REDACTED **PUBLIC ACCESS**

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

REJOINDER
(Merits Phase)

(October 6, 2005)

Department of Justice
Room 844, East Tower
Bank of Canada
234 Wellington Street
Ottawa, Ontario
K1A 0h8

Ivan G. Whitehall, Q.C.
Agent of the Attorney General of Canada

TABLE OF CONTENTS

PART I. OVERVIEW

The Claimant's Evolving Claim

The Claimant's factual and legal allegations have continuously evolved throughout the pleadings up to the Investor's Reply. For example, having spent much effort arguing that Canada Post cross-subsidizes, the Claimant now claims that it is no longer the issue; rather "equal treatment" is. Moreover, the continued lack of precision and the contradictions regarding the impugned measures have made it difficult for Canada to know the case it has to meet.

Canada maintains its jurisdictional objections

This Rejoinder supplements Canada's Counter Memorial. The jurisdictional objections set out in the Counter Memorial are maintained with the exception of the issue of the Claimant's ownership of UPS Canada. Canada withdraws its objection in this respect, given the additional information provided by the Claimant in its Reply establishing that the ownership requirement is met.

The proper test to establish a violation of NAFTA Article 1102

The Claimant spends hundreds of pages setting out facts, many inaccurate and few, if any, related to the test the Claimant must address, if it is to succeed in a Chapter 11 challenge.

Canada's position is that a proper textual interpretation of the national treatment obligation requires establishing each of the elements set out in NAFTA Article 1102. In addition if the subject matter of the complaint is an action of a state enterprise or government monopoly the Claimant must establish that the action is an exercise of a

governmental power vested in the state and transferred to the entity, as opposed to commercial conduct.

Essence of the Claimant's case against Canada Post

The essence of the Claimant's case is that Canada Post has a competitive advantage because it is a Crown Corporation with a monopoly covering some letter mail, thereby able to price its competitive products below those of UPS Canada.

Canada's position is that the fact that a Crown Corporation has a competitive advantage does not translate into a NAFTA violation. In fact, the NAFTA expressly recognizes the existence of state enterprises and government monopolies and their competition in the market place.

In reality, the Claimant is asking this Tribunal to establish, under the guise of a Chapter 11 dispute, a super competition regime, the content of which is not ascertainable but left to the discretion of tribunals. This ignores the text of the NAFTA and of the provisions at issue.

A proper analysis of whether there has been a breach of national treatment with respect to the treatment afforded by Canada Post to UPS Canada as compared to the treatment afforded to Purolator requires the Claimant to establish the following:

- that the measure is an exercise of delegated governmental authority that accords treatment to UPS Canada and to Purolator; and
- UPS Canada is in like circumstances to Purolator in respect of the treatment accorded by these measures; and
- the measures provide less favourable treatment to UPS Canada than to Purolator.

A proper analysis of the question of whether there is a breach of national treatment with respect to Canada Post's pricing of its competitive products requires the Claimant to establish that:

- that the measure is an exercise of delegated governmental authority that accords treatment to UPS Canada and to Canada Post; and
- UPS Canada in like circumstances to Canada Post in respect of the treatment accorded by the measure; and
- the measure provides less favorable treatment to UPS Canada than to Canada Post.

When the proper test is applied, it is clear that the Claimant's case with respect to actions of Canada Post must fail because the impugned conduct is not an exercise of a delegated governmental authority. In the alternative, the Claimant failed to establish that the actions of Canada Post relate to UPS, that the "treatment" is accorded in like circumstances and that there is less favourable treatment accorded to the Claimant.

Where the proper comparison is made, it is clear that the Claimant does not receive less favourable treatment than it provides to comparable domestic investors.

Allegations of discriminatory Customs treatment

A proper analysis of whether there is a breach of national treatment with respect to Customs treatment of UPS Canada as compared to customs treatment of the mail requires the Claimant to establish:

- that there is a measure of the Government of Canada that accords treatment to UPS Canada and to Canada Post; and
- UPS Canada is in like circumstances to Canada Post in respect of the treatment accorded by the measures; and
- The measure provides less favourable treatment to UPS Canada than to Canada Post.

In respect of the Customs measures, the Claimant seeks to compare the treatment it receives with that allegedly received by Canada Post. The Claimant has failed to establish that Customs grants treatment to Canada Post and not the mail, that this treatment is accorded in like circumstances, and that it amounts to less favourable treatment of the Claimant. The differences between the two streams and the legitimate reasons for the creation of the two streams, which the Claimant recognizes, explain the

different customs processes. Having participated in the creation of the two streams and recognized its benefits, it is surprising that the Claimant now claims that it amounts to less favourable treatment.

Canada has demonstrated that none of the challenged measures have anything to do with discrimination based on nationality. Where the proper comparison is made, it is clear that Canada provides the Claimant not less favourable treatment than it provides to comparable domestic investors.

The Publications Assistance Program

A proper analysis of the claim with respect to the *Publications Assistance Program* requires considering:

- First, is the *Publications Assistance Program* a measure with respect to cultural industries and therefore falling within the scope of the cultural exemption?
- If not, is it a subsidy and therefore not subject to Article 1102 pursuant to the exception in Article 1108(7)(b)?
- If not, then is the program's requirement that the publications be delivered by Canada Post in order to receive the subsidy a breach of Article 1102?

With respect to the *Publications Assistance Program*, Canada's position is that the cultural exemption applies.

The proper test to establish a violation of NAFTA Article 1105

The Claimant argues that the Customs treatment of Canada Post, Canada Post's labor practices and Canada Post's dealings with Fritz Starber are in breach of NAFTA Article 1105. Canada's position is that none of the impugned actions constitute a breach of the customary international law minimum standard of treatment of aliens.

NAFTA Article 1105 requires the Claimant to show the existence of an applicable rule of customary international law that relates to foreign investment and establish that the

conduct meet the threshold of gravity contemplated at international law. The Claimant has not met this test.

In addition, these claims must fail for the following reasons:

- The facts alleged in respect of failure to assess duties and taxes and dealings with Fritz Starber are incorrect;
- The Claimant has no standing to raise labour violations under Chapter 11;
- In respect of Canada Post's dealings with Fritz Starber, the conduct at issue is not an exercise of delegated governmental authority.

Damages

Finally, the Claimant failed to establish the necessary causal link between the specific impugned measures and any damage it may have suffered.

PART II. THE CLAIMANT'S CONTINUED MISUNDERSTANDING OF THE RELATIONSHIP BETWEEN CHAPTER 11 AND CHAPTER 15

I. The Claimant's argument is flawed in law

1. Chapter 11 speaks of the obligations of the Parties to the NAFTA. Canada Post is not a Party to the NAFTA. It is a state enterprise and a government owned monopoly whose conduct is subject to the obligations set out in Chapter 15 of the NAFTA. Chapter 15 provides that Chapter 11 obligations are applicable to conduct of the monopoly or state enterprise in certain circumstances.

2. The Claimant seeks to circumvent the terms of Chapter 15 and make Canada Post's conduct always subject to NAFTA Chapter 11 obligations by invoking the general principles of state responsibility. These principles cannot serve to override what the NAFTA Parties provided.

3. Canada Post's conduct is only subject to Chapter 11 obligations, and to this Tribunal's jurisdiction, if it is an exercise of delegated governmental authority within the meaning of Articles 1502(3)(a) and 1503(2).

4. In other words, the Tribunal must first ask: what measure relating to the Claimant is alleged to be in breach of Canada's NAFTA Chapter 11 obligations? If it is a measure of Canada Post, rather than a measure of Canada directly, then the measure must also be an exercise of a delegated governmental authority. Only then can the Tribunal consider whether this exercise of the delegated governmental authority accords UPS Canada a less favourable treatment in like circumstances than to a domestic investor, or whether it accords treatment that is inconsistent with the minimum standard set out in Article 1105.

A. The text of the NAFTA distinguishes between obligations of the State and those that apply to actions of its state enterprise or monopoly

5. The Tribunal in its Award on Jurisdiction recognized that the NAFTA makes a

distinction between a breach flowing from the direct actions of a Party and a breach flowing from the conduct of a state enterprise.[1] While Chapter 11 applies to measures of a Party,[2] the text and title of Chapter 15 as well as the structure of the NAFTA make clear that Chapter 15 sets out the obligations applicable to monopolies and state enterprises.

6. The Claimant argues that Chapter 15 "supplements" the Chapter 11 obligations that may otherwise be applicable to state enterprises and monopolies through the general principles of state responsibility. The reading proposed by the Claimant cannot be reconciled with the language of Chapter 15. Articles 1502(3)(a) and 1503(2) specify that Chapter 11 is only applicable to the exercise of delegated governmental authority, and in the case of monopolies, where this authority is in connection with the monopoly good or service. This language clearly denotes an intention to limit the application of Chapter 11 obligations in the case of monopolies and state enterprises not to "supplement" or "complement"[3] it.[4]

7. Reading Chapter 11 to be directly applicable to measures by a monopoly or state enterprise would not simply create an overlap between Articles 1502(3)(a) and 1503(2) and Chapter 11, but would render these provisions of Chapter 15 redundant and inutile. This is contrary to the principle of effective treaty interpretation, which flows from the *Vienna Convention* and requires that all Chapters of the NAFTA, every provision and

---

[1] *United Parcel Service of America Inc. v. Government of Canada,* (November 22, 2002), (Award on Jurisdiction) [*UPS* Jurisdiction Award], para. 47. (Investor's Book of Authorities, Tab 48). In commenting on the relationship between Chapter 11 and Chapter 15, the Tribunal said: "A challenge can be brought by an investor when the "violations" of Chapter 11 obligations flow from the *direct* action of one of the Parties to the NAFTA or when they flow from conduct of state enterprises *in effect acting in the place of a Party*" [emphasis added]. See also para. 67 of the *UPS* Jurisdiction Award.

[2] NAFTA Article 1101.

[3] Investor's Reply, para. 476.

[4] Through Chapter 15, the Parties adapted relevant obligations to the particular context of monopolies and state enterprises. The limited application of Chapter 11 obligations to cases where the monopoly or state enterprise exercises delegated governmental authority is consistent with the anti-circumvention purpose of the provision described in Canada's Counter-Memorial. The Parties addressed separately in the other subparagraphs of Article 1502(3) and 1503 the obligations applicable to commercial conduct by these entities.

each of the terms be read harmoniously and be each given meaning.[5]

8. The Claimant ignores these clear indications that NAFTA Parties did not intend Chapter 11 to apply directly to state enterprises. The only support it offers for its interpretation is the reference to state enterprises in the exceptions contained in Article 1108(7).[6] Article 1108(7) provides that certain Chapter 11 obligations do not apply to procurements or subsidies "by a Party or a state enterprise". By contrast, the scope and coverage provision of Chapter 11 clearly indicates that "this Chapter applies to measures adopted or maintained by a Party".[7] The explicit reference to state enterprises in Article 1108(7)(a) can be understood as being included for greater certainty and ensure, for example, that a measure of a Party dealing with procurements of state enterprises would only be subject to the national treatment provision to the extent set out in Chapter 10, keeping in mind that Chapter 10 also applies to certain state enterprises. The reference to state enterprises in Article 1108(7)(b) ensures that when the provision of a subsidy by a state enterprise is an exercise of a delegated governmental authority, and therefore subject to Chapter 11 obligations by virtue of Article 1503(2), there is no requirement that it be accorded on a non-discriminatory basis.

B. The principles of state responsibility cannot be used to circumvent what the Parties provided in Chapter 15

9. The Claimant argues that under the general principles of state responsibility, states are responsible for acts of their organs, including crown corporations, and that Canada Post is an organ of Canada. From this, the Claimant concludes that all of

---

[5] *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, adopted 20 May 1996, at 23. (Respondent's Book of Authorities, Tab 67). See also *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R; WT/DS810/AB/R; WT/DS11/AB/R, adopted 1 November 1996, ("A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (ut res magis valeat quam pereat).", at 11. (Respondent's Book of Authorities, Tab 56); *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, adopted 12 January 2000, para. 81. (Respondent's Book of Authorities, Tab 58); *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, adopted 12 January 2000, para. 81. (Respondent's Book of Authorities, Tab 106).

[6] Investor's Reply, para. 482.

[7] NAFTA Article 1101.

Canada's obligations, including Chapter 11, are applicable to Canada Post, notwithstanding the language of Chapter 15.

10. The Claimant's analysis and conclusion are incorrect. Where the Parties to a treaty have specified their responsibility in respect of the conduct of certain entities, there is no need to turn to the general principles of state responsibility.

11. The principles of state responsibility do not set out the content of the international obligations.[8] The substance of the international obligation is determined by looking at the treaty.[9] In this case, the content of the NAFTA obligations for monopolies and state enterprises is set out in Chapter 15.

12. Moreover, to the extent the treaty contains special rules of responsibility, those will prevail over the general rules of state responsibility. [10] In this case, this requires examining the NAFTA provisions. In this respect, the Claimant's reliance on decisions of other international tribunals applying the state responsibility principles outside the NAFTA context does not assist it.[11] NAFTA Chapter 15, and Articles 1502(3)(a) and 1503(2), specify the state's obligation with respect to conduct of its monopolies and state enterprises and, therefore, the state's responsibility insofar as conduct of these entities is concerned. It is clear from the text that the Parties' intention was to have only certain

[8] The ILC Articles recognize that the treaty is the primary source for determining the state's responsibility. Article 2 of the ILC Articles identifies two conditions that must be met in order for conduct to attract responsibility: it must be attributable to the state and must constitute the breach of an international obligation. James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press) [ILC Articles and Commentaries] (Investor's Book of Authorities, Tab 3).

[9] ILC Commentaries, at 74. (Investor's Book of Authorities, Tab 3).

[10] The lex specialis principle is reflected in Article 55 of the ILC Articles. The ILC Commentaries at 306 note: "Article 55 makes it clear by reference to the lex specialis principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency." It comments: "Article 55 provides that the Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law." It further notes at 307: "For the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus the question is essentially one of interpretation." (Investor's Book of Authorities, Tab 3).

[11] Investor's Reply, para. 467.

obligations applicable to state enterprises and only in the specified circumstances. These rules deviate from the general rules of responsibility.[12] For example:

- The state is responsible for conduct of its monopoly or state enterprise that breaches applicable NAFTA obligations only where it is in the exercise of delegated governmental authority as defined by Articles 1502(3)(a) and 1503(2);

- The state is responsible for conduct of its monopoly that breaches NAFTA obligations only where the delegated governmental authority is in connection with the monopoly good or service;

- The state is only responsible for conduct of its state enterprise that breaches Chapter 11 and Chapter 14; not all NAFTA obligations are applicable to the conduct of the state enterprise even where it exercises delegated governmental authority.

13. As a result, Articles 1502(3)(a) and 1503(2) must prevail over the general principles of state responsibility invoked by the Claimant.

14. In order to determine whether Chapter 11 obligations are applicable to Canada Post, the question is not whether Canada Post is an organ of the state under the general rules of state responsibility, but whether the measures in question are an exercise of delegated governmental authority pursuant to Articles 1502(3)(a) and 1503(2).[13] The Claimant's arguments regarding Canada Post's status as an organ of the state, and the applicability of the principles of responsibility for state organs (reflected in Article 4 of the ILC Articles) rather than those for para-statal entities (reflected in Article 5 of the ILC Articles),[14] are not pertinent to determining whether Canada Post's conduct is

[12]While there are some similarities between Articles 1502(3)(a) and 1503(2) and Article 5 of the ILC Articles, as the Claimant notes in para. 472 of the Investor's Reply, these rules are not identical. Moreover, to the extent the Claimant argues that the rules of Article 4 of the ILC Articles are applicable, then the rules of Articles 1502(3)(a) and 1503(2) of the NAFTA differ significantly.

[13] The Claimant's characterization of Canada's position at para. 446 of the Investor's Reply is, therefore, not accurate.

[14] To the extent that the rules of state responsibility are found to be relevant, Canada's position remains that Canada Post is not a state organ as set out in Canada's Counter-Memorial, paras. 792, 808. Canada Post is not part of the formal structure of Government, it has legally distinct personality. Under the rules of state responsibility, this type of entity is considered to be a para-statal entity and its conduct only attributable to the state when it exercises governmental authority. See, Srilal M. Perera, "State Responsibility:

subject to NAFTA Chapter 11 obligations.

II. Meaning of exercise of delegated regulatory, administrative or other governmental authority in the NAFTA

15. The Claimant alleges that Canada Post's actions regarding access to its infrastructure, certain services it performs for customs and its dealings with Fritz Starber constitute a breach of Chapter 11. In order to determine whether the impugned measures by Canada Post are subject to Chapter 11 obligations, it is necessary to consider the meaning of the phrase "exercise of delegated regulatory, administrative or other governmental authority" in NAFTA Articles 1502(3)(a) and 1503(2).

16. The Claimant takes issue with Canada's reliance on the ordinary meaning of the terms "exercise" of "delegated governmental authority" and the context provided by the words "regulatory" and "administrative" and the examples that follow. Instead, the Claimant advances broad interpretations of "governmental authority" as including all conduct by a monopoly and state enterprise.

17. As was more fully discussed in Canada's Counter-Memorial,[15] the Claimant's interpretation is not supported by the context provided by the rest of the provision.

18. The words "wherever such monopoly [state enterprise] exercises any regulatory, administrative or other governmental authority that the Party has delegated to it…" in Articles 1502(3)(a) and Article 1503(2) indicate that the Parties' vicarious obligation under Article 1502(3)(a) or 1503(2) do not arise in every circumstance but only when the monopoly [state enterprise] exercises a "delegated regulatory, administrative or other governmental authority". This phrase would not have been necessary, if these provisions were meant to apply to all actions of monopolies or state enterprises.

19. Furthermore, while it is not necessary to define the precise contours of the words

---

Ascertaining the Liability of States in Foreign Investment Disputes" 6 (4, 2005) at 499-529. (Respondent's Book of Authorities, Tab 115).

[15] Canada's Counter-Memorial, paras. 810-813, 819-828.

"regulatory, administrative or other governmental authority" for the purpose of this arbitration, the nature of the "delegated regulatory, administrative or other governmental authority" contemplated is illustrated by the examples listed in these articles. The examples make clear that the phrase contemplates a formal[16] transfer to the state enterprise or monopoly of a power of a regulatory or governmental nature that can be exercised in relation to the investors or the investments of investors of another party.

20. What is also clear is that the delegated authority contemplated in Articles 1502(3)(a) and 1503(2) excludes commercial activities of the governmental monopolies or state enterprises. This is reinforced by the remaining paragraphs of these Articles which concern conduct of a commercial nature.[17] This distinction between actions in the exercise of delegated governmental authority within the meaning of Articles 1502(3)(a) and 1503(2) and commercial activities of monopolies and state enterprises covered by the other provisions of articles 1502(3) and 1503 was recognized by the Tribunal in its Award on Jurisdiction.[18]

21. These conclusions are also reinforced by the railway example given in the commentaries to Article 5 of the ILC Articles, and to which the Claimant refers.[19] In that example, the distinction is made between the exercise of police powers granted to a railway which are considered an exercise of governmental authority and the sale of tickets or purchase of rolling stock which is not because it is a commercial activity. Canada Post does not exercise any police powers. As will be examined below, the conduct complained of relates to commercial actions like contracting to provide distribution services and attribution of costs within the Corporation that are akin to the

[16] Contrary to what the Claimant argues (Investor's Reply, para. 690), the formal nature of the delegation is made clear by the fact that Note 45 of NAFTA speaks of acts such as a "legislative grant".

[17] For example, Article 1503(3) imposes a non-discrimination obligation in the state enterprise's sale of its goods or services but not its purchases. Reading governmental authority in Article 1502(3)(a) as including commercial conduct and, therefore, making it subject to Article 1102, would make Article 1503(3) repetitious. Furthermore, it would lead to an absurd result as Article 1503(3) is a non-discrimination obligation with a narrower scope of application.

[18] *UPS* Jurisdiction Award, para. 18. (Investor's Book of Authorities, Tab 48).

[19] Investor's Reply, paras. 694-696.

sale of tickets by the railway. The fact that the competitive services support public policy objectives does not change the nature of the conduct.

III. The conduct of Canada Post at issue is not subject to Chapter 11 obligations because it is not an exercise of delegated governmental authority

22. The Claimant argues that everything Canada Post does is governmental authority and, therefore, that its conduct is always subject to Chapter 11 obligations.[20] It also makes reference to certain specific authorities allegedly delegated to Canada Post. Both claims are incorrect.

A. Not all Canada Post's actions are an exercise of governmental authority

23. The Claimant invokes various reasons in support of its proposition that everything Canada Post does is governmental authority. Its main argument seems to be that Canada Post exercises such authority because of its very nature[21] including the fact that it is an institution of government, owned and controlled by Canada, and an agent of the Government. It also argues that it exercises a delegated governmental authority because it pursues public policy objectives[22] and has the same functions as the old Post Office Department.

24. The Claimant spends a great deal of effort describing Canada Post as being an entity "controlled by Canada" and "part of the government"[23]. These characteristics go to the nature of a Crown corporation and therefore to its status as a state enterprise for the purpose of NAFTA Chapter 15. They do not assist in determining whether, in addition to being a state enterprise, Canada Post exercises delegated governmental authority. If it was, the requirement that the entity exercises delegated authority contained in Articles 1502(3)(a) and 1503(2) would be superfluous. Rather, it is necessary for each alleged

[20] Investor's Reply, para. 445.

[21] Investor's Reply, paras. 83, 450 *et.seq.* and 693 *et.seq*.

[22] Investor's Reply, paras. 457 *et. seq*. and 696-697.

[23] Investor's Reply, para. 451-456, 461. The Claimant also incorrectly alleges that Canada Post does not pay taxes.

violation to identify specifically the measure at issue, examine its nature and whether it is an exercise of a delegated governmental authority.

25. The Claimant's attempt at reformulating Articles 1502(3)(a) and 1503(2) as making Chapter 11 obligations applicable where the entity "acts under governmental authority"[24] must also be rejected. The proper question is whether the entity is exercising an authority of a regulatory or governmental nature, not whether it is authorized to do something. The fact that legislation creating Canada Post authorizes it to deliver mail and to provide competitive services does not make Canada Post's commercial decisions related to its network, its products, and pricing of these products an exercise of governmental authority. These are commercial actions that private corporations undertake every day without any governmental delegation.

26. The Claimant also confuses the issue by equating actions in pursuit of public policy objectives as being of a governmental nature and, therefore, an exercise of governmental authority.[25] Canada Post pursues both public policy objectives and commercial objectives. By definition, state enterprises or government monopolies are created to serve a public policy objective. These objectives cannot be put into water tight compartments as the Claimant would suggest. In and of itself, the pursuit of public policy objectives does not indicate whether the particular conduct of Canada Post at issue is an exercise of some governmental authority that Canada has delegated to it. Similarly, the fact that mail was previously delivered by the Post Office is not determinative of whether Canada Post exercises delegated governmental authority with respect to its dealings with Purolator, the pricing of its competitive services, its commercial dealings with Fritz Starber, or its collection of duties and taxes for Customs. The nature of the authority at issue in each case must be examined.

27. Finally, the Claimant's argument that all of Canada Post's impugned actions and, in particular its commercial activities are an exercise of governmental authority, is

[24] See e.g. Investor's Reply, para. 693.

[25] Investor's Reply, para. 697.

inconsistent with its assertion that UPS Canada and Canada Post compete in the market place and that they are in like circumstances.

B. None of the measures alleged to breach Chapter 11 concern an exercise of delegated governmental authority by Canada Post

28. Apart from arguing that everything Canada Post does is an exercise of delegated governmental authority, the Claimant does not identify specifically how the challenged measures of Canada Post are an exercise of governmental authority.

29. In its Reply, the Claimant simply alleges that the following are an exercise of delegated governmental authority:[26]

a) Canada Post's discriminatory leveraging of the Monopoly Infrastructure.[27]

b) Canada Post's failure to perform customs duties and collect duties and taxes; and[28]

c) Canada Post's unfair denial of Fritz Starber's bid.[29]

30. The allegations regarding authority "delegated" to Canada Post are based on mischaracterizations of the facts. In reality, there is no exercise of governmental authority at issue. Canada Post's decisions related to the costing of its products or the terms under which it grants access to the postal infrastructure[30] are commercial decisions that do not flow from any transfer of governmental authority. Contracting decisions with

[26] Although in its factual section the Investor also refers to delegated governmental authority in relation to defining the universal service obligation, what constitutes a letter and setting the rates of postage, it does not explain how this in any way refers to the challenged measures and does not later refer to it in its legal argument. (Investor's Reply, paras. 80-82).

