IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION B of the NORTH AMERICAN FREE TRADE AGREEMENT, and the UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.
Claimant/Investor

and the

GOVERNMENT OF CANADA
Respondent/Party

APPLICATION FOR *AMICUS CURIAE* STATUS

by the

CANADIAN UNION OF POSTAL WORKERS and the COUNCIL OF CANADIANS

INTRODUCTION

The Applicants first petitioned this Tribunal for standing to participate in these proceedings in May, 2001 and, pursuant to the Tribunal's direction of April 2004, made further submissions concerning the modalities for such an intervention. This application is made further to the previous orders of this Tribunal (October 2001, April 2004 and August 2005) and in accordance with the statement of the Free Trade Commission on non-disputing party participation in NAFTA Chapter 11 arbitral proceedings (October 2003).

THE APPLICANTS

Canadian Union of Postal Workers

1. The Canadian Union of Postal Workers ("CUPW – STTP") represents approximately 46,000 operational employees of Canada Post who provide postal services to Canadians throughout the country. Over half are letter carriers and spend a portion of their time handling, processing and delivering expedited and express courier products (Priority Courier and Xpresspost services).

2. Rural mail service in Canada is also provided by approximately 6000 rural route and suburban mail carriers (RRSMC), who were prevented, pursuant to the provisions of the *Canada Post Corporation Act*, from forming a union and engaging in collective bargaining. These workers are also involved in the delivery of parcel and express courier services. In March 1997, these workers formed The Organization of Rural Route Mail Couriers (ORRMC) which worked closely with CUPW-STTP.

3. During the most recent round of collective bargaining, CUPW-STTP was successful in negotiating a collective agreement with Canada Post that finally accorded RRSMC status as employees of Canada Post with the right to bargain collectively for the terms and conditions of their employment. These workers, more than two-thirds of whom are women, now form a separate bargaining unit, and are represented by CUPW-STTP. As of January 2, 2004 they were covered by a collective agreement between CUPW- STTP and Canada Post.

4. CUPW-STTP also represents approximately 40,000 union members who are entitled to pension benefits as Canada Post employees. For many years these employees participated in the Canadian Public Service pension plan. However, in consequence of recent statutory amendments (*Public Sector Pension Investment Board Act* - Bill C-78), Canada Post Corporation no longer participated in the public service pension plan as of October 1, 2000.

5. CUPW-STTP has also been actively involved in the public policy debate about postal services and has made detailed representations to government concerning the role and mandate of Canada Post; the organization and delivery of postal, parcel, courier and electronic communication services; and the public service objectives of this Crown Corporation.

6. Together with the Council of Canadians, on March 28, 2001 CUPW-STTP issued an application in the Ontario Superior Court of Justice seeking, *inter alia*, declaratory judgements concerning the validity of the enforcement procedures set out in Section B of Chapter Eleven, in light of Canadian constitutional requirements.

Council of Canadians

7. The Council of Canadians ("the Council") is a non-governmental organization with more than 100,000 members, many of whom participate in the activities of more than 60 chapters across the country. Strictly non-partisan, the Council lobbies Members of Parliament, conducts research, and runs national campaigns designed to raise public awareness and to foster democratic debate about some of Canada's most important issues, including: the future of Canada's social and cultural programs; the need to renew its democratic institutions; and protecting public health and the environment.

8. The Council is strongly committed to preserving the integrity of Canadian postal services as public services providing high quality, reliable and affordable mail, parcel and courier services to all Canadians regardless of where they live. Moreover, it believes that if the vitality of this public institution is to be assured for the years ahead, Canada Post must respond to new challenges by expanding the types and availability of the services it provides, not by reducing them.

9. The Council also has a close working relationship with Rural Dignity of Canada ("Rural Dignity"), a grassroots citizens' group committed to strengthening rural communities and

maintaining and enhancing services, including postal services, in rural areas. Rural Dignity's Coordinator, Cynthia Patterson, is a member of the Board of Directors of the Council. Both the Council and Rural Dignity made submissions to the Canada Post Mandate Review.

10. The Council also has a long standing commitment to the preservation of Canadian culture and cultural programs, and Gary Neil, who is the Co-ordinator of the International Network on Cultural Diversity, is a member of its Board of Directors.

THE INDEPENDENCE OF THE APPLICANTS

11. The Applicants have no affiliation with the disputing parties, and have received no financial or other assistance from any government, person or organization to assist with the preparation of these submissions.

THE APPLICANTS' INTEREST IN THESE PROCEEDINGS

12. If this Tribunal finds Canada to be in breach of its obligations under NAFTA concerning the activities of Canada Post, Canada would be under considerable pressure to restructure the current framework of Canada Post service delivery. There is a high probability that such a restructuring would have direct consequences for CUPW-STTP members who now provide many of the services at issue in these proceedings.

