UNDER THE ARBITRATION RULES
OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND UNDER
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant / Investor

AND:

GOVERNMENT OF CANADA

Respondent / Party

REJOINDER MEMORIAL OF THE INVESTOR
(Jurisdiction Phase)

Appleton & Associates
International Lawyers
1140 Bay Street, Suite 300
Toronto, Ontario, Canada, M5S 2B4

Barry W. Appleton, Esq.
Counsel

Phone: 416-966-8800
Fax: 416-966-8801

Davis & Company
Barristers & Solicitors
2800-666 Burrard Street
Vancouver, BC, Canada, V6C 2Z7

Michael P. Carroll, Q.C.
Counsel

Phone: 604-643-2958
Fax: 604-605-3702

**** CONFIDENTIAL ****

TABLE OF CONTENTS

I. INTRODUCTION AND INVESTOR'S REPLY TO OVERVIEW

1. This Rejoinder replies to the Reply Memorial of the Government of Canada On Preliminary Jurisdictional Objections ("Canada's Reply (Jurisdiction Phase)") dated April 12, 2002.

2. The Investor continues to rely upon the submissions contained in its Counter-Memorial. As a preliminary comment, the Investor makes the following general observations:

a. Canada's 42 page Reply is in substance a re-argument or repetition of its original Memorial and is not appropriate reply;

b. Canada has, in several important respects, either changed its position or advanced new arguments;

c. The arguments of Canada are not only imprecise, but also reference irrelevant considerations and in many circumstances, baldly assert propositions without any juridical support; and

d. Care must be taken to compare the submission in fact advanced by the Investor in its Counter-Memorial, with the purported paraphrase or restatement of it by Canada. For accuracy, whenever Canada refers to an argument of the Investor, reference should specifically be made to the Counter-Memorial previously provided to the Tribunal.

This Rejoinder Memorial will confine itself to the correction of errors or misstatements of the Investor's position, and to responses to any new position now being advanced by Canada.

3. Accordingly, this Memorial will address:

a. Canada's argument that the Investor is advancing a claim under NAFTA Article 1502(3)(d) under the guise of NAFTA Articles 1105 and 1502(3)(a);

b. Canada's assertion that no claim may be advanced by an Investor under NAFTA Article 1105 for conduct by a government or through a government monopoly or government organ if that misconduct includes anti-competitive conduct, no matter how unfair or inequitable the treatment upon foreign investors and their investments;

c. Whether the "content of the law [ie. NAFTA Article 1105 and the meaning of "fair and equitable treatment"]...is and must be knowable or capable of being discerned in the absence of evidence and not vary from case to case..." (Canada, Reply Memorial paragraphs 10-11, footnote 9, paragraph 88);

d. Canada's further submissions concerning the relevance or applicability of the Free Trade Commission Note of Interpretation; and

e. Where necessary, the misstatements of the Investor's position contained in Canada's Reply Memorial.

4. In summary, the Investor submits that Canada's approach to jurisdiction is excessively textual, neglects the context, objectives and purpose of the NAFTA, and inconsistently applies the relevant interpretative principles and jurisprudence. Canada continues to urge upon the Tribunal a prejudgment of matters that can only properly be determined at the merits phase of the proceeding.

II. REPLY TO CANADA'S SUBMISSIONS ON INTERPRETATION

5. While the general principles of treaty interpretation do not appear contentious, Canada has inaccurately stated the Investor's position. For example, Canada asserts (and then bases much of its subsequent analysis upon the argument) that the Investor is "elevating the objectives

of the treaty into independent legal obligations forming the basis of a claim".[1] In support, Canada references (at paragraph 26), paragraph 18 of the Investor's Counter-Memorial, where the Investor referred to the decision of the ICJ in *Oil Platforms* where the relevant provision of the Treaty in that case did not create legal obligations but was merely a "statement of objective."

