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CERTIFICATE

UNITED PARCEL SERVICE OF AMERICA II

v.

GOVERNMENT OF CANADA

(An Arbitration under Chapter 11 of the North American Free Trade Agreement)

I hereby certify that the attached are true copies of the Award on the Merits of the Arbitral Tribunal dated May 24, 2007, and of the Separate Statement of one of the members of the Tribunal, in the above case.

Eloïse Obadia
Secretary of the Tribunal

Washington, D.C., June 11, 2007

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 THE MERITS

THE TRIBUNAL:

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

Eloïse Obadia, Secretary to the Tribunal

24 May 2007

TABLE OF CONTENTS

THE PROCEEDINGS

1. United Parcel Service of America Inc (UPS or the Investor) alleges that the Government of Canada (Canada) has breached its obligations under the North American Free Trade Agreement (NAFTA or the Agreement) and claims damages for the loss arising out of those alleged breaches.

2. The original Statement of Claim was filed on 19 April 2000 and was replaced by an Amended Statement of Claim on 30 November 2001. Canada's challenge to the jurisdiction of the Tribunal over significant parts of the amended claim was the subject of an Award by the Tribunal given on 22 November 2002. In response to that Award UPS filed a Revised Amended Statement of Claim (RASC) on 20 December 2002. Canada filed a Statement of Defense on 7 February 2003 requesting that the Tribunal dismiss the Claim in its entirety.

3. Extensive interlocutory proceedings followed. In the course of 2005 the parties filed their Memorial, Counter-Memorial, Reply and Rejoinder on the Merits, with supporting witness statements, documents and authorities. Mexico and the United States of America filed submissions under article 1128 of the Agreement. The Canadian Union of Postal Workers and the Council of Canadians also filed submissions, as *amici curiae*, in accordance with earlier directions of the Tribunal. UPS, when responding to those submissions, said its response was without prejudice to its objection that the Union and Council did not meet the test for *amicus* standing. The Chamber of Commerce of the United States of America applied for leave to file such submissions and did in fact file them. Canada did not object to the application and responded to the submissions. UPS did

not file any response to the submissions. In terms of the reasons given in its decision of 17 October 2001 in relation to the earlier applications for *amicus curiae* status, the Tribunal accords the Chamber *amicus* status and will in the course of this award exercise the powers which it states in that decision in respect of *amici* submissions. The parties had the opportunity to reply to the submissions filed by Mexico and the United States and by the *amici curiae*.

4. The hearing on the merits was held from 12 – 17 December 2005 in Washington DC with the assistance of the Secretariat of the International Centre for Settlement of Investment Disputes which the Tribunal had appointed to administer the arbitration. Ms Eloïse Obadia, Senior Counsel at ICSID, acted as Secretary to the Tribunal. The legal representatives of the parties who appeared at the hearing are listed in Appendix 1. Oral submissions were made on behalf of UPS by Barry Appleton, Robert Wisner and Stanley Wong, and on behalf of Canada by Ivan Whitehall, Alan Willis, Kirsten Hillman, Thomas Conway, Sylvie Tabet and Rodney Neufeld. At UPS' request, a number of Canada's witnesses were called for examination. For reasons of commercial confidentiality parts of the hearing were closed to the public and up to two of the client representatives of each party attended those parts of the hearings.

5. At the end of the hearing, the Tribunal invited the parties to file post hearing briefs and fixed dates for the filing of submissions by Mexico and the United States. Those opportunities were not taken up.

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, and Fritz Starber Inc, a Canadian subsidiary of UPS.

7. According to the RASC, "UPS Canada and Fritz Starber Inc. each are an 'Investment' of UPS, and UPS is an 'Investor' of a Party, the United States of America, within the meaning of NAFTA Article 1139. The US subsidiaries are investments of UPS under NAFTA Article 1139". In its Rejoinder, Canada withdrew its jurisdictional objection relating to the Claimant's ownership of UPS Canada.

8. 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.

9. Canada Post Corporation (Canada Post) is a Crown corporation established in 1981 under the Canada Post Corporation Act 1981. 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,

Canada Post may make regulations which, among other things, prescribe what is a letter and determine postal rates.

10. Canada Post also operates in the non monopoly postal services market in Canada providing courier services, special delivery services and expedited and regular parcel services. In that market it is in competition with UPS Canada. In addition it owns approximately 96% of Purolator Courier Ltd (Purolator) which is Canada's largest courier company.

THE CLAIMS IN BRIEF

11. The proceeding brought by UPS, to quote its counsel in his opening at the hearing, "focuses on the simple concept of fairness"; "the promotion and protection of fairness is a central concept in [the NAFTA] investment protection". UPS, counsel continued, assembles its claims under five headings:

- Canada's enforcement of its customs laws is unfair to UPS
- Purolator's access to Canada Post's infrastructure is unfair to UPS
- Canada permits Canada Post to misuse its monopoly infrastructure in ways unfair to UPS
- Canada's use of the Publications Assistance Program under which publishers wishing to get the subsidy for which it provides must use Canada Post is unfair to UPS
- Canada Post's retaliation against UPS in respect of a possible contract with Fritz Starber for raising this NAFTA claim is unfair to UPS.

Under the final heading UPS also makes reference to labor law and pensions issues.

12. Canada replies that NAFTA does not provide for the establishment of a Tribunal with an equitable jurisdiction to impose fairness. This, it says, is not an equitable Tribunal. Rather the Tribunal is to be governed by the provisions of the NAFTA.

13. In terms of the particular provisions of NAFTA, UPS in paragraph 22 of its RASC claims,

> [m]ore particularly, [that] Canada has:
>
> a. Breached its obligations under NAFTA Article 1102, directly and through Canada Post its agent, 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 Article 1103 by failing to accord UPS and UPS Canada most favored nation treatment by providing treatment to non-NAFTA Party Investors that is better than the treatment provided to UPS and UPS Canada;
>
> c. Breached its obligations under NAFTA Article 1104 by failing to accord UPS and UPS Canada the better of national treatment or most favored nation treatment;
>
> d. Breached its obligations under NAFTA Article 1105 by failing to accord UPS and UPS Canada treatment in accordance with international law including fair and equitable treatment and full protection and security; and
>
> e. 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 under Section A of NAFTA Chapter 11.

14. Article 1102, headed National Treatment, requires each Party to accord the investors of other Parties 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. Article 1103, on Most-Favored-Nation Treatment, requires each Party to accord the investors of other Parties

treatment no less favorable than it accords, in like circumstances, to investors of any other State with respect to the same matters. Article 1104 requires each Party to accord the better of the treatment required by those two articles. Each Party under article 1105, headed Minimum Standard of Treatment, is to accord the investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

15. Those provisions, imposing obligations directly on the States Parties, are set out in Section A of Chapter 11, headed "Investment". Articles 1502(3)(a) and 1503(2), the other two provisions invoked by UPS, appear in chapter 15, headed Competition Policy, Monopolies and State Enterprises, and take a less direct form. Article 1502 is headed Monopolies and State Enterprises and its paragraph (3)(a) requires each Party to ensure that private monopolies it designates and government monopolies it maintains or designates act in a manner that is not inconsistent with the Party's obligations under the Agreement wherever the monopoly exercises any regulatory, administrative or other governmental authority the Party has delegated to it in connection with the monopoly. Article 1503 relates to State enterprises. Its paragraph (2) similarly requires each Party to ensure that any State enterprise it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under chapters 11 (Investment) and 14 (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it.

16. The first of those provisions from chapter 15 (article 1502(3)(a)) requires compliance with *all* obligations under the Agreement while the second (article 1503(2)) is limited to compliance with chapters 11 and 14. (Chapter 14 is not invoked in this case.) In that

respect article 1116 which determines those disputes between a Party and an investor of another Party which may be submitted to arbitration is critical:

> **Article 1116: Claim by an Investor of a Party on its Own Behalf**
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A [which includes articles 1102-1105] 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.

17. In its Award on Jurisdiction, the Tribunal concluded that it followed from the terms of article 1116 that UPS, when invoking article 1502(3)(a) or article 1503(2) in respect of actions by Canada Post, had to establish a breach by Canada Post of chapter 11 in addition to satisfying the requirements of one or other of those provisions (paragraphs 47-69 and 134). As appears later, Canada contends that UPS should have brought this claim under article 1117 (harm to investments of investors) rather than under article 1116 (harm to investors). For the moment it is enough to note that in the present context the requirements of article 1117 are identical to those of article 1116.

CANADA'S FURTHER JURISDICTIONAL OBJECTIONS

18. During the merits stage of the proceeding, Canada advanced a series of objections that it characterized as "jurisdictional." Canada's claim is that these objections must be

resolved before the Tribunal can consider the merits, as they affect the Tribunal's right under NAFTA to hear UPS' complaints. These objections include the assertions:

- that UPS' claims were not filed in a timely fashion as required by article 1116(2),
- that (assuming that UPS was entitled to file its claims under Chapter 11 and was not time-barred) UPS erred in bringing its claims under article 1116 instead of under article 1117,
- that UPS has not established that it suffered any damage from the actions complained of,
- that its complaints about unequal treatment in respect of Canada's customs practices are barred as they effectively are complaints about a procurement (the Postal Imports Agreement) which is excepted from the relevant chapter 11 disciplines that UPS claims to have been violated, and
- that the complaint about retaliation against UPS through failure to award a contract to Fritz Starber falls outside the scope of the RASC and fails to comply with time requirements of chapter 11.

19. Although Canada asserts that these objections affect the Tribunal's jurisdiction, some of the objections are more properly characterized as affirmative defenses. We will, nonetheless, discuss three of these objections at the outset before turning to other aspects of the dispute between UPS and Canada. The objection respecting the Postal Imports Agreement is discussed in the section of the Award which addresses UPS' complaint of unequal treatment in respect of customs practices; as will appear, we do not reach the objection in respect of the Fritz Starber claim.

Time Bar

20. Canada contends that UPS' claims are time-barred. This argument, Canada asserts, applies to all of UPS' claims except for its claims respecting Fritz Starber. As previously noted, NAFTA article 1116(2) states:

> 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.

Canada contends that this provision bars UPS' claims because UPS either knew in fact or should have known of the existence of the conduct that constituted each asserted breach and of the information relevant to its losses from each breach more than three years before it filed its complaint. Canada explains this contention at length in its pleadings and pressed the matter quite vigorously during the hearing on the merits.

21. UPS contests this point, asserting that all of "the measures in dispute were either maintained or first occurred after April 19, 1997, three years before the claim was made." The only measure UPS asserts to have occurred in its entirety after April 1997 was the denial of a contract to Fritz Starber. We take up the issue regarding Fritz Starber separately below.

22. With respect to all other claims, the measures that UPS claims violate Canada's NAFTA obligations were first implemented by Canada well before April 1997. With that in mind, the arguments we must address here fall into two categories.

23. One category addresses assertions that UPS did not know of particular aspects of Canada's conduct relevant to its claims before April 1997. In one instance – its claim

respecting Canada's Publications Assistance Program (PAP) – UPS asserts that the Program in its current form was not adopted until after April 1997. Canada discounts the importance of this fact, as the PAP existed well before that time and was known to UPS well before that time. Canada argues that the changes in the PAP after April 1997 do not materially alter the nature of UPS' complaint and, hence, should not affect the argument respecting the time bar under article 1116(2).

24. The other category of arguments concerns the effect of on-going conduct by Canada. UPS states that on-going conduct constitutes a new violation of NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day. Thus, under UPS' view, for any conduct that continued past April 1997, the limitation in Article 1116(2) does not affect this Tribunal's jurisdiction over UPS' claim.

25. Canada disputes this assertion, stating that the purpose of the time limitation in article 1116(2) was to give certainty and finality so that the conduct of a NAFTA Party would not be permanently subject to challenge. Under Canada's view, that purpose is defeated if each day of a continuing course of conduct constitutes a potential new breach of NAFTA obligations. On this view, whenever an investor knew or should have known of the conduct, the time bar should run from that point.

26. UPS' response to this argument draws on logic and on precedent. Its argument on the basis of logic is that an investor cannot know whether a NAFTA Party will continue the conduct that constitutes an alleged breach before the Party determines whether it will end or continue the conduct. Its argument from precedent is that under international law generally, and also under prior NAFTA decisions, continuing acts are treated as continuing

violations of international law obligations (and of NAFTA obligations) such that time bars do not begin until the conduct has concluded.

27. UPS and Canada dispute the state of the law, especially of NAFTA law, on this point. UPS argues that the general rule of international law, applied in many different contexts, is that a continuing course of conduct, if in violation of a legal obligation, constitutes a continued and renewed breach of that obligation. With respect to NAFTA, UPS cites *Feldman v Mexico*, ICSID Case No ARB/(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (December 6, 2000), as authority for the proposition that "state action beginning more than three years before the claim but continuing after that date" is not barred under Article 1116. Canada does not deny the authority of *Feldman*, but it does assert that the tribunal's decision in *Mondev International Ltd v United States of America*, ICSID Case No ARB/(AF)/99/2, Award (October 11, 2002), contradicts *Feldman*. In Canada's submission, *Mondev* stands as precedent that continuing acts do not extend the time bar if the claimant first knew (or should have known) about the acts more than three years before the claim was filed.

28. We agree with UPS that its claims are not time-barred. We put aside for the moment the question of when it first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it. The generally applicable ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term "first acquired" is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus

knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss. The *Feldman* tribunal's conclusion on this score buttresses our own.

29. Further, Canada's argument based on *Mondev* is not well taken. The tribunal in *Mondev* did not find a continuing course of conduct time-barred. Indeed, it rejected the United States' argument that claims at issue were time-barred. The dicta that Canada points us to are neither dispositive of the contentions in *Mondev* nor on point for this decision. The dicta do not relate to a continuing course of conduct that began before and extended past three years before a claim was filed. Instead, the dicta relate to a state action that was completed but was subject to challenge in state court. In that instance, the state's action was completed and the information about it known – including the fact that the investor would suffer loss from it – before subsequent court action was complete. The fact that the exact magnitude of the loss was not yet finally determined would not have been enough, in that tribunal's judgment, to avoid the time bar if the time bar otherwise would have applied. As it was, there was no time bar and no continuing course of conduct – nothing in short that would shed any light or have any precedential consequence for disposition of the matter before us.

30. Although we find that there is no time bar to the claims, the limitation period does have a particular application to a continuing course of conduct. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the date when the claim was filed. A continuing course of conduct might generate losses of a different dimension at different times. It is incumbent on claimants to establish the

damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2). This is not, however, a matter we need to address further at this point apart from the specific claims.

31. Because Canada also contends that UPS' claims should have been brought under article 1117 rather than article 1116, it is important to note that for the purposes of the discussion of NAFTA's time bar the wording of the time bar is identical under articles 1116 and 1117. Our resolution of the time bar issue, in other words, is the same whether we consider the claims from UPS as advanced under article 1116 or article 1117.

Article 1116 v. Article 1117

32. Canada urges us to find that the Tribunal lacks jurisdiction because UPS brought its claims under NAFTA article 1116 (respecting harm to investors) rather than under NAFTA article 1117 (respecting harm to investments of investors). In brief, Canada's argument is that any harm flowing from the conduct complained of primarily affects UPS Canada rather than UPS.

33. Canada asserts that the distinction between filings under articles 1116 and 1117 is not a mere formality. In Canada's submission, it is incumbent on claimants to meet the conditions precedent for claims under chapter 11 for the protection of both the NAFTA Party and of the enterprises potentially involved in filing (and perhaps in receiving compensation from) the claim. In particular, it asserts that, to meet the requirements of NAFTA article 1121, there must be consent from both the investor and the investment for

claims filed under article 1117 and that the requisite consent has not been filed in the instant case.

34. UPS argues that Canada's objection is not well taken. UPS asserts that it has properly brought its claims under article 1116, that it is entitled to claim for losses incurred by a wholly owned subsidiary, that this has been recognized by other NAFTA tribunals, and that it should be allowed the election between claims under article 1116 and article 1117. UPS joins issue with Canada respecting the decisions of other NAFTA tribunals, directly contradicting Canada's reading of NAFTA tribunal decisions in the *Mondev* case and in *Pope & Talbot Inc v Canada*, Award in Respect of Damages (May 31, 2002). If this Tribunal does not accept its contentions respecting the construction of article 1116, UPS asks that it be permitted to modify its claim as a claim under article 1117.

35. We agree with UPS that the claims here are properly brought under article 1116 and agree as well that the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada. If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada's losses flow through to UPS – the question posed by Canada here – may have very different purchase. As it is, there is no reason to ask that question in the instant proceeding. Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims. That is clearly the same position taken by the tribunal in the *Pope & Talbot* proceeding. Moreover, in this context, there is no substantial difference between

claims filed under article 1116 and under article 1117. Canada has not been deprived of any notice about the nature of the claim, and there is no reasonable question whether UPS Canada or UPS would consent to filing the particular claims. We would not, in these circumstances, require that UPS refile its complaint under article 1117 if that were the better basis for its claims. In the event, however, that is not a conclusion we need reach here.

Lack of damage

36. Canada also asserts that UPS' complaint has not met a jurisdictional requisite in that it failed to establish that UPS has suffered damage from the conduct it alleges constitutes breaches of Canada's NAFTA obligations. Although UPS submitted an affidavit and expert report from Howard Rosen of the Law and Economics Consulting Group (LECG Canada), Canada and its experts contend that the Rosen report fails to establish the required harm and especially the requisite causality. Canada submitted a counter-report from its experts, Ross Hamilton and Ian Wintrip of Kroll Lindquist Avey (the Kroll report), taking issue with the assumptions and analysis in the Rosen report. UPS, in turn, criticizes the Kroll report and provides a reply report from its expert, Howard Rosen.

37. We need not engage the debate between experts in order to reject Canada's objection respecting our jurisdiction. We make three observations respecting Canada's objection, the third of which alone would lead to the rejection of the objection. First, Canada separates damage and causation in its analysis. These are not separate aspects of a claim of damage. Rather, these are inseparable, as damage must flow from some cause. Second, Canada mistakes as well the nature of the demonstration that a claimant must make under article 1116. To recover damages, a claimant must demonstrate the loss suffered from the

conduct that breaches NAFTA obligations within the purview of article 1116. But jurisdiction over a claim attaches when the claim is properly put before us. UPS has asserted that it has suffered a loss as an investor, and that its wholly owned investment, UPS Canada, has suffered a loss, as a consequence of Canada's alleged breaches of obligations cognizable under chapter 11. Third and certainly decisively, while we need not engage at this point the debate between the Rosen reports and the Kroll report, we conclude that UPS and its expert have supplied enough to state a *prima facie* case of damage to UPS from Canada's actions at issue in this proceeding. As we indicated in our preliminary Award on Jurisdiction, that showing is enough for us to proceed to a consideration of the merits of UPS' claims.

38. We note that the showing we have evaluated at this point is subject to a different standard when the question becomes what damage has been sustained and what remedy is appropriate. At that stage, a claimant must show not only that it has persuasive evidence of damage from the actions alleged to constitute breaches of NAFTA obligations but also that the damage occurred as a consequence of the breaching Party's conduct within the specific time period subject to the Tribunal's jurisdiction. As we observed above, where a continuing course of conduct is at issue, the damage must flow from conduct that occurred within the three-year time period preceding the complaint. Evaluation of the damage actually incurred is not, however, apposite to disposition of Canada's objection here.

Other objections

39. Although Canada advances other objections, we will not address them here. We take up the assertions that the Postal Imports Agreement constitutes a procurement not subject

to claims under article 1102 and that the Fritz Starber claims fall outside our jurisdiction in conjunction with our discussion of the merits of those particular claims.

APPROACH TO INTERPRETATION

40. As will appear, the principal arguments on the merits relate to the provisions summarized in paragraphs 14-15 and particularly articles 1102, 1502(3)(a) and 1503(2). UPS places their interpretation in the context of the objectives of the Agreement which are stated in article 102:

> **Article 102: Objectives**
>
> 1. The Objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.
>
> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

41. UPS comments, in respect of paragraph (2) of article 102, that interpretation in accordance with both the objectives of the NAFTA and the applicable rules of international

law is confirmed by the direction in article 1131(1) to the Tribunals that they "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Part of the applicable rules of international law, it continues, is set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties concerning treaty interpretation, on the basis that those articles state customary international law. Articles 31 and 32 require interpretation in good faith in accordance with the ordinary meaning of the words used, in their context, and in light of the treaty's object and purpose. The objects and purposes, UPS continues, include trade liberalization (paragraph (a) of article 102(1)), the promotion of conditions of fair competition (paragraph (b)) and increasing substantially investment opportunities between the Parties (paragraph (c)). It cites a number of NAFTA decisions recognizing the importance of interpreting the Agreement in light of its objects and purposes. UPS calls attention to the requirement of article 31(3)(c) of the Vienna Convention that "relevant rules of international law applicable to the relations between the Parties" be taken into account in interpreting treaty provisions. The "supplementary means of interpretation" dealt with in article 32 did not in fact play any role in the hearing.

42. Canada also cites article 31 of the Vienna Convention as embodying the general rule of interpretation which, it says, quoting the International Law Commission, "mandates a single combined operation". UPS, it says, fails to give proper weight to the ordinary meaning of the words of the particular provisions of the Agreement on which the claim depends. So far as the context and the direction about relevant rules of international law in article 31(3)(c) of the Vienna Convention are concerned, Canada calls attention to instruments drawn up within the Universal Postal Union and the World Customs Organization. In relation to the object and purpose of the NAFTA, it first recalls the opening words of article 102 — the objectives are "elaborated more specifically through its

principles and rules, including national treatment, most favored nation treatment and transparency"; and secondly mentions that the objectives are set out in the preamble as well as in article 102. While the preamble includes the goal of increasing investment opportunities it also includes the Parties' expression of their desire to "preserve their flexibility to safeguard public welfare". According to Canada, the preamble and article 102 strike a balance between the diverse objectives common to the NAFTA Parties. Citing a NAFTA Tribunal in the *ADF* case, it submits that it would be unreasonable to give any one objective too much weight. It quotes the following paragraph from that decision:

> [t]he object and purpose of the parties to a treaty in agreeing upon any particular paragraph of the treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph. (*ADF Group Inc* v. *United States of America*, ICSID Case No ARB (AF)/00/1, Award (January 9, 2003), paragraph 147.)

43. The essential differences between the parties relate to the application to particular provisions of NAFTA of the law reflected in article 31 of the Vienna Convention rather than to the authority, relevance and understanding of that statement which, as the International Court of Justice has recently affirmed, is well recognized as part of customary international law: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (26 February 2007), paragraph 160.

44. It is convenient to deal with two of those differences now. The first is whether the obligations undertaken by "Each Party" in articles 1102-1105 are obligations of Canada Post as well as of Canada. The resolution of that difference is critical for major parts of UPS's claim: the second, third and fifth of the headings in paragraph 11 above, and subparagraph (a) in part and subparagraphs (d) and (e) in full of paragraph 22 of its RASC

(set out in paragraph 13 above). Those claims relate to central elements of UPS's case. The second difference relates to the meaning of the expression to be found in both article 1502(3)(a) and article 1503(2) "any regulatory, administrative or governmental authority". That difference may be significant for the claim made in subparagraph (e) of paragraph 22 of the RASC.

IS CANADA POST A "PARTY" TO THE AGREEMENT WITHIN THE MEANING OF ARTICLES 1102 AND 1105?

