance programme

104. Paragraph 18 of the ASC contains allegations relating to a Canadian programme known as the Publications Assistance Programme (PAP), which appear in the part of the Claim relating to national treatment (article 1102).

105. Canada argues that the allegations regarding the PAP should be dismissed as outside the jurisdiction of the Tribunal because of annex 2106 (the so-called "cultural industries exemption") and article 1108(7)(b) (the "subsidies exemption"). These claims are considered briefly below.

(i) The cultural industries exemption

106. Annex 2106 to NAFTA reads as follows:

Notwithstanding any other provision of this Agreement ... any measure adopted or maintained with respect to cultural industries ...

shall be governed under this Agreement exclusively in accordance with the *Canada-United States Free Trade Agreement*.

107. Canada's position, in brief, is that the PAP satisfies the criteria described in annex 2106, namely, it is a "measure" that has been "adopted or maintained with respect to cultural industries."

108. UPS submits that the particular activity in which Canada Post is engaged, which the Investor refers to as the mere "delivery" of books, magazines, periodicals or newspapers, does not fall within the definition of "cultural industries" set out in NAFTA article 2107, which is identical to FTA article 2012 and which reads as follows:

[C]ultural industries means persons engaged in any of the following activities:

(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

109. Setting aside the issue whether or not the word "distribution" includes "delivery" – though it bears noting that UPS itself suggests, elsewhere in its submissions, that the PAP does concern the "distribution" of magazines by Canada Post – it is, at first blush, arguable that the intent of the article 2107(a) definition is to capture *all* aspects of what might be called the business of print-making and -selling; and indeed it is not necessarily obvious why, if the object and purpose of the "cultural industries" provisions of NAFTA are to benefit those industries, the delivery to consumers of cultural products should be excluded.

110. It might also be observed that at least certain activities associated with cultural industries but which Canada and the United States nonetheless chose to exclude from the NAFTA/FTA definition are expressly identified in article 2107(a), to wit: "... the sole activity of printing or typesetting". UPS states that these words indicate that "it is apparent that the cultural industries exception was not intended to apply to such an industrial process", which it describes as "the commercial or industrial process of door to door delivery of magazines to subscribers". It might, however, be argued that the intent of the Parties to NAFTA is clear on its face,

namely, to exclude from the definition of cultural industries (as between Canada and the United States) "the sole activity of printing or typesetting".

111. UPS submits that "[t]he mere fact that magazines are carried through the mail does not convert the mail delivery system into a cultural industry ...". This assertion is likely correct, as far as it goes. It does not necessarily follow, however, that the activity of delivering cultural products to consumers is inconsistent with the protection of Canadian "cultural industries", as the concept is understood in the context of NAFTA, or that the persons engaged in delivering such products are excluded from the article 2107(a) definition of cultural industries.

(ii) The subsidies exemption

112. As mentioned, Canada also submits that the PAP is exempt from the application of NAFTA article 1102 by virtue of article 1108(7)(b), which reads, in part:

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.

113. The Investor disagrees with Canada's position. It argues that a subsidy measure (such as the PAP) benefiting a particular cultural industry (in this case, the magazine industry) should not discriminate against a foreign investor in a different industry. Canada responds that UPS misconceives the focus of the exemption in question, which is clearly "subsidies" and not, as UPS suggests, "industries". It points out that at para 18 of its ASC UPS itself describes the impugned conduct of Canada as "designing and implementing a Publications Assistance Program, intended to subsidize the Canadian magazine industry ...".

(iii) Conclusion

114. Having considered the issues which arise in respect of Canada's contention that the Tribunal lacks jurisdiction to hear UPS's allegations regarding the PAP, and

bearing in mind the appropriate test for determining jurisdictional disputes (paras 33-37 above), the Tribunal is of the view that there is simply insufficient evidence on the record, at the present time, on the basis of which it could dismiss the Investor's allegations. By the same token, it is not possible for the Tribunal to ascertain the correctness of UPS's characterisation of the PAP as some sort of subterfuge, or colorable scheme.

115. In due course, with the benefit of a more complete factual record as well as more fulsome analysis of the issues by the parties, the Tribunal will be prepared to revisit these questions, if invited by the parties to do so, during the merits phase of the arbitration.

Taxation measures

116. The ASC contains allegations relating to goods and services tax. They appear in parts of the Claim relating both to national treatment (article 1102) and minimum standard (article 1105). The allegation relating to article 1105 was challenged by Canada, in its Memorial, as being outside the Tribunal's jurisdiction. Counsel for the Investor stated at the hearing that it abandoned that particular claim and as a consequence para 33(a) of the ASC. It did however maintain the Claim relating to the tax so far as article 1102 was concerned. As a result of that statement, counsel for Canada did not at the hearing pursue its challenge in relation to taxation.