6. Canada misstates the Investor's position and ignores the relevant passage from *Oil Platforms*. After concluding that Article I of the Treaty of 1955 did not create a legal obligation, the Court explained:

> In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 **is such as to throw light on the interpretation of the other Treaty provisions**, and in particular, of Articles IV and X. **Article I is thus not without legal significance** for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.[2] (emphasis added)

7. Thus, contrary to what Canada suggests, the Investor does not assert that a NAFTA objective is an independent basis for a claim. The legal obligations forming the basis of the Investor's claim arise from NAFTA Articles 1102, 1105, 1502(3)(a) and 1503(2). The relevance of the objectives of the NAFTA is simply that they inform the interpretation of these provisions, and are part of the relevant context (see Counter-Memorial of the Investor, paragraphs 25-27, 43, 46-48).

8. In addition, Canada asserts that the Investor's position is that Canada's approach "contradicts" the object and purpose of the treaty.[3] That assertion does not accurately state the position of the Investor. Simply put, the Investor submits that the objectives and purposes of the NAFTA, set out in NAFTA Article 102(1), can generally be characterized as intending to protect and promote foreign investment and to liberalize trade and investment between the NAFTA

---

[1] Canada's Reply (Jurisdiction Phase) at para. 13, 24-27.

[2] At para. 31.

[3] Canada's Reply (Jurisdiction Phase) at para. 14, 28.

parties. Canada submits that its interpretation of the NAFTA does not undermine those objectives. Even were it true that Canada's interpretation did not insidiously weaken and subvert the full achievement of them, the question that the Tribunal must ask is what interpretation of the provisions *best* achieves the objectives of the Treaty? It is the Investor's submission that Canada urges a narrow and restrictive view of the architecture of the NAFTA that does not account for context, objectives and purpose, while that urged by the Investor considers the NAFTA as a whole.[4]

9. Finally, while Canada purports to focus on the "clear meaning" of the words of the NAFTA, fundamentally, the disputing parties differ as to what the "plain" or "clear" meaning is of the relevant provisions. Accordingly, reference to the objectives and purpose of the Treaty is critical.

III. REPLY TO CANADA'S SUBMISSION ON THE JURISDICTIONAL TEST

A. Canada has changed its submission

10. The submissions now advanced by Canada at paragraphs 33-50 of its Reply Memorial are substantially different than those first advanced by it at paragraphs 37-42 of its original Memorial. The position now argued by Canada is simply that the Tribunal has jurisdiction, or must further proceed, if the allegations made "are capable" of constituting a violation of the relevant provisions of the Treaty.[5] While there is nonetheless room for debate as to whether an allegation is "capable" of falling within the Treaty, in substance, the Investor agrees with this test.

---

[4] As argued in the Investor's Counter-Memorial (Jurisdiction Phase) at para. 48: NAFTA Tribunals have interpreted NAFTA Chapter 11 as fitting within the "broad liberalizing context of the treaty and its objectives. Accordingly, any interpretation of the NAFTA Articles 1102, 1105, 1502(3) or 1503(2) must be undertaken having full regard for the objective of investment promotion identified in Article 102(1)(c), together with the objectives of trade liberalization."

[5] Canada's Reply (Jurisdiction Phase) at para. 49.

11. However, the Investor does not agree with Canada's changed analysis. For instance, when Canada asserts, at paragraph 33 of its Reply, that the "underlying objective" of the Tribunal in considering whether it has jurisdiction is the "expeditious and fair settlement of disputes the parties have agreed to arbitrate", the Investor does not agree. The underlying consideration is simply that the Tribunal must answer the legal question whether the Tribunal has jurisdiction, might have jurisdiction or does not have jurisdiction. If it does have jurisdiction, it is bound to exercise it.

12. Additionally, the Investor says that Canada's continued reliance on the *Oil Platforms* case is misplaced and that Canada has stretched the jurisdictional test set out in that case well beyond its intended scope. The *Oil Platforms* test simply requires a determination whether there is a "possibility" that an alleged treaty violation does or does not fall within the provisions of the treaty in question, or that the facts alleged are "capable of having the effect" of violating the alleged treaty obligations.[6] The Investor agrees with Canada that "All that is needed is a determination whether the subject matter of the allegations is covered by the subject matter of the provisions upon which jurisdiction must be based,"[7] but that standard establishes a relatively low threshold.