45. Three of UPS' claims as set out in paragraph 11 above are based in whole or in part on the proposition that the actions of Canada Post which are alleged to be in breach of articles 1102 and 1105 are attributable to Canada. They are the claims in respect of the access by Purolator to the Canada Post infrastructure, the use by Canada Post of that infrastructure and the actions of Canada Post in relation to Fritz Starber. In respect of the first and second the RASC alleges several breaches of national treatment by Canada, through its agent Canada Post. The first reads:

> 26. Canada Post has provided treatment more favorable than that provided to UPS or UPS Canada. UPS has been denied access to the monopoly infrastructure and network, unlike Purolator and other divisions of Canada Post which compete in the non-monopoly market.

There is then an elaboration in the following paragraphs concerning the activities of Canada Post relating to its accounting methods, franchising, and the use by Canada Post of its facilities to provide non monopoly products. Paragraphs 29 and 30 provide:

> 29. Canada Post has acted inconsistently with Canada's obligations under NAFTA Article 1102 by not allowing the Investment similar access to Canada's monopoly infrastructure and network that is provided to Canada's non-monopoly business or alternately by failing to ensure, through accounting, regulatory and/or structural measures, that Canada Post does not employ the monopoly infrastructure and network on such terms and in such a way as to

> alter the conditions of competition in the non-monopoly market to the disadvantage of the Investor.
>
> 30. Canada Post is further able to obtain treatment more favorable than that obtained by the Investor and its Investment through Canada's provision of borrowings to Canada Post at less than market rates by using a guarantee of Canada and by virtue of the fact that Canada does not require a market or commercial rate of return upon its investment in Canada Post. As a result of this and other more favorable treatment, Canada Post is able to price its non-monopoly products at below properly or fairly attributable costs by taking advantage of below market debt charges and the lack of a requirement by Canada that Canada Post provide a return on its capital. Canada Post is further able to use these advantages to develop and compete in non-monopoly postal services markets, without properly attributing costs incurred in so doing and while pricing below those costs.

46. Canada submits that those actions of Canada Post are not to be attributed to it. As discussed later, the first and second claims are also presented as breaches of article 1502(3)(a) or article 1503(2). That contention invokes Canada's alleged breach of its obligation under articles 1502(3)(a) and 1503(2) to ensure that government owned or designated monopolies or State enterprises exercising certain delegated authority comply with Chapter 11. That alternative argument would not however have to be addressed were we to hold that Canada Post's actions were directly attributable to Canada. We accordingly first consider whether the impugned actions of Canada Post are actions of Canada, a "Party" to the NAFTA, for the purposes of articles 1102-1105.

47. In support of its argument, UPS draws on relevant provisions of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, as accepted propositions of customary international law, a status recently recognized (at least in relation to article 4) by the International Court of Justice in the *Genocide Convention* case, paragraph 385. In particular it invokes article 4:

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

UPS refers to the ILC's commentary to article 4. The reference to a "State organ" in that provision covers all the "individual or collective entities which make up the organization of the State and act on its behalf" (paragraph 1). Further, according to the commentary,

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility.

. . .

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy. . . .

. . .

(12) The term "person or entity" . . . used in article 4 . . . is used . . . in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc.

48. UPS also refers to article 5 of the International Law Commission text:

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

When addressing the word "governmental", as used in article 1502(3)(a) and article 1503(2), UPS quoted this passage from the commentary to article 5:

> The justification for attributing to the State under international law the conduct of "para-statal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage.

49. Whether Canada Post's conduct falls under article 4 or under article 5, says UPS, there is clear and undeniable state responsibility attributable to Canada.

50. The UPS submission then turns to the Canada Post Corporation Act 1981 by which Canada Post was created in place of a regular department of State. UPS refers to provisions of the Act stating that Canada Post is "an institution of the Government of Canada" (s5(2)(e)) and "an agent of Her Majesty in right of Canada" (s23). Further, Canada Post, under its regulation-making power, may define the scope of its letter mail monopoly (1) by defining the meaning of a "letter" and (2) by setting the price. (Under the Act, any private letter mail provider must charge three times the price as set.) The regulations may also cover Canada Post's right to place street mail boxes in public places and its right to have access to mail boxes in apartments, condominia and offices.

51. UPS quotes Canadian judicial and executive statements to the effect that Canada Post is "part of the government" or "part of its decision-making machinery" and calls attention to Canada's Statement of Defense which justifies Canada Post's actions as necessary to fulfill its Universal Service Obligation, a public obligation which UPS says is delegated to Canada Post by the 1981 Act. Further, Canada Post is expressly listed as being subject to

Canada's NAFTA procurement obligations under NAFTA chapter 10 (in annex 1001.1a-2).

52. UPS also places emphasis on a Report of a World Trade Organisation dispute settlement panel in *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, Report of Panel (March 14, 1997). In that case, the United States claimed that Canada Post's practice of charging domestic periodicals lower postal rates than it charged imported periodicals was in breach of article III:4 of the General Agreement on Tariffs and Trade 1994. That provision required that products of the territory of a Member imported into the territory of another be accorded treatment not less favorable than that accorded to like products of national origin in respect, among other things, of regulations or requirements affecting their sale, transportation or distribution. The Parties agreed that the products were like and that the fact that Canada Post applied higher rates clearly affected the sale, transportation and distribution of imported periodicals. Canada argued that since Canada Post was a Crown corporation with a legal personality distinct from the Canadian Government the "commercial Canadian" or "international rates" it charged were out of the Government's control and did not qualify as "regulations" or "requirements" within article III:4.

53. The dispute settlement panel rejected Canada's argument on this point (paragraphs 5.35-39). (Its defense succeeded on a separate ground and the appeal to the Appellate Body did not raise the present issue: *Canada – Certain Measures Concerning Periodicals*, AB-1997-2, WT/DS31/AB/R, Report of the Appellate Body (June 30, 1997.) The pricing was to be seen as within article III:4. The panel gave two reasons for its conclusion. Canada Post generally operated under government instructions; and if the

Canadian Government considered Canada Post's pricing policy to be inappropriate it could instruct Canada Post to change the rates under its power of direction conferred by the Act. That analysis, said the panel, was unaffected by the fact that Canada Post had a legal personality distinct from the Canadian Government. The panel concluded that the pricing policy of Canada Post was a governmental measure and was to be regarded as governmental "regulations" or "requirements" within article III:4. This conclusion was supported by a statement of principle in paragraph 1 of article III, which was part of the context in terms of article 31(1) of the Vienna Convention, that internal measures not be applied so as to afford protection to domestic production. UPS submits that this Tribunal should reach the same conclusion.

54. Canada does not challenge the propositions of customary international law as stated by the ILC nor, in general, UPS's characterization of the status of Canada Post in Canadian law. Rather it considers those propositions and that characterization to be irrelevant to the current matter and to be displaced by the specific terms of the NAFTA. The WTO ruling, it says, is also not in point.

55. The propositions of customary international law on which UPS places such weight have a "residual character", to quote the ILC in its commentary to its state responsibility text (introductory paragraph to Part Four of the draft articles). Article 55 makes that clear by reference to the *lex specialis* principle:

> *Lex specialis*
>
> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The special rules, the first sentence of the commentary to the provision says, may make special provisions for determining whether there has been a breach. Canada submits that in this case we do face special provisions relating to attribution, to the content of the obligation and to methods of implementation (through the investor which initiated arbitration) which would displace any possible operation of the residual proposition of law reflected in article 4 about the attribution of acts of a "State organ".

56. As an alternative argument, Canada submits that it is the proposition set out in article 5 that is in point rather than that in article 4. On the basis of that article, what we would be concerned with here is an entity which is not an organ of the State under article 4. But in Canada's opinion the proposition stated in article 5 does not apply since the entity, Canada Post, has not, in terms of that proposition, been empowered by the law of the State, Canada, to exercise "elements of the governmental authority".

57. As article 31 of the Vienna Convention indicates, we are to find the ordinary meaning of the terms of the Agreement in their context and in the light of its object and purpose. Articles 1102-1105, read alone, could well be understood as applying to Canada Post. For the reasons given by UPS, Canada Post may be seen as part of the Canadian government system, broadly conceived. In terms of Canada's very strong submissions, which appear to accord fully with the facts and the history, Canada Post has an essential role in the economic, social and cultural life of Canada. Moreover, like national postal administrations around the world, it meets the obligation of Canada, owed to all other members of the Universal Postal Union, to ensure that international mail is delivered within Canada. Counsel for Canada spoke forcefully of these matters in his opening:

> Now, Canada has, and has had, a single integrated postal service for the delivery of mail from its earliest beginnings as a nation. Indeed, the Post was integral to Canada's development as a nation. The Post was assigned the responsibility of assisting in the economic expansion of the country through its provision of an accessible, effective, and inexpensive system of national communication.
>
> The Post carried out this function through creating a national postal network, and they are of routes, postal offices, and they advance the frontier and accelerated the economic development of Canada.
>
> . . . [T]he Post is as integral to Canada as is the [Royal Canadian Mounted Police]. It . . . is an essential part of our national development, and any attempt to destabilize it will be to the disadvantage of Canada.
>
> The . . . Post . . . was also assigned a social responsibility of assisting in the development of a literate, educated and aware citizenry, providing inexpensive, reliable, and timely delivery of newspapers, books and information.
>
> . . .
>
> The Post Office . . . was one of the first principal departments created in 1867 at the time of our confederation. It continued to provide and, in fact, expanded the wide range of services that had already been provided by the various provincial authorities prior to confederation. These services had always included both letter and parcel service within a single integrated collection and delivery network.
>
> Post offices had a pervasive presence in all communities right across Canada, including remote rural locations, from a total of 25 post offices in 1817, the number grew to 14,000 by 1913. As a result of demand for postal services, the Post had to be present in virtually every community across the country.

58. Articles 1102-1105 are not however to be read alone. They are to be read with chapter 15 and, so far as this Tribunal is concerned, with the jurisdictional provisions of articles 1116 and 1117. The immediately relevant provisions of chapter 15 are the two specific provisions which UPS contends Canada is breaching. They are articles 1502(3)(a) and 1503(2) which provide:

Article 1502: Monopolies and State Enterprises

. . .

3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges;

Article 1503: State Enterprises

. . .

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

59. Several features of these provisions read as a whole lead the Tribunal to the conclusion that the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances. The special rules of law stated in chapters 11 and 15, in terms of the principle reflected in article 55 of the ILC text, "govern" the situation and preclude the application of that law:

- chapter 11 and chapter 15 draw a clear distinction between the "Parties", on the one side, and government and other monopolies and State enterprises, on the other. The governments which negotiated and agreed to NAFTA did not simply and directly apply the rather generally stated obligations of chapter 11 to government and other monopolies and to State enterprises as well as to

themselves. Rather they elaborated a more detailed set of provisions about competition, monopolies and State enterprises and incorporated them in a distinct chapter (chapter 15) of the Agreement.

- The particular provisions of chapter 15 themselves distinguish in their operation between the Party on the one side and the monopoly or enterprise on the other. It is the Party which is to ensure that the monopolies or enterprises meet the Party's obligations stated in the prescribed circumstances. The obligations remain those of the State Party; they are not placed on the monopoly or enterprise.
- Were the expression "Each Party" in the two paragraphs of articles 1502(3)(a) and 1503(2) to be read as including Canada Post in the particular circumstances of this case, the paragraphs would in effect require Canada Post (as "Party") to ensure that *itself* (as a government monopoly or State enterprise) complied with certain obligations; if that reading is not nonsensical it is certainly very odd.
- The particular obligations of compliance with chapter 11 which are in issue under articles 1502(3)(a) and 1503(2) are confined, at least in some degree (discussed later), by the requirement that there be a delegation by the Party to the monopoly or enterprise of regulatory, administrative or other governmental authority which the monopoly or enterprise has exercised. (UPS' submissions do not go to the extent that all actions of all monopolies (private as well as public) and that all actions of all State enterprises are "governmental".) That limit would have no effect if Canada Post were to be treated as a "Party" and as itself bound by the obligations of chapter 11.
- Four (at least) of the particular obligations which would fall within the obligations of a Party under chapter 11 and which could be the subject of investor arbitration were the allegations to be made directly against that Party are not among the obligations, subject to investor arbitration, specifically identified in articles 1116 and 1117 (see paragraph 16 above). The relevant provisions are article 1502(3)(b), (c) and (d) and article 1503(3):

Article 1502: Monopolies and State Enterprises

. . .

3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:

. . .

(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.

Article 1503: State Enterprises

. . .

3. Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment[[1]] in the sale of its goods or services to investments in the Party's territory of investors of another Party.

60. The careful construction of distinctions between the State and the identified entities and the precise placing of limits on investor arbitration when it is the actions of the monopoly or the enterprise that are principally being questioned would be put at naught on the facts of this case were the submissions of UPS to be accepted. It is well established that the process of interpretation should not render futile provisions of a treaty to which the

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[1] Under article 1505, "'non-discriminatory treatment' means the better of national treatment and most-favored-nation treatment, as set out in the relevant provisions of this Agreement", that is in articles 1102 and 1103.

parties have agreed unless the text, context or purpose clearly so demand, e.g. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960*, ICJ Reports 1960, p. 150, p. 160 and *Border and Transborder Armed Actions (Nicaragua* v. *Honduras) Jurisdiction and Admissibility, Judgment*, ICJ Reports 1988, p. 69, p. 89.

61. The foregoing analysis of the Agreement also shows why the WTO panel report in the *Canada Periodicals* case (paragraphs 52-53 above) is not in point. The provisions of the GATT considered in that case do not distinguish, as chapters 11 and 15 of NAFTA plainly and carefully do, between organs of State of a standard type (like the Canadian Post Office before 1981) and various other forms of State enterprises.

62. Accordingly, we conclude that actions of Canada Post are not in general actions of Canada which can be attributed to Canada as a "Party" within the meaning of articles 1102 to 1105 or for that matter in articles 1502(3)(a) and 1503(2). Chapter 15 provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case.

63. It will be recalled that UPS also contends, as an alternative to the argument based on the rules of customary international law reflected in article 4 of the ILC text, that the proposition reflected in its article 5 apply to make Canada directly responsible for actions of Canada Post. That provision (set out in paragraph 48 above) is concerned with the conduct of non-State entities. It attributes to the State "[t]he conduct of a person or activity

which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority . . . provided the person or entity is acting in that capacity in the particular instance". For reasons we have already given, there is real force in the argument that in many if not all respects the actions of Canada Post over its long history and at present are "governmental" in a broad sense (e.g. paragraph 57 above). We again recall however that the proposition in article 5 of the ILC text (as in other provisions) has "a residual character" and does not apply to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of a State's international responsibility are governed by special rules of international law — the *lex specialis* principle (paragraph 55 above). For the reasons which we have just given in relation to the argument based on article 4, and in particular the careful structuring and drafting of chapters 11 and 15 and which we need not repeat, we find that this argument also fails, as a general proposition. It would be otherwise if in a particular situation Canada Post were in fact exercising "governmental authority", as Canada indeed accepts in one respect as we soon record (paragraph 67). But in the absence of such an exercise the consequence for the claim of the findings of law made in this part of the award is that the challenges to the actions of Canada Post made under the second, third and fifth of the headings set out earlier in paragraph 11 all fail. For convenience we set them out again:

- (2) Purolator's access to Canada Post's infrastructure is unfair to UPS

- (3) Canada permits Canada Post to misuse its monopoly infrastructure in ways unfair to UPS

- (5) Canada Post's retaliation against UPS in respect of a possible contract with Fritz Starber for raising this NAFTA claim is unfair to UPS.

The national treatment claim based on the actions of Canada Post as opposed to the direct actions of Canada set out in paragraph 22 (a) of the RASC (paragraph 13 above) fails for the same reason.

CLAIMS UNDER CHAPTER 15: "REGULATORY, ADMINISTRATIVE OR OTHER GOVERNMENTAL AUTHORITY"

64. UPS' alternative claim in relation to the use of Canada Post's infrastructure and Canada Post's actions affecting Fritz Starber is that Canada has breached *its* obligations under chapter 15 to ensure that Canada Post complies with chapter 11.

65. The RASC reflects the ruling in the Award on Jurisdiction (paragraph 17 above) that UPS, when invoking article 1502(3)(a) or article 1503(2), must both satisfy their terms and also show a breach by Canada Post of a provision of chapter 11 A which includes articles 1102 to 1105. The pleading in the Claim is that:

> 52. 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 Section A of NAFTA Chapter 11. These NAFTA inconsistencies include the violation of:
>
> a. NAFTA Article 1102 by permitting non-monopoly products the benefits realized from the monopoly infrastructure without the appropriate charges being allocated to the non-monopoly sector. These benefits are not provided to the Investor and its Investment resulting in less favorable treatment.
>
> b. NAFTA Articles 1103 and 1104 by providing better treatment to Investors and Investments that are parties to other trade and investment treaties that Canada has entered into after the NAFTA came into force; and
>
> c. NAFTA Article 1105 through arbitrary and unfair conduct such as the unfair and discriminatory treatment of UPS's Canadian subsidiary, Fritz Starber, Inc.

66. The Memorial and the Reply allege three relevant breaches by Canada Post:

a. Canada Post's discriminatory leveraging of the Monopoly Infrastructure, in particular

measures of Canada Post that provide competitive advantages to Purolator; and

measures of Canada Post providing competitive advantages to its own courier services;

b. Canada Post's failure to perform customs duties and collect duties and taxes; and

c. Canada Post's unfair denial of Fritz Starber's bid.

67. Canada accepts that Canada Post's actions in respect of the collection of customs duties fall within "delegated" "governmental authority" in terms of article 1502(3)(a) and article 1503(2). That part of the claim is considered in a later section of this award. Canada does not however accept that the actions identified in paragraphs (a) and (c) fall within "delegated" "governmental authority".

68. We have already set out the terms of those two provisions (paragraph 58). A claimant which wishes to invoke them must establish that the monopoly or state enterprise in question is exercising a "regulatory, administrative or other governmental authority that the Party has delegated to it". While the first provision continues with the phrase "in connection with the monopoly good or service" and the second contains no such wording the parties made nothing of that, nor did they see any significance in the differences between the instances of "governmental authority" which each lists:

> - such as the power to grant *import or export* licenses, approve commercial transactions or impose quotas, fees or other charges (article 1502(3)(a));
>
> - such as the power to *expropriate*, grant licenses, approve commercial transactions or impose quotas, fees or other charges (article 1503(2)). (differences emphasized)

69. We make three points about these provisions at the outset. First, the obligations accepted by the Parties are obligations of result and not simply obligations of conduct. They must "ensure" by one measure or another that in the prescribed circumstances the monopoly (private as well as public) or the State enterprise does not act inconsistently with the Parties' *own* obligations under the identified provisions of NAFTA (the whole Agreement under article 1502(3)(a) and chapters 11 and 14 under article 1503(2)). Secondly, the Parties agree that Canada Post is a State enterprise within the meaning of article 1503(2); that position is supported by the definition of "State enterprise" in annex 1505; although that definition is said to be for the purposes of article 1503(3) there can be no reason of substance why it does not apply more generally. Given that the obligation of Canada under article 1502(3)(a) does not differ in the circumstances of this case from that under article 1503(2), we need not consider whether Canada Post is not only a State enterprise under article 1503 but is also a government monopoly, whether a designated or maintained one, under article 1502. Thirdly, under note 45 of the Agreement, in article 1502(3):

> a "delegation" includes a legislative grant, and a government order, directive or other act transferring to the monopoly, or authorizing the exercise by the monopoly of, governmental authority.

Again we can see no reason, nor did the parties suggest one, for not applying this definition to article 1503 as well.

70. An essential purpose of the two particular paragraphs is to ensure that a State Party does not avoid its own obligations under the Agreement as a whole (in terms of article 1502(3)(a)) or under chapters 11 and 14 (in terms of article 1503(2)) by delegating governmental authority to a monopoly (private or public) or to a State enterprise. While,

as noted earlier, the jurisdiction of tribunals such as this is confined, in both situations, to chapter 11 issues by articles 1116 and 1117, those limits on arbitrability do not affect the existence and binding character of the substantive obligations, including any which may fall outside the scope of the arbitration provisions.

71. The parties disagree about the scope of the expression "regulatory, administrative or other governmental authority that the Party has delegated to it". According to UPS, Canada Post always acts under governmental authority. None of its acts are sufficiently commercial to lose their governmental nature. Canada, by contrast, contends that

> the ordinary meaning of the terms in articles 1502(3)(a) and 1503(2) indicate that the contemplated activity is in the nature of what a government would usually do in its sovereign capacity, that is to control or govern State. Further, the power to undertake this activity has to have been specifically and formally transferred to the monopoly or State enterprise.

That meaning gains further support, Canada says, from the context and the object and purpose of the Agreement.

72. We begin with the proposition that the expression must have the effect of narrowing the range of the actions of State enterprises and monopolies, private as well as public, that are covered by it. Not all actions of all monopolies and of all State enterprises which are claimed to be inconsistent with the obligations of the Parties under the Agreement as a whole (in terms of article 1502(3)(a)) or under chapter 11 or chapter 14 (in terms of article 1503(2)) are caught. The provisions operate only where the monopoly or enterprise exercises the defined authority and not where it exercises other rights or powers. They have a restricted operation.

73. The character of that restriction is to be determined in substantial part by the expression "exercises any regulatory, administrative or other governmental authority". That expression is to be read with the instances of authority which each provision lists and with the obligations undertaken by the Parties in relation to other activities of the monopolies and State enterprises as stated in other provisions of the two articles, in particular in 1502(3)(b), (c) and (d) and article 1503(3) (set out in paragraph 64 above). The activities covered in those provisions are the making of purchases and sales rather than the exercising of governmental authority. Those activities, as article 1502(3)(b) emphasizes, have a commercial character rather than a governmental one. Also significant is that they are not subject to investor initiated arbitration under articles 1116 and 1117.

74. That contrast with commercial activities emphasizes the particular character of the limiting phrase. The monopoly or enterprise is exercising a "*governmental* authority" delegated to it by the State Party. To be contrasted with the exercise of that authority is the use by a monopoly or State enterprise of those rights and powers which it shares with other businesses competing in the relevant market and undertaking commercial activities. Those rights and powers include the rights to enter into contracts for purchase or sale and to arrange and manage their own commercial activities. It is the exercise of just such rights and powers by Canada Post in respect of Purolator and the management of its own courier business that is challenged by UPS in this part of the case.

75. The limited scope of "governmental authority" also appears from another contrast within the articles. The contrast is between the statement of the measures a Party must take to meet its absolute obligations of result under chapter 15 on the one side, and on the other the carefully limited statement of "governmental authority" the delegated exercise of

which by the monopoly or enterprise triggers the operation of those obligations undertaken by each Party. Under article 1502(3) and article 1503(2) the Party's absolute obligation to ensure compliance is to be achieved "through regulatory control, administrative supervision or *the application of other measures*", an expression which in its own terms and especially in context cannot be confined within any *genus*. The contrast is even starker in the case of article 1503(3) (paragraph 64 above) under which the obligation is an obligation to "ensure", unadorned. While the first and second means of ensuring compliance set out in articles 1502(3) and 1503(2) ("regulatory control" and "administrative supervision") may be seen as comparable to the "regulatory, administrative or other governmental authority" exercised under delegation to the monopoly or enterprise, the obligation to ensure compliance imposed by article 1503(3) is absolute and the "other measures" contemplated by article 1502(3) must also, for reasons of parallelism among others, be read in the same unconfined way.