[27] Investor's Reply, paras. 688-689. The Investor's continued reference to Canada Post's "Monopoly Infrastructure" is incorrect. As Canada explained in its Counter-Memorial, there is no Monopoly Infrastructure, rather a single infrastructure that delivers all of Canada Post's services. Indeed, the Investor appears to concede this point in its Reply at para. 124.

[28] Investor's Reply, para. 689.

[29] Investor's Reply, para. 689. This is also referred to as an exercise of monopoly privileges at paras. 203-204 of the Investor's Reply.

[30] The Claimant challenges access to the Canada Post network by Purolator as well as by Canada Post's own products. Both are commercial decisions.

respect to freight forwarding services are not an exercise of a governmental authority. Similarly, providing certain administrative services to Customs like material handling and data entry pursuant to a commercial arrangement is not a delegated governmental authority. Although Canada Post collects duties and taxes on behalf of Customs, it does not assess duties and taxes.

31. Finally, the Claimant's characterization of this dispute as unfair competition in the market place by one of its competitors, Canada Post, illustrates perfectly how this dispute relates to commercial behaviour and not the exercise of governmental authority by Canada Post.

32. Therefore, given that the conduct of Canada Post at issue is not an exercise of a delegated governmental authority, Chapter 11 obligations are not applicable to this conduct. In Canada's submission, the Tribunal must dispose of the allegations regarding conduct of Canada Post on this basis alone.

IV. No obligation in the NAFTA regarding how the parties should regulate their monopolies and state enterprises

33. In its Memorial and, again, in its Reply, the Claimant discusses at length what it qualifies as inadequate regulatory control and supervision of Canada Post. According to the Claimant this is relevant to determining whether Canada has acted to meet its "positive obligation" under Articles 1502(3)(a) and 1503(2) to regulate and supervise Canada Post in order to prevent it from breaching NAFTA Chapter 11 obligations.[31]

34. First, if what the Claimant is arguing is that there is a breach of Articles 1502(3)(a) and 1503(2) independently from a breach of Chapter 11, the Tribunal has already determined that it has no jurisdiction over the matter.[32]

35. Second, in Canada's submission, there is no independent stand-alone obligation to regulate or supervise monopolies or state enterprises pursuant to Articles 1502(3)(a) and

[31] Investor's Reply, paras. 203, 204, 712.

[32] *UPS* Jurisdiction Award, para. 69. (Investor's Book of Authorities, Tab 48).

1503(2). Canada is responsible for any breach of Chapter 11 that results from the exercise of a delegated governmental authority by a state enterprise such as Canada Post. Therefore, the Claimant's arguments about lack of sufficient regulation of Canada Post are, in addition to being factually incorrect[33] and contradicting some of its own statements,[34] not necessary to determining a breach of Articles 1502(3)(a) and 1503(2).[35]

36. The Claimant's argument that there is a positive obligation for the state to act rests on the inclusion of the word "ensure" and the reference to "regulatory control, administrative supervision or the application of other measures". This interpretation is contrary to the ordinary meaning of the text.[36] The word "ensure" means to make certain and is commonly used in treaty drafting to connote an obligation of result. Furthermore, if the Parties had intended to create a positive obligation, they would have indicated how the obligation could be satisfied. Instead, the text seems to leave the parties discretion to choose the appropriate means (such as regulatory control, administrative supervision) so long as the result is that the state enterprise and monopoly actions are consistent with NAFTA obligations. No reasonable interpretation of the words "through regulatory control, administrative supervision or the application of other measures" can lead to the specific standard of supervision that the Claimant suggests is required.[37] Nowhere does

---

[33] The extensive regulation and governance regime of Canada Post are described in Canada's Counter-Memorial, paras. 192-233. See generally Expert Report of Robert Campbell, [Campbell 1] and the Affidavit of Gordon Ferguson [Ferguson Affidavit]. (Respondent's Book of Expert Reports and Affidavits, Tabs 5 and 11).

[34] Investor's Reply, para. 86. The Claimant's arguments are contradictory. The Claimant argues both that Canada Post is "out-of-control" and lacks supervision and that it is subject to the influence and control of the government, an organ of the state and, therefore, that everything it does should be attributed to the government.

[35] However, as set out in Canada's Counter-Memorial, governance of Canada Post and applicable laws and regulations and administrative practices may be relevant: legally, with respect to the determination of like circumstances given the additional regulatory and social policy burdens imposed on CPC, and factually, as they support other evidence in showing that CPC does not cross-subsidize.

[36] Canada's Counter-Memorial, para. 844.

[37] Investor's Reply, para. 211. The Claimant and its expert, James Campbell, suggest that whether there is adequate supervision can be determined by looking at the practices of industrialized countries such as the European Union, the United States, Australia and New Zealand. They conclude that it would require "transparent oversight of accounting rules by an independent regulator and not just the postal operators' own auditors" and rules to ensure "fairness and quality of universal service", and "prevent the public postal operator from competing unfairly against other companies" that is by requiring "more than just

Chapter 15 mention a requirement for an independent regulator in the case of monopolies and state enterprises. The phrase "ensure, through regulatory control, administrative supervision or the application of other measures that any state enterprise […] act in a manner […]" establishes an obligation of result.

37. In summary, so long as the state enterprise and monopoly respect the obligations set out in Articles 1502(3)(a) or 1503(2), there can be no breach of these provisions because of lack of supervision. Conversely, if the state enterprise and monopoly does not respect the obligations set out in Articles 1502(3)(a) or 1503(2), there is no need to consider the scope of a Party's supervision of its monopoly or state enterprise. There is a breach of these provisions whether or not there is an independent regulator.

---

contributions from competitive services that exceed incremental costs." (Investor's Brief of Witness Statements and Expert Reports, Tab 13).

PART III. THERE IS NO NATIONAL TREATMENT VIOLATION

I. The Test Set Out by the Claimant Contains Numerous Errors

38. The Claimant's national treatment case is contingent upon its interpretation that the essence of Article 1102 "is the protection of equality of competitive opportunities"[38] and that any treatment accorded to UPS Canada and to Canada Post can be compared because they compete in the courier market.[39] The Claimant summarises its analysis as follows:

> …the essence of national treatment is the protection of equality of competitive opportunities between the domestic and foreign economic interests defined in the treaty. These interests are typically defined to be products, services, intellectual property rights or investments. The analysis requires, as a first step, the determination of a competitive relationship between the interests, then a determination of whether there is equality of competitive opportunities within this relationship.[40]

39. There are at least five reasons that the Claimant's interpretation must be rejected:

- it is not consistent with the language of Article 1102;
- the question of whether treatment is being accorded "in like circumstances" is not resolved by merely showing that two products or services compete in the same business sector;
- the proper comparisons should take into account public policy as part of the relevant considerations of whether the treatment is accorded "in like circumstances";
- the Claimant's "best in jurisdiction" test would allow it to avoid choosing the proper comparator; and
- the Claimant cannot incorporate a broad reference to competitive equality derived from the "like products" test in GATT/WTO jurisprudence to short circuit the test set out in Article 1102.

[38] Investor's Reply, para. 488.

[39] Investor's Reply, para. 601.

[40] Investor's Reply, para. 488 (footnote omitted).

A. The Claimant's interpretation of Article 1102 is not consistent with its language

40. The Claimant argues that the first step in the analysis is to determine the existence of a competitive relationship; the next step is to determine whether a Party's measures have had systemic less favourable effect on the competitive relationship.[41] According to the Claimant, national treatment contains a positive requirement on the government to interfere in the market to ensure an equality of competition between two competitors.[42]

41. Canada disagrees. Article 1102 does not create a positive obligation to interfere in the existing market-place to create equality or force access. Simply stated, it obliges Parties to adopt measures that do not discriminate on the grounds of nationality.

42. As Canada explained in its Counter-Memorial, Article 1102 must be interpreted according to the rules set out in Article 31 of the *Vienna Convention*. Three critical elements emerge from the text:

- First, the Tribunal must determine that Canada accorded treatment to the Claimant or UPS Canada, and to a domestic investor or its investment.
- Second, the Tribunal must determine that Canada accorded these treatments "in like circumstances".[43] It is in this context that nationality-based discrimination is important.
- And third, the Tribunal must determine whether the treatment accorded to the Claimant or UPS Canada was "no less favorable".

43. The positions advanced by the United States and Mexico, most recently in

---

[41] Investor's Reply, para. 501.

[42] See e.g. Investor's Reply, paras. 526(a) and 534.

[43] Previous arbitrations have not established a consistent interpretive approach, although treatment "in like circumstances" appears to have been a particular focus. It was largely the determinative factor in *S.D. Myers, Inc. v. Government of Canada*, (Partial Award), (November 12, 2000), 40 ILM 1408 (2001), [*Myers* Partial Award] (Investor's Book of Authorities, Tab 4); *Pope & Talbot Inc. v. Government of Canada*, (Award on the Merits of Phase 2), (April 10, 2001) [*Pope & Talbot* Merits Award]. (Investor's Book of Authorities, Tab 7); *The Loewen Group, Inc. et al v. United States of America*, (Award), (June 26, 2003); 42 ILM 811 [*Loewen* Award], (Respondent's Book of Authorities, Tab 61), and *GAMI Investments, Inc. v. Government of the United Mexican States,* (November 15, 2004), (Final Award), [*GAMI* Award]. (Investor's Book of Authorities, Tab 100).

Methanex and in *GAMI*, are consistent with Canada's interpretation of Article 1102. According to Mexico, Article 1102 requires two types of comparison. Paragraph 1 establishes a comparison between the treatment granted by a NAFTA Party to its own investors and the treatment that it grants to the investors of another Party in like circumstances. Paragraph 2 establishes a comparison between the treatment of investments of investors.

> Both require appropriate reference points in respect of the treatment granted. It is thus indispensable to determine what treatment the Party grants, and for what and to whom it is granted.[44]

44. For its part, the United States argued in *Methanex* that

> Depending on the treatment in question, the product produced by an investment might be *part* of the relevant circumstances contemplated by Article 1102 – or it might not be.[45]

45. The *Methanex* Tribunal endorsed the US interpretation:

> Given the object of Article 1102 and the flexibility which the provision provides in its adoption of "like circumstances", it would be as perverse to ignore identical comparators if they were available and to use comparators that were less "like", as it would be perverse to refuse to find and apply less "like" comparators when no identical comparators existed.[46]

46. The Claimant's interpretation of Article 1102 runs counter to the ordinary meaning of this provision as understood by all three NAFTA Parties.

---

[44] Courtesy Translation of Mexico's Statement of Defence in *GAMI v. United Mexican States,* paras. 259-260. (Respondent's Book of Authorities, Tab 109).

[45] Amended Statement of Defense of Respondent United States of America in *Methanex v. United States*, 5 December 2003, para. 301 (footnote omitted; emphasis in original). (Respondent's Book of Authorities, Tab 111); see also the Counter-Memorial of the United States in *Loewen v. United States*, at 120, in which it argues as follows: "Determining what the "like circumstances" are for any Article 1102 analysis depends on the nature of the treatment at issue and all the relevant facts of the case." (Respondent's Book of Authorities, Tab 110).

[46] *Methanex Corporation v. United States of America*, (August 3, 2005), (Final Award of the Tribunal on Jurisdiction and Merits), [*Methanex* Award], Part IV, Chapter B, at 8, para. 17. (Investor's Book of Authorities, Tab 171).

B. Test is not whether products or services compete or are in the same business sector

47. If the words "in like circumstances" were intended to mean "same business sector" or "competitive relationship", the drafters would have said so.

48. Canada does not dispute the fact that when two companies are in the same business sector this is a factor that may go to whether the treatment is accorded in like circumstances.[47] However, Article 1102 requires the consideration of all "circumstances".

49. The case law dealing with the interpretation of Article 1102 consistently shows that it is not enough that companies compete in the same sector in order to prove that they are receiving treatment in like circumstances. For example, in *GAMI,* the Tribunal did not hold two sugar mills were in like circumstances even though both were producing sugar. This is because the business sector analysis was not the lone consideration. The Tribunal considered other circumstances, such as the businesses' insolvency. The circumstances were considered in relation to the treatment being accorded, which in that case was the expropriation of certain sugar mills.[48]

50. In *Loewen*, the Tribunal refused to accept that two owners of funeral homes were in like circumstances. Although they were in the same business sector, both were not defendants in court proceedings.

51. In *Feldman,* the Tribunal held that two companies that exported cigarettes were treated differently by the Mexican government, and this did not amount to a breach of Article 1102. The crucial distinction in their treatment by Mexico was that one produced

[47] Canada disputes the Claimant's recharacterization of Canada's argument. Canada never said that whether two investors or investments compete necessarily forms the beginning of the analysis as it suggests. (Investor's Reply, para. 493). Canada stated that "The fact that two businesses are in the same business sector may be the beginning of an examination of the circumstances of the particular treatments." (Canada's Counter-Memorial, para. 596). There may be instances when competing in the same business sector may not be a factor and, hence, it would not form the "beginning" of the analysis.

[48] *GAMI Investments, Inc. v. Government of the United Mexican States,* (November 15, 2004), (Final Award), [*GAMI* Award]. (Investor's Book of Authorities, Tab 100).

cigarettes and exported them while the other company bought cigarettes and exported them. So, although the two businesses competed in the export market, they were not being accorded treatment "in like circumstances".[49]

52. The "in like circumstances" analysis must be completed on a case-by-case basis, taking various factors into account, which may include, but are not limited to, the business sector. The contextual analysis also requires consideration of the circumstances that led to the treatment in question. It is therefore impossible to ignore the policy considerations of the government in enacting the measures that form the subject of the complaint.

C. Public policy forms part of the relevant considerations of whether treatment is accorded "in like circumstances"

53. The Claimant concedes that "the tribunal must examine whether public policy considerations are generally relevant to the discriminatory treatment in question".[50] Therefore, the only dispute between the parties is at what point they are to be considered in the "in like circumstances" analysis.

54. In the Claimant's opinion, public policy considerations either serve as an exception, which Canada must prove, as a tool to evaluate a competitive relationship or as evidence of discriminatory intent, in the case of their absence.[51]

55. NAFTA Chapter 11 Tribunals have consistently referred to the Parties' public policy considerations. With the exception of the *Pope & Talbot* decision, which saw public policy as an exception, no Tribunal has applied public policy in any of the ways put forward by the Claimant. The trend of Chapter 11 decisions demonstrates that public policy considerations are relevant when determining whether the treatment was accorded "in like circumstances".

---

[49] *Marvin Feldman v. Mexico* (Case No. ARB(AF)/99/1), (December 16, 2002), (Award), [*Feldman* Award]. (Investor's Book of Authorities, Tab 8).

[50] Investor's Reply, para. 7.

[51] Investor's Reply, para. 553.

56. The decisions show that a difference in treatment does not necessarily breach Article 1102 when the treatment is not discriminatory, but based on legitimate government policy. Legitimate policy considerations or public interest grounds have included environmental protection (*S.D. Myers*), compliance with other international agreements (*Pope & Talbot*), and efforts to better control tax revenues, discourage cigarette smuggling, protect intellectual property rights and prohibit grey market sales (*Feldman*).

57. Also, the *Feldman* Tribunal shows that it may be inappropriate to subdivide a business for the purposes of the 'in like circumstances' comparison. This is the case where there are rational bases for treating the businesses differently with respect to their function in society.

58. Where a rational basis for different treatment exists, but the Party has not implemented it perfectly, or even correctly, this is not enough to breach Article 1102. As the *GAMI* Tribunal has confirmed, the fact that a government may have been misguided, clumsy or ineffective will not amount to a breach of Article 1102. "That is a matter of policy and politics."[52]

59. Therefore, it is not for the Claimant to second-guess the validity of the policy objectives or argue that there is a better way to meet these objectives. Chapter 11 does not task arbitral tribunals to sit in judgment on whether a State's policy choices are proper. Nor is it a function of such tribunals to determine whether a State's policy-making process is best suited to advancing government objectives. Rather, the function of Chapter 11 tribunals is to apply definite legal standards to the facts before them, which in this case is discrimination on the grounds of nationality.

D. The Claimant must choose the proper comparator

60. Whether a Party accords foreign investors or their investment "treatment no less favorable than it accords, in like circumstances," to its own investors or their investments,

[52] *GAMI* Award, para. 114. (Investor's Book of Authorities, Tab 100).

is the test that the Claimant must satisfy. Therefore, the Claimant must choose the appropriate domestic comparator, taking all relevant circumstances into account.

61. The Claimant has identified Canada Post as the comparator of UPS Canada for the purposes of the "in like circumstances" analysis, despite the fact that Canada Post is not an identical comparator, unlike other recipients of much of the impugned treatment, such as CanPar.

62. According to the *Methanex* Tribunal, "[t]he key question is: who is the proper comparator?"[53] And it continued:

> It would be a forced application of Article 1102 if a tribunal were to ignore the identical comparator and to try to lever in an, at best, approximate (and arguably inappropriate comparator).[54]

63. The *Methanex* Tribunal decided that it is necessary to properly define the class of comparators, choosing identical ones if they exist, before proceeding to an analysis of whether the treatment is no less favourable.[55] In choosing comparators, it is necessary to do so in relation to the treatment that the Party accords.[56]

64. The guidance from the *Methanex* Tribunal is highly instructive and consistent with NAFTA Article 1102 jurisprudence to date, including *Feldman* and *Pope &*

---

[53] *Methanex* Award, Part IV, Chapter B, at 8, para. 17. (Investor's Book of Authorities, Tab 171).

[54] *Methanex* Award, Part IV, Chapter B, at 9, para. 19. (Investor's Book of Authorities, Tab 171).

[55] Investor's Reply, para. 545; at least three other Tribunals have treated "in like circumstances" as a form of condition precedent as well. See *Feldman* Award, para. 170, where the Tribunal held that where there are rational bases for differential treatment, there is no violation of international law. (Investor's Book of Authorities, Tab 8). In *The Loewen Group, Inc. et al* v. *United States of America*, (Award), (June 26, 2003); 42 ILM 811 [*Loewen* Award], para. 140, the Tribunal refused to undertake any comparison in the absence of evidence that treatment was accorded in like circumstances. (Respondent's Book of Authorities, Tab 61). In *GAMI*, para. 114, the Tribunal was not convinced that any difference in treatment was "wrong" unless it was first persuaded that the circumstances in which treatment was accorded were sufficiently like. (Investor's Book of Authorities, Tab 100).

[56] This is consistent with the arguments of Mexico and the US, cited above in paras. 43-44; see also Canada's Counter-Memorial, paras. 489 *et. seq*.

Talbot.[57]

65. The Tribunals in both *Pope & Talbot* and *Methanex* had to contend with precisely the same argument that the Claimant advances in this case, namely that the Tribunal should overlook the better comparator on the basis that a "best treatment in jurisdiction" analysis requires it.[58] The *Pope & Talbot* Tribunal rejected the "best in jurisdiction" argument when it found that the chosen comparator, that was selected on a "best in jurisdiction" basis, was not in like circumstances. While the *Methanex* Tribunal did consider the "most favorable" treatment, this was due to its consideration of Article 1102(3). It did not accept the "best in treatment argument" when applying Article 1102(1) or (2). The *Methanex* Tribunal rejected the argument when it stated that the investor's claim to such treatment "simply does not resolve Methanex's difficulty" that there are other comparators that are identical to it.[59]

66. The Claimant in this case is faced with the same difficulty. It has identified Canada's postal authority as the domestic comparator that receives treatment in like circumstances, but in so doing, ignores the identical comparators. Canada's domestic courier companies, such as CanPar, receive treatment that is in like circumstances with the treatment accorded to UPS Canada with respect to Customs treatment, access to Canada Post's infrastructure and the Publications Assistance Program.

67. As in the case of *Methanex*, if the Claimant improperly identifies the comparator, its claim under Article 1102 must fail on that basis, since it would be impossible for it to

---

[57] The *Feldman* Tribunal found that "the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the business of reselling/exporting cigarettes. Other Mexican firms that may also export cigarettes, such as Mexican cigarette producers, are not in like circumstances." *Feldman* Award, para. 171. (Investor's Book of Authorities, Tab 8). Likewise, in the *Pope & Talbot* Merits Award, paras. 87-88, the Tribunal preferred to select entities that were in the most "like circumstances" and not comparators that were in less "like circumstances". (Investor's Book of Authorities, Tab 7).

[58] *Pope & Talbot, Inc. v. Government of Canada,* Statement of Claim, (March 25, 1999), paras. 74, 75 [Pope & Talbot Statement of Claim]. (Respondent's Book of Authorities, Tab 114); See also Methanex Second Amended Statement of Claim, para. 308. (Investor's Book of Authorities, Tab 175).

[59] *Methanex* Award, Part IV, Chapter B, at 8, paras. 17, 21. (Investor's Book of Authorities, Tab 171).

"receive treatment less favourable than [the domestic] investors in like circumstances."[60]

E. The Claimant cannot use a broad reference to competitive inequality to short circuit the test set out in Article 1102

68. The Claimant's case on "equality of competitive opportunities" does not cite a single NAFTA Chapter 11 case in support.[61] This is not surprising, since not a single NAFTA Chapter 11 tribunal has accepted its interpretation of Article 1102. It is a test that has been applied by WTO panels, arising out of treaty language that is altogether different than the language found in the provision at issue in this case.

69. Canada agrees that provisions guaranteeing "national treatment" exist in a variety of agreements. This does not make "national treatment" a term of art with an identical meaning in every treaty in which it appears.

70. Within the national treatment analysis in the WTO, the concept of equality of competitive opportunities with respect to "like products" means *not* changing conditions of competition between foreign and domestic products by imposing measures that discriminate against products on account of their origin. While substitutability of products or services may be relevant with respect to "like products" or "like services"[62], it cannot be easily transposed to the investment context. Under Chapter 11, national treatment does not impose competition law obligations or a positive requirement on the government to ensure an equality of competition between investors. Article 1102 is designed to protect against discrimination on the grounds of nationality. Its interpretation must be understood in relation to this purpose.

71. The interpretive relevance of WTO law for NAFTA Article 1102 is in how the

---

[60] *Methanex* Award, Part IV, Chapter B, at 8, para. 22. (Investor's Book of Authorities, Tab 171).

[61] Footnote 621 of the Investor's Reply cites three WTO cases in support of opinion that this notion is at the essence national treatment.

[62] Although, it should be noted that Canada's commitments under the General Agreement on Trade in Services, like those of Mexico and the US, specifically distinguish between courier services and postal services. These two services are not to be accorded the same treatment. (Canada's Counter-Memorial, para. 693).

provisions are different. As the *Methanex* Tribunal so clearly points out with respect to paragraphs 1, 2 and 3 of Article 1102:

> These provisions do not use the term of art in international trade law, "like products", which appears in and plays a critical role in the application of GATT Article III. Indeed, the term "like products" appears nowhere in NAFTA Chapter 11.[63]

72. The fact that Article 1102 does not contain the wording "like products", "like services" or even "like investments" or "like investors" is telling. It is equally telling that the provision does not employ the phrase "any like, directly competitive or substitutable investment, as the case may be". The different choice of wording in Article 1102 is precisely what led the *Methanex* Tribunal to conclude that:

> International law directs this Tribunal, first and foremost, to the text; here, the text and the drafters' intentions, which it manifests, show that trade provisions were not to be transported to investment provisions.[64]

73. This stands to reason because, as the United States argued, the concern of the GATT is "with the activity of importation of goods and their 'sale, offering for sale, purchase, transportation, distribution or use'".[65] The concern of Article 1102 is not the same, since it is meant to deal with the activity of investment and the circumstances of the investment and the related treatment.

74. How a government regulates the activities of an investor and all of its investments is highly complex compared to its regulation of the purchase, sale and distribution of a good or a cross-border service. For this reason, Article 1102 requires a contextual analysis based on all relevant circumstances, while the "like products" and "like services" tests comprise a list of objective criteria relating to competition in the market place.

---

[63] *Methanex* Award, Part IV, Chapter B, at 14, para. 30. (Investor's Book of Authorities, Tab 171).