117. The Tribunal records those clarifications which have the consequence that no Canadian challenge remains under this heading. We simply note that while article 2103 provides that nothing in the Agreement applies to taxation measures, one of the limits to that exception is that article 1102 (but not article 1105) does apply to taxation measures (with exceptions that are not relevant). Accordingly the position taken by the two parties appears to conform exactly with the Agreement.

American subsidiaries of the investor

118. Under article 1101, headed **Scope and Coverage**, chapter 11 applies to measures adopted or maintained by a Party relating to

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; ...

119. As already noted, the ASC refers to the Investor, to its US Subsidiaries and to UPS Canada. In relation to the claimed breaches of article 1102, the ASC alleges that

- 19. By reason of the benefits and privileges set out above, which are not correspondingly made available by Canada to UPS Canada, UPS, *the US Subsidiaries* and UPS Canada have suffered harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share, and increased out of pocket expense. Canada has violated its obligation to accord national treatment pursuant to NAFTA article 1102 to UPS and UPS Canada, and is therefore liable to pay compensation. (emphasis added)

In respect of article 1105 the ASC says:

- 35. By virtue of the facts set out in paragraphs 20 to 34 above, UPS, *the US Subsidiaries* and UPS Canada have suffered harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share, and increased out of pocket expense. Canada has violated its obligations under NAFTA and is liable to pay compensation. (emphasis added)

120. Canada says that the references to US Subsidiaries in these paragraphs should be struck. They do not allege either that the Subsidiaries are "in" Canada or that the loss was suffered by UPS itself. So far as the wording of the ASC itself is concerned, we note that the final sentence of para 19 is indeed limited to UPS and UPS Canada and that the final paragraph of the ASC under the heading Relief Sought and Damages Claimed is further restricted, just to UPS:

- 38. UPS claims damages of not less than US \$160 million as compensation for the damages caused by or arising out of Canada's breaches of its obligations under NAFTA, costs including professional fees and disbursements, costs of the arbitration, interest, compensation to remedy the tax consequences of any award and such further relief as this tribunal might deem appropriate.

121. In terms of the jurisdictional provisions of articles 1101 and 1116, UPS, to recover damages, would have to establish at the merits stage that the damage was

suffered either by it or by one or more of its investments "in" Canada. (There is of course no question about UPS Canada.) The evidence may – or may not – establish that any damage suffered by the US Subsidiaries may properly be attributed to UPS itself or that those Subsidiaries, as investments of UPS, were "in" Canada.

122. While the ASC might have been worded somewhat more precisely in this respect, the Tribunal considers that it gives adequate notice of the claim to Canada, against the jurisdictional limits set out in chapter 11 governing the claim that the Investor may make in respect of its investments and subsidiaries. To repeat, at the merits stage, UPS will have to establish on the evidence how and to what extent within those limits it has suffered damage or losses. Accordingly, at this stage, the Tribunal rejects the challenge by Canada under this heading.

Minimum requirements of pleading

123. In its Memorial Canada sought

to strike the Amended Statement of Claim for failure to comply with the requirements of Chapter 11 and UNCITRAL Rules for advancing a claim. In particular, UPS has failed to

...

(ii) plead the minimum required facts and damages flowing from the alleged breach with sufficient particularity.

According to the Memorial, this objection and that relating to the US Subsidiaries (which we have already rejected) "are, alone, a sufficient basis on which to strike the Amended Statement of Claim in its entirety".

124. At the hearing, however, counsel for Canada made no reference at all to this contention either in their primary submissions or in their reply. Counsel for UPS by contrast did touch on the matter.

125. Since Canada did not formally abandon this challenge, we do address it. We do that briefly and essentially in terms of the argument made by the Investor, an argument which we did find persuasive.

126. The applicable rules of international law to which article 1131(1) refers include of course the requirements of impartial and fair judicial process, a matter also

emphasised by the statement of purpose at the beginning of section B of chapter 11. Procedural rules and rulings are means to those ends, not ends in themselves.