76. It is convenient at this point to return to article 5 of the ILC's State responsibility text and in particular to its commentary, quoted earlier (paragraph 48). That provision, it will be recalled, attributes to the State the conduct of non-State organs "empowered by the law of that State to exercise elements of the governmental authority" when it acts in that capacity. The final sentence of the paragraph from the commentary to which UPS has already referred us (also in paragraph 48 above) gives a further example of the contrast:

> Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not it if concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).

77. As indicated, Canada has no quarrel with the proposition that in collecting customs duties Canada Post is exercising delegated governmental authority (as with the exercise by the railway of police powers in the ILC example). But Canada submits, by contrast, that the decisions which Canada Post makes in the course of the establishment, expansion, management, conduct and operation of its overall business, about its own use of its infrastructure for its non monopoly services and about the use by Purolator of the infrastructure are commercial decisions without the governmental character required by article 1502(3)(a) and article 1503(2). In terms of the ILC's example, those decisions are comparable to decisions taken by the railway company about its sales and purchases. We agree with that submission.

78. For the foregoing reasons, the Tribunal concludes that the decisions of Canada Post relating to the use of its infrastructure by Purolator and by its own competitive services are not made in the exercise of "governmental authority" either in terms of article 1502(3)(a) or article 1503(2) or (assuming it to be relevant) in terms of the rules of customary international law reflected in article 5 of the ILC text. They are rather to be seen as commercial activities. It accordingly follows that this part of the claim made by UPS in respect of the actions of Canada Post fails.

79. Given that conclusion we do not find it necessary to decide whether the phrase "exercises any regulatory, administrative or other governmental authority that the Party has delegated to it" requires that the authority referred to is coercive, that is, that the exercise of the power has a binding effect simply through its exercise. In terms of the instances listed in the provision the body exercising this authority *expropriates* the property, *grants* the license, *approves* the commercial transaction (such as a merger), or *imposes* the quota,

fee or charge — in all cases by the unilateral exercise of the governmental authority delegated to it. While that list of authorities is not exhaustive, it helps to identify a genus which involves binding decision-making. So too does the word "authority" when read with its three adjectives — "regulatory, administrative or governmental". The argument is certainly a strong one, but the Tribunal need not resolve it.

CANADA'S ENFORCEMENT OF ITS CUSTOMS LAWS AND NAFTA ARTICLE 1102

80. In support of its claim about Canada's unfair enforcement of its customs laws and its related breach of its national treatment in obligations under article 1102, UPS makes the following allegations in its RASC:

> 25. Canada has granted to Canada Post treatment from which Canada Post is able to reduce its cost of its non-monopoly postal services, which treatment is not correspondingly made available to UPS or UPS Canada. Canada's unusual structuring of the legal and accounting relationships between Canada Post and other entities of the Canadian government results in less favorable treatment to UPS than to Canada Post as a competitor in the non-monopoly segment of the market. The consequence of this structuring is that Canada Post is able to exploit, in the non-monopoly market where it directly competes with UPS, numerous advantages to which UPS has no access. This treatment includes, but is not limited to:
>
> a. Treatment accorded to Canada Post under a heretofore secret agreement dated April 25, 1994, between Canada Post and the Canadian Department of National Revenue (the "Postal Imports Agreement"), which agreement was not disclosed to UPS or to UPS Canada until 1999, including:
>
> i. Payments by the Canadian Department of National Revenue to Canada Post calculated on the basis of the number of packages imported into Canada through the postal system;
>
> ii. The provision by Canada Customs employees to Canada Post of customs brokerage services or services equivalent to customs brokerage services without fee;
>
> iii. The provision of Customs officers to Canada Post during evenings and weekends without cost to Canada Post;
>
> iv. The exemption of Canada Post from interest and penalties for late payment or non-payment of duties or taxes;

v. Permitting Canada Post employees to perform customs functions; and

vi. The exemption of Canada Post from responsibility for the costs associated with maintenance and upgrading of the "PICS" computer system and electronic data interchanges through which Canada Post communicates with Canada Customs, and from paying for computer and processing equipment used by Canada Customs on Canada Post premises.

b. Permitting Canada Post to levy and retain a $5 handling fee for the collection of duties and taxes from recipients of packages imported through the postal system, irrespective of the costs properly or fairly attributable to that transaction;

c. Exempting Canada Post from charging recipients of packages imported through the postal system the seven percent (7%) goods and services tax on the $5 handling fee;

d. Exemption from *Customs Sufferance Warehouse* Regulations and the requirement to post:

i. Customs Brokers License Bonds;

ii. Temporary Importation Bonds;

iii. Bonded Air Carrier Operation Bonds;

iv. Bonded Freight Forwarder Operations Bonds;

v. Bonded Highway Carrier Bonds; and

vi. Sufferance Warehouse Bonds.

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

f. Exempting Rural Route Contractors engaged under contract with Canada Post from the application of the *Canada Labour Code*, and denying those individuals the right to unionize;

g. Granting Canada Post the exclusive right to place its mailboxes in any public place, including a public roadway, without payment of any fee or charge when those mailboxes are also used for the deposit of non-monopoly products;

h. Provision to Canada Post of benefits respecting the pension plans made available to its employees, including by providing Canada Post free of charge with administrative and other services, by providing Canada Post employees with indexed pension benefits without requiring Canada Post to fund any actuarial deficiency, by prohibiting Canada Post employees' unions from negotiating improvements to the pension plan, and by making excessive payments to Canada Post upon Canada Post taking over administration of the pension plan; and

i. Designing and implementing a Publications Assistance Program, in such a way as to provide financial assistance to the Canadian magazine industry, but only on the condition that any magazines benefiting from that financial assistance are distributed through Canada Post, and not through companies such as UPS Canada.

81. NAFTA article 1102 obliges the NAFTA parties to treat investors from other NAFTA Parties and their investments as favourably as domestic investors and their investments.

82. The relevant provisions of article 1102 read as follows:

> 1. Each Party shall accord to investors of another Party treatment no less favourable 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 favourable 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.

83. The Tribunal notes that there are three distinct elements which an investor must establish in order to prove that a Party has acted in a manner inconsistent with its obligations under article 1102. These are:

a) The foreign investor must demonstrate that the Party [Canada] accorded treatment to it [the Claimant or UPS Canada] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

b) The foreign investor or investment must be in like circumstances with local investors or investments; and

c) The NAFTA Party must treat the foreign investor or investment less favorably than it treats the local investors or investments.

84. Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102.

85. Canada contends that it has not accorded "treatment" within the meaning of article 1102 in the circumstance of this case. The Tribunal disagrees. Canada Customs has accorded "treatment" to both UPS and Canada Post. The conduct of Canada Customs in processing items to be delivered in Canada by UPS Canada constitutes treatment of UPS Canada (investment of an investor), and the processing of items from UPS into Canada similarly constitutes treatment of UPS (investor). The assignments of costs and obligations in connection with processing of items also constitute treatment. Canada's argument that the conduct of Canada Customs is at most treatment of the items and not the investment or investor is not correct. That argument would essentially open an enormous hole in the protection of investments and investors. Essentially the same reasoning applies to the treatment of Canada Post. Treatment is not only to items, but to enterprises. Canada Post qualifies as an investment of a Party. The Canadian Government as owner of Canada Post qualifies as an investor for these purposes under NAFTA, (see article 1139). Canada's arguments here also include the argument that Canada Post only delivers items *on behalf of* foreign postal services, such as USPS, so that even if the acts of Canada Customs

constitute treatment of an enterprise rather than solely of items, the enterprise treated is the importing enterprise, not Canada Post.

86. The answer to Canada's assertion is a practical one. The effect of Canada Customs decisions respecting processing of items, allocation of costs and responsibilities associated with the processing, etc., affects the speed, cost, and quality of service associated with shipment of items via particular routes and using particular entities. Changes in these characteristics affect demand for the service, and changes in demand for the service affect the returns associated with it. The changes affect both the entity that delivers the good to Canada Customs and the entity that delivers the good after it clears Customs. Competition between the streams of goods and entities shipping through the different streams is clear. So long as there is financial gain/loss associated with the choice of one or another stream, there is treatment of those whose business is associated with the particular stream. In addition to the reasons above, failure to narrow the term "treatment" in NAFTA definitions is consistent with the practical approach to the issue. No tribunal has adopted the approach urged by Canada.

87. The Tribunal must now determine whether Canada Post and UPS are "in like circumstances with respect to" the Customs treatment accorded to them. This determination will require consideration by the Tribunal of all the relevant circumstances in which the treatment was accorded. In its RASC, UPS contends that:

> UPS is in 'like circumstances' with Canada and Canada Post by virtue of the fact that they compete in the same market and for the same market share. Canada Post non-monopoly products are generally substitutable with UPS courier products.

88. Broadly speaking, this arbitration deals with three different Customs measures. These measures are the Courier Low Value Shipment Program (the Courier/LVS Program), the Customs international mail processing system and a contract referred to as the Postal Imports Agreement (PIA) which concerns the processing and clearance of postal imports.

89. In this section of our Award, the Tribunal will address the first two measures. The Postal Imports Agreement will be dealt with in the next section.

90. These two measures concern the manner in which Canada Customs processes goods imported as mail, and the manner in which Canada Customs processes goods imported by express consignment operators or couriers such as UPS and for that matter Purolator and Canada Post's own competitive courier products.

91. During the hearing, the Tribunal was shown a video presentation of the differences between the Courier/LVS Program and the Customs international mail processing system.

92. The Tribunal noted in that video that, in the mail processing system, goods were handled by bulk and volume. There is no individual record, apart from what appears on the parcel, about the good in question.

93. In the Courier/LVS Program, thousands of goods are processed. As a matter of first impression, the two programs appear to be dealing with different flows of goods with different characteristics.

94. The Courier/LVS Program provides for expedited customs clearance of courier shipments under $1,600. The evidentiary record before our Tribunal demonstrates in detail the characteristics of the Courier/LVS program, including simplified reporting, consolidated accounting, and deferred duty payment.

95. The Tribunal notes that the Courier/LVS Program was created at the request and with the full participation of the Canadian courier industry including UPS Canada.

96. The Customs international mail processing system is a customs measure that applies to goods imported into Canada as mail. The essential elements of the international mail processing system have been in existence for over a hundred years. This system applies to goods arriving in Canada from any of the 189 foreign postal administrations whose countries are members of the Universal Postal Union (UPU), a United Nations organization.

97. Proceeding on the assumption that UPS and Canada Post are in like circumstances, UPS complains that Canada Post has breached NAFTA article 1102 because, for example,

a. Customs provides services akin to brokerage services to Canada Post which are not available to UPS.
b. Canada Post performs certain Customs functions which UPS is not invited to perform.
c. UPS pays costs recovery, costs of transition and systems infrastructure related to CADEX which Canada Post gets for free.
d. UPS pays penalties where Canada Post does not.

e. Customs does not enforce Customs Law in the postal stream and does not assess duties and taxes owing.

98. The evidence before us demonstrates that there are inherent distinctions between postal traffic and courier shipments that require the implementation of different programs for the processing of goods imported as mail and for goods imported by courier.

99. The Tribunal is convinced that the importation of goods as mail and the importation of goods by courier require different customs treatments because of their different characteristics.

100. The manner in which mailed goods arrive for importation into Canada is different from the manner in which courier shipments arrive. As a result of these differences, Customs designed separate processes for the clearance of mailed goods and courier shipments.

101. Customs accords treatment to inbound international mail under the Customs international processing system. Clearly, this treatment is not in like circumstances with treatment that Customs accords to couriers under the Courier/LVS program.

102. The principal factors which demonstrate to the satisfaction of the Tribunal that Customs treatment of international mail is not "in like circumstances" with the treatment accorded to UPS Canada and other couriers including Purolator include:

- couriers provide detailed advance information on shipments, thus permitting Customs to carry out risk assessments and other checks;
- self-assessment in the Courier/LVS Program as contrasted to officer determinations in the postal process;
- greater security of courier shipments through secure shipping routes and trade chain controls;
- the need for expedited clearance by couriers to meet time-sensitive and time-definite delivery standards;
- the existence of contractual relationships between couriers and their clients;
- the different roles performed by couriers such as brokerage and warehousing.

103. The distinctions between postal traffic and courier shipments are recognized not only in Canada but by Customs experts in the United States, the United Kingdom, the World Customs Organization and the UPU.

104. These distinctions are clearly spelled out in the Affidavit of Mr Mike Parsons, an expert in customs matters with over 40 years experience as a senior official with the UK customs and the World Customs Organization. In his Affidavit, Mr Parsons summarizes the differences as follows:

> In my opinion, the main differences between postal services and express carriers can be summarised as follows:
>
> - different treaty basis and correspondingly different national legislation
> - most postal traffic is private person-to-person or business-to-person while express carriers, on the other hand, dealt very largely with business-to-business consignments

- express carriers are free to refuse consignments whilst postal services have to comply with the universal service obligations and reciprocal delivery commitments
- the postal services usually have little or no relationship with the sender whilst express carriers very often are dealing with repeat customers with whom accounts have already been established
- the procedures used by express carriers are more computerized and sophisticated than postal arrangements, which are based on paper declarations travelling with consignments and constituting in the great majority of cases the only Customs declaration available and/or required
- express carriers are in a position, which postal services are not, to supply electronic data prior to the arrival of the goods for the purposes of Customs risk assessment and other checks
- the postal services offer a relatively inexpensive universal service in which time is not the major factor while express carriers, with higher charges, offer rapid transport, release and delivery.

105. In his Affidavit, Mr Parsons also affirms that the distinctions made in Canada between postal traffic and express consignment shipments are consistent with the United Kingdom's treatment of the two streams, and with the Kyoto Convention itself.

106. The Tribunal has also noted the expert opinion of Ms Alice Rigdon with respect to Customs administration processes in the US. Ms Rigdon is an expert in international customs procedures. As the Director, Technique of the World Customs Organization, Ms Rigdon was responsible for the WCO's international policy development in the areas of Customs procedures, Customs automation, and Customs enforcement, as well as the development and acceptance of international Customs rules for international express consignments.

107. In her Affidavit, Ms. Rigdon states:

> Although UPS presents a list of "similarities" between the postal and courier streams in its Memorial, several of the items listed are based on inaccurate assumptions with respect to customs operations generally, for example:
>
> a. **Postal and courier streams are separate modes**. Customs administrations around the world view the postal stream as a separate "mode" of importation and many have established separate clearance processes for goods imported as mail and for goods imported by couriers.
>
> b. **Customs controls in the Postal and courier streams are different due to the high degree of automation in the courier stream**. Due to the high degree of automation in the courier stream, customs can perform pre-arrival electronic monitoring and thus do selective examinations on arrival. By contrast, due to the lack of automation in the postal stream, customs must physically sort all of the arriving packages. (Original emphasis.)

108. Ms Rigdon in her Affidavit lists the differences between international mail and express consignments that U.S. Customs considers in according different treatment under the U.S. Customs law to the two streams. Significantly, the US Code of Federal Regulations contains different chapters setting out the Customs formalities. One deals with international mail and a separate chapter deals with express consignment operators.

109. In her Affidavit, Ms Rigdon affirms that the fundamental distinctions between postal and express consignment traffic are reflected internationally in the Kyoto and Revised Kyoto Conventions.

110. In Ms Rigdon's opinion, both the Canadian and U.S. Customs procedures with respect to the treatment of international mail and treatment of express consignments fully comply with both the spirit and the letter of the Kyoto Convention and the World Customs Organization immediate release guidelines.

111. Ms Rigdon concludes that U.S. Customs treats express consignment operators differently than postal traffic, just as is done in Canada, and that this difference in treatment "stems from the significant differences between the two streams".

112. The Tribunal has also considered the Affidavit of Mr Marcus Harding, a senior official at the UPU and a world expert on matters relating to international postal differences. Mr Harding acknowledged the differences between postal administration and express consignment operators.

113. Mr Harding stated in his Affidavit:

> ...in light of the fundamental differences between a postal administration fulfilling its government imposed delivery obligations to other UPU members, and an international express consignment operator importing packages collected from its own customers abroad, and typically forwarded by its own dedicated transport system, one may ask whether the two are in fact on the same playing field or, indeed, whether they are even playing the same game.

114. The Tribunal notes that the World Customs Organization's Kyoto Convention has a separate annex applicable to postal traffic due to its unique nature. The presence of a distinct annex for postal traffic also exists in the revised Kyoto Convention.

115. The introduction to Annex F 4 of the Kyoto Convention states:

> The Customs are necessarily involved in international postal traffic since, just as in the case of goods imported and exported by other means, they have to ensure that the appropriate duties and taxes are collected, enforce import and export prohibitions and restrictions, and in general ensure compliance with the laws and regulations which they are responsible for enforcing.
>
> Because of the special nature of postal traffic, however, the Customs formalities in respect of items carried by post are somewhat different from those applied to goods carried by other means. While individual postal items are restricted in size, their numbers are enormous and, to avoid creating unacceptable delays, special administrative arrangements are necessary to deal with them. These are made possible because in virtually all countries the

> postal services are furnished by public administrations or authorities, and the two public bodies involved in postal traffic, the Post and the Customs, cooperate very closely with one another.

116. It is clear to the Tribunal that Canada's treatment of couriers is in accordance with the revised Kyoto Convention. In his Affidavit, Mr Parsons, after having analyzed Canada's Courier/LVS program and its international mail process, concluded:

> ... I am of the view that these programs comply with the obligations contained in the *Kyoto Convention*. Likewise, the Canadian system also acknowledges the differences between the commercial shipments and postal traffic in a manner similar to the way that they are differentiated in Annexes A.3 and F.4. Canada, like the U.K., has made great strides to accommodate the express consignment industry as is evidenced by the Courier/LVS program. However, provided that the WCO continues to put into effect separate obligations for postal traffic than for express consignment shipments, as is the case with the *Revised Kyoto Convention*, it is reasonable for states like Canada and the U.K. to continue to treat postal traffic differently.

117. The Tribunal has received convincing evidence that Canada, like all member countries of the UPU and the World Customs Organization, distinguishes between courier and postal traffic on the basis that postal administrations and expert consignment operators have different objects, mandates and transport and deliver goods in different ways and under different circumstances.

118. The evidence is compelling. Canada, like the US and the UK, has adopted customs procedures which are fully compliant with the Universal Postal Convention and the Kyoto Convention. Customs administrations throughout the world accord different treatment to postal traffic than is accorded to express consignment operators for the simple reason that circumstances are not like.

119. In summary, the evidence before our Tribunal is overwhelming. We conclude that UPS and Canada Post are not in like circumstances in respect of the customs treatment of goods imported as mail and goods imported by courier.

120. UPS's claim under NAFTA article 1102 thus fails since the Claimant has not met its burden of proof in respect of this *sine qua non* element of that provision.

Procurement exception

121. As we noted earlier, a particular aspect of the customs treatment UPS complains of in these proceedings is the Postal Imports Agreement (PIA) which is an agreement that was negotiated in 1992 between Customs and Canada Post for the performance of certain non core Customs functions.

122. Under the Postal Imports Agreement, Customs procured three services from Canada Post:

I) Material handling

II) Data entry

III) Duty collection

In return for these services, Customs pays Canada Post a fee.

123. Clauses 4 and 6 of the Postal Imports Agreement describe the services that Canada Post is required to perform for Customs. Extracts from these clauses can usefully be reproduced here since they accurately portray the scheme of the relationship between Customs and Canada Post:

4.0 Responsibilities of CPC

4.1 CPC shall have the following responsibilities with respect to the processing of Postal Imports through the customs clearance process:

(i) separating or dividing Postal Imports according to criteria outlined in Annex "C" and placing the Postal Imports on a conveyor belt;

(ii) Priority Courier Manifesting;

(iii) affixing machine readable bar code identification labels to all Postal Imports requiring Secondary Inspection, such labels to be provided by CPC at CPC's expense;

(iv) moving all Postal Imports to and from the Department's "No Declaration" section in the International Mail Process Site to the Secondary Inspection Area in the same International Mail Process Site;

(v) scanning or entering a bar code identification number on each Postal Import in Secondary Inspection;

(vi) entering into the PICS System of information consisting of name and origin (country or state) of the exporter, name and address of domestic recipient (importer), postal importer reference number (e.g. invoice number or order number); and postal code, (where legible);

(vii) resealing Postal Imports prior to re-entry into the general mail stream, except Postal Imports which have no declaration provided by the exporter;

(viii) printing and affixing E14 Invoices to Postal Imports;

(ix) collecting Duties and Excise Taxes from addressees of Postal Imports;

(x) movement of Postal Imports;

(xi) delivery of Postal Imports;

(xii) maintaining books and records recording Duties indicated on E14 Invoices attached to Postal Imports, duties collected from addressees of Postal Imports, Duties remitted by CPC to the Receiver General for Canada, and Duties which remain uncollected on

Postal Imports which are undelivered or undeliverable;

(xiii) remitting Duties agreed to be collected as agent of the Department to the Receiver General for Canada pursuant to the terms of paragraph 6.6 hereof;

(xiv) recording information with respect to non-delivery of Postal Imports;

(xv) maintaining an inventory of Customs appeal forms, provided by the Department at the Department's expense, and making these forms available to addressees upon request;

(xvi) supplying bags at the Department's expense for the application of E14 Invoices to small parcels; and

(xvii) meeting production standards agreed to by CPC and the Department, as set forth in Annex "C2".

...

6.0 Collection of Duties and Release of Postal Imports

6.1 CPC is hereby designated as agent of the Department to collect Duties on Postal Imports and as its agent for the purposes of any other functions of CPC hereunder related to the collection and handling of Duties on Postal Imports and the handling and release of Postal Imports.

6.2 CPC may determine, in its sole and absolute discretion, the manner in which Duties and fees are collected from addressees of Postal Imports and the manner in which dutiable Postal Imports are delivered to the addressees thereof.

124. Clause 9 sets out the compensation that Customs is required to pay to Canada Post for the services it provides. Clause 13 provides that the Post may determine in its discretion how it performs its obligations under the Postal Imports Agreement, including by subcontracting some of its obligations.

125. Canada asserts that Canada Post performance of such non core administrative services under the terms of the PIA in return for payments is exempted from the application of NAFTA article 1102 because it falls within the procurement exception of NAFTA article 1108 (7)(a).

126. There is evidence before our Tribunal that, in the United States, another Party to the NAFTA, the United States Postal Service also collects duties and customs on behalf of U.S. Customs. It is not a service that is performed by UPS or any other private commercial carrier in Canada or the United States.

127. Article 1108(7)(a) is an exception from national treatment. It reads as follows:

> 1108.7 Articles 1102, 1103 and 1107 do not apply to:
>
> (a) procurement by a Party or a state enterprise;

128. While UPS does not dispute Customs' right to contract for services from Canada Post, it alleges that the PIA accords more favourable treatment to Canada Post than UPS Canada receives as a commercial carrier and as a participant in the Courier/LVS program.

129. The Claimant alleges that Canada's failure to advertise the alleged procurement in 1994 and every year thereafter provides evidence that Canada's procurement from Canada Post was simply an interdepartmental agreement between various State organs, which is not captured by the definition of the international law concept of procurement.

130. The Tribunal now turns to its analysis of the issues. The term "Procurement" is not defined anywhere in the NAFTA. The term should be given its ordinary meaning, in its context, and in light of the object and purpose of the NAFTA.