13. In the short term, these consequences could include revised job classifications for those employees currently providing the services that Canada Post may be directed by the Canadian federal government to abandon. Such downsizing of service delivery may also include lay-offs and permanent job reductions. Indeed, postal service restructuring has had serious impacts on workers in the past.[1] Over the longer term, and to the degree that the financial viability of Canada Post is compromised by constraints that preclude it from providing the full range of current services, the job security of all of its employees may be adversely affected.

14. Furthermore, the security of CUPW-STTP members' pensions has also been put at risk by UPS allegations that Canada is in breach of its NAFTA obligations by, *inter alia*, having acted as guarantor of the pension plan's unfunded liability. This raises the possibility that the future financial security of tens of thousands of Canada Post employees, both past and present, may be at stake in these proceedings.

15. UPS has also raised issues relating to the collective bargaining rights of rural and suburban mail carriers, including their rights under Canada's Constitution as well as under international labour and human rights law. Both parties refer to judicial and

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[1] For example, when the government accepted the recommendation of the Canada Post Mandate Review that the crown corporation get out of most of its admail business, within a week of receiving that direction Canada Post fired 10,000 admail workers. This represented the largest lay-off in Canadian history.

international legal proceedings in which CUPW-STTP was the applicant or intervener. These are also matters with respect to which the CUPW-STTP also has a direct and demonstrable interest.

16. This case also has foreseeable consequences for all Canadians who depend upon the mail, parcel and courier services delivered by Canada Post, and threatens to undermine the viability of an institution the Council of Canadians, in partnership with such groups as Rural Dignity of Canada, has worked hard to defend.

17. For instance, if Canada Post is required to divest itself of courier and package delivery service functions, or otherwise devolve them to an arms-length enterprise, they may no longer be subject to the universal service obligations that are now part of Canada Post's statutory mandate. The result may reduce the universal availability of these services, or increase their cost, or both. These impacts are likely to be most acute for residents of rural or remote communities because of the increased costs associated with providing service to less populated areas. Moreover, if post office closures also result, an important part of the institutional framework of Canadian society would be damaged because of the importance of the post office to many rural communities.

18. The UPS claim also puts at issue the Publications Assistance Program, which is an important Canadian cultural program that is not only important to Canadian publishers and libraries but also to those who benefit from having greater access to library services and to a diversity of Canadian publications.

ISSUES OF FACT AND LAW ADDRESSED BY THE APPLICANTS' SUBMISSIONS

19. The Applicants' submissions address, *inter alia*, the following matters:

(a) The failure of UPS to introduce evidence or make legal arguments to support its claim that Canadian measures relating to the collective bargaining rights of rural and suburban mail carriers represent a breach of Canada's obligation to provide National Treatment under Article 1102 of NAFTA.

(b) The failure of UPS to set out in its statement of claim, any claim that Canadian measures relating to the collective bargaining rights of rural and suburban mail carriers represent a breach of Canada's obligation to provide a Minimum Standard of Treatment, under Article 1105.

(c) The reservation from NAFTA disciplines of measures relating to labour law and policy, which was made when the Parties agreed to and adopted the North American Agreement on Labour Cooperation.

(d) The nature of the relationship between Canada's obligations under NAFTA and those it has under international labour and human rights treaties, and in particular the breach of these latter obligations that would occur if foreign investors are allowed to recover damages for violations of international law where the obligations owed under those treaties are entirely to third parties, not to the investor.

(e) The importance of respecting the tri-partite nature of international law concerning the rights of workers to bargain collectively, and of being guided by this fundamental principle when interpreting NAFTA.

(f) The extent and character of the cultural exemption allowed under NAFTA and FTA rules.

WHY THE TRIBUNAL SHOULD ACCEPT THESE SUBMISSIONS

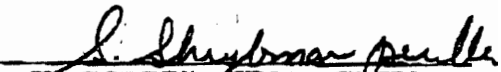
20. The Applicants submissions' would assist the Tribunal in the determination of factual and legal issues related to this arbitration and bring a perspective, particular knowledge and insight that is different from that of the disputing parties. In this regard, the Applicants are particularly qualified to comment on issues concerning: the preservation of public policy and program flexibility with respect to the delivery of public services; labour-management relations; the pension entitlement of postal workers; Canada's international labour and human rights obligations; the exemption under NAFTA for measures in respect of culture; and the importance according NAFTA investment disciplines a strict rather than liberal interpretation.