[64] *Methanex* Award, Part IV, Chapter B, at 19, para. 37. (Investor's Book of Authorities, Tab 171).

[65] *Methanex v. United States,* Amended Statement of Defense of Respondent United States of America, (5 December 2003), para. 300. (Respondent's Book of Authorities, Tab 111).

75. The Claimant seeks to import the concept of competitive equality through a selective reading of WTO jurisprudence in a manner that ignores the ordinary meaning of Article 1102. To oblige Canada to interfere in the market in order to neutralize Canada Post's ability to benefit from economies of scope and scale does not fall within the purpose of Article 1102. None of the provision's terms support the imposition of a positive duty to ensure a climate of equality of competition between investors.

76. Nor do the terms of Article 1102 support the imposition of competition law on investors. In fact, one Tribunal has interpreted "in like circumstances" in a manner that permits measures considered to be "anti-competitive".[66]

77. The Claimant's argument that the words "in like circumstances" in NAFTA Chapter 11 have the same meaning as "like services and service providers" has no merit.[67] To accept the Claimant's desire to import a selective part of the "like products" and "like services" tests from WTO law would cause the Tribunal to look past the ordinary meaning of Article 1102.

78. The *Methanex* Tribunal agreed with this basic difference between trade law terms and Article 1102. Its reasoning with respect to trade law provisions employing the term of art "like products" applies squarely to this case:

> It is thus apparent from the text that the drafters of NAFTA were careful and precise about the inclusion and the location of the respective terms, "like goods", "any like, directly competitive or substitutable goods, as the case may be", and "like circumstances". Like "goods" is never used with respect to the investment regime of Chapter 11 and "like circumstances", which is all that is used in Article 1102 for investment, is used with respect to standards-related measures that might constitute technical barriers to trade only in relation to services; nowhere in NAFTA is it used in relation to goods.

[66] In the *Feldman* Award, para. 170, the Tribunal stated that where rational bases exist for treating the identified comparators differently, the treatment cannot be accorded "in like circumstances", "even if some of these may be anti-competitive." (Investor's Book of Authorities, Tab 8).

[67] Investor's Reply, para. 512.

> It may also be assumed that if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a GATT-type formula, they could have produced a version of Article 1102 stating "Each Party shall accord to investors [or investments] of another Party treatment no less favorable than it accords its own investors, in like circumstances *with respect to any like, directly competitive or substitutable goods"*. It is clear from this constructive exercise how incongruous, indeed odd, would be the juxtaposition in a single provision dealing with investment of "like circumstances" and "any like, directly competitive or substitutable goods".
>
> In any event, the drafters did not insert the above italicized words in Article 1102; and it would be unwarranted for a tribunal interpreting the provision to act as if they had, unless there were clear indications elsewhere in the text that, at best, the drafters wished to do so or, at least, that they were not opposed to doing so […][68]

79. Nor did the drafters insert the words "Each Party shall accord to investors [or investments] of another Party treatment no less favourable than it accords its own investors, in like circumstances *with respect to any like, directly competitive or substitutable services*." To apply the reasoning of the *Methanex* Tribunal, the concepts of "like services", "competitive or substitutable services" or "equality of competitive opportunities" are trade law concepts that are not found in Article 1102 and "these trade provisions were not to be transported to investment provisions."[69]

80. While Canada maintains that WTO jurisprudence is of limited relevance, it is important to point out that the Claimant's concept of "conditions of competitive equality" has not been adopted by the Appellate Body either:

> The Appellate Body indicated in *Korea – Various Measures on Beef* that imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market *to the detriment of imported products*. However, the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this

[68] *Methanex* Award, Part IV, Chapter B, at 17-18, paras. 33-35. (Investor's Book of Authorities, Tab 171).

[69] *Methanex* Award, Part IV, Chapter B, at 19, para. 37. (Investor's Book of Authorities, Tab 171).

> measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case. In this specific case, the mere demonstration that the per-unit cost of the bond requirement for imported cigarettes was higher than for some domestic cigarettes during a particular period is not, in our view, *sufficient* to establish "less favourable treatment" under Article III:4 of the GATT 1994. Indeed, the difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market). In this case, the difference between the per-unit costs of the bond requirement alleged by Honduras does not depend on the foreign origin of the imported cigarettes. Therefore, in our view, the Panel was correct in dismissing the argument that the bond requirement accords less favourable treatment to imported cigarettes because the per-unit cost of the bond was higher for the importer of Honduran cigarettes than for two domestic producers.[70]

II. Summary of the proper test

81. Article 1102 provides a single rule. Like the general rule of interpretation in Article 31 of the Vienna Convention, none of the individual elements in Article 1102 makes any sense on its own, without reference to the other elements.

82. For this reason, it is impossible to analyse whether a treatment is "no less favorable" without first setting out the treatment of the comparators that is "in like circumstances".

83. It is also impossible to consider whether two comparators are operating "in like circumstances" without reference to the treatment being accorded.

84. To summarise, three critical elements emerge from the text of Article 1102:

---

[70] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Report of the Appellate Body, WT/DS302/AB/R, 25 April 2005, para. 96 (footnotes omitted, emphasis in original). (Respondent's Book of Authorities, Tab 108).

- First, the Claimant must prove that Canada accorded treatment to UPS Canada, and to a domestic investor or its investment.

- Second, the Claimant must show that Canada accorded these treatments "in like circumstances". It is in this context that nationality-based discrimination is important.

- And third, the Claimant must demonstrate that the treatment accorded to the Claimant or UPS Canada was not "no less favorable".

85. The investor bears the burden of establishing each of these elements.

III. There is no breach of Article 1102 with respect to Canada Post's arrangements with Purolator

A. The Claimant's argument is flawed in law and in fact

86. The Claimant has identified the impugned measure as Canada Post's "policy and practice" of granting Purolator access to aspects of its network. It points to a number of arrangements that Canada Post has entered into with Purolator; namely arrangements involving:

- Sale and use of stamps
- Sale at retail outlets
- [**REDACTED]**
- Delivery
- **[REDACTED]**
- **[REDACTED]**; and
- **[REDACTED].**[71]

87. The Claimant asserts that with the exception of interlining and distribution services[72], UPS Canada has not been offered any of these arrangements. According to

[71] Investor's Reply, para. 614.

[72] Broadly speaking, an "interliner agreement" is an arrangement dealing with delivery to remote areas. A "distribution agreement" is an arrangement dealing with delivery in other areas.

the Claimant "this fact alone is evidence of differential treatment and creates a burden on Canada to demonstrate that the treatment is no less favorable."[73]

88. These assertions are factually incorrect and propose a wholly inappropriate application of Article 1102.

B. There is no national treatment violation

89. A proper analysis of whether there has been a breach of national treatment with respect to the treatment afforded to UPS Canada as compared to the treatment afforded to Purolator requires *the Claimant* to establish the following:

- That there are measures of the government of Canada that accord treatment to UPS Canada and to Purolator (the domestic investment); **or** if the measures are measures of Canada Post, that these measures are an exercise of delegated governmental authority that accords treatment to UPS Canada and to Purolator; and
- UPS Canada is in like circumstances to Purolator in respect of the treatment accorded by these measures; and
- The measures provide less favourable treatment to UPS Canada than to Purolator.

90. The Claimant has the burden of establishing each of these elements. The Claimant has failed to establish any of them.[74]

1. Arrangements with Purolator are not an "exercise of delegated regulatory, administrative or other governmental authority" by Canada Post

91. The arrangements between Canada Post and Purolator are identified by the

[73] Investor's Reply, para. 616.

[74] As set out in Canada's Counter-Memorial, it is the Claimant who bears the burden of proving a violation of the requirement of Article 1102. UPS of America must prove that Canada accorded UPS Canada and CPC treatment in like circumstances and that treatment accorded in like circumstances is less favourable to UPS Canada. (see: Canada's Counter-Memorial, paras. 625-632).

Claimant as "measures of Canada Post".[75]

92. What the Claimant characterises as "access to the infrastructure" are essentially a series of business decisions regarding partnerships, interlining agreements and other commercial arrangements that Canada Post may conclude, on a commercial basis, with competitors. This is not an exercise of any delegated governmental authority.

93. Chapter 11 obligations are not applicable to this conduct. However, even if the Tribunal finds that engaging in these arrangements is an exercise of delegated governmental authority, there is no breach of Article 1102 because there is no "treatment in like circumstances" and there is no "less favorable treatment".

2. UPS and Purolator are not accorded "treatment in like circumstances"

94. The Claimant asserts that Canada has "essentially admitted that Purolator is in like circumstances with UPS Canada."[76] In support of this assertion, the Claimant cites instances where Canada has stated that Purolator is a "courier company" and instances where Canada has described how the services and operations of a courier company, like UPS Canada or Purolator, are very different than those of Canada Post. These statements do not amount to an admission by Canada. The question is whether UPS Canada and Canada Post are in like circumstances for the purposes of access to the Canada Post network.

95. The Claimant seems to be arguing that a determination of like circumstances can be made in the abstract, independently from the measure that is being challenged. This is not correct. Article 1102 requires the Tribunal to assess whether treatment has been accorded in like circumstances. Therefore the question of like circumstances can only be considered in the light of the measure, or treatment, at issue. It may be that, in relation to a certain measure, Purolator is in like circumstances with UPS Canada but this cannot be

[75] Investor's Reply, para. 611.

[76] Investor's Reply, para. 610. Oddly, the Claimant itself never asserts that it is in like circumstances with Purolator with respect to this treatment.

assumed, in the abstract, to be true in relation to all measures. For example, as Canada notes below, treatment accorded by Canada Customs under the courier/LVS program to UPS Canada may be properly compared with the treatment accorded to Canadian-owned participants in the program, including Purolator.

96. The measures at issue are arrangements between Canada Post and Purolator. Purolator is part of the Canada Post group of companies and Canada Post owns over 90% of Purolator shares. Any increase in the 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. **[REDACTED]**[77] This makes perfect business sense. While these attempts have met with mixed success, given the differences in the operations, facilities and customer base of Purolator and Canada Post, it also makes sense that two related companies would be open to working together to mutually support each other.

97. By contrast, Canada Post and an unrelated company may be less inclined to enter into these arrangements with each other. Other courier companies may be less familiar with the network and operations of Canada Post. They have no incentive to work with Canada Post to mutually support each other's operations and bottom lines. In addition, private courier companies may be concerned about diluting customer loyalty by having their products sold or delivered by Canada Post.

98. This difference is borne out by the evidence of the Claimant's dealing with Canada Post. According to the Claimant, UPS Canada has been offered interliner and distribution services.[78] There is no evidence that the Claimant ever pursued these arrangements. **[REDACTED]**[79] The evidence shows that discussions were undertaken and not pursued. Francine Conn has provided extensive additional information regarding her telephone log and message slips that provide further evidence that it was, in fact, UPS

[77] Affidavit of Bill Henderson, [Henderson Affidavit], paras. 19-24. (Respondent's Book of Expert Reports and Affidavits, Tab 17).

[78] Investor's Reply, para. 616.

[79] Conn Affidavit, June 16, 2005, Exhibit "I" [Conn 1]. Respondent's Book of Expert Reports and Affidavits, Tab 6).

Canada that broke off these discussions.[80]

99. The Claimant is a highly sophisticated, aggressive and successful corporation. Regardless of "who failed to return whose call" the fact is that, had this arrangement been of interest to the Claimant, it would not have let a breakdown in telephone communication deter it from pursuing an arrangement that was in its business interest.

100. When considering the circumstances surrounding Canada Post granting access to its network, the fact that Purolator is owned by Canada Post is an essential feature that distinguishes Purolator from all other courier companies in the Canadian marketplace. UPS Canada is not owned by Canada Post. UPS Canada possesses its own "integrated global network"[81] and seeks synergies within its own group of companies. For the purposes of considering the impugned treatment, UPS Canada and Purolator are "unlike" in this material respect.

101. In determining whether UPS Canada is being subjected to nationality-based discrimination with respect to access to the Canada Post network, the appropriate domestic comparison is with access given to a privately-owned Canadian courier company. The Claimant has not offered any evidence to demonstrate that the treatment that it receives is less favourable than that received by privately-owned Canadian couriers.

3. There is no "less favourable treatment"

102. If the Tribunal finds there is a treatment accorded to UPS Canada and that it is pursuant to a delegated governmental authority and that the treatment is in like circumstances with that accorded to Purolator, the obligation on Canada Post is not to enter into commercial arrangements with UPS Canada, but only to make these arrangements available on similar terms. Canada Post has done so and these offers still stand. In addition, arrangements regarding sale and use of stamps, sale at retail outlets,

[80] Conn Affidavit, September 23, 2005, [Conn 2], paras. 25-41. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[81] Investor's Memorial, paras. 35-36.

rural pick up, delivery, access to delivery boxes and postal codes are available to the Claimant for the asking.

103. **[REDACTED]**.[82] This access is offered to third parties on the same terms that it is offered to Purolator.[83] **[REDACTED]**[84] With respect to the rates charged for access to the Canada Post network, UPS Canada is being afforded treatment that is no less favourable than the treatment afforded to Purolator.[85]

104. In addition, the Claimant has misstated the facts with respect to Canada Post's offers of access to the Claimant and its arrangements with Purolator. The correct facts are as follows:

105. **[REDACTED]**[86] The Claimant alleges that customers can buy stamps at Purolator centres, where Purolator products are sold, but that Canada Post prohibits other couriers from selling stamps where their products are sold. This is incorrect. As Francine Conn sets out in her reply affidavit, Canada Post's agreements with stamp sellers do not contain non-competition clauses This is borne out by the fact that a **[REDACTED]**[87] In addition, to say that Canada Post allows customers to pay for Purolator products with stamps is a mischaracterization. Canada Post accepts stamps and metre impressions as payment for Purolator products that *Canada Post sells* at its retail outlets pursuant to a retail sales agency. These agreements[88] are described in the

[82] Conn 1, paras 31, 38-44, and 49. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[83] Henderson Affidavit, paras. 19 (Respondent's Book of Expert Reports and Affidavits, Tab 17); Conn 1, paras. 31, 37, 46-52. Conn 2, para 5. (Respondent's Book of Expert Reports and Affidavits, Tabs 6 and 39).

[84] Canada's Counter-Memorial, para. 189; Conn 1, at 31. (Respondent's Book of Expert Reports and Affidavits, Tab 6); and Henderson Affidavit, para. 19, Exhibit B. (Respondent's Book of Expert Reports and Affidavits, Tab 17).

[85] Conn 2, para 5. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[86] Conn 1, paras. 53-55. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[87] Conn 2, para. 21. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[88] Conn 2, paras. 11-19. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

Affidavits of Francine Conn.[89] Purolator can not and does not accept stamps as payment for its own products.[90]

106. *Sale at retail outlets:* Access to Canada Post retail outlets was offered to UPS Canada in a letter dated 9 October 2001. Though discussions were initiated, UPS Canada did not pursue the matter.[91]

107. *Rural pick-up*: Where a courier does not have a presence in a rural area, Canada Post will extend rural pick-up services. These services are available to interested couriers on the terms and conditions set out in the Shipping and Delivery Services Customer Guide[92] and **[REDACTED]**.[93] There is no evidence that UPS Canada has ever requested these services.

108. *Delivery:* The only time when a Purolator customer can pick up a Purolator product from a Canada Post retail outlet is when Canada Post, by virtue of an interliner agreement with Purolator, is the delivery agent for Purolator. While UPS Canada has not itself entered into any such agreement with Canada Post, Canada Post **[REDACTED]**[94] **[REDACTED]**.[95]

109. *Access to delivery boxes*: Purolator does not deliver to post office boxes.[96] Where Purolator and Canada Post have concluded an interliner agreement, and Canada Post is the delivery agent for Purolator, Canada Post will deposit the Purolator product in a post

---

[89] Conn 1, paras. 38-44; Conn 2, paras. 25-39. (Respondent's Book of Expert Reports and Affidavits, Tabs 6 and 39).

[90] Conn 2, paras. 11-19. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[91] Conn 1, paras. 38-44; Conn 2, paras. 25-39. (Respondent's Book of Expert Reports and Affidavits, Tabs 6 and 39).

[92] Conn 1, Exhibit P. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[93] Conn 1, Exhibit N. (Respondent's Book of ExpertReports and Affidavits, Tab 6).

[94] Conn 1, para. 49. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[95] Conn 1, para 48. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[96] Conn 2, Exhibit F, at 7, Purolator Terms and Conditions, para. 4(b). (Respondent's Book of Expert Reports and Affidavits, Tab 39).

office box if it is the regular point of delivery for that customer.[97] **[REDACTED]**.

110. *Provision of letter-mail on Purolator planes:* The arrangements that Canada Post makes to use the services of other companies to deliver its letter mail have nothing to do with access to the Canada Post network. If anything, it is Canada Post that accesses the "network" of Purolator in this scenario. In addition, Canada Post is not required to tender procurement of its transportation services under the NAFTA.[98]

111. *Postal codes*: UPS Canada takes full advantage of postal codes. For example, on their website they provide shipping rates based on postal codes[99]

112. *Bills and advertisements*: The Claimant's allegation that Canada Post advertises Purolator products in the same advertisements as lettermail products is incorrect.[100] In addition, as Francine Conn explains, the fact that Purolator's advertisements are delivered without stamps does not mean that they have not paid postage. No large volume advertising bears a stamp.[101] Finally, the assertion that Canada Post will withhold monopoly services to customers who have not paid their bills to Purolator is incorrect.[102]

C. Adverse Inference

113. Canada's position on this issue of adverse inference is fully set out in its Counter-Memorial.[103] Canada maintains its position that the Tribunal has ample evidence before it regarding Purolator's use of Canada Post's network.[104]

---

[97] Conn 2, paras. 42-43. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[98] Chap. 10, Annex 1001-1b-2, V. Also procurement disciplines are not subject to consideration by a NAFTA Ch. 11 Tribunal. See NAFTA 1108(7).

[99] www.ups.com/Canada.

[100] Conn 2 at para. 50. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[101] Conn 2 at paras. 52-55. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[102] Conn 2 at para. 46. (Respondent's Book of Expert Reports and Affidavits, Tab 39).

[103] Canada's Counter-Memorial, paras. 474-495.

[104] For a full list of the documents provided see para. 492 and footnote 491 in Canada's Counter-Memorial. See also See also Conn 1, paras.31 *et seq.*; and the Henderson Affidavit. (Respondent's Book of Expert Reports and Affidavits, Tabs 6 and 17).

114. In addition, where Canada has objected to the documents on the basis that they are irrelevant or not within Canada's control, the Claimant and Canada have fully exchanged views in their Motions. After reviewing these arguments the Tribunal did not order Canada to produce these documents. Rather it ruled that:

> …the best way forward is for the remaining procedural issues to be addressed and decided, to the extent that may be necessary, in the course of the preparation and filing of the memorial, counter-memorial, reply and rejoinder and the associated documents, and then again if necessary, by the Tribunal.[105]

115. The Claimant chose not to make any further motion requiring Canada to produce. Rather, it has simply asked the Tribunal to draw an adverse inference. Canada's objections still stand and in the absence of a ruling on these matters, it would be unfair to draw an adverse inference.

IV. There is no breach of Article 1102 with respect to Canada Post's competitive services

A. The Claimant's Argument is flawed in law

116. The Claimant has identified the "impugned measure" as Canada Post's policy and practice of not charging its competitive products the **[REDACTED]**.[106]

117. With respect to this measure, the Claimant asserts that it has established the existence of a competitive relationship between UPS Canada and Canada Post. The Claimant then argues that "the next order of inquiry is whether, within these competitive relationships, there has been a denial of equality of competitive opportunities and, if so, whether that differential treatment has been justified by Canada."[107]

118. These are not the steps required in order to demonstrate a violation of Article

---

[105] Procedural Direction of the Tribunal, 17 December 2004, para. 3. (Investor's Book of Authorities, Tab 140).

[106] UPS Reply, para 622.

[107] UPS Reply, paras 612 and 613.

1102.

B. There is no Violation of National Treatment

119. A proper analysis of the question of whether there is a breach of national treatment with respect to Canada Post's pricing of its competitive products requires the Claimant to establish that:

- given that the measure is a measure of Canada Post, the first question is whether the measure is an exercise of delegated governmental authority that accords treatment to UPS Canada and to Canada Post; and
- UPS Canada is in like circumstances with Canada Post in respect of the treatment accorded by the measure; and
- the measure provides less favourable treatment to UPS Canada than to Canada Post.

120. The Claimant has the burden of establishing each of these elements and has failed to establish any of them.

C. The Measure

1. Canada Post's pricing policy with respect to its competitive services is not "an exercise of delegated governmental authority"

121. This measure has been identified by the Claimant as a "measure of Canada Post".

122. Canada Post's internal pricing policies with respect to competitive services are part of the business operations of the Corporation, and not the exercise of "delegated regulatory, administrative or other governmental authority". Chapter 11 obligations are not applicable to this conduct.

2. There is no treatment of UPS Canada

123. Even if Chapter 11 obligations are applicable to this conduct, in order to fit within Article 1102, the Claimant must demonstrate that the "impugned measure of Canada Post" affords treatment to the domestic investment (Canada Post) and to the foreign

investment (UPS Canada).[108]

124. Canada will not repeat the arguments it made in the Counter-Memorial, however it is important to restate that what is being challenged is Canada Post using its own network to deliver all of its products. There is no separate "Monopoly Infrastructure". The internal pricing policies of the Corporation are questions of business management and strategy internal to the organisation. These policies do not "treat" UPS Canada.

125. If the Tribunal finds that these policies are an exercise of delegated governmental authority, and that they result in treatment of UPS Canada, there is no breach of Article 1102 because there is no "treatment in like circumstances" and there is no "less favorable treatment".

D. There is no treatment "in like circumstances"

1. In determining like circumstances in relation to Canada Post's pricing policy for its competitive products, public policy considerations such as the universal service obligation are relevant

126. The "like circumstances" test calls for an examination of the overall context in which the impugned treatment is accorded, including relevant public policy considerations. When considering treatment relating to the use and operation of Canada Post's network, one of the foremost relevant circumstances is Canada Post's policy obligations as a Crown corporation, in particular the universal service obligation. Canada Post is required to provide regular and convenient collection and delivery to every address in Canada for letters, parcels and other products at affordable rates.

---

[108] This is fully set out in Canada's Counter-Memorial, paras. 745-746 and 849-856.

In Canada's Counter-Memorial note that the Claimant has not been clear as to whether its claim that Canada Post "leverages" its infrastructure (the formulation in the Memorial) or "provides competitive advantages" to its express services (the formulation in the Reply) is the articulation of a measure of **Canada** or a measure of **Canada Post**. This ambiguity makes it difficult to determine what the Claimant is asking the tribunal to compare to what. In the Reply, however, the Claimant clearly indicates that the "impugned measure" is a "measure of Canada Post". Despite this clear indication of the legal argument being made, the Claimant still confuses the matter at various points in its discussion. For example, it states: "UPS complains that Canada Post is explicitly given better treatment by Canada, even though that better treatment by Canada may have been well-intentioned." (Investor's Reply, para. 608) and "No reason why Canada cannot provide treatment no less favourable to UPS Canada…"(Investor's Reply, para. 607).

127. The Claimant recognises these policy objectives and states that: "There is no dispute that Canada may grant Canada Post a monopoly over letter mail. There is also no dispute that the universal provision of basic customary postal services can be a valid public policy objective for Canada to pursue."[109]

128. The nature of the service that Canada Post is required to provide necessitates the creation and maintenance of a network that is not consistent with a purely commercial approach. Canada Post's social and policy imperatives require it to make operational decisions that are not based on commercial considerations alone.[110] In contrast, private couriers such as UPS Canada maintain a network and make operational decisions based on commercial considerations alone.

129. As one of the means of financing the postal infrastructure, Canada has chosen to give Canada Post a commercial mandate. Canada Post is required to be self-sustaining. Thus Canada Post seeks to make a profit with its competitive products. Canada has provided ample evidence to demonstrate that the contribution that these products make to the bottom line of the Corporation is necessary to offset operations that Canada Post undertakes that are not "purely commercial", **[REDACTED]**.[111]

130. The Claimant has not contested this point. Rather in response to Canada's position that Canada Post's social and policy imperatives are relevant to the consideration of whether Canada Post and UPS Canada are in like circumstances with respect to the price charged by Canada Post for access to its network, the Claimant focuses on the universal service obligation and alleges that:

- "Canada Post in not under the burden of a universal service obligation and it is free of any well-defined obligation",[112] **or**

[109] Investor's Reply para 79.