131. The *ADF* Tribunal examined the meaning of the term "procurement by a Party" in article 1108(7)(a) and concluded that it referred to "the obtaining by purchase by a governmental agency or entity of title to ... possession of, for instance, foods, supplies, materials and machinery." (Paragraph 161).

132. The Federal Court of Canada, in a case which was initiated by UPS' lobbyist in Canada, analysed the PIA and determined that it was a "commercial fee-for-service contract entered into in 1992 between CPC and the CCRA" (*Dussault v. Canada (Customs and Revenue Agency) and Canada Post Corporation* 2003 FC 973, paragraph 4). The Court then went on to say (paragraph 4):

> ...Under the Agreement, CPC agreed to provide certain services regarding postal imports. The services which CPC agreed to provide to the CCRA include:
>
> 1. Scanning or entering a bar-code identification number on each item of mail to be inspected by the CCRA;
>
> 2. Entering into the CCRA data entry system specified information, including the name of the exporter and the country of export, the name and address of the importer, any applicable invoice or order number, and the postal code;
>
> 3. Re-sealing postal imports following inspection;
>
> 4. Printing and affixing invoices to postal imports; and
>
> 5. Collecting duties and excise taxes from the recipients of postal imports and remitting those duties and taxes to the CCRA.

133. The Tribunal further notes that the PIA creates binding legal obligations between the Parties. It contains termination and dispute resolution provisions.

134. NAFTA article 1108(7) does not require, as Claimant alleges, that the fee for the service provided be paid according to a specific formula or in a particular manner in order to fall within the scope of the exception. There is no basis for such a requirement in the text of the article.

135. Having analysed the PIA and being informed by the decisions of the *ADF* and *Dussault* Tribunals, we are of the view that the PIA is clearly a procurement contract under which Canada Post performs services for Customs for a fee.

136. As such, the PIA falls within the procurement exception of article 1108(7)(a) and the Tribunal so finds.

PUBLICATIONS ASSISTANCE PROGRAM

137. In the Award on Jurisdiction the Tribunal determined that it did not have sufficient evidence before it to decide Canada's claim that the Publications Assistance Program (the "program" or the PAP) falls under the so-called "cultural industries exception" (the exception) set out in article 2106 and annex 2106 of NAFTA. Such evidence is now before us concerning the design, operation and objectives of the Program. On that evidence and for the reasons which follow, the PAP as a whole falls squarely within the scope of the exception.

138. Moreover, even if one were to assume that the Publications Assistance Progam is not covered by the cultural industries exception, the Tribunal finds that Canada is not in breach of article 1102 since, among other things, in this context Canada does not accord Canada Post and UPS treatment in "like circumstances".

The public policy function of Canada Post; Canada's universal service obligation

139. In order to understand the Tribunal's analysis and findings in respect of Canada's Publication Assistance Program, it is necessary to review briefly what Canada has characterized as the public policy function of Canada Post. We have touched on some of these matters earlier (paragraph 57).

140. The primary public policy function of Canada's postal service is to provide an accessible, affordable, inbound and outbound postal service to all addresses in Canada in a timely fashion. This concept of postal service is known, in Canada as elsewhere, as the "universal service obligation". The fulfilment of the universal service obligation has been a domestic policy imperative in Canada since the Post Office Act of 1867.

141. Canada is not the only state to recognise the importance of universal and accessible postal service. It was the recognition by governments around the world of the primary importance of universal postal service that led to the creation in 1874 of the UPU. By coordinating the application of the concept of universal postal service internationally, and by enshrining the universal service obligation as a treaty obligation, the member nations of the UPU created and have maintained a seamless international postal regime.

142. There is no dispute between the parties as to the fact that the Postal Service in Canada, in the form of Canada Post, fulfils a number of significant public policy functions, including and in addition to Canada's universal service obligation, which are not governed solely by commercial considerations.

143. Canada Post Corporation's legislative mandate is set out in section 5 of the Canada Post Corporation Act. Section 5(1) establishes the operating mandate of Canada Post. It stipulates:

> 5. (1) The objects of the Corporation are:
>
> (a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;
>
> (b) to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; and
>
> (c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled and operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.

144. Subsection 5(2) goes on to set out some of the basic public policy objectives that Canada Post must take into account in carrying out its objectives. It provides:

> 5.(2) While maintaining basic customary postal service, the Corporation, in carrying out its objects, shall have regard to:
>
> (a) the desirability of improving and extending its products and services in the light of developments in the field of communications;
>
> (b) the need to conduct its operations on a self-sustaining financial basis while providing a standard of service that will meet the needs of the people of Canada and that is similar with respect to communities of the same size;
>
> (c) the need to conduct its operations in such manner as will best provide for the security of mail;
>
> (d) the desirability of utilizing the human resources of the Corporation in a manner that will both attain the objects of the Corporation and ensure the commitment and dedication of its employees to the attainment of those objects; and
>
> (e) the need to maintain a corporate identity program approved by the Governor in Council that reflects the role of the Corporation as an institution of the Government of Canada.

145. In addition to Canada Post's basic policy objectives enumerated in section 5(2) of the Canada Post Corporation Act, Canada Post carries out the other public policy objectives. For example:

- Canada Post is required to maintain a presence in rural and small town locations;
- In doing so, Canada Post often serves as the only federal governmental presence in these locations and plays an exceptionally important role in rural life;
- Canada Post is also subject to the Official Languages Act which is a cornerstone of Canadian federal public policy;
- Canada Post provides free or discounted rates in certain circumstances in furtherance of Canada's public policy objectives. For example, the *Canada Post Corporation Act* allows visually impaired persons and institutions for the visually impaired to mail specific items for the visually impaired free of postage;
- The Act also facilitates communication between Canadians and their federal government by requiring that Canada Post provide free mailing to Members of the House of Commons and the Senate, the Parliamentary Librarian and the Governor General;
- For public policy reasons, Canada Post is required to provide a discounted mailing rate to libraries that send books to other libraries, to persons who are "disabled", "shut-ins", or receive books-by-mail service because they are living in remote locations of Canada;
- As well, Canada Post provides postal subsidies to eligible Canadian magazines, non-daily newspaper and periodical mailed for delivery in Canada as part of the Publications Assistance Program.

The program and the postal subsidisation of the Canadian publishing industry

146. Canada's cultural and social policy with respect to publications is designed to achieve two main purposes:

(1) To connect Canadians to each other through the provision of accessible Canadian cultural products; and

(2) To sustain and develop the Canadian publishing industry.

147. Because of high subscription sales and low newsstand sales in Canada, the Government of Canada has traditionally sought to achieve these two goals through the subsidization of the costs of mail delivery.

148. There is no dispute that Canada has provided postal subsidies to publications since prior to Confederation in 1867. Other countries – such as Austria, Australia, Belgium, France and the United States – have also adopted preferential postal rates to support access to national publications.

149. Originally, Canada established a postal subsidy program under which it offered reduced postal rates to eligible Canadian publications. Over the years, Canada adjusted this subsidy. Distribution assistance to publishers is currently provided through the PAP, which is but one component of a broader Canadian federal cultural policy supporting the Canadian periodical publishing industry. Other legislative manifestations of this policy include provisions of the *Income Tax Act* (concerning original Canadian content and investment review in the foreign publishing sector) as well as the *Foreign Publishers Advertising Services Act* (regarding advertising directed at Canadians).

The operation of the program

150. The operation of the Program is described in detail in the affidavit of William Fizet, responsible for periodical publishing programs at Canada's Department of Canadian

Heritage (the Heritage Department). As explained by Mr Fizet, the PAP provides subsidies to a broad range of eligible Canadian publications, including magazines and periodicals, small community weekly newspapers, and certain other weekly newspapers mailed in Canada for delivery in Canada.

151. The Program, in its current form, provides subsidy payments directly to eligible publications through individual accounts at Canada Post to be used by those publications against the cost of Canada Post's publication and mail services.

152. The PAP is co-administered by the Heritage Department and Canada Post pursuant to the terms set out in a Memorandum of Agreement. The Heritage Department sets the eligibility criteria for publishers to gain access to the PAP. These criteria, which are reviewed regularly, reflect the overall cultural policy objectives of the PAP. Currently, approximately 1200 publications are eligible for the PAP.

153. Once the Heritage Department determines eligibility, Canada Post creates individual accounts for each PAP publisher and calculates the funding amount for each mailing. Canada Post deposits PAP funds into these accounts, allowing PAP publishers to deduct against their account to pay some of their costs of delivery through Canada Post.

154. Both the Heritage Department and Canada Post contribute funds to subsidize Canadian publishers through this Program. In 2004, for example, the Heritage Department and Canada Post contributed $47.8 million and $16 million respectively to the PAP.

Distribution assistance through Canada Post

155. The Heritage Department has determined that delivery through Canada Post is the best and most cost effective means of meeting its policy objectives. As noted by Mr. Fizet:

- Canada Post provides the most effective way for publishers to reach all of their subscribers across Canada at a reasonable price, given its existing universal service obligation.

- Courier companies, including the Investor and UPS Canada, focus on time-definite delivery within densely populated areas. They do not, as a matter of course, go to every address in Canada.

- No Canadian courier company could carry out the affordable distribution of publications to all points across the country.[2]

- Given the volume of goods transported by Canada Post pursuant to the PAP, the Heritage Department is able to negotiate more favourable rates for mailing Canadian publications than would otherwise be possible.

- Canada Post itself contributes significant funds to the PAP.

- The PAP assures accountability in terms of public spending. The fact that funds are deposited directly into individual publishers' accounts at Canada Post ensures that PAP publishers can only use such funding for its intended purpose.

- In addition, as part of the current arrangement, the Heritage Department negotiated special favourable rates from Canada Post for library mailings between public libraries and their patrons and for inter-library loans.

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2 UPS recognizes this. See: Investor's Memorial, paragraph 354.

The Program as a whole is covered by the cultural industries exception

156. Article 2106 and annex 2106 explicitly remove from the scope of NAFTA as between Canada and the United States "any measure adopted or maintained with respect to cultural industries". Annex 2106 provides in full as follows:

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

Canada submits that the PAP supports the Canadian publishing industry by providing distribution assistance to eligible publishers and is therefore a "measure with respect to cultural industries" and, as such, falls within the scope of NAFTA's cultural industries exception.

157. UPS alleges that Canada Post receives preferential treatment because of the requirement for publishers to use Canada Post in order to receive federal assistance under the Program. This requirement, it claims, has nothing to do with protecting cultural industries and so falls outside the scope of the cultural industries exception as set out in article 2106 and Annex 2106 of NAFTA.

158. UPS acknowledges that the cultural industries exception applies to "assistance to publishers". Indeed, referring to the PAP, in its Memorial it states that "[w]ith respect to

assistance to publishers, the terms of the exemption clearly apply". However, UPS contends that the requirement of the PAP which provides for distribution of publishers' products through Canada Post is excluded from the purview of the exception. It argues that, in the context of the Program, distribution by Canada Post constitutes a mere delivery mechanism unrelated to any genuine "assistance to publishers"; that such a mechanism is a discrete and essentially severable aspect of the PAP; and that any assistance related to such a mechanism must be distinguished from otherwise valid "assistance to publishers" that may be provided by the Program.

159. Stated differently, UPS asserts that the cultural industries exception applies only to cultural industries themselves, not to their delivery mechanism, and that there is no connection between the Program's objective and Canada Post's involvement.

160. In essence, UPS asks the Tribunal to find that only certain aspects of the PAP are potentially covered by the cultural industries exception; specifically, those aspects of the Program which, as UPS puts it, are "connected to the purpose of helping the people ... whom the Program is designed to help".

161. In the view of the Tribunal, this dividing of a specific "measure" such as the PAP into several parts for the purpose of attributing to each a distinct categorisation has no basis in article and annex 2106 which quite simply remove from the scope of NAFTA "any measure adopted or maintained with respect to cultural industries".

162. The language of article 2106 is expansive indeed, serving to introduce into NAFTA an admittedly broad exception. This is intentionally so. The evidence is that it was clearly

understood by the Parties in the context of the negotiation, execution and implementation of NAFTA, just as it had been understood in the context of the Canada-US FTA, that a Party's ability to pursue its domestic cultural policies would be virtually unimpaired by these trade and investment instruments. This is consistent with the expansive wording of article and annex 2106 which, on their face, do not circumscribe the nature, scope, objective or operation of an excepted measure, other than, as noted by Canada, by "requiring that the measure be in connection with cultural industries".

163. Moreover, to the extent that this broad exception for cultural industries may have reflected a concession by the other NAFTA Parties regarding a traditional Canadian position, a commercial and political balance was nonetheless achieved. As Annex 2106 explicitly recognizes, the *quid pro quo* for acceptance of such an exemption was the granting of a *unilateral right of retaliation* allowing a party to take measures of equivalent commercial effect in response to measures connected to cultural industries that, but for the exemption, would be in violation of NAFTA. As Canada submits: "[f]or the Tribunal to now introduce limitations to the scope of this cultural exemption would disturb the balance that was agreed to by the part[ies]."

164. Nor is UPS' contention, that the PAP's requirement that publishers use Canada Post should be considered to be separate from and indeed inimical to the other aspects of the Program, factually correct.

165. Alternatives to distribution of PAP publications by Canada Post were considered by the framers of the Program, but were ultimately rejected. Because of Canada Post's universal service obligation, and because of the terms that the Heritage Department has

been able to negotiate with Canada Post, using Canada Post has been determined as Mr Fizet testified, to be the most efficient means to meet the Program's objectives, that is, ensuring the widest possible distribution of eligible Canadian publications to Canadian readers at affordable and uniform prices. As Canada argues, what this efficiency really means, in the end, is that the requirement that PAP publications be delivered by Canada Post results in *more money going to publishers* under the Program than would otherwise be the case.

166. In the context of the PAP, the distribution of eligible Canadian publications by Canada Post is thus an integral element of the federal government's overall scheme of assistance to publishers. Further, given that the subsidy provided by the Program ensures that publications are accessible to all Canadians, thereby helping to sustain the Canadian periodical publishing industry and strengthening Canada's cultural identity, it is in fact an integral part of Canada's cultural policy.

167. As noted, article 2106 requires that for a measure to fall within the cultural industries exception it must be adopted or maintained "with respect to cultural industries". Clearly, not every measure that is drafted in such a way as to refer on its face to some cultural industry or other would necessarily satisfy this criterion. To paraphrase a member of the Tribunal, there is indeed "some point at which ... a particular subsidy falls outside of the cultural exemption," that is, a "point at which the cultural connection is sufficiently tangential that a tribunal could say this is outside the cultural exemption".

168. However, the Program at issue here – including the specific aspect of the Program at which UPS takes particular aim, namely, the requirement that publishers use Canada Post

to distribute eligible publications – lies nowhere near that point. On the contrary, as mentioned above the evidence is that this requirement is *rationally* and *intrinsically* connected to assisting the Canadian publishing industry.

169. As noted above, two of the main purposes of the Program are to connect Canadians to each other through the provision of accessible Canadian cultural products and to sustain and develop the Canadian publishing industry. Delivery through Canada Post has been demonstrated to be the best and most effective way to meet these policy objectives.

170. Moreover, since the concept of cultural industries as understood within the context of NAFTA expressly includes both "publication" and "distribution" (article 2107(a)), and distribution necessarily includes a delivery mechanism, there can be no reason in principle that the "delivery aspect" of the Program should be excluded from the cultural industries exemption. Looked at from a different perspective, bringing the "delivery aspect" of an otherwise valid and exempt measure under the cultural industries exception does not extend unreasonably the scope of the exception. It all depends on the measure in question.

171. Without ruling on the point, the Tribunal acknowledged in its Award on Jurisdiction that the actual delivery of magazines may fall within the scope of the cultural industries exemption:

> 109. Setting aside the issue whether or not the word "distribution" includes delivery [...] 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 the purpose of the "cultural industries" provisions of NAFTA are to benefit those industries, the delivery to consumers of cultural products should be excluded.
>
> ...

> 111. ...It does not necessarily follow ... that the activity of delivering cultural products to consumers is inconsistent with the protection of "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.

172. For the reasons discussed above, and on the basis of the evidence before us, the Tribunal considers that the delivery of eligible publications by Canada Post as required by the PAP is a measure which assists the Canadian publishing industry and which, accordingly, does indeed fall within the scope of the cultural industries exception. The Tribunal concludes that the PAP as a whole is a "measure"; that it is a measure which has been adopted "with respect to cultural industries"; and that, as such, it is excepted from the NAFTA investment protections and investor-state dispute settlement procedures invoked by UPS by virtue of article 2106 and Annex 2106 of NAFTA.

The Program does not breach Canada's national treatment obligation under article 1102

173. The Tribunal also considers that the PAP does not breach article 1102 in particular for the reason that in establishing and operating the Program Canada does not accord Canada Post and UPS Canada treatment "in like circumstances".

174. The treatment at issue is the Heritage Department's choice of Canada Post as the delivery mechanism for publications receiving the subsidy provided under the PAP. UPS asserts that "UPS and UPS Canada are in like circumstances with Canada Post because they have sought and continue to seek to compete with Canada Post in the provision of courier services to publishers that qualify for the *Publications Assistance Program*". In the light of the Program's objectives and operations, however, it is clear that they are not.

175. The Program seeks to ensure the widest-possible distribution of Canadian publications to individual Canadian consumers at affordable and uniform prices throughout the country. As a matter of fact, by virtue of its statutory obligation to deliver to every address in Canada (in fulfilment of Canada's universal service obligation), only Canada Post is in a position to ensure that the Government of Canada is able to attain this objective.

176. It is telling that UPS does not claim that UPS Canada is capable of delivering to individual readers across the country. Instead, it states that UPS Canada is able to deliver to "large retail customers" and "customers in shopping malls". However, this is a far cry from the Program's objectives. As noted above, the Canadian market for publications is characterized, *inter alia*, by the fact that Canadian publications rely heavily on home-delivered subscription sales as opposed to newsstand sales.

177. As an aside, it is noted that this fact also illustrates that the rationale for providing distribution assistance through Canada Post does not comprise any nationality-based discrimination. Under the PAP, UPS Canada and Canadian courier companies – which, unlike UPS Canada and Canada Post, are indeed "in like circumstances" – are treated in an identical manner. Because the involvement of Canada Post is essential to the attainment of the Program's objectives, publishers do not receive any assistance under the PAP if they use a delivery method other than Canada Post, whether it be UPS Canada or any other courier company, Canadian or other.

178. As Canada submits, UPS is not truly asking that it be accorded the same treatment as Canada Post. Rather, it asks that the Program be re-designed for its benefit; specifically, that the choice of delivery mechanisms be left to each publisher to decide for itself. This is because UPS is interested in having UPS Canada compete for only a part of the PAP delivery business offered by Canada Post. It is not interested in having UPS Canada provide the same service or the same contribution as Canada Post under the Program – and in fact, it is not capable of doing so.

179. Yet, as demonstrated, the delivery aspect of the PAP is integral to the attainment of the Program's objectives.

180. Extending "no less favourable" treatment to UPS Canada, in like circumstances, would require that the Heritage Department offer it the same arrangement as is offered to Canada Post; which would entail, among other things, the assumption by UPS Canada of the same responsibilities as those assumed by Canada Post under such an arrangement. However, that is manifestly not what UPS seeks. As mentioned, UPS does not seek for UPS Canada to assume, and it is in fact incapable of assuming, all of the benefits and responsibilities assumed by Canada Post under the PAP.

181. In the circumstances, we conclude that UPS Canada is not "in like circumstances" to Canada Post in respect of its program and, indeed, for essentially the same reasons, is not accorded less favourable treatment than Canada Post or treated differently because of nationality.

MOST-FAVORED-NATION TREATMENT – ARTICLE 1103

182. Article 1103 provides as follows:

> **Most-Favored-Nation Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party 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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

In its pleading on article 1103, UPS also cites article 1104:

> **Article 1104: Standard of Treatment**
>
> Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

UPS's general claim (set out in paragraph 13(b) above) is that Canada has breached its obligations under article 1103 by failing to accord UPS and UPS Canada most favored nation treatment by providing treatment to non-NAFTA Party Investors that is better than the treatment provided to UPS and UPS Canada. In its Memorial it mentions sixteen bilateral investment treaties between the Government of Canada and other Governments. Provisions in those treaties, it says, provide treatment that is better than that provided under section A of chapter 11 of NAFTA if the restrictive effect of the Note of Interpretation relating to article 1105 (the minimum standard obligation) issued by the Free Trade Commission under article 2001(2)(c) is accepted. (The Interpretation given by the Free

Trade Commission is discussed in paragraphs 79-99 of our Award on Jurisdiction.) UPS cites particular provisions of the bilateral treaties under which

> Each Contracting Party shall accord investments or returns of investors of the other Contracting Party
>
> (a) fair and equitable treatment in accordance with principles of international law, and
>
> (b) full protection and security.

According to UPS, the protection accorded by these provisions is not restricted to customary international law — the interpretation given by the FTC to article 1105. It follows, in its view, that if on the basis of that interpretation the Tribunal gives a restricted interpretation to article 1105, then UPS is entitled to better treatment because of these bilateral investment treaties.

183. At the end of the exchange of written pleadings, Canada responded that, even in its Reply, when UPS does identify the breach of the most favored national obligation by reference to the actions identified in the article 1105 claims, UPS still has not identified its claim with sufficient accuracy. Further, UPS has not met its burden of showing how the article 1105 allegations would breach any of the sixteen investment protection agreements which Canada, in any event, maintains institute the same standard of treatment as article 1105.

184. At the hearing counsel for UPS gave very limited attention to the claimed breaches of the most favored nation obligation to this argument, submitting primarily that the claimed breaches of article 1105 were so egregious that they would violate the FTC interpretation

in any event. The Tribunal considers the article 1105 issues next. For the present it is enough to note that in the absence of any further specification of the claimed breaches of article 1103 (and 1104) this claim must fail.

MINIMUM STANDARD OF TREATMENT – ARTICLE 1105

185. Article 1105(1) provides as follows:

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

186. To recall its counsel's opening (paragraph 11 above) UPS contends that Canada is in breach of the minimum standard of article 1105 in respect of three matters: the retaliation by Canada Post against UPS's Fritz Starber by disqualifying its bid, and two restrictions on the collective bargaining rights of Canada Post's employees, in respect of the application of labor law and pension entitlements. The RASC (paragraphs 40-44) also refers to the aspects of the competitive positions and practices of Canada Post while recognizing, no doubt in the light of the Award on Jurisdiction (paragraph 134(a)), that it could not assert an independent breach of anticompetitive conduct *per se*. Given that recognition, this part of the claim cannot extend beyond the breach of the national treatment obligation under article 1102, a claim which the Tribunal has already rejected.

187. As with its most favoured nation claim, UPS gave little attention to any facts constituting or the law underlying this claim at the hearing. The Fritz Starber claim requires that Canada Post be seen as Canada, as "a Party", and since for reasons that have already been given that cannot be established, this claim must fail for that reason if for no other. UPS has demonstrated no sufficient interest to justify its pursuit of the other two

claims nor any substantive ground which could begin to show a breach of the minimum standard reflected in article 1105. This claim too must fail.