21. The Applicants have a significant and direct interest in this arbitration that arises from the foreseeable consequences of an award made in favour of the disputing investor including: potential adverse affects on the job security, pension entitlement and working conditions of postal workers; and the potential decline in the availability and/or quality of universal postal, package and courier services to Canadians.

22. There is also a considerable public interest in the subject matter of the arbitration that arises from the potential of this claim to impugn the validity of an important Canadian cultural program, and to expand the scope of investor-state litigation in a manner that will encourage future claims assailing Canadian policy and law as it relates to other public services, such as those relating to health care and libraries.

23. Furthermore, the Applicants' views on several of the issues that arise in these proceedings are likely to be quite distinct from those of Canada and Canada Post. This conclusion is, we submit, demonstrated by the *Amicus Curiae* submissions attached.

Respectfully submitted this 20th day of October, 2005.



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AMICUS CURIAE SUBMISSIONS

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1. These submissions are made in response to the pleadings filed by the disputing investor and Canada. However, the only version of these pleadings made available to these intervenors has been extensively redacted. In addition, much of the evidence upon which the parties are relying has also been excised from the materials made available. We are unable therefore to know the full nature of the arguments and evidence that have either been presented by UPS to support its claim, or raised by Canada in response to it.

2. This failure to fully disclose the arguments and evidence in this case not only frustrates the intervenors' ability to be of assistance to the Tribunal, but also causes serious prejudice to the intervenors by denying them an opportunity to properly respond to issues that are of both direct interest to them, as well of broader public interest to many Canadians. The following submissions must be read in light of this important qualification.

Position of the Intervenors

3. With the exceptions, and for the additional reasons presented below, we concur with the submissions of Canada and submit that the UPS claim is entirely without merit and should be dismissed with costs to Canada.

The UPS Claim Seeks to Dramatically Expand the Scope of Investor-State Litigation in a Manner Entirely Unsupported by the NAFTA Text or the Intent of the Parties

4. There have now been over 35 claims brought under NAFTA investment rules, but the present claim is unprecedented in several respects. To begin with, this is the first investor-State claim to challenge the manner in which Canada has implemented an

important cultural program. It is also the first to so directly put at issue the interests of non-parties, in this case the jobs and pensions of thousands of employees of a Crown Corporation. It is also the first to challenge measures relating to the delivery of public services, and the first as well to invoke NAFTA disciplines to challenge long-established policies and practices that significantly predate the negotiation of NAFTA. Finally, it is the first to invoke international labour and human rights treaties in support of a NAFTA investor claim.

5. In each of these respects, UPS urges this Tribunal to adopt a broad and expansive interpretation of NAFTA disciplines for which there is no textual support, and even less in the ancillary sources to which this Tribunal may look to ascertain the intentions of the Parties where the text admits of more than one interpretation.

The Use of NAFTA Investment Rules to Challenge the Delivery of Public Services

6. As the first investor-State claim to challenge the provision of public services, this case has broad implications for other social or public services which must similarly be provided on universal terms to all members of Canadian society. The underlying conflict between free trade policies that constrain government actions in favour of market disciplines, and social policies that reject such disciplines to ensure universal access to postal, health care, library and other services, is at the heart of this dispute.

7. Given the extraordinary rights of foreign service providers under NAFTA, including the right to make claims under Chapter 11, this underlying conflict is rife with the potential to inspire claims by foreign companies seeking to expand their businesses in Canada by containing or reducing the operations of publicly owned service providers. This is particularly true where public service providers operate, as many do, within a mixed public-private system. Thus Canada Post has the sole responsibility for ensuring the delivery of certain universal services, in this case letter-mail, but in other areas of service delivery operates in a highly competitive marketplace.

8. If the expansive interpretation of NAFTA disciplines urged by UPS is accepted, the result will certainly be claims by others foreign investors operating in the courier and package delivery industry, but is likely to also open the floodgates of litigation challenging the operations of public service providers that also benefit from the use of established infrastructure, including such diverse institutions as public hospitals and municipal libraries.

9. The most fundamental and distinguishing feature of Canada Post and other public service providers is their respective universal service obligations. In the case of Canada Post, these are mandated by both domestic and international law and include the obligation to provide universal, permanent and quality service to all Canadians regardless of where they live and at affordable prices.[1] In the case of health care it is the requirement to

[1] Universal Postal Convention, Article I, Respondents' Authorities, Tab 4.

provide services regardless of the individual's ability to pay. It is the obligation to provide universal services, however that obligation is formulated, that is key.