[110] Canada's Counter-Memorial, paras. 60-103, 860-882.

[111] Canada's Counter-Memorial, paras. 111-115, 871-882.

[112] Investor's Reply, para. 624(a).

- If Canada Post is under an obligation to provide universal service, "there is no evidence that the obligation is a material burden",[113] **or**

- If Canada Post is under a material burden from the funding of the universal service obligations "Canada Post can fully exploit the economies of scale and scope derived from its network by charging its competitive services a price that offsets the competitive advantage of the use of the network."[114]

Canada Post is under the burden of a universal service obligation

131. After recognizing that the provision of universal postal service is a valid public policy objective for Canada, the Claimant argues that Canada Post is not under any obligation to provide universal service.[115] This is incorrect.

132. Internationally, the universal service obligation is the lynchpin of the Universal Postal Union. It is the necessary corollary of the Union's guarantees of 1) the human right of freedom of communications,[116] 2) the concept of a single postal territory[117] and 3) the mandatory obligation to deliver letter-post and parcel-post items.[118] In other words, the guarantee that everyone around the world is able to send and receive letter items within the single postal territory is meaningless if member States don't agree to deliver these items within their borders, no matter where the addressee is located. The concept of single postal territory has been generally accepted by State practice for over a century.[119]

133. This is what the Union meant when it stated that "Since the creation of the Universal Postal Union, one of the central tasks has been to guarantee a universal service

[113] Investor's Reply, para. 624(b).

[114] Investor's Reply, para. 624(c).

[115] Investor's Reply, paras 79 and 624.

[116] Preamble of UPU Constitution. (Respondent's Book of Authorities, Tab 1).

[117] Article 1 of UPU Convention. (Respondent's Book of Authorities, Tab 3, UPU Letter Post Manual).

[118] Article 10 of the Universal Postal Convention. (Respondent's Book of Authorities, Tab 3, UPU Letter Post Manual).

[119] In 1874, twenty two countries including the U.S., France, Germany and Great Britain signed the Treaty of Berne which first established the Universal Postal Union and accepted the concept of a single postal territory.

in the international letter-post service."[120] Over time, universal service has come to encompass the delivery of parcel post for the majority of Union members, including all NAFTA parties. The goal of the Universal Postal Union has always been to ensure that everyone around the world should be able to send and receive post from all parts of the single postal territory.

134. In 1999 the universal service obligation was codified in the Convention of the Universal Postal Union. The fact that it was incorporated into a treaty at that time in no way implies that it was not part of international practice under the Union for some time prior to that date. Professor Crew, a recognised postal economist, states that "I view the UPU Convention as codifying the practice over many years of the [universal services obligation] in most advanced economies. [121] Indeed a questionnaire circulated to Members in 1997 confirms that the provision of universal postal service was guaranteed within the territories of almost all Union members prior to the codification of this concept in 1999. The questionnaire concluded that "Almost all countries guarantee provision of a universal postal service in their territory. This is normally the traditional letter-post service, plus, in some cases, the parcel service and /or postal financial services."[122]

135. Mirroring Canada's obligations as a Member of the Universal Postal Union, Canadian law requires Canada Post to provide basic customary postal services[123] at fair and reasonable rates[124]. The Canada Post Corporation Act requires Canada Post to establish and operate the postal system for the collection, transmission and delivery of

---

[120] Studies assigned to the International Bureau by the 1997 CA – Memorandum by the secretary general, 26 mar.1998, document CA GT 1.1 1998.1-Doc 6, paras 9-11. (Respondent's Book of Authorities, Tab 116).

[121] Expert Rejoinder Report of Michael A. Crew, September 21, 2005 [Crew 2], para. 6. (Respondent's Book of Expert Reports and Affidavits, Tab 41).

[122] UPU Mission statement – report by the lead Country (France), 26 August 1997, CA C 1 1997-Doc 3b, para. 16. (Respondent's Book of Authorities, Tab 117). Indeed, Professor Crew, a recognised postal scholar, states that "I view the UPU Convention as codifying the practice over many years of the [universal service obligation] in most advanced economies. Crew 2, para. 10. (Respondent's Book of Expert Reports and Affidavits, Tab 41).

[123] CPC Act, Section 5(2). (Investor's Schedule of Documents, Tab U218).

[124] Section 19(2) of the CPC Act. (Investor's Schedule of Documents, Tab U218). See also section 3 of the Lettermail Regulations. (Respondent's Book of Authorities, Tab 29).

messages, information, funds and goods, within Canada and between Canada and places outside Canada.

136. As was fully set out in Canada's Counter-Memorial, the Canadian government has spelled out the details of these obligations in a multitude of regulations. The Claimant seems to suggest that Canada Post "makes" these regulations. This, of course, is incorrect. Canada Post proposes regulations. These regulations are published in the Canada Gazette and, interested parties are afforded an opportunity to make representations regarding these regulations to the Minister responsible for Canada Post. The Minister may then submit the regulation to Cabinet for consideration. Cabinet can approve the regulation, decline it, or send it back for changes.[125]

137. Regardless of the source of the universal service obligation, whether through a binding international obligation, an international practice, domestic legislation or regulation, the salient fact is that Canada Post is required to provide quality basic services to all points in Canada, at reasonable rates. Canada Post provides these services. UPS Canada is under no such obligation and does not provide these services.

The universal service obligation is a material burden

138. The Claimant argues that even if Canada Post has a universal service obligation "there is no evidence that the obligation is a material burden". Article 1 of the UPU Convention explains the principle of the Universal Postal Service:

> In order to support the concept of the single postal territory of the Union, member countries shall ensure that all users/customers enjoy the right to a Universal Postal Service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices.
>
> With this aim in view, member countries shall set forth, within the framework of their national postal legislation or by other customary means, the scope of the postal services offered and the

[125] See Sections 19-21 of CPC Act. (Investor's Schedule of Documents, Tab U218). See also, Ferguson Affidavit, paras. 42-46. (Respondent's Book of Expert Reports and Affidavits, Tab 11).

> requirement for quality and affordable prices, taking into account both the needs of the population and their national conditions.

139. To implement the universal service obligation, Canada requires Canada Post to offer, among other things:

- regular and convenient collection and delivery
- universal letter service at uniform low rates

140. Canada has provided extensive evidence to demonstrate that these and other requirements are a material burden[126] and refers the Tribunal to its arguments and evidence contained in the Counter-Memorial. The following discussion will highlight the burden arising out of the requirements of regular and convenient delivery and universal letter service at uniform low rates.

Regular and convenient collection and delivery:

141. Canada Post delivers to every address in Canada – over 13.7 million individual addresses. Canada's immense geography and modest population creates low population densities and vast rural delivery zones. **[REDACTED]**.[127]

142. In addition, the number of delivery addresses in Canada increase by over 200,000 per year. At the same time, lettermail volumes have remained static. The result is that each year mail density per address, and thus revenue per address, decreases while delivery costs increase.[128]

143. The Claimant attempts to support its argument that the universal service obligation is not onerous with the claim that it delivers to all addresses without being required to do so. As Professor Crew points out, this argument does not take account of

---

[126] Canada's Counter-Memorial, paras. 68-90. See also the Expert Reports of Michael Crew, [Crew 1], paras. 28, 29 and 61; Paul Kleindorfer, [Kleindorfer 1], paras. 17 *et seq.*; and the Ferguson Affidavit, paras. 21 *et seq.* (Respondent's Book of Expert Reports and Affidavits, Tabs 9, 20, 27 and 11).

[127] Conn 1, paras. 5, 7. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[128] Affidavit of Douglas Meacham, [Meacham Affidavit], para. 11. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

the very different business models of Canada Post and UPS Canada. He explains that "**[REDACTED]**"129 This option is not available for lettermail. He notes:

> UPS has more money on the table per drop than CPC. With a forty cent stamp there is not much margin for sophisticated pricing as transactions and metering costs are likely to eat up the margin fast. However, at three or four dollars per drop, there is much greater scope for more complex pricing.
>
> […]
>
> POs [postal operators] deliver primarily letters and not packages unlike UPS. The compensation per piece is therefore far lower. So a POs business model is one where it delivers to most addresses and aims to deliver not just one piece per drop. This contrasts with that of UPS. *Given these two different business models, the inference made by Attorney Campbell that the ubiquitous delivery requirement of the USO is not onerous is hollow.* [emphasis added][130]

144. In addition, the universal service obligation also includes the requirement of universal collection. This is a requirement that is not imposed on the Claimant. The Universal Postal Union's Memorandum on Universal Postal Service Obligations and Standards,[131] lists the particulars of the universal service obligation and provides guidelines as to quality of service. This includes *at least one guaranteed collection per day at "any point at which postal items can be deposited for sending and delivery"*. In order to meet this standard Canada Post has over 900,000 conveniently-located street letter boxes, community mail boxes, group mail boxes, kiosks and rural mail boxes where Canadians can deposit mail.[132] Absent the universal service obligation Canada Post would have far fewer drop-off locations.

---

[129] Crew 2, para. 6. (Respondent's Book of Expert Reports and Affidavits, Tab 41).

[130] Crew 2, paras. 6-7. (Respondent's Book of Expert Reports and Affidavits, Tab 41).

[131] Respondent's Book of Documents, Tab 2.

[132] Meacham Affidavit, para. 22 *et seq.* (Respondent's Book of Expert Reports and Affidavits, Tab 27). Detailed specifications regarding these mail receptacles are set out in the Letter Mail Regulations. (Respondent's Book of Authorities, Tab 29).

145. The requirement to provide convenient and universal collection and delivery services also requires Canada Post to maintain post offices and outlets in rural and low population density locations.[133] Indeed the Government of Canada has imposed a moratorium on rural and small town post office closures on Canada Post, in support of the universal service obligation.[134]

Universal letter service at uniform low rates

146. The universal service obligation requires that basic postal services be offered at affordable rates. The universal service obligation requires that basic postal services be offered at affordable rates. As Professor Crew notes: "A uniform price for letters has been part of the foundation of modern mail service beginning with the Penny Post in the U.K. in 1840." [135]

147. This component of the universal service obligation is implemented by Canada Post Act which requires rates to be fair and reasonable, and section 3 of the Letter Mail Regulations which establishes the price cap. The price cap on the basic lettermail service constrains Canada Post's price-per-piece revenue and places a further burden on Canada Post.[136]

148. This is especially true because, as was noted above, each year Canada Post delivers to hundreds of thousands of new addresses while the number of letters does not increase.[137]

149. In addition, as Canada has explained in its Counter-Memorial, the Universal Postal Union implements the universal service obligation through various measures,

---

[133] Crew 1, paras. 27-28. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

[134] Ferguson Affidavit, Exhibit D. (Respondent's Book of Expert Reports and Affidavits, Tab 11).

[135] Crew 2, para. 4-5. (Respondent's Book of Expert Reports and Affidavits, Tab 41).

[136] Crew 2, paras. 4 and 12-13. (Respondent's Book of Expert Reports and Affidavits, Tab 41).

[137] For a discussion of these trends see Kleindorfer 1, at 6-10. (Respondent's Book of Expert Reports and Affidavits, Tab 20).

including its regulations.[138] Canada implements the universal service obligation, in part, by implementing the detailed requirements of the Universal Postal Convention through regulation of Canada Post. Some examples include:

- Articles 9, 10 and 12 of the Universal Postal Convention deal with the size and shape of postal items and the indicia that must appear on them – these are implemented in Canada through regulations such as the International Letter Post Items Regulations[139], the Letter Mail Regulations[140], the Materials for use of the Blind Regulations[141] and the Postage Meters Regulations[142].

- Article 25 of the *Universal Postal Convention* deals with articles that national authorities must prohibit from being mailed – this is implemented in Canada through the Non-Mailable Matter Regulations[143].

- Articles 27, 28, 34 to 38 and 41 of the *Universal Postal Convention* – implemented through the Posting Abroad of Letter-Post Items Regulations, the Special Services and Fees Regulations, the Undeliverable and Redirected Mail Regulations and the Deficient Postage Regulations.

Canada Post is not required to neutralize the effects of taking advantage of economies of scope and scale

150. The fact that Canada Post has social and policy obligations including a universal service obligation, and the burdens that these impose are important distinguishing factors between Canada Post and a private courier. In order to offset this burden and meet these policy objectives, Canada Post seeks to make a profit with the sale of its competitive products.

151. In doing so, Canada Post seeks to ensure that the contributions that its competitive products make to the operation of the network exceed their incremental cost.

---

[138] Canada's Counter-Memorial, paras. 81-86.

[139] International Letter-Post Items Regulations, (SOR/83-807), (Respondent's Book of Authorities, Tab 27).

[140] The Letter Mail Regulations, (SOR/88-430) (Respondent's Book of Authorities, Tab 29).

[141] The Materials for the Use of the Blind Regulations, (C.R.C., c. 1283), (Respondent's Book of Authorities, Tab 31).

[142] The Postage Meter Regulations, (SOR/83-748), (Respondent's Book of Authorities, Tab 35).

[143] The Non-Mailable Matter Regulations, (SOR/90-10), (Respondent's Book of Authorities, Tab 33).

[REDACTED].[144] However, the Claimant goes on to assert that it is requiring Canada to meet a different test, a test of "fairness in competition". [145]

152. Canada acknowledges that Canada Post does not attempt to charge its own products what a third party would be willing to pay for the use of its network.[146] Canada Post, like its predecessor the Post Office Department, is a single entity, offering both competitive and exclusive privilege services. The network of Canada Post, is a single integrated operating network that is used to deliver all products, exclusive privilege and competitive, letter and parcel, domestic and international, air, ground, commercial and residential. All of the products serve to contribute to Canada Post's bottom line, which in turn serves as a means of funding Canada Post social's obligations, including the universal service obligation.

153. The Claimant asserts that: "Canada Post can fully exploit the economies of scale and scope deriving from its network by charging competitive services a price that offsets the competitive advantage of the use of its network." It is unclear to Canada how Canada Post can "fully exploit economies of scope and scale" and at the same time "offset the competitive advantage" of using its network.

154. More importantly, Canada has argued that it is entirely proper and efficient for Canada Post to take advantage of economies of scope and scale in its network for both monopoly and competitive products. This is not prohibited by the NAFTA and it makes good economic sense. As Professor Kleindorfer asserts:

> First and most importantly, CPC [Canada Post] faces a USO that imposes unique obligations on CPC not faced by its competitors. Second, it is appropriate, from an economic perspective, to finance this obligation, in part through exploiting economies of scope in its network and across its various products and services. Failing to do so, or unduly constraining CPC's ability to exploit these economies

[144] Investor's Reply, para. 152.

[145] Investor's Reply, para. 152.

[146] Here of course we are referring to the Canada Post competitive product and not Purolator products which, as has been demonstrated, access the network at market rates.

> of scope, would be tantamount to throwing away a significant source of economic value.[147]

155. In addition, it is likely that if Canada Post could not take advantage of economies of scope and scale, it may have to exit some of the competitive market[148]. Canada Post would then be required to find other sources of revenue to support the Canadian postal service, likely by way of a subsidy from the government.

156. The NAFTA clearly imposes some limitations on the manner in which a monopoly may operate in the non-monopolised market. Specifically, Article 1503(d) recognises that Canada can designate a monopoly[149] and that such a monopoly can operate in a non-monopolised market provided that it complies with Article 1502(3)(d) regarding certain anti-competitive conduct, including cross-subsidisation.

157. The Claimant has asserted that the issue is not cross-subsidisation.[150] Rather, it argues that Canada must ensure that Canada Post's competitive services receive no competitive advantage through access to the Canada Post network.[151] The Claimant offers no support in the text of the NAFTA, or under any Chapter 11 decisions, for this proposed requirement.

158. Article 1502(3) requires Parties to ensure that the monopolies abide by certain obligations and those obligations are carefully circumscribed. Only item (d) governs the monopoly's conduct in the market, and it applies only to certain anti-competitive practices.[152] Nowhere does Article 1502(3) suggest that the monopoly should not take advantage of economies of scale and scope, or that the Party must take positive steps to

---

[147] Kleindorfer 1, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 20).

[148] Reply Report of Robin Cooper, September 19,2005 [Cooper 2] at 3 and 18. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[149] Article 1502(1) and 1502(3)(d).

[150] Investor's Reply, at 73 –"A. The Issue Is Equal Treatment Not Cross-Subsidization".

[151] Investor's Reply, para. 153.

[152] Note 46 to the NAFTA illustrates the detailed attention the Parties paid to the conduct of monopolies. It provides that cross-subsidization and certain other actions are only prohibited by Article 1502(3)(b) "when they are used as instruments of anticompetitive behavior by the monopoly firm."

prevent its monopolies from doing so.

159. Likewise there is no support in Article 1102 for the Claimant's argument that Canada must intervene to extinguish any advantage that necessarily flows form allowing a monopoly to operate in a non-monopolised market. Article 1102 is a national treatment obligation, whose basic purpose is to prevent discrimination on the basis of nationality and cannot be used to subvert the obligations set out in Article 1502.

2. The Claimant does not meet its own test of "competitive products", namely that customers view Canada Post products as substitutes for UPS Canada products

160. As set out above, the Claimant equates "like circumstances" with "same economic sector" or the existence of a competitive relationship. In its Counter-Memorial, Canada sets out the differences between Canada Post's competitive products and those provided by UPS Canada, and offers supporting evidence establishing these differences.[153] The Claimant spends considerable effort in its Reply arguing why these products are virtually identical and are in direct competition in the market.[154] The Claimant's expert, Dr.Fuss, asserts that UPS Canada and Canada Post products are in the same economic sector, as they contain products "that are competitive with one another in the sense that a significant number of customers are prepared to substitute among them."[155]

161. **[REDACTED]**.[156] However, as Prof. Schwindt points out: "To say that product "X" most resembles product "Y" does not lead to the conclusion that a "significant number of customers are prepared to substitute among them."[157]

162. The Claimant, and its expert Professor Fuss, provide no evidence that customers

[153] Canada's Counter- Memorial, paras. 128-138; Conn 1, paras. 10-30, 67 and 69. (Respondent's Book of Expert Reports and Affidavits, Tab 6); and Henderson Affidavit, at 9 *et seq*.

[154] Investor's Reply, paras. 49-53, 59-62.

[155] Reply Expert Report of Melvin A. Fuss, July 29, 2005 [Fuss Report], para. 9. (Investor's Witness Statements and Expert Reports, Tab 12).

[156]Expert Report of Melvyn A. Fuss, March 21, 2005 [Fuss Reply Evidence]; and Fuss Reply Evidence, para. 19. (Investor's Witness Statements and Expert Reports, Tabs 4 and 50).

[157] Schwindt 2, at 4. (Respondent's Expert Reports and Affidavits, Tab 50).

view Canada Post products as substitutes for UPS Canada products. Rather than relying on documents such as power point presentations prepared by a Canada Post employee for the purposes of a price change proposal.[158] Professor Fuss could have requested systematic evidence from UPS demonstrating that a significant number of UPS Canada customers are prepared to substitute between UPS Canada and Canada Post products. **[REDACTED]**.[159]

163. Companies routinely collect specific data on customer preferences in order to inform decisions on, for example, whether to introduce or retire a product, whether to engage in an advertising campaign to win new customers, and in order to keep track of lost and gained customers.[160] UPS Canada most certainly could have made this data available to Dr. Fuss.

164. While the Claimant has not provided relevant data regarding customer behaviours, insight into the extent of product substitutability between UPS Canada and Canada Post can be gleaned from an examination of the Claimant's data regarding

[158] Professor Fuss does cite a CPC document that shows CPC's weak position in the business-to-business segment (which accounted for nearly a third of industry revenues) and its relative strength in the consumer segment (5 percent of industry revenues) and the government and institutions segment (6 percent of industry revenue). Professor Fuss does not draw from this an inference that the identity of buyers differs between CPC and UPS. Schwindt 2, at 5, footnote 13. (Respondent's Expert Reports and Affidavits, Tab 60).

[159] Expert Report of Juergen Mueller, [Mueller Report], para. 19. (Respondent's Book of Expert Reports and Affidavits, Tab 49).

[160] Specific categories of data include: "Price changes: In preparation for price changes firms commonly forecast impacts on revenues and volumes. Often these forecasts include an analysis of likely impacts on rivals. Firms also regularly analyze the likely impacts of their rivals' price on their own sales.

Customer loss/gain analysis: Marketing departments often keep track of lost and gained customers and the competitor to whom or from whom the customer was lost or gained.

Product introduction/retirement: Before introducing or retiring products, firms usually analyze the likely impacts upon and responses of competitors.

Customer identify: Firms usually have a good understanding of who their customers are. For example, it is my understanding that UPS emphasizes business-to-business shipments while CPC has a larger share of business-to-consumer and consumer-to-consumer shipments.

Customer surveys: Many firms regularly survey customers with regard to product satisfaction, use of alternate suppliers and the like.

Advertising campaigns: Before incurring substantial advertising costs firms usually undertake or commission studies of the potential impacts of the campaign on the target audience and the target competitors." Schwindt 2, at 5. (Respondent's Book of Expert Reports and Affidavits, Tab 50).

revenues by product. Professor Schwindt has considered this data and observes:

> CPC's SPX [small parcel express] revenues were about 25 percent greater than UPS' in 2001. UPS derived revenues from all 21 services identified by Infobase, but CPC obtained revenues from just seven. Interestingly the 14 services that generated no revenue for CPC accounted for nearly 60 percent of UPS' revenues. Moreover, even where there was overlap, the relative importance of services tended to be very unbalanced. For example, domestic deferred air package accounted for 37 percent of CPC revenues but only 1 percent of UPS revenues.[161]

165. **[REDACTED]**:

> **[REDACTED]**[162]

166. Professor Schwindt concludes:

> Based upon both UPS and Infobase estimates, CPC and UPS depend upon different services for the bulk of their SPX revenues. Furthermore, it appears that his has been true for a number of years.[163] *These data do not prove that CPC and UPS serve different markets. However, they do suggest that the two firms cater to different segments and this in turn raises questions as to whether a significant number of customers are willing to move across segments. It is a question not answered by Professor Fuss*.[emphasis added][164]

167. **[REDACTED]**:

> **[REDACTED]**[165]

168. In summary, therefore, the Claimant's expert has not been able to demonstrate

---

[161] Schwindt 2, at 5. (Respondent's Book of Expert Reports and Affidavits, Tab 60).

[162] Schwindt 2, at 6. (Respondent's Book of Expert Reports and Affidavits, Tab 60).

[163] The Infobase data cover 1999, 2000 and 2001. There were no significant changes year to year. See: Infobase Marketing Inc., *Canadian Next Day or later Delivery Courier Market Sizing Study 1998-2003 (Overview)*, July 2001, (UPS0004.0098).

[164] Schwindt 2, at 7-8. (Respondent's Book of Expert Reports and Affidavits, Tab 60).

[165] Mueller Report, para. 17 (footnotes omitted). (Respondent's Book of Expert Reports and Affidavits, Tab 49).

that UPS Canada and Canada Post are in the same "economic sector" in the sense that a significant number of customers are prepared to substitute between their products.

3. The existence of a competitive relationship does not establish "like circumstances"

169. The Claimant also argues that Canada Post's own documents demonstrate its focus on courier services.[166] The importance of express delivery services to Canada Post is not contested by Canada. Indeed Canada has demonstrated how these and other competitive services are key to Canada Post's ability to fulfil its social and policy obligations including providing universal postal service at a low cost.

170. The question is not whether UPS Canada competes with Canada Post, whether they are in the same "business sector" or whether UPS Canada services are in competition with those of Canada Post. What is relevant for the purposes of Article 1102 of the NAFTA is whether UPS Canada and Canada Post are in like circumstances with respect to the measure identified by the Claimant, i.e. Canada Post's policy and practice of not charging its competitive services the "equivalent of what a third party would be willing to pay for the use of the network".

171. Canada's position, as affirmed by the case law and set out above,[167] is that it is not enough to show that companies compete in the same business sector to prove that they are receiving treatment in like circumstances.