COSTS

188. In terms of article 1135 of the Agreement and articles 38 and 40 of the UNCITRAL Arbitration Rules (1977, 1997 print) and given the substance and overall course of the proceedings the Tribunal rules that the parties bear the costs of the proceedings equally and bear their own costs. The total costs of the arbitration amount approximately to US$950,000. In accordance with article 38 of the UNCITRAL Arbitration Rules, a detailed written account will be provided by letter to the parties by ICSID as soon as practicable after this Award is communicated to the parties.

CONCLUSION AND DECISION

189. For the foregoing reasons the Tribunal rejects as a whole the claim brought by UPS. It orders that the parties bear the costs equally.

Made in Washington D.C., U.S.A., being the place of arbitration,

Dean Ronald A. Cass,
Arbitrator
(Subject to the attached dissenting opinion)

L. Yves Fortier CC, QC
Arbitrator

Judge Kenneth Keith,
President

APPENDIX 1

REPRESENTATIVES ATTENDING THE HEARING

On behalf of UPS
Legal Representatives

Barry Appleton
Robert Wisner
Dr. Stanley Wong
Frank Borowicz
Prof. Robert Howse
Dr. Alan Alexandroff
Asha Kaushal
Nick Gallus
Hernando Otero
Appleton & Associates

On behalf of Canada
Legal Representatives

Ivan G. Whitehall
Thomas Conway
Kirsten Hillman
Sylvie Tabet
Carolyn Knobel
Rodney Neufeld
Alan Willis
Richard Casanova
John Deveen
Donald Campbell
Brian McLean

Client Representatives

Alan Gershenhorn
Steve Flowers
Norm Brothers
Alix Apollon
Alice Lee
Cathy Harper
Paul Smith
David Bolger
Nick Lewis
Amgad Shehata

Client Representatives

ALSO PRESENT

On behalf of the United States

Department of State

Keith Benes
Renee Gardner
Carrielyn Guymon
Mark McNeill
Andrea Menaker
Heather van Slooten
Jennifer Toole

US Department of Justice

Richard Larm

Caldwell Harrop

US Department of Commerce

David Weems

ALSO PRESENT (Continued)

US Department of Treasury

Gary Sampliner

Office of the US Trade Representative

Jason Kearns

On behalf of the United Mexican States

Maximo Romero Jimenez
Salvador Behar la Valle
J. Cameron Mowatt
Graham Cook

SEPARATE STATEMENT OF DEAN RONALD A. CASS

CONTENTS

CONCURRENCE AND DISSENT

1. I join the Tribunal's opinion in all respects except those indicated below.

2. While I am generally in agreement with the disposition of claims and issues in the Tribunal's opinion, I disagree with the Tribunal's conclusion that Canada has not violated its national treatment obligation under NAFTA Article 1102. I conclude that Canada has

violated that NAFTA obligation in three respects: its Customs treatment of UPS relative to its treatment of Canada Post, its Publications Assistance Program's preference for distribution by Canada Post, and its failure to supervise Canada Post to prevent discrimination in treatment given to Purolator and UPS Canada, specifically Canada Post's decision to grant Purolator preferential access to its monopoly infrastructure. This statement explains the reasons for those conclusions.

CUSTOMS TREATMENT

3. The decision of the Tribunal explains the basic contentions and legal framework for resolving them. My point of departure from the Tribunal's opinion concerns the conclusions drawn from its observations respecting the relationship between the treatment complained of in UPS' Revised Amended Statement of Claim (RASC) and Canada's invocation of international customs accords.

4. In addressing the arguments of the parties, the Tribunal emphasizes that Canada's distinction between the treatment given to products imported for distribution by UPS Canada and products imported for distribution by Canada Post complies with international postal treaties and also complies with the Kyoto Convention of the World Customs Union. The Tribunal's conclusions that UPS (and its investment UPS Canada) and Canada Post are not in like circumstances and that, therefore, Canada has not violated its national treatment obligation rest in substantial part on the finding that Canada's customs program complies with the Kyoto Convention.

5. I accept the Tribunal's statement that Canada's conduct is consistent with – or, perhaps more accurately, at least does not violate – the Kyoto Convention. I disagree, however, with the conclusion that this supports a decision that UPS is not in like circumstances with Canada Post.

Like Circumstances

a. *Legal Test*

6. Article 1102's national treatment obligation requires treatment no less favorable than that given to investors or investments of the Party who are "in like circumstances" with respect to the complaining investor or investment. The Article should be read in its entirety because it cannot be sensibly interpreted by pulling its terms apart. That does not, however, mean that its terms cannot be discussed separately, only that they must ultimately be understood as parts of a whole.

7. The Tribunal, reviewing the arguments of the parties to this proceeding, gives substantial attention to understanding the meaning of the term "like circumstances." Differences respecting the meaning of this term form a critical point of dispute between Canada and UPS. The term is not defined in the NAFTA and tribunals addressing Article 1102 claims must give meaning to it. Before turning to the larger issue of the construction of Article 1102's national treatment obligation, I discuss the arguments respecting "like circumstances." Following that discussion, I return to the question of the relationship between "like circumstances" and the rest of Article 1102.

8. Canada suggests that like circumstances means circumstances that are identical or virtually identical. Canada argues that the requirement of national treatment is a very

modest one that the NAFTA Parties intended to circumscribe through the limitation of national treatment obligations to investors or investments that are so similarly situated that any deviation in treatment is presumptively improper.

9. In connection with the determination of like circumstances, Canada emphasizes the role of government determinations respecting reasons for particular treatment of investors and investments. Canada argues that any public policy rationale for distinguishing between two entities or investors makes them unlike. It is sufficient, in Canada's view, for differences in treatment to be based on "legitimate policy considerations or public interest grounds" or to have any "rational basis," and suggests that dispute resolution tribunals should not "second-guess the validity of public policy objectives" or whether "there is a better way to meet these objectives." *See* Canada Rejoinder, Merits Phase, ¶¶ 56-59.

10. UPS begins with a radically different notion of what like circumstances means. UPS suggests that being in the same economic sector or being in competition makes investors or investments in like circumstances. According to UPS, the essence of the like circumstances determination is finding a competitive relationship in the market.

11. UPS cites numerous NAFTA tribunal decisions in support of its position as well as WTO decisions interpreting similar terms. UPS also states that the Parties to NAFTA agreed that the term like circumstances, as used in Article 1202 (national treatment of services), was intended to have the same meaning as the term "like service providers," a much more expansive concept than the approach urged by Canada. UPS especially relies on the submissions of NAFTA Parties in the *Cross Border Trucking* proceeding. *See* In the Matter of Cross-Border Trucking Services, Final Report of the Panel, February 6, 2001 (USA-MEX 98-2008-01).

12. UPS does not deny that there is some role for public policy considerations in making the like circumstances determination. It suggests, however, that public policy can play only a minor and subordinate role. Under the approach UPS urges the Tribunal to adopt, a NAFTA Party could justify unlike treatments on public policy grounds provided that the difference in treatment is essential and utilizes the means that are least different and least disadvantageous to the investor or investment of another NAFTA Party.

13. I do not believe that the test offered by either party to this dispute fits the legal requisites of NAFTA Article 1102. Although I disagree with the application of the like circumstances test by the Tribunal as well – believing that the Tribunal in some respects overemphasizes differences that should not make the parties unlike – the test used by the Tribunal in this proceeding properly fits between the two poles offered by the parties.

14. NAFTA does not require the sort of near identity of circumstances urged by Canada, a test that if adopted would substantially undermine the efficacy of Article 1102. Canada's approach would require an excessively close fit between the complaining investor or investment and the compared domestic investor or investment. National treatment protection would be dramatically reduced under that approach, as it would eliminate any right to protection whenever there were differences between the complaining party and the compared investment or investor even if those differences were slight enough not to affect the competitive relationship that Article 1102 was designed to protect.

15. Further, Canada's proposed test would grant the government of any NAFTA Party extensive power to avoid national treatment obligations, giving conclusive weight to a Party's assertions that public policy supports divergent treatment of domestic and foreign

investors or of particular investments. That position has not persuaded other tribunals and does not persuade me.

16. At the same time, UPS understates the similarity required for a complaining party to show like circumstances. It is not sufficient for a complaining investor to show that the investor or investment is in the same economic sector as, or competes with, an investor or investment of the NAFTA Party charged with violating its national treatment obligation. Sharing the same economic sector may be evidence that two businesses are in like circumstances. So, too, being in competition, even if businesses might be classified in different economic sectors, may be evidence of like circumstances. Yet, neither showing is conclusive of like circumstances. It is possible for two investors or enterprises to be in the same sector or to be in competition and nonetheless be quite unlike in respect of some characteristic critical to a particular treatment.

17. The most natural reading of NAFTA Article 1102, however, gives substantial weight to a showing of competition between a complaining investor and an investor of the respondent Party in respect of the matters at issue in a NAFTA dispute under Article 1102. Article 1102 focuses on protection of investors and investments against discriminatory treatment. A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a *prima facie* case of like circumstances. Once the investor has established the competitive relationship between two investors or investments, the burden shifts to the respondent Party to explain why two competing enterprises are not in like circumstances.

b. Competitive Position of UPS and Canada Post

18. In this proceeding, UPS has established that it, as an investor – and UPS Canada, as an investment – is in a competitive relationship with Canada Post and with other enterprises that deliver letters and packages, especially those that deliver letters and packages through express services.

19. UPS does not complain of different treatment of all products imported for delivery by UPS Canada and by Canada Post. It does not, for example, contest the separate and different customs treatment given by Canada to letter mail under 30 grams, a category of mail that is subject to exclusive privilege for Canada Post. UPS Reply, Merits Phase, ¶ 627.

20. Instead, UPS directs attention solely to differences in treatment of a category of items carried by both UPS Canada and Canada Post that have similar characteristics and markets. This category is composed of items that are committed by identified patrons for express delivery, items that receive special handling, are subject to special tracking, and have characteristics that make them especially valuable in distinction to ordinary mail delivery. That is the set of items for which a determination must be made as to whether UPS and Canada Post are in like circumstances.

21. Submissions in this proceeding have specifically identified and extensively described the characteristics of the products that define the set of like products that are the focus of the national treatment complaint. UPS introduced substantial and persuasive evidence that Canada Post products, such as Xpresspost, Priority Courier, and Expedited Parcel, are close substitutes for UPS Canada products. *See, e.g.*, Report of Professor Melvyn Fuss, accompanying UPS Memorial, Merits Phase (Fuss Report). *See also* documents at

Investor's Compendium Nos. C-090, C-091, C-092, C-093, and C-097 (Competitive Impact Analysis prepared by Professor Richard Schwindt for Canada Post Corporation) (Schwindt Report).

22. These products have features closely resembling those of competing UPS and UPS Canada products. For example, they have similar times taken for delivery (similar promised speeds for delivery) and similar designs for – and limitations on – the items to be delivered. Each enterprise offers parallel categories of delivery products in what Professor Schwindt terms the Small Package Express market. Comparable service features in these parallel offerings include how shipments are tendered, the delivery guarantees offered, tracking capabilities, delivery confirmation, signature options, insurance options, and other service characteristics. *See* Fuss Report, *supra*. *See also* UPS Reply, Merits Phase, at ¶¶ 50-53. The parallel Canada Post and UPS offerings are used by similar customers, and the Canada Post and UPS offerings are used for similar purposes.

23. For the categories of letter and package products at issue in this dispute, customers recognize that they have a choice between similar UPS and Canada Post products, and many customers use these products interchangeably. *See* UPS Memorial, Merits Phase, ¶¶ 124-134; Fuss Report, *supra*.

24. Canada Post recognizes the similarities between their offerings and competing UPS and UPS Canada offerings, explicitly comparing their products and UPS products in internal documents. *See* UPS Memorial, Merits Phase, ¶ 135 & nn. 142-145; Schwindt Report, *supra*. *See also* Affidavit of Francine Conn, General Manager of Shared Services and Market Process, Canada Post Corporation, at ¶ 67, in Canada's Expert Reports and Affidavits, at Tab 6; Canada Post Corporation Memorandum, in UPS Authorities and

Supporting Documents at Tab U-165. Documents introduced into evidence in this proceeding also make clear that Canada Post routinely looks to the competing UPS products for price information and for determination of its own market prices. *See, e.g.,* documents at Investor's Merits Hearing Compendium Nos. C-090, C-091, C-092 and C-093. Canada Post plainly sees UPS and UPS Canada as its competitors, sees the class of products at issue in this dispute as one in which parallel Canada Post and UPS products directly compete, and takes actions in response to that competition between parallel products of Canada Post and UPS.

25. This evidence is persuasive that Canada Post considers these products to be very much like those of UPS and UPS Canada. That, in turn, strongly indicates that Canada Post and UPS are in like circumstances with respect to actions concerning those products.

26. Given the weight of this evidence, Canada must bear a heavy burden if it is to establish that, with respect to delivery of express mail and express or courier parcel products, UPS and UPS Canada are not in like circumstances with Canada Post. In my view – subject to persuasive rebuttal by Canada – UPS' evidence of the essential similarities of UPS and Canada Post products, their customers, and the uses of their delivery products, together with evidence of direct, overt competition between UPS Canada and Canada Post (the businesses that develop and promote these products), more than meets the like circumstances test.

c. Differences in Customs Treatment for Courier and Mail Products

27. Canada's response to the case that UPS and Canada Post are in like circumstances primarily consists of two related arguments. Canada first asserts that the courier and mail streams are recognized as separate streams by international postal conventions, so that

differences in customs treatment should not be held to violate national treatment requirements. In addition, Canada claims that, under the Postal Imports Agreement, Canada Post provides services to Canada's customs authority – which is presently called the Border Services Agency (Canada Customs) – that distinguish it from UPS and other couriers. Both arguments combine two analytical strands, asserting that courier products and mail products cannot be deemed to be in like circumstances for purposes of customs treatment because of differences between them and also asserting a valid, over-riding governmental purpose for differential treatment.

28. Before turning to those arguments, it is helpful to restate in brief the differences between Canada's treatment of imports under the Courier/LVS program and its treatment of parallel products imported through the mail. Although UPS in its submissions and evidence documents a wide array of differences, its complaint essentially turns on two matters. *See* UPS Memorial, Merits Phase, at ¶¶ 278-336; UPS Reply, Merits Phase, at ¶¶ 248-249.

29. First, Canada Customs pays handling fees to Canada Post for services that UPS Canada is required to perform without compensation. Canada Customs charges cost recovery fees for services (including electronic data services and related line and equipment costs) that its customs officers perform in connection with UPS Canada imports but does not impose similar charges for imports to be distributed by Canada Post. *See* UPS Memorial, Merits Phase, at ¶¶ 279-292, 306-336. *See also* witness statement of Lisa Paré (Vice President of Brokerage for UPS Canada), at ¶¶ 9-30.

30. Similar services are performed by both UPS Canada and Canada Post in support of compliance with customs requirements, such as materials handling tasks and support for electronic data interchange. UPS Canada must pay for availability of customs officials, for

communications lines, and other support equipment and services. *See* UPS Memorial, Merits Phase, at ¶¶ 279-292. Canada Post, in contrast, receives substantial services and equipment without charge. Moreover, it is paid by Canada Customs for the same sort of materials handling that UPS Canada is required to undertake without compensation. *See* UPS Memorial, Merits Phase, at ¶¶ 292-297, 306-315; UPS Reply, Merits Phase, at ¶¶ 248, 251, 269-287 (summarizing extensive evidence from witness statements, affidavits, replies to interrogatories, and documents submitted to the Tribunal). The payments Canada Post receives are not calibrated to reflect actual cost-savings to Canada Customs or cost to Canada Post, and no comparable treatment is offered to UPS Canada. *See* UPS Memorial, Merits Phase, at ¶¶ 308-311 & nn. 387-384.

31. Second, Canada Customs does not levy the same fines and penalties against Canada Post for failures to comply with Customs regulations as it levies on UPS Canada, nor does it collect duties and taxes prescribed by law from Canada Post in the same manner or to the same extent as it does UPS Canada. *See* UPS Memorial, Merits Phase, at ¶¶ 317-322. *See also* witness statement of Lisa Paré, *supra*; Expert Report of James H. Nelems (Nelems Study), accompanying UPS Memorial, Merits Phase (tracking and analyzing 450 comparable shipments imported for distribution by UPS Canada and by Canada Post).

32. The differences between the customs collections, taxes, and other fees imposed on UPS Canada and those incurred by Canada Post are substantial. *See* UPS Reply, Merits Phase, at ¶¶ 306-335. UPS Canada pays fines to Canada Customs on any inadvertent miscalculation of proper duties and taxes (which in the aggregate amounts to a large sum, approximately $450,000 over a five-year period), while Canada is exempt from such payments. *See* UPS Memorial, Merits Phase, at ¶¶ 321-322. According to the Nelems

Study, UPS Canada's compliance rates for collection of duties and taxes on imported packages from non-US sources was 95% while Canada Post's compliance rate on comparable packages was 5%. *See* Nelems Study, *supra*. *See also* UPS Memorial, Merits Phase, at ¶ 335. UPS also introduced evidence suggesting that Canada Post has a financial incentive to minimize its compliance with legally required obligations to collect duties and taxes. *See* witness statement of Denise Polesello, former Manager of Postal, Courier/LVS, and Casual Refund Programs, Canada Border Services Agency, at ¶¶ 14-16. *See also* UPS Reply, Merits Phase, at ¶¶ 323-335.

d. Canada's Justifications: International Accords and Different Characteristics

33. The differences in treatment noted above are extensively documented by UPS in its submissions, evidence, and testimony before this Tribunal. For the most part, Canada does not so much dispute them as defend them as justified.

34. Canada does argue that the evidence relied on by UPS in some respects is flawed. For example, Canada challenges the time period during which the Nelems Study was conducted as unrepresentative. Canada claims that the differences between UPS Canada and Canada Post treatment of imports may have been influenced by the Christmas holiday season and particularly by the inclusion of Ukrainian Christmas within the shipment period covered by the Nelems Study. *See* Canada Counter-Memorial, Merits Phase, at ¶ 375. *See also* Expert Report of Dr. Shirley Mills, at ¶¶ 7, 24, 26.

35. Canada's arguments do not succeed in persuading me that the evidence from the Nelems Study should be ignored. While Canada may be correct that seasonality influences the rates of customs collections, speed of processing, or other aspects of the customs

process, it has given no explanation of why the particular time frame chosen by Mr. Nelems would be expected to reveal greater differences between UPS Canada and Canada Post than any other time of year. *See* Reply Report of James H. Nelems, at ¶¶ 6(e), 20. The whole point of the Nelems Study was to examine whether UPS Canada and Canada Post differed from each other in their customs treatment of comparable packages imported into Canada. That is the issue that must be examined in connection with the time frame for the Nelems Study. Canada's efforts to discredit this study have failed to focus on that issue.

36. Although Canada has argued that its treatment of Canada Post and UPS is not as dissimilar as UPS claims, far more of its attention is devoted to explaining why the differences are legitimate and follow from differences between UPS and Canada Post.

37. Canada places primary reliance on international agreements respecting mail under the Universal Postal Union and the separate annex respecting mail under the Kyoto Convention of the World Customs Organization. Canada notes the extensive regulation of obligations among signatories to the Universal Postal Union accords. The regulations include requirements that signatory nations agree to special, expedited customs treatment for express mail products. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 79-80. *See also* Universal Postal Union Convention, Articles 17.1 & 61(1), Canada's Book of Authorities, at Tab 3.

38. Canada also declares that mail and courier products must be treated differently because the security in knowing the origin and nature of the goods moving through the mail system is substantially lower than with goods moved by courier and the risks associated with mail importation are concomitantly greater than those associated with courier delivery. *See* Canada Counter-Memorial, Merits Phase, at ¶ 658.

39. When viewed in the context of the dispute over national treatment under Article 1102, Canada's assertions about the weight to be given to international treaty obligations and to the asserted differences in the nature of courier and mail products fails to carry its burden of rebutting UPS' *prima facie* like circumstances showing. As noted already, UPS does not challenge customs measures applicable to letter mail under 30 grams, a category of mail that is subject to exclusive privilege for Canada Post. *See* UPS Reply, Merits Phase, at ¶ 627. That category represents the great bulk of items carried in the postal stream. UPS' challenge is entirely directed to different treatment by Canada Customs of products that are similar in nature, that are designed to serve similar clientele, and that compete directly with one another. That is, UPS' challenge is solely with respect to the differences in treatment accorded activities as to which UPS and Canada Post seem to be in like circumstances.

40. Although Canada stresses the existence of customs recognition of different postal and courier streams, its evidence does not show that its differences in treatment challenged in this proceeding are *required* by international agreement. Some provisions in international agreements do specify treatment to be given to items imported through the postal stream, but nothing in any of the agreements – and specifically nothing in the Kyoto Convention or revised Kyoto Convention – requires the differences challenged before this Tribunal. *See* Expert Report of James I. Campbell, Jr., at ¶¶ 151-165 (Campbell Report).

41. It is one thing to say that customs authorities *may* provide different facilities and procedures for handling international mail traffic from the facilities and procedures for handling the general run of other imports. It is quite another thing to say that customs authorities are *required* to provide different treatment for materials moving in those streams. Even that assertion does not say that customs authorities are *required* to provide different

treatment for *all* items coming through the mail from that provided to all other items imported by any entity other than a national mail service. This last assertion is Canada's position in this proceeding.

42. To see the difference between the Kyoto Convention and UPU agreements, on the one hand, and the position taken here by Canada, on the other hand, look for example at the requirement of special, expedited customs treatment of express mail products. *See* Universal Postal Union Convention, Articles 17.1 & 61(1). This requirement distinguishes one class of mail from another class of mail. The requirement, however, is entirely in line with a grant of similar expedited customs treatment of courier products that are functionally equivalent to express mail products. *See* Campbell Report, *supra*, at ¶ 162. This requirement evidences an appreciation that express mail products are dissimilar from other mail products. It does not show any conviction that these products are dissimilar from courier products with which they compete.

43. Attention to the ways in which the express mail products are dissimilar from ordinary mail so that special customs treatment is sensible only serves to emphasize their similarity to competing courier products. Express mail products have a demonstrated need (customer demand) for expedited delivery (and therefore expedited customs processing); they are imported in far smaller numbers than ordinary mail products; and the carriers for these products generally have better information about their origins and contents than for ordinary mail products. In other words, the characteristics that make it sensible to separate them out from ordinary mail products for special, expedited processing are exactly the same characteristics that Canada asserts distinguish courier products from ordinary mail products. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 657-672. *See also* Affidavit of Mike

Parsons (former United Kingdom delegate to the World Customs Organization), at ¶ 62, in Canada's Book of Expert Reports and Affidavits, at Tab 30; Affidavit of Alice Rigdon (former Port Director, San Francisco, California, for United States Customs Service), at ¶¶ 14-18, 25, in Canada's Book of Expert Reports and Affidavits, at Tab 32.

44. Canada's reliance on the existence of differences between the exclusive postal franchise recognized in most nations and other imports, thus, is misplaced, even if its arguments on this general matter are credited. Because UPS has not challenged the treatment of products that are generally recognized as peculiarly within the province of the postal stream, Canada – rather than defending a difference between the general category of postal mail services and courier services – must instead address the particular complaint respecting the products at issue in this dispute.

45. As just noted, the differences between the postal stream and the courier stream addressed by Canada in its Memorial and Counter-Memorial generally do not distinguish the UPS products at issue here from competing Canada Post products. Knowledge of the content of goods and repeat relationship between customers and courier delivery services are similar for UPS products and Canada Post products at issue in UPS' claim of different, and less favorable, treatment. *See* UPS Reply, Merits Phase, at ¶ 52. *See also* Canada Postal Guide, Investor's Schedule of Documents, at Tab U484.