10. Canada's obligation under Article 1102 only requires that it accord foreign investors no less favourable treatment than it accords, "in like circumstances", to its own. It is the obligation to provide universal service that makes the circumstances of Canada Post and other public sector services providers entirely unlike those of commercial enterprises. As Canada argues, this Tribunal has no jurisdiction to conduct an inquiry into or substitute its own judgment about the activities and practices of a Crown Corporation which Canada is entitled to establish and maintain under NAFTA rules and which operates in circumstances entirely unlike those of commercial corporations with which it may compete in certain service areas.

Using NAFTA Investment Disciplines as a Sword Rather Than a Shield

11. Unlike other investor-State claims, this is not a case where UPS is asserting that some action by a Canadian government has entirely deprived it of the right to carry on its business (see the *Ethyl*, *S.D. Myers*, *Metalclad* and *Loewen* cases) or has interfered with an existing contractual obligation or concession agreement (the *Mondev*, *ADF Group*, and *Robert Azinian* cases). [2]

12. Rather, the UPS claim relates to future and speculative growth and profit. No other foreign investor claim has sought to invoke Chapter 11 procedures for such opportunistic reasons. In every other Chapter 11 case, dispute procedures have been invoked as a *shield* to defend against measures which are alleged to have materially diminished the ongoing operations of the foreign investor, or interfered with contractual relations. In contrast, the UPS claim invokes Chapter 11 dispute procedures as a *sword*, not to preserve its business in the face on government initiatives that threaten to reduce it, but rather to assail long established policies, law and practices for the purposes of expanding an already growing business empire by diminishing the activities and flexibility of a publicly owned competitor.

13. It is not the case that Canadian measures or the activities of Canada Post have prevented UPS and companies like it from establishing and growing profitable business operations in Canada. In fact, when the United States International Trade Commission (USITC) studied major U.S. trading partners' commitments under the WTO General Agreement on Trade and Services, and after conducting extensive interviews with U.S. express courier industry representatives, the Commission reported that:

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[2] *Mondev, Award* (UPS Authorities at Tab 37); *Ethyl Corporation and Canada*, (UPS Book of Authorities at Tab 50); *Loewen and United States* (UPS authorities at Tab 51); *S.D. Myers and Canada* (UPS Authorities at Tab 4); *Metalclad Corporation and Mexico, Award* (UPS Authorities at Tab 86); *Re: Azinian and Mexico* (2000) 39 ILM 537 (UPS authorities TAB 40); *ADF v. US*, (ICSID Case No. ARB(AF)/00/1) ("*ADF*") (UPS Authorities at Tab 95).

> *Among the subject trading partners, Canada represents the most open market for U.S. courier services. Canada imposes few restrictions and provides for, among other things, inter-provincial and intra-provincial trucking privileges.*[3]

14. The USITC went on to comment favourably that, unlike other major US trading partners, Canada also provides for the temporary entry and stay of intra-corporate transferees, and allows business visitors to stay for 90 days.[4]

15. Nevertheless, despite its commercial success and supportive Canadian government regulations, UPS has invoked NAFTA dispute procedures for the strategic purpose of forcing Canada Post out of express delivery and other competitive services. To succeed, it must persuade this Tribunal to adopt a broad and expansive interpretation of NAFTA investment disciplines that it was never the intention of the Parties they should be given.

16. If this strategy succeeds, the ability of Canada Post to deliver core letter-mail services is likely to be seriously compromised. For, as documented by the TD Securities study cited extensively by both parties, to be financially viable Canada Post must be active in providing services that complement its primary focus on letter-mail, which is expected to diminish over time with the growth of electronic communication. The TD study emphasizes the potential synergies available if Canada Post is obliged to keep abreast of technological developments and to develop new products and services in emerging areas such as electronic communications and commerce. Advances in customer service will require constant updates and capital investment in sophisticated technologies.

17. Conversely, if Canada Post is denied the ability to grow into new areas, its long-term prospects for financial sustainability are poor, and it will be forced to rely on increases in basic postage rates to augment dwindling revenues. A viable strategy that seeks to take advantage of Canadians' considerable investment in the postal infrastructure to lever economic efficiencies and to provide new, enhanced services for Canadians will inevitably bring Canada Post into competition with private companies in certain areas.

18. This interaction of monopoly and non-monopoly services, and the commingling of commercial, publicly funded, and subsidized services, describes the dynamics at play for such diverse institutions as Canada Post, public hospitals and municipal libraries, all of which have, in one form or another, an obligation to provide services on a universal basis. It is the *particular or unique circumstances* of such institutions that distinguish these public entities from, or in other words, makes them *unlike* purely commercial enterprises such as UPS.

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[3] U.S. International Trade Commission (1995). "General Agreement On Trade In Services: Examination Of Major Trading Partners' Schedule Of Commitments (Canada, European Union, Japan, And Mexico. Investigation No. 332-358. USITC publication 2940. December 1995, see ch. 5, p.12.