E. No less favourable treatment is not "equal treatment" as defined by Dr. Neels

1. The UPS arguments

172. The Claimant's arguments with respect to the operations of Canada Post in the competitive market have evolved during the course of this dispute. Initially, the focus was on allegations of cross-subsidisation between the exclusive privilege and competitive

[166] Investor's Reply, paras. 40-48.

[167] See Part III, I, (b)

products. The Claimant's allegations have changed over the course of three statements of claim, the Memorial and the Reply. With this final set of written arguments from the Claimant, it is now clear what the Claimant is really seeking - that Canada force Canada Post to increase the prices of its competitive products.

173. In its Memorial, while the Claimant alleged "leveraging of the monopoly infrastructure", it nonetheless devoted several pages in its arguments and witness reports to the discussion of cross-subsidisation and Canada Post's Annual Cost Study (ACS). Canada responded to these claims in its counter-memorial so as not to leave these allegations unanswered. In its reply the Claimant goes on to imply that the methodology used by Canada Post in the ACS has been severely criticised by the US Postal Rates Commission. Professor Bradley, in his Rejoinder affidavit, explains how the Claimant's arguments, and the expert report of Mr. Cohen, upon which these arguments are based, contain factual errors. Professor Bradley clarifies:

> Nowhere in Mr. Cohen's report can I find the statement that Canada Post's costing methodology would not be found to be appropriate by an outside regulator.

174. He goes on to note that while a title in Mr. Cohen's report appears to suggest that Postal Rate Commission has rejected the ACS costing methodology, the Commission, in fact, rejected an implementation study that Professor Bradley submitted to the Commission. Professor Bradley notes that:

> In fact, the study to which Mr. Cohen refers is not used anywhere in the Annual Cost Study and it is not part of its implementation.[168]

175. In any event, this discussion is beside the point as the Claimant clearly states, in Part Two V(A), that cross subsidisation is not the issue. Canada agrees.

176. The Claimant's case can now be gleaned from key passages in the Reply. First the Claimant appears to state that it wants access to the Canada Post network:

[168] Reply Report of Michael D. Bradley, September 16, 2005 [Bradley 2], para 21. (Respondent's Book of Expert Reports and Affidavits, Tab 37).

> …as a result of its monopoly and related privileges, Canada Post has developed a vast network which no competitor can replicate. Canada Post gives its competitive services access to the network to take advantage of economies of scale and scope. Conversely, Canada Post rarely gives access to UPS Canada and, when it does, it never gives access on terms as favourable as those it gives to its own competitive services.[169]

177. As Canada has explained at length, Canada Post's obligation to maintain a national network in order to serve every address in Canada, no matter how remote, is, if anything a competitive disadvantage vis–a-vis private competitors. Canada Post does exploit economies of scope and scale but in so doing ensures that no cross-subsidisation is taking place.

178. The Claimant then shifts its focus away from seeking actual access to the Canada Post network and concentrates on the pricing policies relating to Canada Post's competitive products. However, the Claimant then attempts to shoehorn a competition law claim under Chapter 11, and asserts that the issue in relation to Canada Post's competitive products is not whether they are subsidised by the monopoly services. It states that "UPS is merely requiring Canada to meet a different test than the cross-subsidization test", it is "requiring Canada to meet a test of *fairness in competition*", called the "equal treatment test".[170] The Claimant states:

> Canada can ensure that Canada Post's competitive services receive no competitive advantage through their exclusive access to the Monopoly Infrastructure. One way would be for Canada Post's competitive services to pay a sum to use the network that equates to the competitive advantage gained. This sum would necessarily be greater than incremental cost. Since incremental cost is the technical test for cross subsidization,
>
> Canada must show more than just that Canada Post does not cross subsidize to show that it provides equal treatment.[171]

[169] Investor's Reply, para. 122.

[170] Investor's Reply, para. 152.

[171] Investor's Reply, para. 153.

> In this way UPS is not attempting to *replace* the cross-subsidization test. UPS is merely holding Canada to a different standard for a different purpose. This standard addresses the competitive advantages while retaining the economies of scale and scope. It ensures that the full benefits of the network are received by monopoly or USO consumers in accordance with Canada's stated policy objectives. (Emphasis added).[172]

179. In Canada's view neither the concept of cross-subsidization nor the concept of equal treatment invented by UPS' economists for the purposes of this arbitration are relevant to the question of national treatment.

2. National treatment obligation and the relevance of the Claimant's arguments

180. The question is not whether UPS Canada receives "equal treatment" in economic terms because of Canada Post's involvement in both monopoly and competitive services, but whether the measure being challenged accords less favourable treatment to UPS Canada, as this is understood in NAFTA Article 1102.

181. Notwithstanding the fact that the Claimant expressly recognizes that international investment disputes are different from competition law disputes,[173] it tries to equate the two by attempting to turn the national treatment obligation in Article 1102 into a fair pricing and fair competition provision.[174]

182. The Claimant admits that its concept of equal treatment is a "fairness in competition" standard.[175] This has nothing to do with Article 1102 which is meant to prevent nationality-based discrimination and not to establish a competition regime for the involvement of state-enterprises in competitive services.

183. In addition, the requirement to provide "treatment no less favourable" to foreign

[172] Investor's Reply, para. 154.

[173] Investor's Reply, para. 235.

[174] Investor's Reply, para. 152.

[175] Investor's Reply, para. 152.

investors under article 1102 does not impose a positive obligation on the government of Canada to intervene in the internal pricing policies of Canada Post so as to assure "equal treatment" as between Canada Post's own products and those of UPS Canada.

3. The Claimant's "equality of competitive opportunities" test is simply an attempt to force Canada Post to raise its prices

184. The Claimant does not dispute that if Canada Post's competitive services pay the long-run incremental cost of the use of the Canada Post network, there is no cross-subsidisation between monopoly and competitive products.[176] **[REDACTED]**.[177] The Claimant asserts that "Canada must show **more** than just that Canada Post does not cross-subsidize to show that it provides equal treatment.[emphasis added]"[178]

185. Thus the Claimant's "equal treatment standard" is a more onerous standard than the accepted test for cross-subsidisation that Canada Post applies. As Professor Cooper explains:

[REDACTED].[179]

186. **[REDACTED]**[180] Indeed the Claimant recognises this in its reply when it sates that: "The sum (the payment required by the equal treatment test) would necessarily be

---

[176] Investor's Reply, para. 150.

[177] Conn 1, para. 64. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

See also Bradley 1, at 4-24 (Respondent's Book of Expert Reports and Affidavits, Tab 3) and Cooper 1. (Respondent's Book of Expert Reports and Affidavits, Tab 7). In any event, even if relevant, the onus is not on Canada to prove that there is no cross-subsidisation between Canada Post's monopoly and competitive products. The onus is on the Claimant.

[178] Investor's Reply, para. 153.

[179] Cooper 2,at 13. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[180] Cooper 2, at 13. Professor Cooper also points out in his report that the Neels test is flawed in two important respects. First, it assumes that there is a market for the unused capacity of the Canada Post network. However, Professor Cooper notes that Canada Post operates in an environment in which adequate external markets to consume its infrastructure do not exist. Second, it assumes that that the monopoly and competitive services in Canada Post are like physical products in that they have externally observable unambiguous market prices, which they do not. The result is that the approach proposed by Dr. Neels yields arbitrary transfer prices. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

greater than the incremental cost."[181] **[REDACTED]**[182] As Professor Hufbauer, a well-recognised trade economist, notes:

> However, if Canada Post is a pure price taker [which it is], and if the proposed standard compels Canada Post to raise the price it charges for its courier services, it will of course lose a substantial fraction of its existing markets to its competitors. Being a price taker means that other firms are ready and able to supply a service with equivalent characteristics at very nearly the same price. [183]

a) The Claimant's "equality of competitive opportunity standard" leads to negative economic consequences

187. The Claimant argues that the negative economic consequences of its standard are irrelevant:

> The issue before the Tribunal is whether Canada fulfils its NAFTA obligation to provide equal treatment and not the economic consequences of fulfilling those objectives.[184]

188. If it is indeed the Claimant's position that the economic consequences of applying the equal treatment standard are not at issue in this case, then it is puzzling why many pages are spent extolling the alleged positive economic consequences of adopting the Neels equal treatment standard in Dr. Neels initial report, his Reply Report and the Claimant's Memorial and Reply. In particular, the Claimant argues that the application of the equal treatment test will increase the contribution that Canada Post's competitive products make to funding the universal service obligation.[185] **[REDACTED]**.[186] Professor Cooper explains:

---

[181] Investor's Reply, para. 153.

[182] Cooper 2, at 14. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[183] Report of Gary Hufbauer [Hufbauer Report], para. 10. (Respondent's Book of Expert Reports and Affidavits, Tab 45).

[184] Investor's Reply, para. 169.

[185] Investor's Memorial, para. 184, Investor's Reply, paras. 155, 168; Neels Report, paras. 50-57; and Neels Reply Report, 21 *et seq.*

[186] Cooper 2 at 11.

[REDACTED].[187]

189. Any economic consequences of this "equal treatment standard" are most certainly negative. Professor Kleindorfer explains:

> While the Neels Equal Treatment Standard is ostensibly directed at improving the welfare of customers of CPC's monopoly products through the language of "maximizing contribution from competitive products to the USO products", this Standard is in reality solely concerned with CPC's profits from its operations in the competitive sector. This is where the Standard departs from good policy and from the literature on efficient pricing in public enterprises.[188]

190. Furthermore Professor Hufbauer explains:

> …the proposed equal treatment standard would require Canada Post to provide equal access to its network – in other words, make its network available to its competitors at the same price that it charges for services supplied internally between its own divisions. This requirement has two anti-competitive features.

191. First, the Claimant's "equal treatment" standard does not call for equal access to the networks of private corporations, and would lead to highly unequal conditions. Professor Hufbauer adds:

> Moreover, it is vigorously debated whether such access – even if extended to all firms – would enhance or diminish competition. In the short run, such access might enable more firms to enter a particular segment of a service market. For example, if other firms had legally mandated access (at an internal price somehow determined) to Intel's chip plants to manufacture chips of their own design, additional firms might well enter the market for sophisticated integrated circuits. On the other hand, over the long run, investment in chip plants might well fall off, leading to capacity constraints and fewer competitors in five or ten years.

[187] Cooper 2 at 11.

[188] Kleindorfer 2, para. 8. (Respondent's Book of Expert Reports and Affidavits, Tab 47).

> In the second place, the **equal access** rule would allow private firms to "cherry pick" the networks of their public competitors. In other words, private firms could access those parts of the network where the internal price yields a very low return relative to the cost of building equivalent new capacity. They could also access those parts of the network where scale economies are significant and a private competitor might not be able to build or utilize the capacity of a comparable facility.[189]

192. Ultimately, the result of this "cherry-picking" from private firms would be that Crown corporations would be disinclined to invest in network capacity.[190] After considering this standard, Professor Hufbauer concludes that the imposition of "equal treatment" as defined by Dr. Neels would have "breathtaking repercussions" for a wide range of Crow corporations and public enterprises.[191]

193. Ultimately requiring Canada Post to charge its competitive products the equivalent of what a third party would pay for access to the network would diminish the economic performance of Canada Post and reduce its ability to defray the cost of the universal service obligation and other social obligations. It would be forced to fall back on government assistance, such as subsidies.

4. In any event, UPS has not proven what it alleges

194. The Claimant argues that it has been forced to reduce its prices. Dr Neels acknowledges that this dispute is really about the pricing when he states that:

> To the extent that Canada Post has engaged in these behaviours [allegations regarding pricing policy] Canada Post has forced UPS to reduce prices and production and hence *robbed it of an opportunity to earn a full return on investment*.[emphasis added][192]

195. The evidence of Francine Conn and Professor Cooper indicate that there is good

---

[189] Hufbauer Report, para. 15-16. (Respondent's Book of Expert Reports and Affidavits, Tab 45).

[190] Hufbauer Report, para. 17.

[191] Hufbauer Report, para. 22. (Respondent's Book of Expert Reports and Affidavits, Tab 45).

[192] Neels 1, para. 21. (Investor's Witness Statements and Expert Reports, Tab 5).

reason to doubt that the actions of Canada Post have caused the Claimant to reduce its prices. Francine Conn, has described the Canada Post pricing policy as follows:

> **[REDACTED]**.[193]

Professor Cooper states that **[REDACTED]**". He explains:

> .
>
> **[REDACTED]**[194]

196. Based on this analysis, Professor Cooper concludes **[REDACTED]**"[195]

197. In any event, there is no need to consider the Claimant's allegations of damages are as it has not discharged its burden of proof. It has not proven that there is any nationality-based discrimination. It has offered no comparison between any alleged treatment that it receives with the treatment received by a domestic courier company. It has failed to demonstrate that UPS Canada and Canada Post are receiving treatment in like circumstances and it has failed to demonstrate less favourable treatment. For all of these reasons, the Claimant's arguments must fail.

F. Adverse inference regarding failure to produce documents related to the ACS and "Access to the infrastructure"

198. Canada's position on this issue of adverse inference is fully set out in its Counter-Memorial.[196] In addition, in Canada's view the information that the Claimant is requesting in relation to the Annual Cost Study[197] is not relevant to Article 1102 test. This information is not even relevant to the test that the Claimant is proposing. In its Reply the Claimant clearly states that even if Canada could prove that Canada Post does not cross-subsidize this would not be sufficient to establish equal treatment.

---

[193] Conn 1, para. 67. (Respondent's Book of Expert Reports and Affidavits, Tab 6).

[194] Cooper 2, at 4. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[195] Cooper 2, at 4. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[196] Canada's Counter-Memorial, paras. 474-495.

[197] Investor's Reply, paras. 379-385 and 390(b) and footnote 507.

199. The Claimant has also requested an adverse inference be drawn from Canada's failure to produce certain lease agreements for buildings used to process certain competitive products of Canada Post. Again, Canada has objected to the production of these documents on the basis that they are not relevant. As stated above, in the absence of a ruling from the Tribunal on Canada's objections, it would be unfair to draw an adverse inference.

V. There is no breach of Article 1102 with respect to Customs treatment of UPS Canada and mail

A. The Claimant's argument is flawed in law and fact

200. The Claimant has identified the impugned measure as the "*design* and *operation*" of Canada's customs streams for courier and postal items that results in "systematically less favorable treatment to UPS Canada with respect to the imports of packages and parcels in competition with Canada Post."[198] With respect to this measure, the Claimant asserts that "UPS Canada and Canada Post compete for the importation of parcels and express packages into Canada from the United States"[199] and that the existence of this "competitive relationship" [200] satisfies the test for like circumstances for customs treatment.[201] The Claimant acknowledges there are "legitimate reasons for distinguishing between postal and courier imports."[202] Nonetheless, the Claimant argues that Canada's failure to create a customs process that is "competitively neutral" [203] or which "ensures equality of competitive opportunities" [204] between UPS Canada and Canada Post constitutes a violation of Article 1102.

201. The Claimant does not apply the proper Article 1102 test.[205] In addition, the Claimant's application of the national treatment test to customs treatment allegedly accorded to Canada Post continues to be based on a misunderstanding of Customs' responsibilities and the recipient of the alleged customs treatment in the mail stream.

---

[198] Investor's Reply, para 629.

[199] Investor's Reply, para. 612(b).

[200] Investor's Reply, para. 612.

[201] Investor's Reply, para. 488.

[202] Investor's Reply, para. 248

[203] Investor's Reply, para. 629.

[204] Investor's Reply, para. 629.

[205] Canada's Counter-Memorial, paras. 574-632; Canada's Rejoinder, paras. 38-80 [Part III(I) The Test Set Out by the Claimant Contains Numerous Errors.

B. The Claimant has abandoned certain customs treatment claims

202. In its Reply, the Claimant has narrowed its claims with respect to customs treatment:

> The Investor's Memorial also referred to Canada's granting of additional time to Canada Post to remit duties and taxes, its exemption of Canada Post from various bonding requirements and from Goods and Services Tax on its handling fees. In light of the complexity of some of the defences raised by Canada in regard to these measures in its Counter-Memorial, the Investor has chosen not to challenge these measures in its Reply. It has done this solely to narrow the issues in dispute for the Tribunal and this decision does not represent an admission that these measures comply with the NAFTA.[206]

203. Accordingly, Canada has not addressed those claims in this Rejoinder on the basis that these three allegations have been abandoned by the Claimant and no longer form part of the issues in dispute. The Tribunal should disregard paragraphs 316(a), (c) and (d), 317-320, 323-329, 418, 450(g) and (j), 452, 585(f), (h), and (i), and 643(h) and (i) of the Claimant's Memorial and any evidence referred to in those paragraphs. Should the Tribunal find that the three above-mentioned allegations have not been abandoned, Canada maintains the defence to those claims, as Canada has for all of its defences, as set out in the Counter-Memorial and Canada hereby reserves the right to respond to any further evidence adduced, or argument raised, by the Claimant in that respect.

C. There is no breach of Article 1102

204. A proper analysis of whether there is a breach of national treatment with respect to customs treatment of UPS Canada as compared to customs treatment of the mail requires the Claimant to establish:

- that there is a measure of the Government of Canada that accords treatment to UPS Canada and to Canada Post; and

[206] Investor's Reply, footnote 332.

- UPS Canada is in like circumstances to Canada Post in respect of the treatment accorded by the measures; and

- The measure provides less favourable treatment to UPS Canada than to Canada Post.

205. The Claimant has the burden of establishing each of these elements with respect to the impugned measure and, as further explained below, has failed to establish any of them.

1. Under the International Mail Processing System, Customs accords treatment to inbound foreign mail not to Canada Post

206. Article 1102 requires the Claimant to demonstrate that the impugned measure affords treatment to foreign investors and to domestic investors or, alternatively, to investments of foreign investors and domestic investments.[207] The Claimant has not met its burden to establish Customs accords treatment to a domestic investor or investment.

207. Customs accords treatment to inbound foreign mail under the International Mail Processing System and not to Canada Post. Canada Post presents inbound foreign mail to Customs on behalf of the foreign postal administration or the sender.[208] After customs clearance, Canada Post completes delivery pursuant to the requirements of the UPU. Therefore, the recipient of the customs treatment is international mail *per se* or alternatively the foreign postal administration, the sender, or the recipient of the mail item. The recipient of customs treatment is not Canada Post.[209]

2. No customs treatment in like circumstances

208. Rather than comparing the treatment UPS Canada has received under the Courier/LVS Program to the treatment of other program participants, the Claimant

---

[207] The Claimant has failed to specify if its claim is brought under Article 1102(1) or 1102(2).

[208] Canada's Counter-Memorial, para. 646.

[209] Canada's Counter-Memorial, paras. 650-652; Jones Affidavit, [Jones 2], paras. 7, 9. (Respondent's Book of Expert Reports and Affidavits, Tab 46). Any treatment Customs accords to Canada Post as a result of the Postal Imports Agreement is exempted from the operation of Article 1102 as it is a procurement. (See Canada's Counter-Memorial, paras. 704-709.)

instead asks the Tribunal to compare it with the treatment Customs allegedly accords to Canada Post under the International Mail Processing System.[210] As more fully explained in Canada's Counter-Memorial, Customs treatment of international mail is not in like circumstances with that accorded to UPS Canada.[211]

a) Considerations relevant to like circumstances in relation to customs treatment

209. The Claimant acknowledges that there are "legitimate reasons for distinguishing between postal and courier importations".[212] These "legitimate reasons" are the circumstances that cause Customs treatment of goods imported "by courier" and "as mail" to be different.

210. If treatment is not accorded in like circumstances as between the two streams then it is not possible to compare whether the treatment is "no less favorable".

211. In its Counter-Memorial, Canada explained how the differing characteristics of importations of goods "as mail" and "by courier" are what necessitated the development of distinct programs for the clearance of courier shipments and mail.[213] Factors that have contributed to the design differences in the Courier/LVS Program and the International Mail Processing System include amongst others:

- couriers providing 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;

[210] Investor's Reply, paras. 627-632.

[211] See Canada's Counter-Memorial, paras. 656-696.

[212] Investor's Reply, para. 248.

[213] Canada's Counter-Memorial, paras. 656-683.

- 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; and
- the different roles performed by couriers such as brokerage, warehousing, etc.

212. International agreements recognize the need for different customs processes to deal with postal and courier imports.[214] In response, the Claimant argues:

> Although the *Kyoto Convention* does provide for simplified customs treatment of parcels from foreign postal administrations, nothing in this Convention requires or recommends preferential treatment of such parcels over similar items conveyed by private operators.[215]

213. The Claimant misses the key point: international customs authorities agree that the nature of postal traffic necessitates different customs clearance processes from courier traffic because of its different circumstances. [216] The international community and specific countries such as the United States and the United Kingdom recognize differences from a customs perspective in postal and courier traffic.[217]

b) The Claimant does not meet its own test of "competitive relationship"

214. Customs authorities, whose mandate it is to protect a country's national security and economic interests through border regulation,[218] consider many factors in the design

[214] Canada's Counter-Memorial, paras. 684-689.

[215] Investor's Reply, para. 266.

[216] See Canada's Counter-Memorial, paras. 338-339, 383, 684-689; and Jones 2, para. 13. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[217] See Canada's Counter-Memorial, paras. 338-339, 383, 684-689. As Brian Jones explains, "the Canadian programs are founded in international treaties and recognized best practices and are largely consistent with the analogous programs maintained by the customs administrations of Canada's major trading partners". See Jones 2, para. 13. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[218] Canada's Counter-Memorial, para. 310.

of customs programs.[219] The Claimant would narrow the permissible considerations to a single factor: the existence of a competitive relationship.[220] Even then, it fails to meet its own test.

215. To the extent there is any "competition" between certain products imported through the postal stream and others imported through the courier stream, which Canada denies, any competition would be between the Claimant and foreign postal administrations. Therefore, any comparison with treatment of these items would not be relevant to a national treatment determination.

216. Canada Post's completion of deliveries in Canada of international inbound mail does not establish that Canada Post competes with the Claimant in foreign countries. Canada Post, as Canada's postal administration, delivers international inbound mail to its Canadian destination in accordance with Canada's UPU obligations.[221] Thus, Canada Post completes delivery in Canada of mail originating in the United States destined for Canada on behalf of the USPS. Similarly, Canada Post completes delivery in respect of international inbound mail for each and every postal administration of the other 189 member states of the UPU.

217. The Claimant refers to the activities of Canada Post's International Business Development function citing it as an example of competition for import services.[222] The Claimant misapprehends the role of this division. The International Business Development's role is fundamentally about the operations of the international mail

---

[219] For a listing of considerations Canada Customs took into account in developing programs for postal and courier shipments, see Canada's Counter-Memorial, para 322.

[220] Investor's Reply, para. 612 and in particular at para. 612(b), the Claimant argues that Canada Post and UPS Canada "compete for the importation of parcels and express packages into Canada" and, as a result, are in like circumstances.

[221] Affidavit of David Eagles, paras. 36-44. (Respondent's Book of Expert Reports and Affidavits, Tab 42). At para. 37 Mr Eagles states: "I am afraid I do not see the connection between Canada Post's role as the postal administration of destination in the movement of international mail from the US into Canada through mechanism established by international treaty and UPS Canada's role as the Canadian subsidiary of an international courier dispatching parcels from the US into Canada. On the face of it, the comparison is absurd."

[222] Investor's Reply, paras. 69-72.

exchange mechanism.[223] There is no support to the Claimant's competition claims.
There is no support to the Claimant's competition claims.

218. The Claimant also relies on the conclusions of its expert, Professor Fuss, to assert that Canada Post and UPS are in direct competition for courier delivery services between Canada and the United States.[224] Professor Fuss had tried to show that the Claimant and Canada Post were in the same 'economic sector' to establish they are in direct competition for courier delivery services both from point-to-point within Canada, and between Canada and the United States. **[REDACTED]**[225] In his analysis, Professor Fuss relied on inadequate evidence to draw his conclusions regarding the international market between the United States and Canada. As Professor Mueller states:

> **[REDACTED]**.[226]

219. **[REDACTED]**:

> **[REDACTED]**[227]

220. Given the inadequate evidence relied upon, Professor Fuss' conclusions regarding competition for international courier delivery between Canada and the United States should be accorded no weight.

i) Claimant has not established the existence of a joint USPS/Canada Post product or partnership

221. In order to establish that Canada Post competes with the Claimant in the United States, it has advanced the theory of the existence of "joint products" of Canada Post and USPS[228] and of a "partnership"[229] between postal administrations. As explained by

---

[223] Affidavit of David Eagles, [Eagles Affidavit], paras. 18-22. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[224] Investor's Memorial, paras. 128 and 129.