46. Further, if the distinctions offered by Canada to support different treatment of postal and non-postal courier imports were accepted as true, they would (in the main) point in a very different direction than Canada suggests. The differences urged by Canada as distinctions between courier imports and postal imports indeed would not justify less favorable treatment of courier imports than of postal imports. For example, greater advance

knowledge of courier shipments, greater end-to-end security of courier shipments, and provision of better information on shipment contents and sources on a rapid basis all provide bases for *more* favorable treatment of courier shipments, not *less* favorable treatment.

47. These distinctions, as argued by Canada and its supporting affidavits, should militate in favor of less costly impositions in connection with customs inspection of courier imports than in connection with customs inspection of postal imports – and, following the logic of Canada's assertions, that would mean less cost imposed on UPS than on Canada Post. The asserted differences certainly do not support higher charges to UPS for the personnel, equipment, and services associated with customs screening for express mail and courier imports and stricter enforcement against UPS of obligations respecting customs duties, taxes, and fees.

48. Under Canada's description of the differences between UPS and Canada Post, even equal treatment might be deemed "less favorable" because the difference in circumstances would justify better customs treatment for UPS. Whether this is the proper reading of NAFTA is not something this Tribunal needs to reach in this proceeding, but it is the logical extension of the argument Canada has advanced respecting the difference between the position of postal imports on matters relevant to the sort of security, administrative cost, and tax collection aspects of customs inspection and the more favorable position of courier imports on those margins.

National Treatment: Like Circumstances in Context

49. Given the fact that Canada has argued to the Tribunal that courier imports are relatively easier to screen quickly and efficiently for the matters that concern customs

authorities, it is difficult to understand Canada's case in opposition to the claims by UPS respecting Article 1102. Canada cannot excuse what would otherwise be a violation of national treatment by claiming that differences between mail and courier shipments make circumstances "unlike" when the differences it points to would not justify the treatment it has given. Canada's position here, seen in context, is simply untenable.

50. Rather than asking whether the different treatment given to a non-Canadian investor and a Canadian investor is justified by different circumstances, Canada separates the Article 1102 inquiry into two discrete components. It asks "are the circumstances unlike"? And only if the answer is "no" does it ask whether there is a violation of national treatment because the treatment is less favorable.

51. That approach would allow Canada (and other NAFTA Parties) broad opportunity to defeat any claim under Article 1102, no matter how improper or how discriminatory the government's action. Indeed, Canada's approach would parse its national treatment obligation under NAFTA in such a way that rejection of complaints would be virtually axiomatic. If *any* plausible distinction suffices to eliminate a need for equal treatment even though the logic of the distinction would suggest a basis for better treatment of the complaining investor or investment, the NAFTA national treatment obligation would have precious little meaning.

52. Imagine, for example, that Canada refused to allow buses made by a US investor to be used to transport children to school under a Canadian program regulating school safety (or, to bring the example a bit closer to the present dispute, imagine that Canada set up more onerous safety standards or more expensive and time-consuming safety certification processes for the US investor). Then imagine that Canada defends its discrimination on the

ground that the US investor's buses are *more* crash-resistant and *less* prone to tip over than buses from a competing Canadian investor – in other words, that the US investor's buses are safer than the competing Canadian investor's buses. From that, Canada would assert that the two entities are not in like circumstances and, therefore, no NAFTA national treatment obligation would attach. This cannot possibly be the meaning of Article 1102. Yet that is exactly the way in which the interpretation urged by Canada in this proceeding would function.

53. Article 1102's national treatment obligation is a cornerstone of the NAFTA Parties' obligations to investors. This Tribunal should not accept an approach that would so dramatically circumscribe that obligation. While my colleagues on this Tribunal would certainly agree with that conclusion, I am afraid that the Tribunal's acceptance of Canada's argument in this proceeding paves the way to that unfortunate result.

National Treatment: Less Favorable Treatment

54. There is another aspect to the argument between UPS and Canada over national treatment that would need to be decided if the Tribunal passed beyond the like circumstances determination: the scope of the national treatment obligation.

55. UPS asserts that it is entitled, under established national treatment principles, to treatment no less favorable than the best treatment accorded to Canadian investors or investments. Its assertion relies on decisions of NAFTA dispute resolution tribunals and on decisions rendered under GATT and WTO dispute resolution. *See* UPS Reply, Merits Phase, at ¶¶ 498-500.

56. In addition to offering a different reading of the meaning of NAFTA's national treatment requirement, Canada argues that decisions interpreting national treatment obligations under the General Agreement on Tariffs and Trade and under the General Agreement on Trade in Services are inapposite. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 577-578. It asserts that NAFTA intended a very narrow protection of investors under Article 1102 and expressly rejects UPS' assertion that it is entitled to the same treatment as the best treatment Canada gives its own investors. *See* Canada Rejoinder, Merits Phase, at ¶¶ 39, 60-67. In its submission, that provision only prohibits a NAFTA Party from imposing treatment that plainly discriminates among investors on the ground of their national affiliation. *See* Canada Rejoinder, Merits Phase, at 39, 41-42, 84. In essence, Canada asks the Tribunal to find that, unlike other national treatment obligations, the NAFTA national treatment obligation is merely to refrain from bold distinction between domestic investors or investments and investors or investments of another NAFTA Party.

57. Although Canada is correct in asserting that the Tribunal's charge is to interpret NAFTA Article 1102, not other national treatment obligations, the obligation contained in Article 1102 is drawn from and closely resembles other national treatment obligations. The wording of Article 1102 suggests a very close parallel to the national treatment obligations contained in the GATT and GATS, as well as other international trade and investment agreements and treaties. It is not surprising, thus, that NAFTA tribunals have referred to decisions on such other national treatment obligations in construing Article 1102. *See, e.g.*, Cross-Border Trucking Services, USA-MEX-98-2008-01, Final Report, 6 February 2001.

58. The national treatment obligation is not discharged merely by refraining from overt discrimination against non-national investors or investments. Such a limited undertaking would be of little value to investors.

59. Instead, NAFTA, like other international agreements designed to vouchsafe foreign investment, requires each Party to accord treatment to the investors and investments of other NAFTA Parties that is not less favorable than the treatment it grants its own investors and investments. That requirement plainly extends beyond formal parity. It commands an effective parity of foreign and domestic investors and investments.

60. Such parity does not exist where a NAFTA Party favors a national champion over other investors and investments. The violation is not mitigated by existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is, as UPS urges, enough to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment.

61. This reading is consistent with the language of NAFTA Article 1102 and with precedent under GATT and WTO. This reading is buttressed by, but does not depend upon, the exposition of objectives in NAFTA Article 102, in particular the promotion of fair competition and encouragement of investment noted in Article 102(1)(b) and 102(1)(c).

62. This reading of the national treatment obligation of Article 1102 is consistent as well with the context in which disputes over treatment of investors and investments generally arise. Frequently, the most significant competition in a given field will be between a domestic entity or investor and a foreign investment or investor. In that setting, preferential treatment for a favored domestic investor or investment is effectively a discrimination

against the foreign investor or investment, even if other domestic investors or investments receive treatment equivalent to that given to foreign investors or investments.

63. Given the manifest inconsistency between the customs treatment given to Canada Post and that given to UPS Canada for similar products being handled on similarly expedited bases for similarly situated customers, and the fact that treatment given to UPS and its investment UPS Canada is less favorable than that given to Canada Post, I would find that UPS has established a violation of Canada's national treatment obligation under Article 1102.

Postal Imports Agreement: Procurement Exclusion

64. Canada also asserts that its different treatment of Canada Post and UPS cannot be the basis for an Article 1102 violation because an essential component of the different treatment – the terms under which Canada Post operates pursuant to the Postal Imports Agreement – is excluded from Article 1102's scope as a government procurement. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 562-569. The Tribunal accepts this assertion. I disagree.

65. Canada correctly states that Article 1108(7)(a) of NAFTA excepts government or state enterprise procurements from the application of Article 1102 and certain other NAFTA obligations. Procurements are covered by Chapter 10 of NAFTA and the Parties obligations are subject to that chapter's provisions.

66. UPS' complaints about discriminatory customs treatment, however, are not properly characterized as arguments respecting government procurement activity. Reviewing the nature of the agreement and the procedures used to adopt it, I am persuaded that the Postal

Imports Agreement is not an excluded procurement and that UPS' complaints thus do not fall under the procurement exclusion.

67. Canada declares that any government conduct that results in payments to another party in exchange for any good or service constitutes procurement. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 564-568. Although it quotes language from NAFTA Article 1001(5) stating that procurement is a "purchase, lease, or rental, with or without an option to buy," Canada argues in fact for a far broader definition of "procurement."

68. In Canada's submission, the tribunal in *ADF v. United States*, ICSID Case No. Arb(AF)/00/1, Award on Merits, Investor's Book of Authorities at Tab 95, accepted its view that NAFTA broadly covers any purchase or exchange of value under the term procurement. That dispute, however, involved a formal procurement, including formal descriptions of the services to be provided, formal procedures for soliciting and evaluating proposals, and formal rules governing contract award, performance, and monitoring. It involved procurement in exactly the form, legal organization, and circumstances contemplated by the drafters of NAFTA when they separated out procurement from other activities. Further, the dispute in *ADF* – respecting application of the "Buy America" law – was exactly the sort of dispute that 1108(7)(a) was designed to remove from Chapter 11 dispute resolution proceedings.

69. The wrinkle in *ADF* was that the contract was not let directly by the United States. Instead, at issue was a government highway construction sub-contract let by a State of the United States under federal regulations (the Virginia Department of Transportation acting pursuant to rules of the Federal Highway Administration). The only substantial question in *ADF* was whether the conduct of Virginia – which clearly constituted "procurement" – was

by a Party. The tribunal had to decide if conduct by the State of Virginia was to be treated as conduct of the United States or whether the fact that the project at issue was funded in part and regulated by the national government as part of a national highway construction program would make the conduct tantamount to procurement by the United States.

70. The only question addressed by the tribunal in *ADF* that is remotely connected to the present dispute is whether the participation of the United States in funding and regulating the highway construction project converted the sub-national state procurement activity into national procurement activity. The tribunal expressly noted that the argument before it was not whether the national government's activity of itself constituted procurement. *See* ADF v. United States, *supra*, at ¶¶ 162, 171. On that issue, the tribunal took a relatively narrow, not an expansive, view of the procurement exception, contrary to the suggestion in Canada's submission in the instant proceeding.

71. In asking whether the Postal Imports Agreement is procurement excluded by virtue of Article 1108(7)(a), this Tribunal must start in a very different posture than the tribunal in *ADF*. As noted by UPS, the Postal Imports Agreement has none of the indicia of the sort of government associated with Chapter 10 of NAFTA or with ordinary understanding of the exclusion in 1108(7)(a). The processes governing procurement of goods and services for national governments such as Canada and the United States are quite elaborate. They contain many formal requirements designed to safeguard public monies, promote purchasing efficiencies, and reduce opportunities for corruption. Attention to such requirements was wholly absent from Canada Customs' construction of the Postal Imports Agreement (PIA).

72. The PIA was not engaged pursuant to a formal request for proposals, was not associated with a formal announcement of services to be purchased by the government, and

was not part of any tender and evaluation process. In short, it was not in any way similar to or regulated in ways comparable to government procurement. The PIA was initially drawn as an informal letter agreement between two agencies of the Canadian government. As UPS observes:

> The *Postal Imports Agreement* started out on June 20, 1992 as an interim understanding consisting of a two paragraph letter sent from the Minister of National Revenue to the President of Canada Post. The interim agreement did not make any reference at all to fees or services to be provided by Canada Post to Canada Customs regarding materials handling or customs processing.

See UPS Reply, Merits Phase, at ¶ 638. Although the agreement later was given a fuller and more formal incarnation, at no point did Canada Customs or any other organ of the Canadian government engage in the sort of formal procedure associated with government procurement or contemplated by Chapter 10.

73. If the intention of those who drafted and ratified NAFTA was to exclude from NAFTA obligations any informal government conduct that resulted in the exchange of money, even among government agencies, that would have been very easily done. It would have required different language than used in Article 1108(7)(a). And it would have opened an enormous hole in the protection offered to investors under NAFTA. If that were the provision's meaning, it would allow the government at will to create exceptions to NAFTA obligations. The rules of construction applicable to treaties and accepted by this Tribunal caution against such an interpretation absent the clearest direction from NAFTA's text.

74. In addition, the structure of the PIA looks very unlike ordinary procurement in another respect. The payments made under the PIA are not geared to the cost or value of service but to a formula designed to transfer money between the two agencies largely at the discretion

of Canada Post. As noted in the Affidavit of John Cardinal, Director of Brand Development, Canada Post Corporation, Canada's Book of Expert Reports and Affidavits, Tab 4, at ¶ 21 (describing an appendix and annex to the PIA), the PIA provides for additional payment to Canada Post from Canada Customs if the level of dutiable postal imports falls *below* a set level and payments from Canada Post to Canada Customs if the level of dutiable postal imports *exceeds* a certain level.

75. This financial arrangement immediately raises questions about Canada's characterization of the PIA. It would be an odd procurement that provided for less money to be paid for more services and more money for a lesser amount of service. This provision only makes sense if this is something other than procurement. One datum in that regard is that Canada Post apparently can elect to treat certain postal imports as dutiable or not and so keep the level of payments within an expected range. *See* witness statement of Denise Polesello, *supra*, ¶ 29. *See also* UPS Reply, Merits Phase, at ¶¶ 323-328. If the intention of the agreement was in large measure to transfer monies between departments rather than to secure services performed in an efficient manner at a reasonable price by the enterprise best able to do so – the typical case of procurement – then the payment schedule would be understandable.

76. Canada contends that its own federal court decision in *Dussault v. Canada*, 203 F.C. 973, 238 F.T.R. 280, Canada's Book of Authorities, at Tab 77, provides clear precedent for concluding that the PIA is a procurement. *See* Canada Counter-Memorial, Merits Phase, at ¶ 567. Although Canada quotes a phrase from that decision to support its point, the decision did not concern the question before us.

77. Instead, *Dussault* involved the question whether the PIA's terms were confidential and whether release of information about them – and specifically about the terms for payments to Canada Post – would reveal information that would harm Canada Post's competitive position. The court observed that there was evidence, in the form of an affidavit from a Canada Post official, supporting the contention that this information would harm Canada Post. The affidavit averred that Canada Post operates in a competitive environment and that half of Canada Post's revenues come from services in which it competes with others outside of its monopoly franchise and that revealing the information respecting payments would allow Canada Post's competitors to undercut Canada Post's position. The *Dussault* court accepted these representations and declined to order release of the information.

78. In making this determination, the court apparently believed that Canada Post was performing services for Canada Customs that Canada Customs would be prepared to contract to others. Specifically, comments in passing in the court's decision suggest that the court believed that Canada Post's competitors would bid against Canada Post in tenders for the contract to perform the work for Canada Customs and that one of them would, if successful in such a tender, replace Canada Post. The sensitive nature of the information on this view was its ability to allow a competitor such as UPS to supplant Canada Post in performing the relevant services for Canada Customs. No one familiar with the nature of the agreement could come to that conclusion.

79. If the *Dussault* decision were taken seriously as support for a conclusion in this proceeding, the logical conclusion would be that UPS and Canada Post are direct competitors in respect of the activities at issue in UPS' complaint respecting customs treatment. That is not necessary to decision here. But Canada's use of *Dussault* is

completely inapposite. Nothing in the decision touches on the question whether the PIA should be treated as "procurement" for purposes of NAFTA or of any Canadian law.

80. I conclude that the Postal Imports Agreement is not within the exclusion of procurement activity from NAFTA Article 1102. I also conclude that, by giving Canada Post preferential treatment – by choosing to charge entities like UPS Canada for services that it pays Canada Post to perform, by making its own services freely available to Canada Post while charging UPS Canada for the same services, and otherwise giving advantages to Canada Post over competing entities like UPS Canada – Canada (through Canada Customs) breached its obligation to treat UPS equally as an investor.

Postal Imports Agreement: Subsidy Exclusion

81. In addition to urging this Tribunal to find that the Postal Imports Agreement is a standard contract for services that should be treated as an exempt procurement, Canada argues in the alternative that the PIA constitutes a subsidy that is, on that ground, exempt from Article 1102 obligations under Article 1108(7)(b). *See* Canada Counter-Memorial, Merits Phase, at ¶ 570. The assertion appears to have been made as an afterthought. The reasoning apparently is this: if the PIA is found not to be within the meaning procurement because it appears intended to provide payments to Canada Post irrespective of services, then the payments must be subsidies.

82. Canada's contention is not developed. I do not believe it merits serious attention. Had Canada pressed this contention seriously, I believe that it should be rejected. The reasoning I would apply to this issue is set forth below in dealing with a far more significant argument

respecting the subsidy exception, in regard to the Publications Assistance Program. I turn to the issues relating to that Program next.

PUBLICATIONS ASSISTANCE PROGRAM

83. UPS claims that Canada violated its national treatment obligation under Article 1102 in implementing its Publications Assistance Program (PAP). *See* Revised Amended Statement of Claim, at ¶ 25.i.

84. Canada requires that entities seeking to gain the benefits of support from the government under this program use Canada Post to deliver their publications. *See* Affidavit of William Fizet, Exhibit E, Memorandum of Agreement Concerning the Publications Assistance Program, between the Department of Canadian Heritage and Canada Post Corporation, dated February 1, 1999.

85. UPS asserts that this requirement is discriminatory and violates Canada's obligations under NAFTA, including its obligation to provide treatment no less favorable to investments and investors of other parties under Article 1102.

86. The argument advanced by UPS is straight-forward: The PAP makes a clear distinction between UPS and Canada Post. Canada Post benefits from payments from the government for delivery of publications in Canada while UPS (and its investment, UPS Canada) cannot receive similar payments under the PAP. Even if other Canadian delivery firms also cannot avail themselves of the payment from the government, the discrimination against the non-Canadian investor, UPS, and its investment is clear. UPS, thus, asserts that it receives less favorable treatment than Canada Post and, consistent with conclusions of

other NAFTA tribunals, is entitled to a finding that Canada has violated its obligations under Article 1102.

87. There is no question that Canada's actions with respect to the PAP are the actions of a NAFTA Party, taken through a governmental agency, Canada's Department of Canadian Heritage (Canadian Heritage). Although Canada poses several objections to the claim by UPS respecting the PAP, it does not contend that the conduct at issue is not conduct of Canada or conduct that is attributable directly to Canada for purposes of Article 1102.

88. Canada does, however, object that the claim fails because there is no discrimination on grounds of nationality of investor or investment, because Canada Post and UPS are not in like circumstances for purposes of the PAP, because the structure of the PAP is excepted from NAFTA claims as a "measure taken with respect to a cultural industry," and because the PAP is a subsidy excepted by Article 1108(7)(b) from claims under Articles 1116 and 1117. *See* Statement of Defence, at ¶¶ 142-145; Canada's Rejoinder, Merits Phase, at ¶¶ 269-278. I do not find these objections persuasive.

National Treatment: Less Favorable Treatment

89. In contrast to UPS' assertion that there is discrimination under the PAP in violation of the national treatment obligation imposed by Article 1102, Canada contends that there is no such discrimination. Its view is that the only conduct that would violate Article 1102 is a plain division between all Canadian investors or investments, on the one hand, and all non-Canadian investors or investments (or all investors or investments of another NAFTA Party), on the other hand.

90. Because Canada's PAP prefers Canada Post to all other potential delivery firms, Canadian and non-Canadian alike, Canada asserts that there is no discrimination violative of Article 1102. Canada also faults UPS for failing expressly to declare its willingness to make deliveries under the PAP on exactly the same terms as Canada Post. *See* Canada's Rejoinder, Merits Phase, at ¶¶ 277-278.

91. UPS asserts here, as it does in respect of its claim respecting customs treatment, that it is entitled to treatment no less favorable than the best treatment accorded Canadian investors or investments. For reasons already stated, I conclude that UPS has correctly interpreted NAFTA's national treatment obligation in this regard.

92. Because UPS and its investment, UPS Canada, plainly receive less favorable treatment than the Government's Crown Corporation, Canada Post, I would find that UPS has made out the first element of a claim that Canada's exclusive award to Canada Post of the benefits associated with payments for delivery of periodicals under the PAP constitutes a violation of its obligations under Article 1102.

93. Whether the claim as a whole is made out, however, depends on resolution of the arguments over construction of the requirement in Article 1102 that discrimination be between investors or investments in like circumstances and over the affirmative defenses interposed by Canada. I turn now to those matters.

Like Circumstances

a. Prima Facie Showing

94. As an initial matter, UPS Canada and Canada Post would appear to be in like circumstances for purposes of analyzing the PAP. Both are enterprises that deliver materials

of the sort for which delivery payments are made under the PAP. Both make such deliveries as routine parts of their business. And both derive part of their revenues from such deliveries. *See* UPS Memorial, Merits Phase, at ¶¶ 591-592.

95. UPS introduced substantial evidence in its submissions to this Tribunal to establish the similarity of the enterprises and the recognized competitive relationship between them. The two enterprises are clearly competitors in the same line of business that encompasses the type of deliveries privileged by Canada's PAP. *See* UPS Memorial, Merits Phase, at ¶¶ 112-127; Fuss Report, *supra.*

96. At least as a starting point, that finding is sufficient to support a conclusion that UPS and Canada Post are in like circumstances with respect to UPS' claim that Canada discriminated in favor of Canada Post – and against UPS and other firms of non-Canadian investors – in selecting firms to benefit from payments for making periodical deliveries under the PAP.

97. Canada, however, asserts that UPS Canada and Canada Post are not in like circumstances with respect to the PAP because only Canada Post can guarantee nationwide delivery of publications to all residential addresses in Canada. *See* Canada Rejoinder, Merits Phase, at ¶¶ 277-278. Canada also claims that assuring nationwide delivery to all residential addresses is an essential aspect of its public policy goal reflected in the PAP. *See* Canada Rejoinder, Merits Phase, at ¶¶ 277-278.

98. UPS answers this claim by making three rejoinders. First, UPS states that it can deliver publications to virtually all if not all of Canada. This might be intended, though UPS has not made the point in quite these terms, as a declaration that the similarity in scope of delivery capabilities is sufficient to put Canada Post and UPS Canada in like circumstances.

That argument looks to similarity in delivery coverage standing on its own, apart from other arguments about the likeness of circumstances for UPS Canada and Canada Post.

99. Second, UPS challenges the reasonableness of a requirement that PAP benefits go only to a firm able to achieve nationwide residential delivery. UPS urges the Tribunal to find that requirement improper, and not a valid consideration for making the determination of like circumstances. In this regard, UPS argues that there is no need to have the PAP benefits go to a single firm, rather than to two or more firms that together achieve nationwide coverage. *See* UPS Memorial, Merits Phase, at ¶ 594.

100. Third, UPS asserts that the procedure used by Canada undermines the claim that a requirement of nationwide delivery capability was a *bona fide* consideration in Canada's implementation of the PAP. If that were indeed a requirement, Canada could have advertised the requirement and taken applications from enterprises willing to fulfill the terms imposed by Canada as conditions for receipt of the benefits of government payment for PAP deliveries.