B. The Tribunal has jurisdiction *ratione materiae*

13. Thus, the majority in *Oil Platforms* ask the question whether, as a consequence of falling "within the provisions of the treaty", the dispute is one which " the court would have jurisdiction *ratione materiae* to entertain" under the jurisdiction granting provisions of the relevant treaty?

---

[6] *Oil Platforms* at para. 16, 50, and 51. See Investor's Counter-Memorial, Book of Authorities, Vol. 1, Tab. 6.

[7] Canada Reply (Jurisdiction Phase), footnote 9, page 13

Applying that approach to this case, the Tribunal must first assess the subject matter jurisdiction it possesses under Chapter 11 of the NAFTA. The Tribunal's subject matter jurisdiction is set out in NAFTA Article 1101(1):[8]

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

14. It is clear that the subject matter of NAFTA Chapter 11 is NAFTA Party "measures" relating to foreign investors and their investments. In addition, NAFTA Article 1115 makes it clear that the "purpose" of NAFTA Chapter 11 is to establish a "mechanism for the settlement of *investment disputes*".[9] NAFTA Article 1116 further clarifies that the dispute in question must relate to a claim that a NAFTA Party has "breached an obligation" under Section A of NAFTA Chapter 11, and certain provisions of NAFTA Chapter 15, and that the alleged breach has caused loss or damage.

15. Given the allegations in its Amended Statement of Claim, the Investor submits that it has met the necessary requirements to establish the Tribunal's jurisdiction. The Investor has claimed that Canada has breached its NAFTA obligations under NAFTA Articles 1102, 1105, 1502(3)(a)

---

[8] Similarly, under Article 25(1) of the *ICSID Convention*, there are two specific requirements that must be met to establish jurisdiction *ratione materiae* in an ICSID investor-state arbitration: (1) the dispute must be one "arising directly out of an investment", and (2) the dispute must be a legal one. Article 25(1) provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the Parties have given their consent, no party may withdraw its consent unilaterally."

[9] Emphasis added. The term "investment disputes" is not defined under NAFTA Chapter 11. In the *Pope & Talbot* arbitration, that Tribunal rejected the narrow interpretations of Mexico and Canada. See: *Pope & Talbot and Canada,* Award In Relation to Measures Relating to Investments Motion, January 26, 2000 at para. 25, 26. Investor's Counter-Memorial, Book of Authorities, Vol. 1, Tab 4.

and 1503(2) as permitted under NAFTA Article 1116. The measures taken by Canada have clearly affected the Investment of the Investor in Canada, and so relate to investment as required by NAFTA Article 1101.

IV. REPLY TO CANADA'S SUBMISSIONS CONCERNING CHAPTER 15

A. The UPS Allegations of Anti-Competitive Conduct Are Arbitrable

16. Canada continues to err by focusing on whether the conduct complained of by the Investor falls within NAFTA Article 1502(3)(d). This is a fundamentally misguided analysis, and misconceives in any event the obligation established by that provision. NAFTA Article 1502(3)(d) imposes an obligation on the Party - Canada - and not upon the monopoly - Canada Post. That obligation is to *ensure* that the monopoly not act in an anti-competitive way. The obligation is supervisory, and is in the nature of an assurance to the other NAFTA Parties that such misconduct will not occur. But it is not that provision upon which the Investor bases its claim. While it is interesting that the conduct in issue may also give rise to issues that would be resolved at a State to State level, that fact is incidental and irrelevant.

17. The question the Tribunal must ultimately answer is whether any of the conduct complained of violates any of the pleaded articles. At this stage, the question is simply whether that conduct *is capable* of constituting a breach of those provisions.