[225] Mueller Report, paras. 5-6. (Respondent's Book of Expert Reports and Affidavits, Tab 49).

[226] Mueller Report, para. 13. (Respondent's Book of Expert Reports and Affidavits, Tab 49).

[227] Mueller Report, para. 16. (Respondent's Book of Expert Reports and Affidavits, Tab 49).

[228] Investor's Memorial, para. 129; Investor's Reply, paras. 63-68.

Professor Schwindt, the Claimant relies on the logic of Professor Fuss in an effort to show that "because the USPS uses CPC to deliver some of its Canada-bound shipments the two Posts are jointly producing the service and therefore CPC is competing in the U.S. market for Canada-bound shipments."[230]

222. The joint products argument is flawed. **[REDACTED]**[231]

223. In fact, Canada Post one of the parties of the alleged partnership, denies it offers a joint product with USPS:

> [T]o equate the Canada Post/USPS relationship in any way to a 'partnership' that offers 'joint product[s]' is far off the mark.[232]

224. **[REDACTED]** [233]

225. Professor Schwindt demonstrates why, for a variety of reasons, USPS products destined for Canada are not offered "jointly" by Canada Post:

> The USPS created these products.
>
> The USPS markets these products.
>
> The USPS attaches it marks (e.g. logo) to these products and does not attach CPC's marks (indeed, CPC is not identified as a participant).
>
> The USPS is responsible to the shipper for service failure.

---

[229] Investor's Reply, paras. 67-68.

[230] Schwindt 2 , at 8. (Respondent's Book of Expert Reports and Affidavits, Tab 50), Fuss Reply Evidence, paras. 34-43. (Investor's Brief of Witness Statements and Expert Reports, Tab 12).

[231] Mueller Report, para 27. (Respondent's Book of Expert Reports and Affidavits, Tab 49). See also Schwindt 2, at 8-12. (Respondent's Book of Expert Reports and Affidavits, Tab 50); and Mueller Report, paras. 25-35. (Respondent's Book of Expert Reports and Affidavits, Tab 49).

[232] Eagles Affidavit, para. 48. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[233] Professor Mueller states:**[REDACTED]**, Mueller Report, para. 28. (Respondent's Book of Expert Reports and Affidavits, Tab 49).

> Track and trace functions are carried out using information technology maintained by the USPS.
>
> The USPS is responsible for setting out the characteristics and price of each product.
>
> Most importantly, the USPS is the residual claimant with respect to the product. If the product generates a profit, it goes to the USPS. If the product generates a loss, this is borne by the USPS. CPC is paid a set amount for its service regardless of whether the service is profitable or not.[234]

226. The USPS does have a courier-like joint product. This product is offered in conjunction with a private courier company and not with a postal administration such as Canada Post. Moreover, this product, unlike other USPS products, exhibits indicia of its joint product nature. This product is co-branded with FedEx and is referred to by the USPS as being the product of a *strategic alliance*.[235] USPS products whose deliveries are completed by Canada Post do not have these tell-tale indicia of a joint product.

227. Furthermore, Canada Post's completion of deliveries in Canada on behalf of foreign postal administrations pursuant to UPU obligations does not establish it has a "partnership" or joint products with foreign postal administrations.[236] The concept that

---

[234] See Schwindt 2, at 8. (Respondent's Book of Expert Reports and Affidavits, Tab 50). Similarly, as Mr. Eagles explains:

"[T]he USPS alone:

1. markets and sells to USPS customers;
2. collects product from USPS customers; and
3. dispatches USPS product to the various international exchange offices of Canada Post".

Eagles Affidavit, para. 15. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[235] Affidavit of Kal Tobias [Tobias 2], paras. 4-18. (Respondent's Book of Expert Reports and Affidavits, Tab 51).

[236] The Claimant would have the Tribunal disregard reference to Canada's obligations to the UPU as it "is not a disinterested source of international law". (Investor's Reply, para. 93). As is noted by Marcus Harding, the Claimant's suggestion is that the UPU thereby "acts as sort of a commercial endeavour". Such a suggestion is to be rejected. The UPU is an intergovernmental organization based on an international treaty. There is no collusion between members of the UPU to advance the competitive position of public postal operators to the detriment of their private sector competitors. Reply Evidence of Marcus Harding [Harding 2], paras. 9-16. (Respondent's Book of Expert Reports and Affidavits, Tab 43).

receipt of terminal dues by Canada Post creates a "partnership" with other foreign postal administrations or that they are "lucrative"[237] is misguided. As stated in Marcus Harding's Reply Affidavit:

> Terminal dues are designed to cover the receiving postal authorities delivery costs. Terminal dues are not 'lucrative' commercial arrangements that motivate public postal operators to compete with private operators in the country of origin to gain delivery traffic.[238]

228. Under the bilateral arrangement in place between Canada Post and USPS, terminal dues remain cost-based.[239] **[REDACTED]**[240] David Eagles adds, "It is therefore difficult to see how terminal dues might be construed as in any way 'lucrative'."[241]

229. If Canada Post's completion of deliveries in Canada on behalf of USPS were considered a "partnership" or were considered as creating a joint product, which Canada denies, it would not be "in competition" with courier companies. Kal Tobias, the former President of the Canadian Courier Association and former President and CEO of DHL International Express Ltd., states in his Reply Affidavit:

> As a long-term expert in the courier industry, I can attest to the fact that the courier industry does not view USPS/CPC as being in a

---

[237] Investor's Reply, para 68. The Claimant makes an improper comparison of the amounts of terminal dues. The Claimant compares income and revenue. When Canada Post receives payment for delivering postal items within Canada, which payments include terminal dues, it is included on the books of Canada Post as revenue. Canada Post's total annual revenue is currently in excess of $5 billion. The proper comparator for the $118 million terminal dues received by Canada Post in 2003 is therefore roughly $5 billion, not $253 million, which was Canada Post's approximate net income for that year. See Investor's Book of Documents, Tab U445; and Eagles Affidavit, para. 11. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[238] Harding 2, para. 8(c). (Respondent's Book of Expert Reports and Affidavits, Tab 43); see also Eagles Affidavit, paras. 9-14. (Respondent's Book of Expert Reports and Affidavits, Tab 42). Also, Marcus Harding stated that "It is simply incorrect to refer to such cooperation [between UPU countries] as 'joint products' or commercial 'partnerships' as claimed by UPS. Harding 2, para.12. (Respondent's Book of Expert Reports and Affidavits, Tab 43).

[239] Eagles Affidavit, paras. 5-14. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[240] Eagles Affidavit, para. 10. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[241] Eagles Affidavit, para. 9. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

> partnership to have a joint product that could compete with the courier industry.[242]

230. Finally, the Claimant relies on the existence of Canada Post's *Borderfree* division[243] and Express Mail Services ("EMS"),[244] as a means to demonstrate competition. Even accepting that competition is a relevant factor and assuming that the Claimant established that there was competition between the Claimant's products and these products, it would not advance the Claimant's case.

231. **[REDACTED]**.[245] There is no difference in treatment accorded to these shipments and to those of UPS Canada.

232. This is also the case with respect to EMS.[246] **[REDACTED]**[247]

c) The proper comparison is with customs treatment of Canadian courier companies

233. The Claimant does not make the appropriate comparison for the purpose of Article 1102. The Canadian-owned courier companies that are participants in the Courier/LVS Program are "identical comparator[s]"[248]: when acting as a Courier/LVS participant they are in the same circumstances as UPS Canada with respect to customs

---

[242] Tobias 2, para. 20. (Respondent's Book of Expert Reports and Affidavits, Tab 51).

[243] Investor's Reply, paras. 71-72. As described by Mr. Eagles, Borderfree helps American retailers, e-tailers and cataloguers expand their market presence in Canada through:

1. By customizing their websites for Canada customers.
2. By customizing their delivery capabilities to suit the individual needs of their Canadian customers.
3. **[REDACTED]**.

See Eagles Affidavit, paras. 24-27. (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[244] Investor's Reply, paras. 263-264.

[245] Eagles Affidavit, para. 26(3). (Respondent's Book of Expert Reports and Affidavits, Tab 42).

[246] Contrary to the opinion evidence of James Campbell Jr., the practice of most UPU member countries, since at least 1989, is to treat international EMS as being covered by the provisions of the Kyoto convention. See Harding 2, paras. 8(b) and 17-21. (Respondent's Book of Expert Reports and Affidavits, Tab 43).

[247] Jones 2, paras. 14-16. **[REDACTED]**.

[248] *Methanex* Award, Part IV, Chapter B, at 9, para. 19. (Investor's Book of Authorities, Tab 171).

treatment.[249] The treatment accorded to UPS Canada under the Courier/LVS Program is the same as that accorded to the Canadian and foreign-owned participants, including Purolator.[250] The Claimant admits that when parcels are imported by Purolator, they are "required to have customs inspection in the same manner as UPS Canada."[251] All voluntary participants in the Courier/LVS Program receive the treatment as fully described in D-Memorandum D17-4-0, irrespective of the nationality of their ownership.[252]

234. When the proper comparison is made - that is, when treatment accorded by Customs under the Courier/LVS Program to UPS Canada is measured against that accorded to other program participants, including Purolator - it is apparent that UPS Canada has not received less favourable treatment and that there is no nationality-based discrimination.

3. Treatment Canada accords the Claimant and UPS Canada is "no less favorable" than any treatment it accords Canada Post

235. As Canada set out in its Counter-Memorial, UPS Canada receives the same treatment as the over 40 participants of the Courier/LVS program. Thus, when the appropriate comparison is made, it clearly does not receive "less favorable" treatment. Canada has also demonstrated that the treatment accorded to UPS Canada under the Courier/LVS program was designed at the request of the industry[253] and that UPS Canada

[249] In addition, the specific allegations section explains that where additional functions, such as customs brokerage, are undertaken by UPS Canada, they receive the same treatment as anyone undertaking these functions.

[250] Note, reference here is made to treatment of Purolator in the context of customs treatment. As Canada has argued, it may be that, in relation to a certain measure, Purolator is in like circumstances with UPS Canada but this cannot be assumed, in the abstract, to be true in relation to all measures. See Canada's Rejoinder, para. 95.

[251] Investor's Reply, para. 627. See also Investor's Reply, para. 54: "The fact that Purolator is in like circumstances with UPS Canada is clearly not in dispute."

[252] Canada's Counter-Memorial, para.697 and Affidavit of Brian Jones [Jones 1], para. 82. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

[253] See Canada's Counter-Memorial, paras. 698-703.

has acknowledged that **[REDACTED]**[254]

236. Therefore, there is no basis for the Claimant to allege that the treatment UPS Canada receives as a result of its demands is "less favorable" treatment.

4. Specific Treatment Identified by the Claimant does not Violate Article 1102

237. The Claimant lists three categories of measures constituting violations of Article 1102 under the section entitled "Measures of Canada Customs Providing Preferential Treatment to Canada Post".

- "Customs charges cost recovery fees to UPS Canada while not charging similar fees to Canada Post[255];
- Canada Post does not comply with the types of Customs obligations that are imposed on other competitors in the parcel and package market such as UPS and is exempt from the payment of fines, penalties and interest[256]; and
- Canada Customs fails to properly assess duties and taxes on postal imports.[257]

238. These allegations are based on incorrect facts and a misunderstanding of the different roles and responsibilities in the courier and postal streams. Furthermore, as discussed above, given that the alleged treatment is not accorded in like circumstances with respect to postal items and with respect to the Claimant/UPS Canada, there is no requirement under Article 1102 that the treatment be no less favourable. Finally, the treatment the Claimant receives must be considered in light of the related benefits it receives because of these different circumstances.

a) Assessment of Duties and Taxes and Revenue Collection Compliance

239. The Claimant argues that Customs fails to properly inspect postal imports and

[254] Paré Statement, para. 13. (Investor's Brief of Witness Statements and Expert Reports, Tab 2).

[255] Investor's Reply, para. 630(a).

[256] Investor's Reply, para. 630(b).

[257] Investor's Reply, para. 630(c).

enforce Customs laws in the postal stream and that this constitutes "less favorable" treatment of UPS Canada. In order to substantiate this allegation, the Claimant relies on a flawed study by Nelems/MWI and argues contrary to all evidence that Customs has a financial incentive not to properly assess duties and taxes on items in the postal stream.

240. Contrary to the Claimant's allegations,[258] Customs does enforce domestic Canadian law in both the International Mail Processing System and in the Courier/LVS Program.

241. While there are different customs processes applicable in the two streams because of the different circumstances under which goods imported "as mail" and "by courier" arrive in Canada and the different roles and responsibilities of couriers and Canada Post, both programs have the same objectives: to assess duties and taxes where applicable and to prohibit the importation of proscribed goods. The Government of Canada has strong financial incentives and systems in place to ensure that duties and taxes are properly assessed are collected in both streams.[259]

242. The Claimant's suggestion that because of the Postal Imports Agreement, there is a financial incentive to keep the number of dutiable parcels below a threshold level has no merit.[260] The payment of compensation to Canada Post for increased volumes is not a motivating factor for Customs to disregard the law. Nor does Canada Post have any motivation under the Postal Import Agreement to avoid referring items to Customs.[261] As Brian Jones explains in his Reply Report, the Claimant's argument is based on an incorrect interpretation of the Postal Imports Agreement and of the number of mail items that are referred to primary and secondary processing.[262]

---

[258] Investor's Reply, para 630(c).

[259] Canada's Counter-Memorial, paras. 370, 420 **[REDACTED]**

[REDACTED]

[260] Investor's Reply, paras. 323-328.

[261] **[REDACTED]**. **[REDACTED]**.

[262] Jones 2, para. 43-48. Jones explains the Claimant's error with respect to the volume reference in the Postal Imports Agreement and the payment of supplementary fees. He also explains the Claimant's

243. Moreover, the Claimant's evidence of failure to assess duties and taxes in the postal stream should be accorded no weight. In its Counter-Memorial and supporting Expert Report of Dr. Mills and Affidavit of Darwin Satherstrom, Canada demonstrated that the Nelems/MWI Study was flawed and relied on incorrect assumptions.[263] Likewise, the additional reports of Mr. Nelems, Dr. Sen and Darrell H. Pearson adduced by the Claimant along with its Reply do not lend support to the Claimant's allegations.

244. Dr. Mills, in her Reply Expert Report, demonstrates that the new analysis of Mr. Nelems is as faulty as his previous report. As she states:

> "…Mr. Nelems' statistical methodology is incorrect and the conclusions he draws both with regard to the sample data he has and the population to which he wishes to make inference are statistically incorrect… The Nelems/MWI Study is fatally flawed on three counts: it has been incorrectly designed, incorrectly analyzed, and incorrectly interpreted."[264]

245. Dr. Mills summarizes the flaws in the Nelems study as including:[265]

i) Lack of clear purpose;

ii) Improper design;

iii) Small sample size;

iv) Incorrect statistical analysis; and

v) Attempt to inappropriately extrapolate outside the range of parameters of the study.

---

confusion between the release and examination functions performed by Customs and the assessment of duties and taxes. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[263] Canada's Counter-Memorial, paras. 372-375.

[264] Expert Rejoinder Report of Dr. Shirley E. Mills [Mills 2], para. 20. (Respondent's Book of Expert Reports and Affidavits, Tab 48).

[265] Mills 2, paras. 4-21. (Respondent's Book of Expert Reports and Affidavits, Tab 48); Jones 2, paras. 49-62. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

246. Dr. Mills also reviewed the report of Dr. Sen and concluded it lends no further credibility to the Nelems/MWI study. [266]

247. The Reply Affidavit of Brian Jones addresses other weaknesses in the Nelems Study and in the efforts of the Claimant to bolster the conclusions of this study through the witness statements of Darrell H. Pearson. Mr. Jones points out, for example, that there are inconsistencies between their statements as to whether a portion of the goods were duty-free under the United States tariff treatment and whether the goods were examined by Customs.[267] He also indicates that compliance was not properly understood or measured: Mr. Nelems seems to have assumed that compliance can be equated with an assessment of duties and taxes and not the assessment of the *correct* amount of duties and taxes.[268] Additionally, the study results were further tainted by the fact that Customs inspectors did not have the same information on which to base their assessment.[269]

248. In summary:

- the Nelems Study is flawed and does not establish different compliance rates between the postal and courier streams;
- the results can not be extrapolated beyond the period and items covered by the study;
- in any event, even if the compliance rates between the postal and courier streams were not identical, the differences would not result from a failure on the part of Customs to assess duties and taxes in the postal stream or from any failure on the part of Canada Post. Rather they would be attributable to factors such as the advance knowledge of the content in the courier stream but not in the postal stream, contractual relationship with the sender in the courier stream but not in the postal stream, and the fact that the courier stream relies on the self-assessment model whereas the postal stream relies on officer determination. Given the different circumstances it is not possible to make a national treatment comparison.

---

[266] Mills 2, para. 14. (Respondent's Book of Expert Reports and Affidavits, Tab 48).

[267] Jones 2, paras. 50 and 57. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[268] Jones 2, paras. 50 and 55. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[269] Jones 2, paras. 50, 58 and 59. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

b) Levying Fines and Penalties against Canada Post

249. The Claimant argues that the exemption of Canada Post "from the payment of fines, penalties and interest"[270] constitutes a breach of national treatment. The Claimant suggests that penalties relating to non-report of imported goods to Customs, unlawful removal of goods and late accounting that apply to courier companies like UPS Canada should also apply to Canada Post for "similar infractions". UPS Canada is subject to reporting, warehousing, and accounting obligations under customs laws because it *chooses* to offer multiple services to its clients and act as a bonded carrier, sufferance warehouse operator, agent for the importer and customs broker. Because it performs these multiple functions, and as a result of its participation in the Courier/LVS program, it benefits from consolidated accounting, deferred payment of duties and taxes, simplified inspection and release process and elimination of paper transactions.[271] However, failure to fulfil its obligations or lack of timeliness results in the application of penalty provisions and late accounting fees. Canada Post does not perform the same functions as UPS Canada.[272] It is therefore not subject to the associated obligations and penalties.[273]

250. Given these different circumstances, it is inappropriate to make a comparison between the treatment UPS Canada receives and that of Canada Post. The obligations and related penalties that the Claimant challenges apply to those that perform certain functions regardless of nationality.

c) Cost recovery fees

251. The Claimant has identified two elements included within the claim as failure to

---

[270] Investor's Reply, para 630(b).

[271] Jones 1, paras. 85, 149. (Respondent's Book of Expert Reports and Affidavits, Tab 19).
Affidavit of Larry Hahn, paras. 35-40. (Respondent's Book of Expert Reports and Affidavits, Tab 14).
Affidavit of Donald Martin, para. 57. (Respondent's Book of Expert Reports and Affidavits, Tab 26); and
Tobias 1, paras. 37-38, 40. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

[272] Jones 1, paras. 23-56. (Respondent's Book of Expert Reports and Affidavits, Tab 19). Canada's Counter-Memorial, paras. 676-683.

[273] It is therefore incorrect to suggest that Canada Post is "exempt" from these obligations.

charge Canada Post cost recovery fees: cost recovery for work of customs officers and cost recovery for computer systems.

252. *Provision of Customs officers on the premises of UPS Canada:*[274] The Claimant implies that it could not receive services without entering into a cost recovery agreement with Customs. This is not correct. The cost recovery program is entirely voluntary and the majority of Courier/LVS participants do not incur cost recovery fees.[275] Customs charges cost recovery when the courier requests services outside core business or if the courier requests expedited service that require processing outside the normal First In, First Out (FIFO). In order to receive these special services, UPS Canada has agreed to pay cost recovery fees.

253. By contrast, Customs does not supply any special services in relation to the postal stream.[276] The work carried out by Customs officers in the Customs Mail Centres is customs work conducted within offices designated for the processing of goods imported as mail. The fact that the facilities are co-located with Canada Post does not change this. Customs staffs these offices in the same manner as any border or airport office.[277]

254. Given the differences in the services provided by Customs and in the responsibilities of Customs in the courier and postal streams,[278] it is not appropriate for the purposes of Article 1102 to compare what Customs charges UPS Canada to what Customs charges Canada Post. Customs charges cost recovery fees for special services to all courier companies, domestic and foreign owned, that require these services.

255. *Computer Technology*: [279] The Postal Imports Control System (PICS) is an internal CBSA system and database designed to facilitate Customs processing of mail,

---

[274] Investor's Reply, paras. 269-280.

[275] Jones 2, para. 20-22. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[276] Jones 2, para. 18. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[277] Jones 2, paras. 124-136. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[278] Jones 2, para. 23. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[279] Investor's Reply, para. 278.

the control of mail packages referred for examination, the consistent application of duties and taxes, and the application of financial controls. By contrast, the CADEX Electronic Data Interchange is used by importers and brokers, both domestic and foreign owned, to transmit accounting data electronically to Customs. There is no requirement to use this electronic system but many importers and brokers do as it facilitates their accounting function.[280]

256. Given the different roles and responsibilities in the postal and courier streams and the different purposes of the computer systems, any costs incurred or charged in relation to these systems cannot be compared. The treatment is not accorded in like circumstances. Customs charges fees in relation to the CADEX system regardless of the nationality of the users.

d) Canada Post does not provide customs brokerage services

257. The Claimant *chooses* to perform customs brokerage services for which it is compensated by its clients. Despite the fact that the choice to provide customs brokerage services is a commercial decision made by the Claimant, it alleges that there is a violation of national treatment because Canada Post does not perform such functions.[281]

258. A customs broker typically acts as the lawful *agent* of the importer or owner of the goods for the purposes of accounting and payment of duties and taxes and the fulfilment of any other regulatory requirements that may be applicable. UPS Canada is a licensed customs broker and is also authorized to act "in lieu of" the importer/owner in accounting for casual goods.[282]

259. Canada Post has no knowledge of the contents of mail items originating with the

---

[280] Jones 2, para. 24. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[281] Note: This allegation does not appear in at Part III.VI.F.2(c) "Measures of Canada Customs Providing Preferential Treatment to Canada Post" but is listed in the Statement of Facts at Part II.VII.C.3 as "Canada Provides Treatment Less Favorable"

[282] Counter-Memorial, para. 418. Jones 2, para. 34. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

foreign postal administration and has no contractual relationship with the sender/exporter of the goods, who utilizes the services of that foreign postal administration, or with the addressee/importer of the goods in Canada. Consequently, Canada Post has neither the knowledge nor the legal relationship to perform customs brokerage services, nor are they authorized or licensed by Customs to perform such services.[283]

260. The "treatments" which the Claimant seeks to compare are not accorded in like circumstances. There is no exemption of Canada Post from the requirements for customs brokerage services.[284] Simply, because they do not perform such services the requirements do not apply. Customs requirements apply to UPS Canada and to all companies, domestic or foreign owned, that offer customs brokerage services.

e) Payment to Canada Post for services

261. The Claimant also argues more generally that it receives less favourable treatment because Customs pays Canada Post for services that UPS Canada must supply for free.[285] This reveals a misunderstanding of the different responsibilities in the customs context. It is the responsibility of Customs to clear postal items. Canada Post collects duties and taxes as agent for Customs under the terms of a service agreement while UPS Canada, in collecting and remitting duties and taxes, does so on behalf of the importer or in his own right in lieu of the importer.[286] Canada's payments to Canada Post in relation to its procurement of services (material handling, data entry and collection of duties and taxes) are not made in like circumstances with UPS Canada who provides no services to Customs. Moreover, the services that Canada procures from Canada Post under the *Postal Imports Agreement* are exempted from the application of Article 1102 by virtue of

---

[283] See Counter-Memorial, paras. 415, 416; and Jones 1, paras. 52, 53. (Respondent's Book of Expert Reports and Affidavits, Tab 19). Jones 2, paras 33, 35, 36. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[284] Jones 2, para. 32. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[285] Canada notes that this allegation does not appear at Part III.VI.F.2(c) "Measures of Canada Customs Providing Preferential Treatment to Canada Post" but is listed in the Statement of Facts at Part II.VII.C.2 as "Canada Provides Treatment Less Favorable"

[286] Jones 2, paras. 25-27. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

Article 1108(7)(a).