101. The essential starting point is the similarity of UPS Canada and Canada Post as enterprises capable of making deliveries of periodicals, as enterprises actually engaged in making deliveries of these or similar materials, and as enterprises that routinely do so in the ordinary course of their revenue-producing activities. That much is established by the evidence and not disputed by Canada. Given the demonstration of that similarity, I find that UPS has made a *prima facie* case that the two entities are in like circumstances.

102. Canada, hence, must bear the burden of establishing that some particular circumstance distinguishes UPS Canada from Canada Post with respect to the government discrimination at issue in a manner that justifies treating the entities as unlike.

103. To determine whether Canada's assertion of an interest in nationwide delivery of periodicals to residential addresses satisfies that burden, I consider the three arguments advanced by UPS.

b. Policy Justifications and Factual Similarity

104. UPS' first argument is a factual one respecting the similarity of its delivery business to Canada Post's. The evidence of record is sufficient to support UPS' assertion of similarity, but it does not establish identity. In particular it does not support a finding that UPS presently can deliver to all parts of Canada, and it is conclusive on the question whether UPS could do so if that were required for participation in the PAP.

105. UPS does not assert in a straightforward way that it does presently deliver items to all residential addresses in Canada, but claims instead that it has the capability to do so, or nearly so. Its position on this factual point is not framed in clear, unambiguous terms.

106. UPS' evidence on this score contrasts with Canada's flat assertion that only Canada Post is capable of such delivery. *See* Affidavit of William Fizet. This assertion is to some extent conclusory, but it is based as well on the gap between current UPS Canada deliveries and the scope needed for full, nationwide residential delivery service.

107. Which party to this proceeding makes the stronger case on the factual presentation turns in large measure on the exact nature of the factual dispute. Canada's position is that the relevant question on this score is UPS Canada's demonstrated ability to effect nationwide residential delivery.

108. If such demonstrated ability is a legitimate requirement for eligibility to receive the benefits PAP provides to an entity delivering Canadian periodicals, validly adopted as part

of the PAP – so that the only question is whether Canada improperly rejected UPS Canada for its failure to satisfy that requirement – I find that Canada would sustain its burden of showing that the two enterprises are not in like circumstances. UPS Canada well may have the capacity to build a nationwide residential delivery service in Canada. Yet, its current service has not been shown to be close enough to that end-point to preclude Canada from satisfying its burden of proving that UPS could not imminently provide that coverage at the time of Canada's decision respecting PAP.

109. UPS, however, argues that this is not the proper factual question to ask because the like circumstances determination does not require that UPS have the capacity to effect nationwide delivery on its own in order to be eligible to participate in the PAP on equal footing with Canada Post. UPS, in other words, asserts that there is no basis for considering the precise question on which Canada would have carried its burden of persuasion.

c. Policy Justifications: Reasonableness

110. The second argument put forward by UPS, thus, challenges the legitimacy of Canada's assertion that PAP deliveries must be made by a single firm with nationwide coverage of all residential addresses. In UPS' view, this assertion cannot be a reasonable basis for granting or withholding the benefits of government payments for delivery of Canadian periodicals.

111. UPS' argument on this point has two components. One urges the Tribunal to find that I can inquire into the legitimacy of any public policy rationale advanced by a NAFTA Party for what otherwise would be discrimination in violation of Article 1102. Legally, UPS says, the meaning of "like circumstances" cannot be left to the Parties definition through

invocation of public policy concerns. Only legitimate concerns of a certain sort can have that effect.

112. The other part of UPS' argument on this point looks at the particular public policy articulation and challenges its reasonableness. UPS asserts that Canada's claimed rationale for its design of the PAP is unreasonable. UPS contends that two or more firms together could provide nationwide coverage, and that Canada could have designed the PAP to reach the same end – the same assurance of nationwide residential delivery of supported publications – with less discrimination against investors of other NAFTA Parties.

113. Resolution of this question turns on the scope given to the NAFTA Parties under Article 1102 to design government programs in a manner that discriminates against investments or investors of other NAFTA Parties. UPS urges what is in effect a "least restrictive means test" – one that would require any government program to be tailored so that it discriminates as little as possible between national investors or investments and other Parties' investors or investments. UPS argues that the scope of government assertions of public policy considerations as justifications for national treatment violations is strictly limited and that the limitation is best captured in a requirement of "least restrictive" means.

114. If that is the proper test, Canada's decision to limit the PAP's benefits to a single delivery entity capable of effecting nationwide residential coverage could not stand. To be sure, Canada could have designed the PAP in a manner less obviously likely to discriminate against UPS and other non-Canadian investors. As UPS urges, Canada could have designed the PAP to provide benefits to firms delivering periodicals to different parts of Canada, distributing contracts in such a way as to assure overall nationwide coverage.

115. UPS introduced evidence showing that Canadian publishers had expressed frustration with Canada Post and questioned whether Canada Post's performance and charges under the PAP. Indeed, UPS showed that Canadian publishers desired a different structure of the PAP to allow a choice of delivery vendors. *See* Missy Marston & Jae-Sang Park, *Publications Assistance Program: Analysis of Responses to Discussion Paper*, December 14, 2001, Investor's Book of Authorities, at Tab U-231.

116. Yet Canada suggests plausible reasons – including administrative convenience – for the design it has adopted. I am far from certain that these reasons in fact explain the implementation of Canada's PAP, as I explain further below, but I am not willing to declare on the record before the Tribunal that Canada cannot choose to design the PAP to provide benefits to a single entity that delivers periodicals nationwide.

117. The position urged by UPS on this point would have the Tribunal read Article 1102 to provide narrowly limited scope for government to follow policy objectives that have the effect of disadvantaging foreign investors or investments. That construction would severely constrain NAFTA Parties in pursuit of their own objectives and would greatly expand the power of NAFTA tribunals to evaluate the legitimacy of government objectives and efficacy of governmentally chosen means. Although some NAFTA panels have used language that might be read to indicate such a test, I do not believe that is a correct construction of Article 1102.

118. The simple prohibition on discrimination through failure to provide national treatment has not been understood to intrude so forcefully on government prerogatives or to authorize so sweeping a mandate for dispute resolution proceedings. Although a bald discrimination on the basis of nationality cannot be salvaged by assertion of governmental policy

objectives, where the claim of national treatment violation rests on the effects of decisions not expressly predicated on nationality a different standard applies. *See, e.g.*, Methanex Final Award, Investor's Book of Authorities, at Tab 171.

119. Specifically in the present matter, the position urged by UPS would force Canada to assemble a collection of enterprises that together can assure such delivery and to bear the burden of monitoring and coordinating the coverage areas to produce the same end. I am not prepared to assert a prerogative to assess the benefits and burdens of Canada's choice of program design in such an intrusive manner notwithstanding UPS' demonstration that Canadian publishers would have preferred such a design for the PAP and that it would have provided greater parity between national investors or investments and those of other NAFTA Parties.

120. There must be limits to the reach of policy justifications offered to support national treatment discriminations – that is, of justifications offered to establish the unlikeness of circumstances under Article 1102. *See, e.g.*, Canada – Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, DS17/R-39S/27, 18 February 1992. But, in my view, those limits should not be imposed through an overly critical examination of governmental policy choices by arbitral tribunals.

121. I need not, in this matter, select a precise formula for the degree of justification required of the Party defending according another Party's investor or investment less favorable treatment. Here, UPS has offered a different basis for concluding that Canada's justification is not availing, one addressed to the procedural posture in which the justification arises rather than strictly to the reasonableness of the justification itself. Because I rest my conclusion respecting this argument on that ground, the precise degree of

justification for the reasonableness of a policy justification need not be determined to resolve this issue.

d. Policy Justifications: Legitimacy

122. The third argument advanced on this subject by UPS does not ask the Tribunal to decide what the bounds are for a reasonably designed PAP. It does not ask the Tribunal to say that Canada cannot choose to select one enterprise with nationwide coverage rather than several with smaller delivery footprints. Instead, this argument calls into question the *bona fide* character of Canada's asserted reasons for its PAP program design. It attacks directly the matter addressed inferentially above.

123. In general, I am reluctant to address the motivations for government decisions. That is true here. That reluctance, however, is nonetheless not conclusive. UPS' argument, though couched in terms of Canada's motivation, does not in fact require that I assess either the actual motive for Canada's choice of the design for PAP implementation or the reasonableness of the design.

124. Framed in its narrowest terms, the third argument advanced by UPS on the PAP like circumstances point focuses on the manner in which Canada has advanced its justification for the discrimination against UPS and the timing of that justification, as well as other related circumstances, to cast doubt on the explanation offered. The gravamen of this argument is that Canada may be free to adopt any reasonable design to implement its policy of promoting widespread distribution of Canadian periodicals, but it is not free to assert for the first time during a dispute resolution proceeding an ex post rationalization that would

limit availability of a government benefit to a single (domestic) recipient. On this point, I agree with UPS.

125. I begin with the position, taken above, that Canada is free to choose whatever design it wants for the PAP within the broad limits of reasonableness. That follows not merely from the relation of the PAP to a cultural industry (a matter I address below) but also from the NAFTA's general reluctance to substitute arbitral for governmental decision-making on matters within the purview of each NAFTA Party.

126. Yet Canada's decision to offer benefits only to Canada Post for delivery of Canadian periodicals and its failure to provide an opportunity for any other delivery enterprise to establish that it is or would be willing to make the investment necessary to become able to deliver periodicals throughout Canada cannot be accepted as deciding the issue of like circumstances without some understanding of the reason behind those determinations. That reason is not self-evident. As my initial review of the like circumstances argument here exposes, UPS Canada would seem broadly to be in like circumstances to Canada Post with respect to delivery of Canadian periodicals. In this instance, a more careful distinction between Canada Post and UPS Canada with respect to eligibility for delivering periodicals (and receiving associated monies) under the PAP.

127. No such distinction appears to have been made independent of this proceeding. Canada did not openly announce that it wanted to see which firms might be able to meet the nationwide delivery test it now says explains its distinction among delivery firms. It did not articulate publicly its current rationale for limiting benefits to Canada Post at the time it framed the current structure for delivery associated with the PAP. Its inquiry into views of

publishing enterprises that ostensibly are beneficiaries of the PAP countenanced the prospect of structuring the PAP in ways at odds with that rationale.

128. Moreover, the particular approach to distribution of benefits under the aegis of the PAP challenged here follows another program that gave benefits to Canada Post directly, without even the pretense of passing funds through periodical publishers. That prior version of the PAP was found to violate Canada's trade obligations. *See* Decision of WTO Appellate Body in Canada – Certain Measures Concerning Periodicals, WT/DS31/AB/R (1997); Decision of WTO Panel in Canada – Certain Measures Concerning Periodicals, WT/DS31/R (1997).

129. The substitution of this version of the PAP for the prior version that was found to be an improper discrimination in favor of Canada Post, as UPS urges, further calls into question the rationale offered by Canada during the proceeding before this Tribunal. That is especially significant given the evidence that Canadian publishers sought support from Canadian Heritage for use of other vendors to distribute their publications. *See* UPS Memorial, Merits Phase, at ¶¶ 351-353.

130. If Canada sought simply to assure that firms participating in the PAP meet legitimate conditions, it could have accomplished that readily with a public request for interested parties wanting to meet certain criteria to come forward. I am troubled that Canada instead used a procedure for constructing this aspect of the PAP that on its face seemed to ask only *how* to give PAP benefits to Canada Post, not *why* that was important to broader public policy goals.

131. Canada asserts that so long as it advances a public policy rationale for its action, as it has in this proceeding, my inquiry should be at an end. *See* Statement of Defence, at ¶ 144;

Canada's Counter-Memorial, Merits Phase, at ¶ 615; Hearing Transcript, Merits Hearing, at 1251. Canada's position would in effect make it the sole arbiter of the legitimacy of its public policy rationale, encompassing both the selection of valid policy ends and the determination that those were in fact the ends that brought about a discriminatory treatment.

132. Accepting Canada's position on this issue would to a very substantial degree cede to Canada the right to decide on its own when investors will enjoy the protections of NAFTA's national treatment obligation. NAFTA Parties would not be required to articulate in advance a rationale for treating firms differently, but would be able to craft rationales during the course of a dispute that would be tailored to the legal issues arising in the proceeding. That would provide great flexibility for the NAFTA Parties but little protection for the investors (or investments) of other NAFTA Parties who were the intended beneficiaries of Article 1102's restrictions on state action.

133. For this reason, I conclude that Canada has not sustained its burden of rebutting the *prima facie* case that UPS Canada and Canada Post are in like circumstances for eligibility for benefits associated with delivery of Canadian periodicals. UPS, thus, has established the basic elements of a violation of Article 1102. I next consider two affirmative defenses offered by Canada.

Cultural Industries Exception

134. Canada also argues that, even if UPS Canada and Canada Post are in like circumstances, there can be no finding of a violation of Article 1102 because the basis of the relevant UPS claim – discrimination in the design of the PAP – is precluded from examination in Chapter 11 claims by virtue of the "cultural industries exception" embodied

first in the US-Canada Free Trade Agreement and subsequently in NAFTA Articles 2106 and 2107 and NAFTA Annex 2106.

135. These articles declare:

> Article 2106: Cultural Industries
>
> > Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries.
>
> Article 2107: Definitions
>
> > For purposes of this Chapter:
> >
> > **cultural 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;
> >
> > (b) the production, distribution, sale or exhibition of film or video recordings;
> >
> > (c) the production, distribution, sale or exhibition of audio or video music recordings;
> >
> > (d) the publication, distribution or sale of music in print or machine readable form; or
> >
> > (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services; . . .
>
> Annex 2106: Cultural Industries
>
> > Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada - United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

136. UPS counters the contention that the cultural industries exception of NAFTA precludes examination of Canadian decisions about the PAP, including decisions respecting selection of firms eligible to be paid for delivering publications under the PAP. UPS asserts that Canada's argument would unduly expand the bounds of cultural industries.

137. In UPS's view, the NAFTA exception of cultural industries from subjection to Article 11 disciplines is limited to activities closer to the core of the cultural enterprise. UPS points to the express exclusion of activities such as typesetting and printing of books and periodicals from the definition of cultural industries in Article 2107.

138. As UPS urges, these limitations show that there are aspects of even the direct production of cultural products that might seem to come within the definition of cultural industries but which the NAFTA Parties thought did not merit the exception carved out for cultural industries. I agree with UPS, as well, that the characteristic that seems to separate the activities excluded from the cultural industries exception from activities covered by that exception is that the excluded activities are more mechanical activities that are less centrally related to the creative acts associated with cultural industries. UPS is correct, too, in observing that the activities at issue in this proceeding look more like the mechanical activities excluded from the exception than like some of the activities clearly included.

139. UPS's contentions make a strong case for the exclusion of the delivery activities at issue here from the scope of the cultural industries exception, although its argument on this point is not conclusive of itself. The distinction put forward by UPS is certainly a plausible interpretation of the NAFTA language and also seems sensible, assuming that the reason for protecting cultural industries relates to the link between their creative aspects and national culture.

140. UPS's argument, however, does not explain the dividing line between the activities included within the definition of cultural industries and activities that are excluded from the cultural industries provision in a manner that allows simple, unquestioned application. While the line it proposes for separating cultural activities from other activities is suggestive, there are many aspects of creative work that could be cast as merely mechanical, including much of the work involved in producing movies for example. It is difficult to imagine that the work involved in set production, for instance, would be excluded from the definition of a cultural industry, even though it is predominantly mechanical work. Further, UPS's argument does not explain why the particular activities – typesetting and printing – were listed specifically as activities that fall outside the cultural industries exception and other activities, such as those UPS now urges the Tribunal to find outside the exception, were not.

141. Canada also advances a reasonable – but, I believe, ultimately overstated – argument. It has at least a facially plausible justification for including the activities at issue here within the cultural industries provision and therefore putting them outside the purview of NAFTA dispute resolution.

142. Canada starts with the textual argument under Articles 2106 and 2107 and Annex 2106 that the cultural industries exception does cover the distribution of books and periodicals, and that distribution includes the delivery mechanism. That is a reasonable starting point for analysis. It may well be correct that distribution includes certain aspects of delivery.

143. That does not, however, necessarily mean that any treatment of delivery – and any payments to firms engaged in delivery – falls within the cultural exemption from NAFTA disciplines. The problem here is that the argument advanced by Canada proves too much.

144. The same provision that applies to distribution also extends the "cultural industries" exception to sales of books or periodicals. Does that mean, however, that Canada could provide subsidies to book sales and limit the subsidy to books sold in stores owned by Canadians, to stores located in buildings owned by Canadians, or to stores located in buildings that were built by Canadians? All of these limitations of the subsidy apply to sales and they all have the effect of subsidizing a class of entities whose business intersects with and in some measure supports the sales. But making the cultural industry exception so broad would extend the exception well beyond any reasonable or foreseeable bounds.

145. The fact that Canada, under the cultural industries exception, could subsidize the sale of Canadian books without violating Article 1102 does not mean that Canada would be equally immunized from NAFTA constraints if it decided to subsidize Canadian owned bookstores or buildings. The fact that Canada can subsidize Canadian periodical distribution without being called to account under NAFTA's dispute resolution provisions does not mean that it would be equally immunized if it chose to subsidize Canadian delivery firms.

146. To further understand the difficulty with Canada's argument, consider this analogy: Imagine that, in the instant case, Canada provided a subvention for delivery that went, not to Canada Post, but to a local courier service provided by taxicabs or by a fleet of autos maintained by Canadian car rental companies. I do not believe that would be consistent with the language and evident meaning of the cultural industry exception to conclude that use of taxicabs or rental cars to deliver Canadian periodicals would convert the taxi business or car rental business into a "cultural industry" under NAFTA.

147. The subsidy given by Canadian Heritage that is challenged by UPS effectively goes in some measure to Canada Post rather than to periodical production. That is, the payments to

some degree support a general mail and package delivery entity rather than a firm engaged in, or essentially part of, a cultural industry. While payments directly to periodical publishers to support delivery of their periodicals might indirectly support delivery services, the payment structure here is more direct, indulging only the fiction of payments to publishers. The aspect of the PAP that is challenged here is not Canada's subvention of periodical publication and delivery, but instead is Canada's subvention of Canada Post's mail and package delivery services.

148. I conclude, after examining Canada's explanations and UPS's responses that Canada has not established any necessary basis connected to a cultural industry that requires Canada to structure the subsidy in the way it has chosen. Rather, Canada's support for Canada Post through the PAP appears to be at least partially a subvention to Canada Post rather than to Canadian publications. That subvention is not within the cultural industries exception to ordinarily applicable NAFTA disciplines.

149. The conclusion I draw here should be distinguished from my hesitation to inquire too critically into the reasonableness of a governmental policy determination for purposes of evaluating "like circumstances." In that context, the question is whether there will be a decision that parties must be deemed to be in the same position even if there is a reasoned explanation of the policy basis for differentiating between them. There I concluded that a more deferential – though certainly not a wholly deferential – review was in order. In the instant determination, I ask instead whether there is a reasonable connection to a specific exception to NAFTA obligations. In that context, I do not believe a similar deference is appropriate.

150. Although Canada is free to decide to subsidize its cultural industries under the terms of Article 2106 and Annex 2106, NAFTA does not broadly immunize any decision by Canada to provide support to other industries, including to its mail and postal service, merely by asserting a connection to a cultural goal. The argument by UPS, which I accept, is that Canada has failed to meet its burden of demonstrating that this subvention falls within the cultural industries exception.

151. I should be clear in reaching this conclusion that I am not saying that Canada cannot, if it desires to, choose to subsidize distribution of periodicals within Canada rather than periodical production. The issue presented here is a different and more limited one, respecting the nature of the support given to Canada Post and the manner in which Canada has chosen to provide that support.

152. My decision on this point only draws the conclusion that Canada Post is not part of a cultural industry any more than a local firm running delivery trucks is a cultural industry, even if each at times delivers cultural products. Neither Canada Post's business nor the local truck company's business is within the cultural industry exception even if some of the activities of each firm relate to the distribution of cultural products.

153. I conclude that Canada Post's delivery service is not itself within the scope of the cultural industries exception recognized by NAFTA Articles 2106 and 2107 and Annex 2106.

154. Although Canada's decision to subsidize distribution of Canadian periodicals cannot be challenged under NAFTA Article 1102 (for instance, by competing American or Mexican investors who produced American or Mexican periodicals in Canada), Canada's decision respecting selection of a particular delivery firm can be challenged without breaching the

cultural industries exception. I therefore conclude that Canada has not met its burden of establishing a defense based on the cultural industries exception.

Subsidy Exclusion

155. Canada separately asserts that, if the PAP is seen as a grant of benefits to Canada Post, this grant of benefits is excluded from 1102's ambit because the benefits constitute a subsidy under Article 1108(7)(b). *See* Statement of Defence, at ¶ 142. As noted earlier in this decision, Article 1108(7) excludes from discipline under, *inter alia*, Article 1102 for "subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance."

156. Although the evidence on this point was not substantial, I may at the outset accept for purposes of analysis here that the effect of the PAP is to subsidize the operation of Canada Post. Canada's arguments on this score are contradictory – urging both that the payment is a subsidy to Canada Post and that Canada Post actually incurs costs beyond what it is paid for delivering publications under the PAP. Canada Post has declared – in materials not prepared in contemplation of the current dispute – that it receives no subsidies of any kind. *See* Canada Post Submission to the Canada Post Mandate Review, 1996, Investor's Schedule of Documents, at Tab U567.

157. Nonetheless, I begin my analysis by accepting Canada's assertion that there is a payment from the Government to Canada Post that more than defrays the cost of periodical delivery. That is implicit in its claim of subsidy. The argument by UPS that it lost an opportunity to profit from the delivery of Canadian periodicals on the same terms as Canada Post is at least suggestive of that point.

158. Even accepting that Canada's payments to Canada Post under the PAP overpay Canada Post for the cost of delivery does not establish that the payments are subsidies within the meaning of Article 1108(7)(b). The effect of paying more than the cost of delivery, standing alone, is not sufficient to bring the PAP within the scope of "subsidies" that are excluded from national treatment requirements of Article 1102. Simply put, the scope of government activity that has the effect of increasing returns to a particular business is too vast for that of itself to bring all such activity within the ambit of Article 1108(7).

159. Article 1108(7)(b) does not appear intended to cover the entire, broad sweep of government activity that might reduce the costs or increase the benefits of a particular business – what might in more colloquial terms be referred to as a "subsidy." Instead, the Article appears intended more narrowly to reach only self-conscious and overt decisions by government to expressly convey cash benefits to a particular business, enterprise, or activity. The list of government actions that come within the scope of the provision is not exclusive, but it is certainly suggestive.

160. Decisions to provide direct, clear subsidies of the sort averted to in Article 1108(7)(b) typically have substantial political costs and, thus, are commonly subjects of intense debate. The evident belief in drafting the subsidies exception to NAFTA was that the political processes for evaluating considerations relevant to such decisions would guarantee public scrutiny and, if appropriate, discipline under WTO provisions for addressing trade-distorting subsidies. Investors are not in a specially privileged position to address these matters, although NAFTA shows special concern to vouchsafe investors against governmental discriminations of many types.