B. Reply to Canada's submission that NAFTA Article 1502(3)(d) and Articles 1102, 1105, 1502(3)(a) and 1503(2) are distinct obligations

18. While Canada now accepts the proposition that the same conduct can violate multiple treaty obligations (Reply Memorial, paragraph 60), Canada asserts that, even when the conduct in issue is vicious, unfair and inequitable, if that conduct can also be characterized as involving anti-competitive elements, then a claim respecting it "cannot...be rooted in the provisions relied upon by UPS" (paragraph 60), that the NAFTA does not provide "*an investor* with a remedy"

(paragraph 59), and that such conduct "could never satisfy the requirements for investor complaint" (paragraph 67). By focussing only on the "distinct *obligations*" (paragraph 54) created by the various provisions of the NAFTA, Canada loses sight of the fact that it is ultimately the *conduct* of Canada and Canada Post that is in issue, and whether that treatment of the Investor and the Investment violates the obligations pled. The relevant question is not whether the conduct in question involves anti-competitive elements.

19. Thus, Canada's Reply (Jurisdiction Phase) at paragraphs 64, 86, 92, and 105-107 continues to focus on the notion that conduct which might be in breach of NAFTA Article 1502(3)(d) is to be hermetically sealed off from consideration in connection with a claim advanced by an Investor under Chapter 11.[10] Despite Canada's acceptance that a certain fact matrix may apply to more than one NAFTA obligation, its argument is inconsistent with that proposition. For instance, Canada states, at paragraph 86 of its Reply, that because NAFTA Article 1502(3)(d) covers anti-competitive conduct, that conduct cannot also be covered by NAFTA Article 1102. At paragraphs 92 and 105-107 of its Reply, Canada cites the presumption against redundancy to argue that NAFTA Article 1105 must have an independent meaning from NAFTA Article 1502(3)(d). While the Investor does not quarrel with the proposition that the two articles have independent meaning, thatis no response to the submission that the same conduct could result in a violation of NAFTA Articles 1102 and 1105, while still being relevant to the separate question of whether Canada has ensured that its monopoly not act in a certain way.[11]

---

[10] Again, it is important to note that the anti-competitive conduct of Canada Post is not a breach of Article 1502(3)(d). Rather, the breach would be Canada's failure to ensure such conduct not occur.

[11] If the Investor can demonstrate that Canada has failed to properly supervise Canada Post in its exercise of delegated authority, and that this exercise of delegated authority resulted in conduct that would violate NAFTA Articles 1102 or 1105 if it had been conducted by Canada itself, a compensable breach will have been established. The fact that such conduct might also be relevant to a breach of NAFTA Article 1502(3)(d) is useful in understanding the nature of the breach, but not necessary to establish that a breach has occurred.

20. As stated above, Canada mischaracterizes the Investor's claim, when it asserts, in paragraph 74 that the Investor is seeking to "create an obligation, identical to that substantively covered in NAFTA Article 1502(3)(d), and thereby engineer a right of recourse where none was intended." The Investor has repeatedly acknowledged that the obligations created by NAFTA Article 1502(3)(d) on Canada to ensure certain conduct not occur, and the obligations under Articles 1102 and 1105 to afford certain standards of treatment are different. But, as stated above, they can arise from the same factual matrix.

C. Reply to Canada's Submission that the Obligations in NAFTA Article 1502(3)(d) Are Not Included in NAFTA Article 1502(3)(a)

21. The submission advanced by Canada at paragraph 62 of its Reply Memorial, that "Article 1502(3)(a) only applies when the monopoly is exercising governmental authority 'in connection with the monopoly good or service'" and that "Pursuant to its clear terms, 1502(3)(a) only deals with the *monopolized* market" must be rejected on the facts of this case.