5. Procurement exception applies to the Postal Import Agreement

262. The *Postal Imports Agreement* is a procurement of services by Customs and as such is excluded, by virtue of Article 1108(7)(a), from the application of Articles 1102 and 1103.[287]

263. The Claimant suggests in the Reply that: "Canada has merely argued that since a procurement may be involved, everything connected with the *Postal Imports Agreement* is inoculated from Tribunal review."[288] The Claimant misunderstands Canada's submission.[289] Under the *Postal Imports Agreement* Customs procured three services from Canada Post: material handling, data entry and duty collection. The three services procured from Canada Post, the fee Customs pays for the services and the choice of supplier are core elements of the procurement and as such, fall within the terms of the Article 1108(7).

264. The *ADF* Tribunal examined the meaning of the term "procurement by a Party" in Article 1108(7)(a) and noted that it referred to "the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery."[290]

265. As explained in Canada's Counter Memorial, the *Postal Imports Agreement* meets this definition. It is a contract under which Canada Post performs a service for Customs for a fee.[291]

---

[287] See Canada's Counter-Memorial, paras. 562-570.

[288] Investor's Reply, para. 644.

[289] Any confusion that may have arisen regarding which of the impugned treatments is the subject of an exception on the basis that it is a procurement is as a result of the Claimant's identification of treatments flowing from the *Postal Imports Agreement*. At paragraph 278 of the Memorial, the Claimant lists five items it claims are "privileges" arising from the *Postal Imports Agreement*.

[290] *ADF Group Inc. v. United States of America*, (January 9, 2003), (Award), para. 161 [*ADF* Award]. (Investor's Book of Authorities, Tab 95).

[291] Canada's Counter Memorial, paras. 564-569.

266. The Claimant now seeks to introduce additional conditions that must be met in order for a procurement to fall within the exception in Article 1108(7)(a). There is no basis for this in the text.

267. NAFTA Article 1108(7) does not require that the fee for the service procured be paid pursuant to a specific formula or in a particular manner in order to fall within the scope of the exception. Accordingly, the Claimant's arguments regarding the calculation of the fee paid to Canada Post are not relevant. **[REDACTED]**[292]**, [REDACTED]**[293] The *Postal Imports Agreement* is a contract that was the subject of "protracted negotiations".[294] A Canadian court recognized the agreement entered into in 1992 as a "commercial fee-for-service contract".[295] As noted previously, the Claimant itself has recognized the agreement as contractual in nature.[296] These elements are sufficient to make it a procurement.

268. Finally, while Canada does not accept the Claimant's allegations that the procurement was inconsistent with domestic or NAFTA procurement disciplines, there is no requirement in Article 1108(7) that the procurement be "lawful". This Tribunal does not have jurisdiction to consider whether the procurement complied with any existing or applicable NAFTA Chapter 10 disciplines. Nor is it its role to examine consistency with domestic procurement obligations. The Tribunal should therefore disregard the Claimants new arguments and evidence regarding the lawfulness of the procurement.[297]

---

[292] **[REDACTED]**.

[293] Affidavit of John Cardinal, [Cardinal Affidavit], para. 16. (Respondent's Book of Expert Reports and Affidavits, Tab 4).

[294] Cardinal Affidavit, para. 14. (Respondent's Book of Expert Reports and Affidavits, Tab 4)

[295] Canada's Counter-Memorial, para 567; *Dussault v. Canada (Customs and Revenue Agency),* 2003 FC 973, 238 F.T.R. 280, para. 4. (Respondent's Book of authorities, Tab 77).

[296] In addition to the example at footnote 568 of Canada's Counter-Memorial see also the following example:

> "The dispute does not concern the existence of different postal and courier streams nor Canada's right to contract for services from Canada Post." Investor's Memorial, para.30. [emphasis added]

[297] Investors' Reply, paras. 646, 655-657.

VI. There is no breach of Article 1102 with respect to the Publications Assistance Program

269. A proper analysis of the claim with respect to the Publications Assistance Program requires considering:

- First, is the Publications Assistance Program a measure with respect to cultural industries and therefore falling within the scope of the cultural exemption?
- If not, is it a subsidy and therefore not subject to Article 1102 pursuant to the exception in Article 1108(7)(b)?
- If not, then is the program's requirement that the publications be delivered by Canada Post in order to receive the subsidy a breach of Article 1102?

A. NAFTA's cultural exemption applies to the Publications Assistance Program

270. The ordinary meaning of the NAFTA Annex 2106 exempts any measure with respect to cultural industries from the scope of the NAFTA and makes applicable the provisions of the *Canada-United States Free Trade Agreement*. It states:

> 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**, […] shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada - United States Free Trade Agreement*. […] (emphasis added)

271. The Claimant recognizes that the exemption applies to the publications assistance provided by the Publications Assistance Program.[298] However, the Claimant does not agree that the exemption applies to the Program as a whole. In order to avoid the application of Annex 2106 which exempts "any measure adopted or maintained with respect to cultural industries", the Claimant argues that the "measure" it challenges is not the Publications Assistance Program but only an aspect of the Program, the distribution

[298] Investor's Memorial, para. 601.

of the assistance though Canada Post. How the Claimant defines the measure challenged is not relevant to the question of whether a measure is exempt under NAFTA Article 2106. The question of what falls within the scope of the cultural exemption is a separate and prior question from whether the measure identified by the Claimant is in breach of a NAFTA obligation.

272. Given that the Program as a whole is a measure with respect to cultural industries and falls within the scope of the cultural exemption, there is no need to consider whether an aspect of the Program which is identified by the Claimant as the challenged measure, breaches Article 1102.

273. Furthermore, the Claimant recognizes that the words "with respect to" only require a connection between the measure and the cultural industries.[299] Therefore, by its own admission, there is no requirement to show that all aspects of the program are "necessary", less trade restrictive, or help realize the cultural objective.[300] It is indicative that NAFTA Article 2106 makes no reference to cultural objectives. It does not require inquiring about or second-guessing the objectives pursued by the Program. It is sufficient to establish that it is a program in connection with cultural industries.

B. The subsidy exception applies to the Program

274. Article 1108(7)(b) provides that Article 1102 does not apply to subsidies provided by a Party or state enterprise. The Claimant argues that it is not challenging the subsidy itself but the requirement that the publishers use Canada Post for delivery in order to receive the subsidy.[301] The requirement for publishers to use Canada Post is not a stand-alone obligation: it is a condition on the provision of the subsidy. Therefore, the Claimant's attempt to create two separate measures in order to avoid the application of

[299] Investor's Reply, para. 680.

[300] In this respect, although Canada provided an explanation as to the program's objectives, (Canada's Counter-Memorial, paras. 301-302), Canada does not accept that Canada has to demonstrate that the use of Canada Post to deliver the publications assistance helps achieve the cultural objective pursued by the program.

[301] Investor's Reply, para. 685.

the subsidy exception must fail.

275. It is also clear that this is not a question of nationality based discrimination. The Claimant would remain unsatisfied even if the Program required use of a U.S. courier company.

276. The Claimant's reliance on the *US-FSC* case to limit the content of the subsidy exception in NAFTA Article 1108(7)(b) is misplaced.[302] Although the Claimant recognizes that the wording of the subsidy exception to the national treatment obligation in GATT is different than the exception in NAFTA Chapter 11, it would have the Tribunal ignore this. The Claimant also ignores the fact that NAFTA Chapter 11 has its own set of disciplines with respect to conditions on receipt of advantages and subsidies. NAFTA Article 1106(3) prohibits Parties from imposing certain conditions related to the receipt of a subsidy or advantage. There is no prohibition on requiring use of certain services as a condition on the receipt of the subsidy.

C. The requirement to use Canada Post is not a breach of Article 1102

277. The Investor's Reply makes clear that what it is seeking is to "remov[e] the restrictions to allow publishers the freedom to use a carrier."[303] This is not a question of failure to provide national treatment. The Claimant continues to carefully avoid the question of whether UPS Canada is prepared to receive the same treatment as Canada Post that is, deliver all the publications qualifying under the program on the same terms and conditions agreed to by Canada Post. It is evident from its statements that the Claimant is not. Rather, it is only interested in delivering to "retail clients" and "news stands". [304]

[302] Investor's Reply, para. 686.

[303] Investor's Reply, para. 353.

[304] Investor's Reply, para. 356.

278. **[REDACTED]**[305] **[REDACTED]**

[305] Reply Witness Statement of Alan Gershenhorn, para. 13. (Investor's Witness Statements and Expert Reports, Tab 9).

PART IV. THERE IS NO MINIMUM STANDARD OF TREATMENT VIOLATION

I. The Claimant's 1105 Allegations Must Fail

279. It seems there is now agreement between the disputing parties that the content of the minimum standard of treatment is found in customary international law.[306]

280. There is also agreement that to establish a rule of customary international law, two requirements must be met: consistent state practice and an understanding that the practice is required by law ("*opinio juris*").[307]

281. Where the disagreement lies is on how the content of the minimum standard of treatment is to be established. The Claimant argues that the content of customary international law can be extracted from the awards of international tribunals because "the NAFTA Parties signalled their acceptance that the accepted content of customary international law displayed the two elements of practice and *opinio juris*."[308] So, the Claimant is of the view that although the minimum standard is found in custom, it exists through a variety of rules, including a prohibition on regulating arbitrary and discriminatory conduct, good faith, abuse of rights, which need not be proved because the Parties have already agreed to their existence.

282. Canada submits that the Claimant's case must fail if it cannot demonstrate: 1) that the rules upon which it relies are part of the "accepted content of customary international law" is; and 2) that the customary rule is applicable to foreign investors. The Claimant has failed to identify the requisite State practice and *opinio juris*, and it has not invoked a single arbitral decision which provides evidence of a rule through its two essential elements.

---

[306] Investor's Reply, para. 717.

[307] Investor's Reply, para. 717.

[308] Investor's Reply, para. 718.

283. The other major point of disagreement between the disputing parties is on the threshold of application of Article 1105. The Claimant contends that every internationally wrongful act committed by Canada constitutes a breach of Article 1105.[309] Canada submits that the minimum standard of treatment is not meant to cover every internationally wrongful act. Treatment may fall below the international minimum standard when it is "grossly unfair",[310] "wholly arbitrary"[311], "idiosyncratic or aberrant",[312] a "clear and malicious application of the law" or a "pretence of form",[313] "clearly improper and discreditable"[314] and an "outright and unjustified repudiation" of legal rules.[315] Acting contrary to a policy or to Canadian law is not sufficient to show a breach of the minimum standard, because "something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)".[316]

A. The Claimant Provides No Insight into the Content of the Minimum Standard of Treatment

284. The Claimant's contention, which was the same contention that the *ADF* Tribunal rejected, apparently allows it to side-step the basic rule of law that custom must be proven by demonstrating it through the elements of State practice and *opinio juris.*

285. The Claimant attempts to justify its position by relying on the following statement

---

[309] Investor's Reply, paras. 742-743.

[310] *ADF* Award, para. 189. (Investor's Book of Authorities, Tab 95); *Waste Management Inc. v. United Mexican States,* Case No. ARB(AF)/00/3, (April 30, 2004), (Award), 43 I.L.M. 967 (2004), [*Waste Management II* Award], para. 98. (Respondent's Book of Authorities, Tab 71).

[311] *Waste Management II* Award, para. 115. (Respondent's Book of Authorities, Tab 71).

[312] *ADF* Award, para. 188. (Investor's Book of Authorities, Tab 95).

[313] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, (October 11, 2002), (Award), 42 ILM 85 (2003), para. 126 [*Mondev* Award]. (Investor's Book of Authorities, Tab 37), endorsing the language adopted by the Tribunal in *Azinian v. The United Mexican States,* ICSID Case No. ARB(AF)/97/2, (November 1, 1999), (Award), 39 ILM 537 (2000), [*Azinian* Award]. (Investor's Book of Authorities, Tab 40).

[314] *Mondev* Award*,* para. 127. (Investor's Book of Authorities, Tab 37).

[315] *GAMI* Award, para. 104. (Investor's Book of Authorities, Tab 100).

[316] *ADF* Award, para. 190. (Investor's Book of Authorities, Tab. 95).

of the *Mondev* Tribunal taken well out of context: "Thus the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it". Contrary to the Claimant's belief, this statement did not pertain to the investor's burden of demonstrating the content of customary international law as it pertains to the minimum standard. Rather, the Tribunal's statement followed a detailed overview of the *opinio juris* of the NAFTA Parties, which showed that their "intention was to incorporate principles of customary international law."[317] On this narrow point, the Tribunal found that there was no need to show state practice and *opinio juris*.

286. However the Tribunal's comment was not meant to apply to the larger question of "what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?"[318] To answer this question, it is necessary to refer to customary rules of law.

287. This is clear from the further analysis of the *Mondev* Tribunal, which was limited to the long-standing customary rule of a denial of justice.[319] The Tribunal lays out no other standard or rule of custom despite arguments from Mondev.[320] Its analysis is entirely confined to a breach of Article 1105 through a denial of justice.

288. The award in *ADF v. United States* established the same principle. In that case, the Investor argued that the *Mondev* Tribunal found that the minimum standard of treatment existed in-and-of itself without any dependence on customary rules. The Tribunal did not agree. It stated that "the Tribunal in *Mondev* did <u>not</u> reach the position

[317] *Mondev* Award, para. 111. (Investor's Book of Authorities, Tab 37).

[318] *Mondev* Award, para. 113. (Investor's Book of Authorities, Tab 37).

[319] *Mondev* Award, paras 126-127. (Investor's Book of Authorities, Tab 37).

[320] The Investor argued that behaviour attributable to the US was "devoid of any vestige of good faith" and that it prevented Mondev from "realizing its contractual rights and benefits" contrary to Article 1105; *Mondev v. United States*, Transcript of Hearing on Competence and Liability (Uncorrected), 20 May 2002, at 25 and 244-245; see also the request made by one of the arbitrators, Prof. Crawford, to counsel for Mondev, Sir Arthur Watts, for cases on the minimum standard of treatment that involved contractual conduct by the respondent state, at 250-255. (Respondent's Book of Authorities, Tab 112).

of the Investor".[321]

289. The *ADF* Tribunal also provided the following:

> We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments.[322]

290. The Tribunal rejected ADF's case on Article 1105 because it had not satisfied its burden of proof that the alleged breach constituted a breach of customary international law.[323]

291. The Claimant in this case does not allege a denial of justice. Instead, it alleges violations of the following standards without establishing how they are a part of customary international law or how they relate to the treatment of aliens:

i) acting without reason or fact or on the basis of irrelevant considerations;

ii) arbitrary and discriminatory conduct;

iii) a withdrawal of full protection and security through legislative amendment;

iv) a breach of good faith;

v) a failure to live up to the Claimant's legitimate expectations;

---

[321] *ADF* Award, para. 183. (emphasis in original). (Investor's Book of Authorities, Tab 95).

[322] *ADF* Award, para. 183. (Investor's Book of Authorities, Tab 95).

[323] The Tribunal stated that "The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts." *ADF* Award, para. 185. (Investor's Book of Authorities, Tab 95).

vi) *pacta sunt servanda*;

vii) abuse of rights; and

viii) a breach of labour standards thereby encouraging anti-competitive behaviour.

292. The above elements are the Claimant's extrapolations from arbitral commentary. In its attempt to set them out as stand-alone rules, the Claimant has taken the comments of tribunals out of context and filled them with its own meaning.

293. Contrary to the Claimant's assertions, acting without reason or fact[324] or on the basis of irrelevant considerations[325] do not amount to a breach of a customary rule for the simple reason that they would impose an unacceptable international legal standard on States. Decision-makers must be able to make mistakes without breaching the minimum standard in every instance.[326] In the words of the *Mondev* Tribunal, "an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)."[327]

294. The Claimant relies on *Lauder* to argue that the prohibition against "arbitrary and discriminatory conduct" is part of customary international law.[328] "Arbitrary and discriminatory conduct" is specific treaty language pulled from the US-Czech BIT, which exists alongside but separately from the provision guaranteeing a minimum standard of treatment.[329] Although in *Lauder*, the Tribunal found a breach of "arbitrary and discriminatory conduct", on the same facts, it did not find a breach of the minimum

[324] Investor's Reply, para. 737.

[325] Investor's Memorial, para. 736.

[326] The *GAMI* Tribunal has stated that misguided, clumsy or ineffective decision-making "is a matter of policy and politics", para. 114. (Investor's Book of Authorities, Tab 100).

[327] *Mondev* Award, para. 120. (Investor's Book of Authorities, Tab 37).

[328] Investor's Reply, paras. 731-732.

[329] This is also the case for the 1948 FCN Treaty between Italy and the United States, which was interpreted by the International Court of Justice in *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy),* 1989 ICJ 15, para. 72. (Respondent's Book of Authorities, Tab 45).

standard. Therefore, contrary to the Claimant's position, *Lauder* stands for the proposition that these standards are separate and distinct in law.[330] The Claimant has read the comments in *Lauder* out of context.

295. Although "full protection and security" is a concept that exists in customary international law, the Claimant has ignored its meaning established over years of State practice.[331] Canada agrees with the United States that the phrase "refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law."[332] Breaches have occurred when there has been a physical invasion of the person or property of the alien, but not when a legislative change led to interference with an investment.[333]

296. The remaining elements identified by the Claimant depend on the existence of an international legal right in order to have meaning. While these may constitute elements of a denial of justice or some other breach of the minimum standard, they are not in and of themselves rules of customary international law of independent application.[334] As the ICJ stated, good faith "is not in itself a source of obligation where none would otherwise

---

[330] This position is also supported by the fact that acting "on prejudice" or in a discriminatory manner is something protected by Article 1102, not by Article 1105, as considered by the Tribunal in *Methanex*. It specifically found that customary international law allows "a State [to] differentiate in its treatment of nationals and aliens"; *Methanex Award,* Part IV, Chapter C, at 11, para. 25. (Investor's Book of Authorities, Tab 171).

[331] At para. 741 of the Investor's Reply, the Claimant cites the *CME* Tribunal's conclusion that the Czech Republic breached full protection and security. The significance of that finding is seriously undermined by the fact that the *Lauder* Tribunal came to the opposite conclusion on the exact same facts; *Ronald S. Lauder v. The Czech Republic* (September 3, 2001), (Final Award), paras. 308-309. (Investor's Book of Authorities, Tab 43).

[332] Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* in *ADF v. United States of America*, June 25, 2002, at 3. (Respondent's Book of Authorities, Tab 104).

[333] See e.g. *American Manufacturing & Trading, Inv. v. Zaire*, 36 ILM 1531 (1997), para. 6.05 *et. seq.* (Respondent's Book of Authorities, Tab 105); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka,* 30 ILM 577 (1991), para. 47 *et. seq* .(Respondent's Book of Authorities, Tab 107).

[334] Moreover, to the extent that any allegation results in the promotion or permissibility of anti-competitive practices, it cannot amount to a breach of Article 1105, since the Tribunal has already determined that there is no rule of customary international law prohibiting or regulating anticompetitive behaviour; *UPS* Jurisdiction Award, para. 92. (Investor's Book of Authorities, Tab 48).

exist."[335] This is also the case with an abuse of rights, *pacta sunt servanda* and legitimate expectations. The Claimant has not identified the international legal source of its expectations, its rights or its pact.

297. The circularity of the Claimant's argument becomes clear when it submits that "[t]he source of the obligation does exist in this circumstance - the source is the customary international law standard of treatment, which Canada has accepted it is bound by."[336] This statement marks the divide between the interpretations of Article 1105 put forth by the disputing parties.

298. On the one hand, the Claimant calls on the Tribunal to act as ombudsman with full discretion to consider all conduct by any standard. On the other, Canada, like the United States and Mexico, submits that a claimant must identify the breach of a customary rule applicable to foreign investors.[337] If the Claimant is incapable of identifying a single customary legal obligation that Canada owes to foreign investors, it is impossible that Canada has abused it or has failed to carry it out in good faith. After all, a NAFTA Chapter 11 tribunal does not have the power to decide matters *ex aequo et bono*.[338]

299. Theoretically, the Claimant's position that the minimum standard is a general rule existing in customary international law, independent from other customary rules, is open for substantiation. Like any rule of custom, substantiation occurs through proof of the

---

[335] *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras),* Jurisdiction of the Court and Admissibility of the Application, Judgment, 1988 I.C.J. 69, at 105-106, para. 94. (emphasis added). (Respondent's Book of Authorities, Tab 42); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria),* Preliminary Objections, 1998 I.C.J. 275, at 297. (Respondent's Book of Authorities, Tab 46).

[336] Investor's Reply, para. 724.

[337] The United States has stated that "the Investor […] must show a violation of a specific rule of customary international law relating to foreign investors and their investments"; *ADF* Award, para. 182. (emphasis in original). (Investor's Book of Authorities, Tab 95); Mexico argued in *GAMI* that "[t]he Claimant has failed to identify any rule of customary international law that Mexico has violated respecting its treatment of the Mexican sugar industry." Courtesy Translation of Mexico's Statement of Defence in *GAMI v. United Mexican States,* para. 236. (Respondent's Book of Authorities, Tab 109).

[338] UNCITRAL Arbitration Rules, Article 33(2).

two basic elements: state practice and *opinio juris*. The Claimant has failed to meet this burden.

B. The General Rules of State Responsibility Do Not Broaden the Scope of the Minimum Standard of Treatment

300. Having seemingly abandoned its position that the minimum standard is meant to cover all breaches of international law including treaty law, the Claimant attempts to achieve the same result by arguing that every internationally wrongful act amounts to a breach of Article 1105. Its argument runs counter to the meaning of Article 1105 as interpreted by the Free Trade Commission as well as by this and other Tribunals.[339]

301. A State commits a "wrongful act" when it breaches *any* obligation, customary or treaty-related, owed to another State. The ILC Articles on State Responsibility are secondary rules; they apply once it has been determined that a customary or conventional rule has been breached. Therefore, they provide no interpretative assistance on whether the primary rule, such as the minimum standard, has been violated. This is confirmed by the Commentaries, which set out the limits of the scope of the Articles:

> … it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other sources of international obligations, such as customary international law.[340]

302. Therefore, while it is abundantly true that every international wrongful act of a

---

[339] *UPS* Jurisdiction Award, para. 98. (Investor's Book of Authorities, Tab 48); see also *Methanex* Award, Part IV, Chapter C, p. 6, para. 11, in which the Tribunal stated, at paras. 120-121, that "The tribunal in *Mondev*, for example, emphasised that the application of the customary international law standard does not *per se* permit resort to other treaties of the NAFTA Parties or, indeed, other provisions within NAFTA.". (Investor's Book of Authorities, Tab 171).

[340] ILC Commentaries, at 75, para. 4. (Investor's Book of Authorities, Tab 3).

State entails responsibility, an interpreter must first assess the content or scope of the rule in order to determine whether it has been breached. Unfortunately, the Claimant does not assist the Tribunal to define the scope of the minimum standard.

C. The Claimant Provides No Insight into the Proper Threshold of the Minimum Standard of Treatment

303. The Claimant does not assist the Tribunal in properly identifying the threshold of application of Article 1105. Every Chapter 11 tribunal that has had to contend with an interpretation of this provision has recognized that it covers acts so grave as to shock a sense of judicial propriety. These acts must be grossly unfair, wholly arbitrary, idiosyncratic or aberrant, a clear and malicious application of the law or a pretence of form, clearly improper or discreditable, or an outright and unjustified repudiation.

304. If there are situations in which "even lesser failures would suffice to trigger Article 1105",[341] then it is up to the Claimant to substantiate them within customary international law. It has not.

D. Summary of the legal test

- Article 1105 applies to measures that "relate to" an investor or its investment;
- Article 1105 requires a breach of customary law related to a subject area applicable to aliens (not every internationally wrongful act amounts to a breach of Article 1105);
- customary international law must be proved by showing state practice and *opinio juris*; and
- to breach the minimum standard of treatment requires meeting a high threshold of showing conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice in a manner that offends a sense of judicial propriety.

[341] *GAMI* Award, para. 103. (Investor's Book of Authorities, Tab 100).