161. The payments at issue in this proceeding, however, have not been publicly identified as subsidies to Canada Post, and there has been no public discussion of the benefits and problems occasioned by such a subsidy. Instead, Canada has presented the PAP publicly – and has placed its primary reliance on this argument in the current proceeding as well – as a means for supporting a cultural industry. Its argument has been that the PAP program is a support for Canadian publications, not a subsidy to Canada Post. This argument was maintained through the hearing on the merits in this proceeding. *See, e.g.,* Testimony of William Fizet, Hearing Transcript, Merits Hearing, at 698.

162. That argument undermines Canada's contention here in two respects. First, if any benefit of the sort conferred on Canada Post comes within the subsidy exception, the cultural industries exception would be entirely superfluous. Any benefit that Canada chose to confer in support of a cultural industry already would be excepted from important NAFTA disciplines under Article 1108(7) – which was less controversial and less discussed. That reading seems inconsistent with ordinary canons of construction which disfavor construing provisions to have meanings that are essentially redundant of other provisions in an agreement, statute or treaty.

163. Second, Canada again is in the position of making an argument in the alternative in a fashion that would allow almost any government activity to be excepted from NAFTA disciplines under one or another view of its effect. It is, at a minimum, reasonable to ask a NAFTA Party seeking to avail itself of the subsidy exclusion from Chapter 11 to clearly designate its conduct as a subsidy somewhere other than in defense of its conduct before a tribunal seeking to resolve a dispute under Article 1116 or 1117. The broad protection for

investors and investments that is evidenced in NAFTA's preamble and in the various provisions of Chapter 11 is incompatible with this construction of Article 1108(7).

164. I conclude that Canada also has failed to sustain its burden of showing that the PAP constitutes a subsidy excepted from Article 1102's reach by virtue of Article 1108(7).

ACCESS TO MONOPOLY INFRASTRUCTURE

Claims under Chapter 15

165. UPS also asserts that Canada has breached its Article 1102 obligation in failing to assure that Canada Post, a state enterprise and state-maintained monopoly, acts in a manner not inconsistent with Canada's obligation to assure equal treatment to investments and investors of other NAFTA Parties. UPS asserts that Canada has violated Article 1102 through violations of Articles 1502(3)(a) and 1503(2). *See* Revised Amended Statement of Claim, at ¶¶ 21, 22.a, 22.e, 26-30.

166. As the Tribunal's decision explains, the claim by UPS on this issue includes the claim that Canada failed to prevent Canada Post from abusing its monopoly position through various acts that effectively used its monopoly services to lower the prices of its non-monopoly services or otherwise to advantage itself against competitors. UPS also claims that Canada failed to prevent Canada Post from discriminating against UPS by granting Purolator, an investment of a Canadian investor, preferential access to its monopoly infrastructure.

167. The requisites of the claim asserted by UPS in these respects are: (1) that Canada Post has given less favorable treatment to UPS than to a Canadian investor, (2) that the less

favorable treatment violates Canada's obligations under Article 1102, (3) that the acts at issue are taken in the exercise of delegated governmental authority, and (4) that Canada has failed to ensure compliance by Canada Post with NAFTA obligations by exercising regulatory control, taking administrative measures to assure compliance, or by other measures designed to assure such compliance by Canada Post. The first of these requirements has been established plainly by UPS, and the fourth requirement also is clearly shown by the evidence. The second and third requirements, however, have been contested.

168. The Tribunal has not reached the other requirements for this claim, however, as it determined that the acts at issue were not taken in the exercise of delegated governmental authority. The Tribunal's decision reviews some of the arguments by the parties to this proceeding, and explains why the construction given by UPS to the scope of delegated governmental authority is excessively broad.

169. I join in this part of the Tribunal's decision and in part of its conclusion that the conduct asserted by UPS to underlie a violation of Canada's Article 1102 obligation is not within the scope of such delegated authority. I do not agree, however, that *all* of the conduct asserted by UPS to be inconsistent with Canada's obligation under Article 1102 falls outside the purview of delegated governmental authority.

Delegated Governmental Authority

a. Basic Structure of Limitation

170. Under Articles 1502(3)(a) and 1503(2), responsibility for the acts of state enterprises and state-maintained monopolies attaches "whenever [the state enterprise] exercises any regulatory, administrative, or other governmental authority" or whenever the monopoly

exercises such authority "in connection with the monopoly good or service." Canada argues that none of the actions challenged by UPS with respect to use of its monopoly infrastructure fits this description. It urges that the actions at issue are purely commercial conduct. *See* Canada Rejoinder, Merits Phase, at ¶¶ 30-32.

171. The Tribunal accepts this characterization of Canada Post's challenged conduct. I believe that this is appropriate with respect to much of the challenged conduct, but I do not believe that the characterization is apt with respect to all of it. In my view, two different kinds of conduct by Canada Post are at issue, and they should be treated differently with respect to the limitations in Articles 1502(3)(a) and 1503(2).

172. At the outset, it should be noted that Articles 1502(3)(a) and 1503(2) do not simply state the limitation of state responsibility to conduct of state enterprises or state-maintained monopolies that constitutes exercise of "delegated governmental authority," although that is the phrase used by Canada to describe the limitation. *See* Canada Rejoinder, Merits Phase, at ¶¶ 30, 36, 92, 102, 122. Instead, the language used by those who drafted and ratified NAFTA is that responsibility attaches "whenever" the enterprise exercises "any regulatory, administrative, or other governmental authority." The inclusion of administrative authority and other governmental authority, along with regulatory authority, supports a broader reading of the scope of activity covered by Articles 1502 and 1503 than given by Canada.

173. All of the examples given by Canada to explain the scope of delegated governmental authority would fit the definition of regulatory authority. These are in the nature of coercive, unilateral impositions of governmental power over other enterprises or individuals. *See* Canada Counter-Memorial, Merits Phase, at ¶ 811. I address further below Canada's contention about the meaning of delegated authority, but as an initial matter it should be

clear that if the additional words are not mere surplus – a construction that is frowned upon by interpretive conventions – these must be intended to suggest a wider scope of state responsibility than Canada suggests.

174. The same result is suggested by the combination of the words "whenever" with "any" exercise of such authority. Had the drafters of NAFTA intended a limitation as severe as Canada contends, one might have expected the language to state that state responsibility attaches "only" where there is an exercise of delegated governmental authority. The fact that they chose a locution as far as possible from that one indicates a very different understanding of the responsibility attaching to Articles 1502 and 1503.

175. Of course, as Canada urges and the Tribunal accepts, strictly commercial decisions, such as setting prices of its own products, are not within the scope of conduct that constitutes delegated regulatory, administrative, or other governmental activity. A contrary construction, in effect, would subject virtually all actions of state enterprises and state-maintained monopolies to government obligations under Chapter 11. As the Tribunal's decision explains, that is inconsistent with the design of NAFTA.

176. I do not believe we need here to reach the question, also debated by the parties, whether or to what degree such a construction would be at odds with generally applicable international law. Under the principle of *lex specialis*, it is sufficient here to find that the design of NAFTA is at odds with that construction.

177. While NAFTA does not make all conduct of state enterprises or state-maintained monopolies subject to Chapter 11 disciplines, it does expressly include within the examples of state responsibility under Articles 1502 and 1503 delegated exercise of authority to approve commercial transactions. Something other than ordinary commercial transactions

must be intended by this, or else the separate provisions in 1502 and 1503 respecting nondiscrimination obligations in the sale or purchase of monopoly goods or services (Article 1502) and of sale of a state enterprise's goods and services generally (Article 1503) would be unnecessary.

178. Canada argues that decisions of a state enterprise or state-maintained monopoly to approve commercial transactions must be read to encompass only approval of the conduct of others. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 811-840. In Canada's submission, that comprehends only the sort of unilateral, external approval associated with regulatory authority.

179. In part, Canada derives this understanding from its assertion that "authority" comprehends only "power given over someone or something in a manner that affects their rights" in contrast to the word "authorized" which Canada would read as a broader commitment of power to do something affirmative, not simply exercising control over someone else. *See* Canada Counter-Memorial, Merits Phase, at ¶ 811. As UPS points out, Canada selected among dictionary definitions to choose the one most conducive to its argument. *See* UPS Reply, Merits Phase, at ¶¶ 702-705. Moreover, UPS is correct in noting that NAFTA texts in languages other than English clearly reflect a choice of broader, not narrower, scope of responsibility for the conduct of state enterprises and monopolies. So, for example, the French-language text uses the word "pouvoir" rather than "autorité," denoting a more general notion of power to accomplish things rather than coercive authority over others.

180. Beyond its strained reading of the term "authority," Canada's preferred reading of Articles 1502(3)(a) and 1503(2), by conflating all delegated authority to some form of

unilateral, regulatory power unduly constricts the scope of responsibility beyond what could have been intended. As already noted, it makes the inclusion of the words "administrative or other governmental authority" unnecessary. Canada's suggested interpretation of these additional terms – which strains to make them duplicate the form of coercive, regulatory authority it sees as the pre-requisite for state responsibility with respect to state enterprises and monopolies – only underscores the degree to which its construction of Articles 1502 and 1503 makes the other terms redundant. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 811, 838. If the actual terms of NAFTA are to have meaning beyond the repetition of a single thought – if each term in the text is chosen purposefully to some end, as we must presume in interpreting the text – then responsibility for approval of commercial transactions by a state enterprise or state-maintained monopoly must have a broader meaning in these Articles than that urged by Canada.

b. Commercial Activity versus Approving Commercial Transactions

181. As noted above, UPS' complaints about Canada Post's use of delegated power can be separated into two categories of complaints. One focuses on Canada Post's conduct respecting its courier products and courier-like products. The other focuses on Canada Post's conduct with respect to Purolator.

182. The first category covers a set of complaints respecting Canada Post's own commercial services, its decisions regarding the prices for its services, the relationship between its monopoly services and services it offers in competitive markets, and the use it makes of facilities that are used both for provision of its monopoly services and for products such as Xpresspost and Priority Courier that compete directly with products of courier firms

such as UPS. UPS characterizes this set of decisions as actions that determine what use can be made of Canada Post's monopoly infrastructure and has submitted an enormous amount of evidence respecting the market distortions caused by these decisions. *See, e.g.*, UPS Memorial, Merits Phase, at ¶¶ 137-207, 568-571; UPS Reply, Merits Phase, at ¶¶ 621-625; Expert Report of Dr. Kevin Neels, report accompanying UPS Memorial, Merits Phase. Canada, in contrast, argues that it has nothing that can be properly characterized as a separate "monopoly infrastructure" and also asserts that this set of decisions is composed simply of ordinary commercial decisions respecting the nature and prices of its own products. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 154-185, 747-761, 778-782, 832-841.

183. Putting aside for the moment the question respecting the nature of Canada Post's infrastructure, I agree with Canada and with the Tribunal that the challenged decisions regarding Canada Post's own prices and products do not constitute approval of commercial transactions. These decisions cannot be separated analytically from the categories of conduct – purchase and sale of goods and services – that are dealt with separately under Articles 1502 and 1503 apart from the injunctions under Articles 1502(3)(a) and 1503(2). For that reason, the concept of approving these transactions as an act of delegated governmental authority would seem incompatible with the design of Articles 1502 and 1503.

184. The same is not the case, however, for UPS' complaints that Canada Post gave Purolator preferential access to its infrastructure. UPS details the extensive network of facilities maintained by Canada Post, in some measure under state-imposed mandates and in some measure as a result of state-sanctioned monopoly privilege. *See* UPS Memorial, Merits Phase, at ¶¶ 141-143; UPS Reply, Merits Phase, at ¶¶ 614-620. These include, for

example, Canada Post's 24,000 post offices and retail outlets maintained for sale of stamps, provision of monopoly postal services, and provision of other governmental services. Canada Post makes these outlets available to Purolator for sale and deposit of its products and provides personnel to help with collection and distribution of Purolator products sold or deposited at its locations. *See* UPS Memorial, Merits Phase, at ¶¶ 152-155. Canada Post does not make these facilities similarly available to other couriers such as UPS.

185. Whether one characterizes this infrastructure as a monopoly infrastructure or not, it is plain that Canada Post has a unique network of facilities that exists in large measure because of special government privilege and protection for Canada Post's monopoly services. This is not simply a network of facilities built by a private firm on the basis of commercial considerations. As an initial matter, I accept UPS' contention that there is an infrastructure unique to Canada Post that must be viewed differently from ordinary commercial assets of private enterprises.

186. UPS has documented thoroughly the preferential access to its infrastructure given by Canada Post to Purolator. UPS asks the Tribunal to draw adverse inferences about some of the terms of Purolator's access to Canada Post facilities, based on Canada's refusal to produce certain documents. *See* UPS Memorial, Merits Phase, at ¶ 401. Canada Post contests this request. *See* Canada Rejoinder, Merits Phase, at ¶¶ 113-115. I do not believe it necessary to resolve the dispute over adverse inference, as there is already ample evidence that Canada Post makes its facilities available to Purolator in a manner not equally available to other competing courier companies.

187. Although Canada has answered this complaint in part by declaring that some of its facilities are available in some measure to other couriers, by interlining agreements for

instance, that does not address the major part of UPS' contention. Further, Canada's assertion that it would have provided access to UPS similar to what it has provided Purolator, advanced in part through the testimony of Ms. Francine Conn, is markedly unpersuasive and contradicted by evidence respecting UPS' efforts to secure similar arrangements as well as by documents provided in connection with Ms. Conn's own affidavit. *See* testimony of Ms. Francine Conn, Hearing Transcript, Merits Phase, at 398-410 (relating contacts with Geoffrey Bastow of UPS); Affidavit of Ms. Francine Conn, Canada Book of Expert Reports and Affidavits, at Tab C-011, and material accompanying affidavit at Tab J; Witness Statement of Geoffrey Bastow, at ¶¶ 5-6. *See also* UPS Reply, Merits Phase, at ¶¶ 138-142. I would find that UPS has provided sufficient basis for concluding that Canada Post has provided access to its facilities to Purolator that it has not provided or made available to UPS or others.

188. The decision by Canada Post to grant preferences to Purolator is not in the nature of a decision to purchase or sell a product. It is not a decision respecting the price of Canada Post's own delivery products or of Canada Post's purchase of materials to create stamps or packaging. It is not, in other words, a decision of the sort that would seem to fall within the scope of Articles 1502(3)(b), 1502(3)(c), or 1503(3). Instead, it is a decision to approve a relatively complex commercial transaction – one undertaken between Canada Post and Purolator respecting the access Purolator will have to Canada Post facilities – and the simultaneous decision not to approve a similar transaction effecting similar arrangements between Canada Post and UPS Canada. The latter decision was taken despite efforts by UPS to obtain access to Canada Post's infrastructure on terms comparable to those granted to Purolator and despite an announced preference by the government that Canada Post

explore additional access agreements similar to that granted to Purolator. *See* Witness Statement of Geoffrey Bastow, at ¶¶ 5-6; Reply Statement of Alan Gershenhorn, at ¶ 8. These decisions are not the everyday sort of decision on matters such as product pricing that was removed from the ambit of delegated governmental authority. They were approvals of – or refusals to approve – commercial transactions of a very different kind than those subject to the other parts of Chapter 15 that Canada says should govern here.

c. Specificity

189. In my judgment, there is no basis for placing these decisions outside the scope of the exercise of delegated governmental authority by a state enterprise or monopoly that obligates the delegating government to assure that action by the enterprise or monopoly comports with requisites of NAFTA Chapter 11.

190. Canada urges that for state responsibility to attach under Articles 1502 and 1503 the delegation of authority needs to be specific, not general. *See* Canada Counter-Memorial, Merits Phase, at ¶ 818. That argument is unpersuasive. Nothing in Articles 1502 or 1503 requires the sort of specificity in delegation that Canada argues for and nothing in logic compels that reading of NAFTA. Indeed, the design of Articles 1502 and 1503, preventing a State from evading obligations through delegations of authority to entities that can act in place of the State, would be undermined by Canada's reading of this requirement. Moreover, Canada's own witness on this issue acknowledges that the government of Canada expressed a specific desire for Canada Post to arrange access agreements with courier enterprises other than Purolator. *See* Affidavit of Ms. Francine Conn, *supra*. This should satisfy any requirement of specific delegation of authority to approve such transactions.

Like Circumstances

191. Canada also asserts that Purolator and UPS Canada (the investment of UPS) are not in like circumstances with respect to access to Canada Post's infrastructure. Although UPS Canada and Purolator are similar firms engaged in similar courier operations that compete closely with similar courier products and services, Canada says that they are not in like circumstances because Purolator is largely owned by Canada Post. *See* Canada Rejoinder, Merits Phase, at ¶¶ 96-100. Canada states that it is entitled to seek synergies with its subsidiary, Purolator, on terms different than offered to other privately-owned firms.

192. As a general matter, businesses should be able to decide for themselves how to use their own facilities. There are ample reasons for avoiding external interference with such business decisions, not least because the decisions respecting investment in a firm's facilities and operations generally are made by the individual investors and managers who bear the risks associated with those decisions. The government does not protect them from the consequences of wrong choices and should not be specially privileged to exercise subsequent control over facilities that turn out to be especially valuable as a result of wise or fortunate private decisions. A different rule would discourage investment, especially investment that has high-risk but high potential reward. Imposing subsequent regulatory or other governmental controls on the fruits of successful investment would shift investment away from what may be the most socially beneficial forms of investment, those that have the potential to yield major technological or other societal benefits that are not widely perceived at the time the investment is made. The presumption in any proceeding, thus, should be

strongly opposed to any action that dictates the uses that can be made of a firm's facilities or that requires a firm to share the benefits of its investment with competing firms.

193. Canada Post, however, is not a private commercial enterprise engaged in strictly commercial activity. Indeed, Canada's submissions in this proceeding repeatedly emphasize that Canada Post is a governmental enterprise and that its operations are in large measure conducted without respect to ordinary commercial considerations. *See, e.g.*, Canada Counter-Memorial, Merits Phase, at ¶¶ 55-115. In emphasizing the interaction of Canada Post's operations with its Universal Service Obligation, Canada takes pain to explain that Canada Post at times engages in practices that are non-remunerative in order to fulfill requirements associated with Canada Post's governmental obligations. *See, e.g.*, Canada Counter-Memorial, Merits Phase, at ¶¶ 104, 124.

194. Canada Post relies on that argument to distinguish its operations from those of UPS and to establish the absence of like circumstances in regard to various UPS claims. But its argument also establishes a reason why Canada cannot use the norms of business decision-making for ordinary commercial enterprises to shield Canada Post's conduct from NAFTA's requirements. Canada, thus, must establish some other basis – apart from the ordinary norms of conduct for commercial enterprises – for asserting that decisions respecting Purolator's access to Canada Post's infrastructure are beyond NAFTA's strictures.

195. Canada asserts that "Purolator is part of the Canada Post group of companies" and that "[a]ny increase in profitability of Purolator will directly benefit Canada Post, its ability to meet its obligations and to make a return of equity to the Government of Canada." *See* Canada Rejoinder, Merits Phase, at ¶ 96. It also asserts that it is normal to expect close working relations with Purolator and not with other companies. All of this, however, takes

the relationship between Canada Post and Purolator as a given, rather than as part of the conduct to be examined in this proceeding.

196. Canada Post chose to acquire a large financial stake in Purolator, but Purolator remains a separate legal entity with separate ownership. Canada Post chose to give Purolator access to its facilities that it did not choose to give to other companies, without regard for the relative ability of other firms to contribute to Canada Post's profitability or its ability to meet its Universal Service Obligations. Canada admits that attempts to "synergise" the activities of the two companies have not always proved as fruitful as might have been desired. *See* Canada Rejoinder, Merits Phase, at ¶ 96.

197. Taking these statements together, Canada essentially claims that Canada Post's decision to grant preferential access to Purolator – whatever its consequences for Canada Post's finances and whatever its impact on other investors and investments – is immune from scrutiny simply because the decision brought Purolator into the "Canada Post group of companies." That position cannot be legally correct. The grant of preferential access to a legally distinct investment of Canadian investors cannot be removed from the reach of NAFTA's national treatment requirements because the state enterprise whose actions are challenged has decided to establish a closer relationship with that Canadian investment by taking an ownership interest.

198. Unless some other characteristic of Purolator distinguishes it from UPS Canada in a fashion that justifies the differential grant of access, Canada's argument cannot be credited as sufficient to establish that Purolator and UPS Canada are not in like circumstances. Canada has not offered any other justification for its assertion that Purolator and Canada Post are not in like circumstances. I conclude that for purposes of this claim respecting

access to Canada Post's infrastructure, UPS has made its case that it and its investment have received less favorable treatment than a Canadian investor and investment in like circumstances have received.

Failure to Ensure Compliance through Adequate Supervision and Control

199. The final aspect of UPS' claim under Chapter 15 is a showing that Canada has failed to assure that Canada Post acted consistently with Canada's NAFTA obligations. In essence, this element of the Chapter 15 claim requires a showing that the challenged conduct of Canada Post was the result of some inadequacy in Canada's controls over Canada Post.

200. UPS submitted substantial evidence that Canada did not provide forms of supervision and regulation sufficient to deny allowed ample scope for Canada Post to make decisions that derogate from Canada's NAFTA obligations. *See* UPS Memorial, Merits Phase, at 208-266; UPS Reply, Merits Phase, at 203-242. UPS also introduced evidence respecting the complaints voiced at various times, from government commissions and outside observers, respecting insufficiencies in governmental oversight, in particular its failure to constrain behavior by Canada Post directed at restraining competition from UPS and others. It especially stressed criticisms contained in the government's own Postal Services Review Committee report from 1989, in the government-sponsored 1996 Mandate Review, in comments from Professor Robert Campbell, and in the government-initiated study by TD Securities, Inc., and Dresdner Kleinwort Benson. *See, e.g.,* UPS Memorial, Merits Phase, at 226-228, 231-238, 241.

201. All of these sources noted ways in which government oversight permitted Canada Post significant leeway to use its monopoly franchise to reduce prices for its competitive services

and otherwise to structure its operations to enhance its competition against firms such as UPS. Although the evidence in this regard is largely offered in support of UPS' complaints respecting cross-subsidization, the evidence also is probative regarding Canada Post decisions favoring Purolator over UPS.

202. In contrast, Canada asserts that Canada Post is subject to an extensive array of controls over all aspects of its operation. *See* Canada Counter-Memorial, Merits Phase, at ¶¶ 193-233. It argues that the government inquiry that most clearly drew opposed conclusions on this score, the 1996 Mandate Review, should not be given any credence. Canada especially objects to UPS' submissions respecting Canada's failure to regulate Canada Post's use of its monopoly services to cross-subsidize competitive offerings.

203. This last argument is not relevant to the narrow point at issue under the approach I would take to UPS' claims under Chapter 15. The question here is not whether Canada's regulation of Canada Post is ideal or whether it assures proper pricing for Canada Post's products. The question is not whether a more intrusive form of regulation would be preferable for Canada or its citizens. The sole question relevant here on my view would be whether Canada sufficiently regulated or supervised Canada Post's decisions on issues respecting preferential access to its infrastructure.

204. Given the evidence in this proceeding, I do not believe that this question is a close one. I would find that UPS has introduced ample and persuasive evidence that Canada has not adequately regulated Canada Post to assure that its actions are consistent with Canada's obligations under Article 1102 of NAFTA.

CONCLUSION

205. For the foregoing reasons, I would find that Canada has violated its obligations under Article 1102 and under Articles 1502(3)(a) and 1503(2) in its treatment of UPS, an investor of another NAFTA Party. In the respects indicated above, I dissent from the decision of the Tribunal.

Dean Ronald A. Cass, Arbitrator