[4] Idem

19. The distinction between public and private entities is fundamental to the future viability of many Canadian public and social services, and is one that NAFTA investment rules require this Tribunal to take into account as the *unlike circumstances* of public service providers. For these and the reasons argued by Canada, UPS claims relating to Article 1102 should be clearly and completely rejected to discourage similar adventurism by other commercial service providers seeking to expand the use of NAFTA investor-State procedures for purposes they were never intended to serve.

The Bargaining Rights of Rural and Suburban Mail Carriers

20. UPS makes two arguments relating to Canadian measures that have until recently denied rural and suburban mail carriers (RSMC) the right to join a union and engage in collective bargaining with Canada Post.[5] These arguments have also been extensively redacted and the principle evidence upon which they rely, the Rosen report, has not been provided at all.

The Failure of UPS to Provide any Support for These Claims Under Article 1102

21. In its Revised Amended Statement of Claim (Dec 20, 2002), UPS asserts that Canada was in breach of its obligations under Article 1102 of the NAFTA by, inter alia:

> *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; [para 25(f)]*
>
> *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' union 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; [para 25(h)]*

22. However, in the redacted materials made available, there is no legal argument or other assertion made to support these claims. If, in fact, UPS has failed to advance these aspects of its claim related to National Treatment, they should be considered to have been abandoned.

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[5] *Petition to the Arbitral Tribunal* by the Council of Canadians and the Canadian Union of Postal Workers, May 10, 2001. http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp

The Failure of UPS to Submit These Claims to Arbitration Under Article 1105

23. Canadian measures relating to the collective bargaining rights of RSMC, including their rights to negotiate for improvements in their pension entitlements are now argued by UPS to constitute a breach of Canada's obligations under Article 1105, not Article 1102.

24. No such claim relating to Article 1105 was set out in the UPS Notice of Intent to Submit a Claim to Arbitration, nor in the Statement of Claim and Amended Statement of Claim that have been filed subsequently. Therefore, UPS has failed to comply with the requirements of Article 1119 of NAFTA, and Article 18 of the UNCITRAL Arbitration rules. Moreover, because compliance with Article 1119 is mandatory and a condition precedent to asserting a claim under Chapter 11, we submit that this particular claim has not been properly submitted to arbitration and therefore should not be considered further.

25. However, if the Tribunal, contrary to this view, is willing to consider the merits of these claims, the following arguments are submitted in the alternative.

Alleged Violations of Article 1105 Concerning Labour and Human Rights

26. UPS argues that Canadian laws prohibiting RSMC from exercising the collective bargaining rights provided by Canadian law made it possible for Canada Post to pay lower wages and accord fewer benefits to these workers, thereby reducing its operating costs. We agree.

27. UPS further argues that such measures also represented a breach of Canada's obligations under international law, most notably those set out in the *Right to Organize Convention 1948* (*Convention No. 87*) under the International Labour Organization, which require Canada to uphold the right of workers to bargain collectively.

28. We agree that Canada was in breach of its obligations under the ILO in this regard, not just those under Convention No. 87 which it has ratified, but also those under Convention 98: *Right to Organize and Collective Bargaining Convention, 1949*, which it has not ratified but is, by virtue of its adherence to the ILO Constitution, nevertheless obligated to respect. [6]

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[6] Eight of the ILO conventions have been identified as being fundamental to the rights of human beings at work. Two of these fundamental conventions relate directly to the concept of freedom of association: the Freedom of Association and Protection of the Right to Organize Convention, 1948 (Convention No. 87), and the Member States, by virtue of their adherence to the ILO Constitution, are obligated to respect the principle of freedom of association articulated in the Freedom of Association Conventions. The concept of freedom of association is so fundamental that complaints of non-compliance in relation to these Conventions can be brought against even non-ratifying Member States, including Canada. Simply by being an ILO Member State, Canada has committed to uphold these minimum standards. See Poisson and Torobin, *The Right to Organize and Collective Bargaining: Canada and International Labour Organization Convention 98* (1999), 2 Workplace Gazette 86.

29. That being said, NAFTA dispute procedures cannot be considered a proper forum for redressing these violations of international law, nor does UPS have, as Canada argues, standing to make such a claim. Chapter 11 procedures were not intended to become a vehicle for asserting opportunistic claims for damages that are essentially being caused to third parties. Even less so because those most directly affected by such violations have no right to seek redress under these investment rules, nor even to be accorded party standing in such proceedings.