22. Canada's argument fails to take into account the simple fact that Canada Post has integrated its monopoly and non-monopoly functions. That integration is central to the claim, and makes it all but impossible for such an artificial distinction to be made in the context of the Investor's claim that Canada Post is abusing its monopoly position through the use of that integrated infrastructure in a manner that is unfair and inequitable to the Investor and its investment.[12] The Investor has alleged that in exercising its governmental authority, Canada Post is causing harm to the non-monopoly market. This factual reality is consistent with the Investor's interpretation that conduct which is relevant to NAFTA Article 1502(3)(a) may also be relevant to a different obligation, such as Canada's obligation under NAFTA Article 1502(3)(d).

23. Moreover, through its narrow construction of "governmental authority" generally, and by

---

[12] See Investor's Counter-Memorial (Jurisdiction Phase) at paras. 89-108.

excluding the non-monopoly portions of Canada Post's activity, Canada seeks unilaterally to permit itself to evade state responsibility for actions that are (on one argument) undertaken not directly by the state itself but through its designated agents. If Canada's contention were to be accepted, states could simply delegate responsibility to a quasi-governmental body to avoid their obligations under international law. As the Investor has previously argued, the ILC Draft Articles and commentaries, as well as international jurisprudence, do not support Canada's restrictive interpretation.[13]

24. And, contrary to Canada's dismissive response on the importance of principles of state responsibility to the NAFTA, the principles set out in the ILC Draft Articles can be considered to be an important reflection of the development of this area of international law which this Tribunal is bound to follow under NAFTA Article 1131. They are directly relevant to the context in which Canada's responsibility under state arbitration rules is to be analyzed under NAFTA Chapter 11. In addition, they are also relevant to how NAFTA Chapter 15 should be interpreted with respect to the conduct of a state organ carrying out a core governmental function such as Canada Post.

D. Reply to Canada's submission that even if a breach of a Section A Chapter 11 Could be Established, NAFTA Article 1502(3)(a) Is Not Engaged

25. At paragraph 79 of its Reply, Canada argues that the Investor "overlooks the plain meaning of Article 1502(3)(a) read in its context, and instead relies on the 'principles of state

---

[13] Canada's narrow construction of the kinds of delegated authority for which it is obliged to supervise under NAFTA Articles 1502(3)(a) and 1503(2) also fails on a simple, textual basis. The lists of delegated functions contained within Articles 1502(3)(a) and 1503(2) are clearly not exclusive, as there is no limiting text to such effect. For example, Article 1503(2) lists the following activities as examples of delegated authority: "the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges." If these were the only kinds of activity that NAFTA Parties were obliged to supervise, there would be no reason for the NAFTA Parties to include an exception for the "procurement" activities of a state enterprise in NAFTA Article 1108(8)(b) or an exception for "subsidies or grants" provided by a state enterprise. The reason why these exemptions were obviously included is because the NAFTA Parties did not regard the kinds of delegated authority listed in Articles 1502(3)(a) or 1503(2) as nearly as limited as Canada now argues.

responsibility' to circumvent the plain terms of Article 1502(3)(a)." Canada thus views NAFTA Article 1502(3)(a) as a narrowing of the principles of state responsibility that would otherwise apply.

26. Simply put, under the international law of state responsibility, Canada is responsible for a state entity that acts like a department of the government and uses that authority in a manner that causes injury to foreign investors. As noted above, the international law of state responsibility, as part of international law, is part of the governing law and context of the NAFTA. Canada ignores this context in its interpretation.[14]

27. If Canada's interpretation was correct, then it would permit Canada to avoid its international obligations as long as the offending conduct is that of government monopolies or state enterprises. This interpretation is clearly in conflict with the context of the NAFTA, and its objectives and purposes.