127. 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. The tribunal also must be informed of the essence of the claim. An exhaustive statement of the facts or of the evidence supporting the claim is not required. What is required, according to article 18(2) of the UNCITRAL Arbitration Rules, is the following:

The statement of claim shall include the following particulars:

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

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

128. The ASC follows the list of particulars set out in article 18(2). Thus it has parts headed *The Parties*, *Relevant Entities*, *Procedural History of Dispute and Jurisdiction*, *Overview – Breaches of NAFTA, Canada’s NAFTA Obligations* (under which it states *facts* as well as legal obligations and alleges breaches by reference to both), *Points in Issue* and *Relief Sought and Damages Claimed*. (The italics indicate the four elements included in the list in article 18(2) of the Rules.) The Investor used essentially the same structure in its initial Statement of Claim which was much longer (75 pages plus 26 pages of appendices), a matter which Canada criticised in an earlier phase of the case when it challenged, it appeared, more than 100 paragraphs of the claim and said that it should not have to waste significant time and effort responding to lengthy and complex allegations that *prima facie* were not properly before the Tribunal (see paras 17 and 19 of the Decision of the Tribunal of 17 October 2001 on the filing of a statement of defence). In a formal sense at least, the Investor complies with the UNCITRAL article.

129. Canada also calls attention to the elements required by article 1116 : that the claim is that the Party has breached an obligation under one of the specified provisions and the Investor has incurred loss or damage by reason of or arising out of

that breach. The ASC does allege such breaches (para 12 above) and, in its final paragraph headed Relief Sought and Damages Claimed (para 120 above), claims damages as compensation for the damage caused by or arising out of Canada's breaches of its obligations under NAFTA.

130. Canada complains nevertheless that there is insufficient precision. The Investor has failed to advise the Tribunal and Canada of all the alleged measures, breaches of chapter 11 and the alleged damage suffered. In particular, six paragraphs (paras 16, 22, 27, 34, 35 and 36) provide non exhaustive lists of alleged breaches. Further, leave to amend the statement of claim to provide greater precision should not be granted if the other party would be prejudiced or the amendment fell outside the submission to arbitration.

131. The last submission refers to one of the controls which the Tribunal has over the development of the claim to ensure that it understands the essential matters and that the other party has proper notice. Under article 20 of the UNCITRAL Rules, either party may amend or supplement its claim or defence unless the tribunal considers the amendment inappropriate having regard to delay, prejudice or other circumstances; further, a claim may not be amended to take it outside the scope of the arbitration claim. It will be observed that the article does not have quite the balance that Canada would suggest. While the tribunal may exercise control over amendments, its leave need not be sought in the first instance. Article 22 is also relevant, as both parties remind the Tribunal. It has the power to decide whether further written statements, in addition to the statements of claim and defence, should be required from the parties or may be presented by them. Those powers are to be read with the broad powers of the tribunal under article 15 of the UNCITRAL Rules to conduct the arbitration in such manner as it considers appropriate provided that the parties are treated with equality and given a full opportunity to present their cases.

132. Looking at the ASC as a whole and in the context of principle and the relevant UNCITRAL Rules, the Tribunal considers that it does adequately give notice to Canada of the essential elements of the claim it must meet. It does enable Canada to formulate a statement of defence. As the process of the production of evidence and of proof proceeds (a process supported by the Tribunal's powers mentioned earlier and also article 24 of the UNCITRAL Rules), the Investor will have the opportunity to

give its claims greater precision. It is of course in its interests to do so if it is to establish its claims as a matter of fact.

133. The Tribunal concludes that this objection by Canada fails.

Conclusion

134. Canada's challenge to the Tribunal's jurisdiction over heads of claim B (paras 20-28 and 30-32) and C (paras 33(b) and 34) succeeds on the basis of the Tribunal's rulings in respect of the relationship of chapter 11 and chapter 15 and of the scope of article 1105. It follows that

- (a) paras 22, 23, 33(b) and 34 are struck as is the consequential reference to article 1502(3)(d) in para 36, and
- (b) 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.

135. Canada's challenge to jurisdiction over para 16(f) and para 29 is dismissed but UPS's attention is drawn to the comments made in the Award about the formulation and positioning of para 29.

136. Canada's challenge to jurisdiction over para 33(a), based on the taxation exemption, is moot since the Investor agreed to delete that part of its Claim.

137. Canada's challenge to jurisdiction over the claim concerned with the Publications Assistance Program (para 18) is joined to the merits.

138. Canada's challenge in respect of the US Subsidiaries of UPS is joined to the merits.

139. Canada's challenge to the adequacy of the Amended Statement of Claim is dismissed.

140. In its written pleadings UPS sought a costs order in its favour and Canada did not refer to the matter. Given the result, the Tribunal decides that the parties are to bear their own costs of this phase of the proceeding.

141. The parties are to advise the Tribunal by Monday, 9 December 2002 of their proposals for the appropriate next steps in the procedure, including a timetable, and are to respond, if necessary by Monday, 16 December 2002.

For the Tribunal

Kenneth Keith

President
22 November 2002