30. It is entirely disingenuous for UPS to be seeking redress for Canadian measures that have disenfranchised Canadian workers, while at the same time resisting the participation of those same workers in the proceedings where this claim will be adjudicated.[7] As for the sincerity of its concern for the interests of Canada Post workers, we note the UPS' complaint that Canada Post's policy of structuring its operations in such a manner as to avoid lay-offs and staff reductions is misguided and inappropriate.[8]

Allowing Investor Claims to Recover Consequential Damages Allegedly Caused by Canada's Failure to Comply with International Labour and Human Rights Treaties Would Represent a Further Breach of Those Obligations

31. Acceding to this aspect of the UPS claim would not only compound the injustice caused to Canadian workers, but would in and of itself represent a breach of Canada's obligations under ILO conventions for the following reasons.

32. In effect, UPS argues that in negotiating NAFTA, Canada created a dispute procedure that allowed for the recovery of damages caused by its failure to comply with obligations under another treaty. However, the right to recover such damages would not be available to those most directly affected under those treaties, but only to those who might suffer indirect or consequential loss.

33. Creating such an asymmetrical enforcement regime is certainly incompatible with both the spirit and the letter of these conventions, and would only operate to compound the injustice done to workers by Canada's failure to respect core labour rights. This is so because the ILO is fundamentally a tripartite structure, which recognizes as its first principle the equal role that must be played by workers, employers and government in achieving the objectives of the Organization and the Conventions it administers. Thus representatives of governments, employers, and workers serve together on ILO committees, on the Executive Council, and in the General Assembly.

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[7] Investors Response to the Petition filed by the Canadian Union of Postal Workers and the Council of Canadians, May 28, 2001. http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp

[8] UPS memorial, para. 205-06.

34. The dispute procedures provided for under the ILO constitution are similarly and thoroughly tripartite.[9] The notion of allowing only employers or workers the right enforce or seek redress for breaches of an ILO convention is fundamentally antithetical to this founding principle of tripartitism. To allow this to occur entirely outside the adjudicative framework of this ILO convention would only further undermine the integrity of the regime that UPS purports to uphold.

35. If this Tribunal concludes that core international labour standards are amenable to foreign investor claims, it would sanction the adjudication of issues that fall entirely within the framework of ILO conventions in a forum that is not only external to those mandated by those conventions, but that operates according to principles that are fundamentally incompatible with the modalities of the ILO. Such a finding would clearly place Canada's obligations under NAFTA and those under the ILO into conflict.

36. Moreover, even putting aside these contradictions, exposing governments to such claims might actually encourage the Parties to adopt policies that reduce the protections afforded by labour law to a lower common denominator, thereby infringing the rights of an even greater number of workers, but averting potential claims that it had discriminated between investors. If foreign investors are given recourse when Canada fails to comply with its obligations under ILO conventions but workers are not, Canada would be under much greater pressure to accommodate the interests of employers over employees. This is not a consequence that Canada can be taken to have sanctioned when it negotiated NAFTA.

37. We submit that this Tribunal must seek an interpretation of NAFTA investment disciplines that most readily accords with Canada's obligations under ILO and other treaties. Canada must not be taken to have negotiated an international treaty that would conflict with its obligations under pre-existing instruments.

The North American Agreement on Labour Cooperation (NAALC)

38. In response to this aspect of the UPS claim Canada further argues that in any event, "labour issues were specifically left out of NAFTA, and that by establishing the NAALC the Parties made clear their intention to address labour issues in a forum separate from

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[9] Once a Member State ratifies an ILO Convention, other parties can represent and complain to the Governing Body alleging that the Member State has failed to implement or abide by that Convention. Pursuant to Article 24 of the ILO Constitution, employer or worker organizations can complain that any Member State, "...has failed to secure in any respect the effective observance within its jurisdiction of any Convention of which it is a party." Under Article 26 of the ILO Constitution, one Member State can file an allegation of non-compliance against another Member State. This provision has now been extended to all Conference delegates, including worker and employer representatives. A tripartite Commission of Inquiry appointed by the Governing Body investigates the complaint and makes recommendations to the Governing Body. The government concerned may either accept the recommendations or appeal the dispute to the International Court of Justice, whose decision is final.

NAFTA."[10] We concur with this view for the reasons Canada argues, and also for those that follow.

The NAALC Reserves Labour Matters From NAFTA Investment Disciplines

39. The NAALC was negotiated and implemented in parallel to NAFTA[11] and was designed to facilitate greater cooperation between Canada, the U.S. and Mexico in the area of industrial relations, as well as to promote the effective enforcement of each country's labour laws and regulations.

40. It is quite clear from the text of the NAALC that the Parties intended to preserve their sovereignty with respect to the establishment, as opposed to the enforcement, of labour laws and regulations.