II. Collective Bargaining

305. Whether or not Canada has breached *ILO Convention No. 87* or collective bargaining obligations at customary international law, the Claimant admits that the actions have no link to UPS Canada except that they give Canada Post "an unfair competitive advantage over UPS Canada."[342] This argument flies in the face of the Tribunal's ruling that "those parts of the [Amended Statement of Claim], which are based on article 1105, and which challenge anticompetitive behaviour and the failure to prohibit or control it are not within its jurisdiction."[343] The argument should be rejected on this basis.

306. Moreover, the Claimant has not shown the breach of a customary rule that relates to the protection of aliens. The treatment it complains about, "denying Canada Post's workers collective bargaining rights",[344] is treatment of Canada Post workers, not foreign investors. The Claimant has no standing to make such an allegation, since there is no measure relating to UPS Canada as required by Article 1101.

III. Customs Treatment Does Not Violate the Minimum Standard

307. The Claimant persists with its argument that Customs' actions breach the minimum standard of treatment because they "result in a competitive advantage of Canada Post over UPS Canada."[345] The Claimant depends on this link between the identified measure and UPS Canada because none of the treatment of which it complains relates to UPS Canada alone. Rather, the treatment principally concerns the mail brought to Canada by foreign postal administrations and handed to Canada Post. The Claimant has not satisfied its burdens under Article 1101, to show that these measures "relate to" an investor or its investment.

308. Every single allegation of an Article 1105 breach compares treatment that Canada

[342] Investor's Reply, para. 755.

[343] *UPS* Jurisdiction Award, para. 99. (Investor's Book of Authorities, Tab 48).

[344] Investor's Reply, para. 755.

[345] Investor's Reply, para. 753.

accords to Canada Post to the treatment that it accords to UPS Canada.[346] Therefore, the Claimant's Article 1105 case on Customs treatment is founded on different treatment. **[REDACTED]**.[347] Moreover, the allegations signal a difference in treatment through a proper application of the law. Canadian law calls for the mail to be treated differently than couriers and imports through the Courier/LVS stream. There is nothing arbitrary about such a difference in treatment. Nor is it discriminatory in any way, contrary to the allegations of the Claimant.

309. Besides, even if the different treatment amounted to discrimination, the *Methanex* Tribunal has clearly stated that discriminatory treatment does not violate the minimum standard of treatment. As it stated,

> the plain and natural meaning of the text of Article 1105 does not support the contention that the 'minimum standard of treatment' precludes governmental differentiations as between nationals and aliens. Article 1105(1) does not mention discrimination; and Article 1105(2), which does mention it, makes clear that discrimination is not included in the previous paragraph.[348]

310. The Claimant ignores the meaning of the minimum standard in customary law. It draws inappropriate comparisons between different types of treatment accorded for different reasons and alleges that this breaches some sort of general fairness standard that it has failed to prove. This is the case even where the Claimant points to a difference in treatment that is allegedly due to non-enforcement of the law.

311. For example, the Claimant argues that Canada breaches the minimum standard because Canada Post fails to produce goods to Customs for clearance and Canada fails to punish Canada Post for this behaviour.[349] The example it cites to prove its point is that of

---

[346] Investor's Memorial, para. 643(a)-(i); note, however, that the Claimant has already abandoned three of these allegations, see Investor's Reply, fn. 332, one of which it had already abandoned on a previous occasion; see *UPS* Jurisdiction Award, paras. 116-17. (Investor's Book of Authorities, Tab 48).

[347] Expert Report of Howard N. Rosen, para. 36. (Investor's Book of Witness Statements and Expert Reports, Tab 8).

[348] *Methanex* Award, Part IV, Chapter C, p.7, para. 14. (Investor's Book of Authorities, Tab 171).

[349] Investor's Reply, para. 752.

USPS not delivering mail to the proper port of entry. In other words, it claims that when a parcel, in the control of a foreign postal administration, is delivered to the wrong port of entry, this is somehow comparable to when the Claimant/UPS Canada brings a parcel into Canada.

312. The Claimant's strained comparison overlooks the fact that, in the case of the postal shipment, the sender, the contents and even the existence of the parcel are unknown to Canada Post and Canada Customs until it arrives in Canada. In the latter instance, the Claimant/UPS Canada stands in the shoes of the shipper with full knowledge of the contents of the package and their value for duty. UPS Canada provides advance information to Customs so that the parcel can be cleared in an expedited manner, and accordingly, bears liability and responsibility that is not shared by Canada's postal administrator, which does not enjoy expedited customs clearance.[350] The two systems bear different realities.

313. Canada cannot be held responsible for actions of USPS and should not be expected to levy fines against Canada Post as a result of actions by USPS.

314. There is no dispute between the witnesses of each disputing party **[REDACTED]**.[351] Canada performs periodic sampling.[352] Moreover, the Nelems study conducted by the Claimant demonstrates that every item sent through the post passed through Canadian Customs.

315. The allegation that Canada selectively enforces the law to somehow encourage foreigners to send goods through the post is entirely without foundation. It ignores the different realities in postal imports as opposed to imports through the Courier/LVS stream. It also overlooks the fact that Canada Customs has every interest to collect duties and taxes on all items imported into Canada, irrespective of the means of importation,

---

[350] Jones 2, para. 25. (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[351] Polesello Report, para. 19. (Investor's Book of Witness Statements and Expert Reports, Tab 21); Jones 2, paras. 27 *et seq.* (Respondent's Book of Expert Reports and Affidavits, Tab 46).

[352] Jones 1, para. 170. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

and it makes best efforts to do so, even if success rate is not perfect.

316. If a State makes best efforts to enforce its laws, it surely cannot be acting arbitrarily. As stated in *ELSI,*

> The key point is that the Chamber accorded deference to the respondent's legal system in applying the standard, finding that even though the mayor's act of requisitioning the factory at issue in the case was unlawful at Italian law as an excess of power, mere domestic illegality did not equate to arbitrariness at international law.[353]

317. This has been confirmed by the *ADF* Tribunal, which held that "something more than simple illegality or lack of authority under the domestic law of a State is necessary".[354]

IV. Fritz Starber

318. The Tribunal must reject the Claimant's allegation because:

- it is a new claim not sufficiently related to the Statement of Claim;[355]
- it relates to commercial conduct of Canada Post, not to an exercise of delegated governmental authority and therefore it is not subject to Chapter 11 obligations;
- Article 1105 does not require Canada Post to enter into a contract with every company with which it has exploratory discussions nor does it impose procurement disciplines; and
- UPS misrepresents the facts.[356]

319. Canada Post's decision over its choice of transportation service supplier is something that is quintessentially conduct of a commercial nature, and is not an exercise

---

[353] Article 1128 Submission of the United Mexican States in *Mondev International Ltd. v. United States of America*, 23 July 2002, at 17. (Respondent's Book of Authorities, Tab 113).

[354] *ADF* Award, para. 190. (Investor's Book of Authorities, Tab. 95).

[355] See Canada's Counter-Memorial, paras. 571-573.

[356] See Canada's Counter-Memorial, paras. 980-986.

of delegated governmental authority.

320. Canada Post did not act arbitrarily when it rejected an unsolicited bid from Fritz Starber to deliver; it rejected the bid based on a commercial decision to continue with its existing arrangement with USPS. The affidavits of Barry Craven and Donald Lavictoire correct UPS' misunderstanding in this respect.

321. The Claimant argues that it relied on Canada Post acting in accordance with commercial imperatives, not because of "political reasons",[357] yet refusing to deal with a company with which there is on-going litigation is something many companies do. Even accepting that this was the underlying rationale of Canada's refusal to deal with Fritz Starber, it could not be qualified as shocking and outrageous commercial behaviour by Canada Post in breach of the minimum standard of treatment.

322. The Claimant suggests that there would be no basis for a complaint if Canada Post had a stated policy of "not doing business with parties adverse in interest in litigation".[358]

323. Canada disagrees that Article 1105 imposes a duty upon Canada Post to act "transparently", to act in accordance with its internal policies at all times or to justify all the commercial decisions it takes.[359] Article 1105 does not impose a transparency obligation[360] and imposing any such obligation in a commercial context would make no sense. The Claimant's argument would mean Canada Post would be required to have policies addressing each situation and to publish these policies.[361] In this case, Barry Craven confirmed there was no policy regarding doing business with companies involved

---

[357] Investor's Reply, para. 744.

[358] Investor's Reply, para. 749.

[359] Investor's Reply, para. 751.

[360] *United Mexican States v. Metalclad Corporation*, BCSC, Tysoe J, [2001] 89 BCLR (3d) 359. (Respondent's Book of Authorities, Tab 63).

[361] The Claimant further submits that a decision by Canada Post that "departs from Canada Post's own stated policies is the essence of arbitrariness." (Investor's Reply, para. 749). Given that a departure from domestic legal standards does not in itself constitute arbitrariness, it is impossible that a departure from policy could. As the Chamber stated, in *ELSI*: "To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right", para. 124. (Respondent's Book of Authorities, Tab 45).

in on-going litigation. The fact that a low-level employee made an error in thinking there was such a policy cannot be sufficient to constitute a breach of Article 1105. Here, in any event, regardless of whether the policy is to do business with companies involved in litigation with Canada Post, the result is the same for Fritz Starber: it would not have been awarded the contract.

324. The exploratory discussions between Fritz Starber and Canada Post did not reach the point of a procurement as was clearly established by the CITT decision.[362] Exploratory discussions about a potential contract do not give rise to any legitimate expectation regarding conclusion of a contract or the right to any justification.

PART V. THE CLAIMANT HAS NOT RAISED A *PRIMA FACIE* CASE THAT CANADA HAS BREACHED ARTICLE 1103

325. Only now has UPS identified the measures that amount to an Article 1103 breach, albeit without sufficient accuracy. Throughout three Statements of Claim and a Memorial, the Claimant has ignored Canada's repeated requests that it has a right to know the case brought against it. Now, for the first time, in its Reply, the Claimant argues that the measures that breach Canada's obligation to accord most-favoured-nation treatment are identifiable "through the measures identified in the Investors' NAFTA Article 1105 claim".[363] On that basis alone the claim should be rejected

326. Moreover, the Claimant has not dispensed of its burden of showing how these allegations would violate any of the 16 FIPAs. The Claimant does not bother to cite the language of even one of the agreements. It seems to be of the belief that this is the Tribunal's role, arguing that:

> The specific harm to the Investor from Canada's breach of NAFTA Article 1103 depends on the specific international law obligation,

[362] Decision of the Canadian International Trade Tribunal, December 27, 2001 [*CITT Decision*]. (Respondent's Book of Authorities, Tab 72); see also Canada's Counter-Memorial, para. 985.

[363] Investor's Reply, para. 761(a).

> that is not a customary law obligation, that the Tribunal finds Canada has breached.[364]

327. The Claimant does not provide the requisite information for the Respondent to defend against the allegation, or for that matter, for the Tribunal to perform any analysis. When a matter is not "adequately litigated", the Claimant's burden will not be discharged.[365]

328. Canada maintains that its FIPAs institute the same standard of treatment as does NAFTA Article 1105.[366] There is no basis for complaint.

[364] Investor's Reply, para. 761(e).

[365] *ADF* Award, para. 183. (Investor's Book of Authorities, Tab 95).

[366] See Canada's Counter-Memorial, paras. 992 *et seq*.

PART VI. THE CLAIMANT HAS FAILED TO PROVE THE EXISTENCE OF DAMAGES

329. The Tribunal has determined in its Award on Jurisdiction that the Claimant must establish the fact of damage at the merits stage. It held:

> To repeat, at the merits stage, UPS will have to establish on the evidence how and to what extent within those limits [the jurisdictional limits of Chapter 11] it has suffered damage or losses.[367]

330. The Claimant asserts that UPS Canada "suffered damage and that such damage suffered was caused by Canada's breach of the NAFTA".[368] The Claimant has not satisfied its burden to demonstrate that any damage it suffered was in fact caused by Canada's violation of a NAFTA Chapter 11 obligation.

331. The Claimant relies on a new Report, in which Howard Rosen states that "[b]y definition an assessment of whether Harm has occurred does not require as detailed an analysis as does an assessment of damages."[369] While the Claimant does not need to provide the evidence necessary to quantify its damages, it is nonetheless required to establish a link between damages and its allegations of breach, which must include some financial analysis.[370] Otherwise, its case must fail.

332. It must be recalled that, in this case, the issue is not whether Canada Post has gained financially from any of its or Canada's practices, but whether the Claimant has suffered any damage.

333. Given the Claimant's failure to tie its damage to a measure, Ross Hamilton and

---

[367] *UPS* Jurisdiction Award, para. 122. (Investor's Book of Authorities, Tab 48).

[368] Investor's Reply, para. 439.

[369] Reply Expert Report of Howard Rosen, at 3. (Investor's Brief of Witness Statements and Expert Reports, Tab 22).

[370] Expert Report of Ross Hamilton, para. 2. (Respondent's Book of Expert Reports and Affidavits, Tab 15).

Ian Wintrip of Kroll Lindquist Avey (now Navigant) maintain their assessment that "LECG has not performed sufficient work to support the assumptions made and conclusion reached in its report dated March 22, 2005".[371] In response, the Claimant has argued that the Kroll Report "is merely a reiteration of Canada's liability defenses with respect to each of the alleged breaches."[372] This statement demonstrates the Claimant's misunderstanding of the obligation it has to demonstrate that damage was "by reason of" an alleged breach. The Kroll Report does not relate to liability. Rather, it examines the causal link that the Claimant is required to show between the supposed breach and the damage.

334. The link that is required by Articles 1116(1) and 1117(1) is that of proximate causation, since these provisions require the Claimant to show that it has incurred loss or damage "by reason of, or arising out of" a Party's breach.[373] The United States, in *Methanex*, interpreted Articles 1116(1) and 1117(1) as obliging the investor to establish that its losses were proximately caused by a supposed breach. The Tribunal did not have to contend with the argument or Methanex' attempt to rebut it. Nevertheless, the Tribunal stated that it "would be minded to decide these issues against Methanex and in favour of the USA".[374]

335. By way of example, if the damage alleged is that UPS Canada has lost market share as a result of the treatment, the Claimant would have to demonstrate through credible evidence the fact that a measure of Canada caused UPS Canada to lose a share of

---

[371] Expert Report of Ross Hamilton and Ian Wintrip, [Hamilton/Wintrip Report], para. 1. (Respondent's Book of Expert Reports and Affidavits, Tab 52).

[372] Investor's Reply, para. 443.

[373] The following insight from the ILC into the causal process in general international law is useful to interpret Articles 1116(1) and 1117(1): "Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable [to the wrongful act] as a proximate cause' or to damage which is 'too indirect, too remote, and uncertain to be appraised', or to 'any direct loss, damage […]'. Thus causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury, that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'." ILC Articles and Commentaries, Article 31, Commentary 10, at 204 (footnotes omitted). (Investor's Book of Authorities, Tab 3).

[374] *Methanex* Award, Part IV, Chapter F, at 1, para. 2. (Investor's Book of Authorities, Tab 171).

the market and that this has resulted in damage to UPS of America. They would not, however, need to demonstrate the value of that loss. That is to take place at a later stage, if at all. Similarly, a concert pianist who alleges that a car accident diminishes his earnings may have to prove, for example, that the car accident caused an injury that limits his use of his arm, a separate and distinct issue from the value of the loss, which will depend on his economic success as a pianist.

336. The Claimant in this case has failed to establish the fact of damage arising out of a breach in the following instances:

337. *Treatment of UPS of America's Investment*. The Claimant has brought its case on its own behalf on the grounds that it, and not its investment, such as UPS Canada or Fritz Starber, has suffered harm. In the Claimant's words, "the Investor may properly claim to the extent that the loss or damage suffered by the Investor's US subsidiaries may be attributed to the Investor itself."[375] Canada does not disagree, but submits that the Claimant has provided insufficient proof of attribution of harm to UPS of America. UPS Canada is not UPS of America, so damage incurred by one company does not necessarily entail damage to the other.[376] On the case brought by the Claimant, if it cannot show that UPS of America has suffered harm, its claim must be rejected.

338. *Canada Post's Commercial Arrangements with Purolator*. The Claimant has offered no evidence that UPS Canada has been denied access to Canada Post's network. Without such evidence, its claim that it has been damaged must fail.

339. *Treatment Related to Internal Pricing of Canada Post's Competitive Products*. **[REDACTED]**,[377] or that it has lost market share as a result of this policy.[378]

---

[375] Investor's Reply, para. 438.

[376] See Canada's argument on the distinction between Article 1116 and Article 1117 in its Counter-Memorial at paras. 523-536; five years into the dispute, the Claimant now asks for leave to amend its claim to come under Article 1117. Canada has already submitted that this type of procedural defect can only be cured by the filing of a new claim and it does not object to the Claimant filing such a claim with this Tribunal; see Canada's Counter-Memorial, para. 536. Canada has prepared its defence on the claim that has been brought, which is limited to Article 1116.

[377] For greater discussion, see Canada's Rejoinder, at paras. 194-196 above; and Cooper 2, at 3-4. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[REDACTED][379]

340. *Customs Treatment*. The Claimant originally asserted that nine types of action by Customs amount to a breach of Article 1102, 1103 and 1105,[380] and that "Canada's differential policy affects the competitive opportunities of UPS Canada against Canada Post."[381] By citing a loss of competitive opportunity without any evidentiary support, the Claimant has failed to prove it has incurred damage. There are a number of reasons that the causal link between the alleged breach and the loss is too tenuous to prove damages as a result of the measure.

341. First, Customs treatment is directed at courier products or mail sent to Canada from another country. Therefore, on the case brought by the Claimant, which it has limited to "the courier market [as] a competitive sector *of the Canadian economy*",[382] the Claimant's case must fail unless it can demonstrate proximate causation. The chain of causation requires it to show that the Claimant or UPS Canada is affected when customers abroad choose to send mail through a foreign postal administration instead of shipping with UPS of America. It also requires the Claimant to show that UPS of America incurs damage "by reason of, or arising out of" that supposed breach. It has provided speculative evidence of the former and no evidence of the latter.

342. The Claimant argues that senders may choose to mail items with foreign postal administrations rather than ship with UPS of America, but it has failed to show how UPS of America or UPS Canada is affected by this. The Claimant has not proved that UPS of America sets its prices "by reason of" Canada's customs treatment. Nor has it proved that foreign postal administrations are able to lower their costs as a result of Canada's

---

[378] Hamilton/Wintrip Report, para. 4. (Respondent's Book of Expert Reports and Affidavits, Tab 52).

[379] Cooper 2, at 4. (Respondent's Book of Expert Reports and Affidavits, Tab 40).

[380] Investor's Memorial, paras. 585(a)-(i) and 643(a)-(i); three of these claims have been abandoned, (Investor's Reply, fn. 332); the Claimant has admitted for the first time in its Reply that "Canada breaches Article 1103 through measures identified in the Investor's NAFTA Article 1105 claim". (Investor's Reply, para. 761(e)).

[381] Investor's Reply, para. 630.

[382] Investor's Reply, para. 601 (emphasis added).

customs formalities. This is clearly not the case, since customs formalities have no effect on the prices set by foreign postal administrations.

343. Second, the Claimant identifies a series of measures, which together diminish UPS Canada's competitive opportunity, but does not tie any of the measures to specific damage. In its Reply, it has chosen not to challenge three of the original nine claims against Customs, while submitting that "this decision does not represent an admission that these measures comply with NAFTA."[383] The Claimant has not shown whether its competitive opportunity has been damaged by these three claims that no longer form part of the arbitration, as opposed to the other six, that continue to be a matter in dispute. Presumably, it must at least show a *correlation* between each of the contested measures and the lost profits or other damage. The fact that none of its evidence is specific to any measure demonstrates that that it has failed to meet the requirements of Article 1116(1).

344. Third, and perhaps most importantly, demonstrating a loss of competitive opportunity is not the same as proving damage. The Articles on State Responsibility helpfully provide that, in international law, "compensation shall cover any *financially assessable* damage including lost profits *insofar as it is established*."[384] Even "lost profits" are appropriately compensated only "in certain cases".[385] They are not recoverable where they are too remote or speculative.[386] Besides, a claim based on a lack of competitive opportunity does not demonstrate that the Claimant has lost profits. The Claimant's case of "loss of competitive opportunity" is no less speculative than the claim that was rejected by the *Myers* Tribunal for "lost opportunity", and accordingly it must fail.[387]

345. *Fritz Starber*. Even assuming that Canada Post refused to do business with Fritz

---

[383] Investor's Reply, fn. 332.

[384] ILC Articles and Commentaries, Article 36(2). (emphasis added). (Investor's Book of Authorities, Tab 3).

[385] ILC Articles and Commentaries, Commentary 27, Article 36. (Investor's Book of Authorities, Tab 3).

[386] ILC Articles and Commentaries, Commentary 27, Article 36. (Investor's Book of Authorities, Tab 3).

[387] *S.D. Myers, Inc. v. Government of Canada*, (Second Partial Award), (October 21, 2002), paras. 161-162. [*Myers* Second Partial Award]. (Investor's Book of Authorities, Tab 49).

Starber because of its relation to the Claimant and that this constitutes a breach of Article 1105, [388] the Claimant has not provided the requisite evidence to establish that it suffered harm as a result.[389]

346. *Publication Assistance Program*. The Claimant's witness, Alan Gershenhorn, limits his statement to a loss of opportunity by the Claimant in relation to certain deliveries of publications, not to the program as a whole. The Claimant carefully avoids the question of whether UPS Canada would be prepared to deliver publications qualifying under the program on the same terms and conditions as Canada Post.[390] Until the Claimant could commit its investment to delivery on the same terms as Canada Post, meaning delivery to every address in Canada not matter how remote or how costly, any allegation that it has been damaged because of a breach of national treatment must be rejected.

347. *Rural Route Workers*. Although the Rosen Report concludes that the inability of rural route contractors to unionize was a cost savings to CPC, it performed no comparison of Canada Post and UPS Canada's operating costs in reaching this conclusion.[391] Since its analysis is based on insufficient evidence, it cannot succeed in proving damages.

348. *Any Treatment Related to Article 1105*. The Claimant through its principal witness, Howard Rosen, has made bald statements about economic damages without identifying the measure that lead to them. In his words, "we remain of the opinion that UPS has suffered Harm as a result of the discriminatory exploitation of the Privileges accorded to CPC by Canada".[392] Since the Claimant's proof of damage has been limited

[388] For greater discussion, see Canada's Counter-Memorial, para. 984.

[389] Hamilton/Wintrip Report, para. 4. (Respondent's Book of Expert Reports and Affidavits, Tab 52).

[390] For greater discussion, see Canada's Rejoinder, paras. 262-278 above.

[391] Hamilton/Wintrip Report, para. 4. (Respondent's Book of Expert Reports and Affidavits, Tab 52).

[392]Supplementary Expert Report of Howard Rosen, LECG Canada, at 1. (Respondent's Book of Expert Reports and Affidavits, Tab 22).

to "discriminatory" conduct, and discriminatory conduct does not violate Article 1105,[393] all of its Article 1105 allegations must fail.[394]

349. *Any Treatment Related to Article 1103*. The Claimant has pleaded harm in relation to its Article 1103 case for the first time in its Reply. Its entire argument can be quoted here: "The specific harm to the Investor from Canada's breach of NAFTA Article 1103 depends on the specific international law obligation, that is also not a customary international law obligation, that the Tribunal finds Canada has breached." The Claimant has failed to demonstrate the causal link between any allegation of an MFN breach and the fact of damage.

350. In conclusion, the record suggests no causal relationship between any of the measures that the Claimant alleges breach Articles 1102, 1103 or 1105 and financially assessable damage insofar as it can be established.

[393] *Methanex* Award, Part IV, Chapter C, para. 25. (Investor's Book of Authorities, Tab 171).

[394] See Canada's Rejoinder, paras. 307-317 above.

PART VII. RELIEF SOUGHT

351. For the foregoing reasons Canada respectfully requests that this Tribunal render an award:

a) in favour of Canada and against the Claimant, United Parcel Service of America, Inc., dismissing its claims in their entirety; and

b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that the Claimant, United Parcel Service of America, Inc., bear the costs of this arbitration, including Canada's costs for legal representation and assistance.

Respectfully submitted,

_____

I.G. Whitehall, Q.C.
Agent for the Attorney General
Of Canada
Room 844, 234 Wellington Street
Ottawa, Ontario
K1A 0H8