41. Thus Article 2: Levels of Protection, provides:

> Affirming full respect for each Party's constitution, and **recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations**, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light. [emphasis added]

42. Similarly Annex I: *Labor Principles* to the NAALC provides:

> The following are guiding principles that the Parties are committed to promote, **subject to each Party's domestic law, but do not establish common minimum standards for their domestic law.** They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces. [emphasis added]

43. The intention to preserve national sovereignty with respect to labour law and regulation was also made clear in a letter from Ambassador Kantor, the U.S. Trade Representative, dated September 29, 1993 to the Chairman of the Committee on Energy and Commerce, in which the Ambassador, speaking on behalf of the Administration, stated:

> ....the fundamental premise of the supplemental agreements is national enforcement of national laws, not supranational enforcement nor one

[10] Canada, Counter Memorial, paras. 977-78.

[11] North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, September 13, 1993

> country's enforcement of its law within another country's borders. The dispute settlement provisions provide a mechanism for dealing with cases when national enforcement breaks down. We were always guided by our understanding that the United States would have live with anything that we asked Canada and Mexico to accept. Consequently, we had no intention of fashioning supplemental agreements that intruded unacceptably on the U.S. sovereignty by inappropriate reliance on supranational authority."[12]

44. In other words, the sovereignty of the Parties with respect to matters of labour and regulation is explicitly reserved to the parties under this Agreement. While the failure of Parties to enforce their domestic law may become the subject of a complaint and inquiry under the NAALC regime, no minimum standard of law or regulation is mandated by this Agreement.

45. This fact was underscored with respect to the collective bargaining rights of RSMC when the United States' NAO declined to pursue issues raised in a communication by the Organization of Rural Route Mail Carriers and other labour organizations in the United States, Mexico and Canada, including the present intervenor trade union. That communication raised the issue of whether legislation denying rural route mail carriers employed by the Canada Post Corporation the right to unionize and bargain collectively was contrary to the NAALC.

46. The communication also alleged that Canadian law failed to provide rural route mail carriers with access to compensation for industrial accidents and occupational diseases. In addition, it alleged that this treatment of rural route mail carriers violated the NAALC obligation to promote the elimination of employment discrimination.

47. Deferring to Canadian labour laws, the U.S. NAO, in a decision issued on February 1, 1999, declined to carry out the review requested by this public communication, on the basis that the rural route mail couriers are mail contractors, not employees entitled to collective bargaining rights under Canadian law.[13]

48. The timing and substance of the NAALC not only indicates the Parties' intentions to preserve their sovereignty with respect to labour law, but also represents a mutually agreed upon reservation, or codicil to NAFTA, the effect of which to is entirely reserve questions relating to labour law and regulation from NAFTA disciplines.

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[12] Item 45, Annex to letter dated September 29, 1993, from Ambassador Kantor, United States Trade Representative to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, House of Representatives, reproduced in House Report 103-361, Part 3, House Report on the North American Free Trade Agreement Implementation Act.

[13] See letter from the NAO to the RRMC, cited by Canada in footnote 935 of its Counter Memorial.

49. The requirement to regard these NAALC provisions as delineating the parameters of those matters addressed by NAFTA is mandated by the Article 31 of the *Vienna Convention*, which stipulates that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

50. We submit that it is clear that in limiting the application of NAALC to matters of enforcement, the Parties intended other issues relating to labour law and regulation to be exempt from the disciplines of the NAALC *and* NAFTA.

51. We submit that it would also be fundamentally unjust, and contrary to public policy, to compensate UPS for an injury that was first and foremost caused to RSMC while leaving these workers without any commensurate recourse or remedy. Moreover, and as noted, it is entirely disingenuous for UPS to plead the unfairness of measures that disenfranchise workers, while doing its best to frustrate the participation by these same workers in this proceeding.[14]

Canadian Measures Relating to the Canada Post Pension Plan do not Either Directly or Indirectly Offend NAFTA Disciplines.

52. As set out in its Revised Amended Statement of Claim, UPS alleges that Canadian measures relating to the pension plan of Canada Post employees were in breach of Article 1102. These measures included Canada's *failure to charge Canada Post for certain administrative and other services it provided, or require Canada Post to fund any actuarial deficiency associated with the indexed plan, and making excessive payments to Canada Post upon Canada Post taking over administration of the pension plan*. It also

[14] Investors Response to the Petition filed by the Canadian Union of Postal Workers and the Council of Canadians, May 28, 2001. http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp

claims that *prohibiting CUPW-STTP from negotiating improvements to the pension plan* also represented a breach of Article 1102.[15]

53. As noted, claims concerning such measures relating to Article 1102 appear to have been abandoned. Instead, measures relating to the bargaining rights of Canada Post employees is now presented as offending Article 1105. Other elements of the UPS claim relating to the Canada Post pension plan appear to have been entirely abandoned. In other words, the only aspect of the UPS claim relating to the Canada Post pension plan that remains concerns the removal of pension issues from those with respect to which CUPW-STTP and other Canada Post employees might bargain with Canada Post.

54. Thus limited, the UPS claim relating to the Canada Post pension plan relies entirely upon the same arguments and international instruments that found its claims relating to the collective bargaining rights of RSMC. It should accordingly be rejected for the reasons we have set out above.

Other Human Rights Instruments

55. UPS buttresses its claims relating to the rights of Canada Post employees by invoking other international human rights instruments, including:

- The Universal Declaration of Human Rights
- The International Covenant on Political and Civil Rights
- The International Covenant on Economic, Social and Cultural Rights

56. UPS cites provisions of these international instruments that concern freedom of association, and the rights of everyone to form and join trade unions. Its argument is virtually the same as the one made with respect to Canada's obligations under the ILO and should fail for the same reasons.

57. To reinforce the points we have previously made, we note that Article 26 of *the International Covenant of Civil and Political Rights* stipulates that:

> ***All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*** *In this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin,* ***property,*** *birth or other status.* [emphasis added]

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[15] Revised Amended Statement of Claim, para. 25(h).

58. UPS argues that it is entitled to be compensated for the indirect consequences of Canada's failure to comply with international human rights law, and the right as well to assert such a claim in forum that it argues should be closed to the participation of the very persons most directly affected. Its argument offends not only the spirit, but also the letter of the very human rights instruments it seeks to rely upon.

PUBLICATIONS ASSISTANCE PROGRAM

59. The pleadings of the parties with respect to this issue are also heavily redacted; however, to the extent that they have been revealed, we concur with Canada's response to this aspect of the UPS claim but subject to the following comments.

60. The cultural 'exemption' set out by Article 2106 and Annex 2106 of NAFTA and Article 2005 of the FTA does not, as Canada has claimed, ensure "that NAFTA leaves unimpaired Canada's ability to pursue cultural objectives." In truth, and as Canada acknowledges elsewhere, this so-called exemption actually allows for unilateral retaliation where a Canadian cultural measure is regarded as offending NAFTA disciplines. In other words, rather than safeguarding Canadian cultural measures, these cultural provisions actually expose them to retaliation that may be meted out more swiftly and with less accountability than would have been the case had these treaties included no such 'exemption'.

61. Given the price that Canada is likely to pay for relying upon these provisions, it is reasonable to give effect to the broad wording of these provisions. In the present case, this means that Canada has considerable latitude to both design and implement the Publications Assistance Program. A more conservative reading might be warranted in the case of an exemption or reservation that truly removed a measure from the threat of retaliatory sanction, but has no place where a significant disincentive already exists to constrain the use of this 'exemption.' It is this built-in governing device that supports the view that the Parties otherwise intended the scope of this safeguard to be broadly applied.

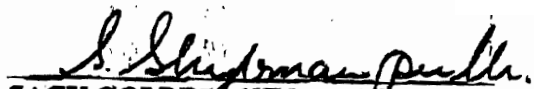
62. UPS also argues that Canada is obliged to tender for the delivery of services required to support the Publications Assistance Program, whatever the administrative burden of doing so. It argues that it should "declare its arrangement with Canada Post to be procurement and be prepared to defend the deal in NAFTA Chapter 10 proceedings." Of course UPS would have no standing to bring such a proceeding, but more importantly, if

this is in fact the correct characterization of the measure in question, then it is exempt from this investor state claim under Article 1008 which provides that:

> *Articles 1102, 1103 and 107 do not apply to:*
>
> *(a) procurement by a Party or state enterprise ...*

63. The UPS claim represents an unprecedented use of NAFTA investment disciplines to further a strategic corporate offensive intended to expand UPS Canadian operations by diminishing the scope of Canada Post operations and constraining its ability to most effectively meet its universal service obligations under both international and Canadian law. To succeed it must persuade this Tribunal to adopt a broad and expansive interpretation of NAFTA that would allow investor-State procedures to be used to assail public policies and laws that are well beyond the reach of such disciplines if properly interpreted. If acceded to, the UPS claim will no doubt spawn others, not only claims by courier companies, but by investors who may regard other public service providers as being vulnerable to similar challenges. For the reasons advanced by Canada, and those we have added, the UPS claim should be dismissed, with costs to the Respondent Party.

Respectfully submitted this 20th day of October, 2005



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