V. REPLY TO CANADA'S SUBMISSION ON NAFTA ARTICLE 1102

28. Canada argues, at paragraph 84 of its Reply, that "Canada Post as a monopoly is not subject directly to the obligations of NAFTA Chapter 11." While it is true that private monopolies would not be subject to NAFTA Chapter 11, Canada Post is an "institution of

---

[14] It is the position of the Investor that Canada Post is clearly an "organ of the state" in the Canadian context. For example, the relevant legislation refers to Canada Post as an "institution of the government of Canada". (See Investor's Counter-Memorial at paras. 99-101). However, the Investor cited, at paragraph 102 of its Counter-Memorial (Jurisdiction Phase), Article 5 of the ILC Draft Articles to demonstrate that even if Canada Post were not an "organ of the state" it would nevertheless attract liability to Canada. Canada has argued, at footnote 17 of its Reply (Jurisdiction Phase), that Article 5 supports Canada's proposition that the commercial activity of Canada Post is not part of any delegated "governmental authority". However, Canada cites paragraph 5 of the Commentary to Article 5 as supporting its conclusion while ignoring paragraph 6 which makes it clear that any analysis of the nature of "governmental authority" is fact dependent on how this authority is exercised, and the extent to which the entity is accountable to government. The general standard must be applied to "varied circumstances" such as the case with Canada Post. In the case of Canada Post, the level of integration of its non-monopoly and monopoly businesses are such that both the fact dependent issues of how authority is exercised and the nature of its accountability are directly relevant to the merits of this case.

government" and an "agent of the Crown". Accordingly, under the principles of state responsibility, Canada Post is a state organ that would subject a state to liability under NAFTA Chapter 11.

29. Moreover, to say that anti-competitive decisions and practices by a government monopoly carrying out a basic governmental function could not involve the exercise of governmental authority by a government monopoly is unsustainable. Canada Post's activities are built on a foundation of its postal monopoly and publicly funded network, and have clearly already been found to be incompatible with basic principles of fairness.[15]

VI. REPLY TO CANADA'S SUBMISSIONS CONCERNING NAFTA ARTICLE 1105

A. Introduction

30. Canada's first proposition is that "the scope and applicable legal standard of the legal obligation under Article 1105 is a question of law" (para. 88), that it is "knowable or capable of being discerned in the absence of evidence" (para. 13), and that "it must be capable of definition and interpretation in the abstract" (footnote 9). Based on this reasoning, it argues there is a jurisdictional issue of "whether the subject matter of the allegations are capable of falling within the provision upon which the jurisdiction of this Tribunal must be based".

31. That proposition cannot withstand scrutiny. As the Investor has argued at paragraph 85 of its Counter-Memorial, NAFTA Article 1105 must be considered in light of the facts of the case and any evidence of custom or international law principles lead by the Parties. As noted by the United Nations Conference on Trade and Development, in the context of bilateral investment treaties, the "fair and equitable" standard is subjective and depends heavily on a factual context.[16]

---

[15] Amended Statement of Claim at paras. 16-19.

[16] U.N. Conference On Trade & Development, "Fair and Equitable Treatment" (1999) at 10, 15 and 16.

32. In his treatise on *Aspects of the Administration of International Justice,* Sir Eli Lauterpacht put the matter this way, speaking first about the meaning of "equity" or "equitable principles":

> They are intended to refer to elements in legal decision which have no objectively identifiable normative content. The are, in the present context, virtually synonymous with "fair" or "reasonable". **The concepts have no meaning in isolation from the details of the particular factual situation in which they fall to be applied.**
>
> ...
>
> There are basically two ways in which equity in this broad and elastic sense can find its way into the international legal system.
>
> The first possibility is that a treaty or a rule of customary international law may prescribe the application of a rule which is itself expressed in terms of "equity" or "equitable principles" or even of fair or just or reasonable treatment. All these formulae are inherently identical in that the result that they prescribe is not specifically elaborated. Instead, the judge is called upon to construct a solution out of whole cloth according to the needs of the case.
>
> ...
>
> Nor is reference to equity limited to multilateral treaties. We find, for example, that in many bilateral treaties the standard of treatment which is to be accorded by each of the parties to the nationals of the others is that of "fair and equitable" treatment. **Everybody appreciates that there is no intrinsic or objective concept of equity applicable in those circumstances, but that we are there dealing with a concept the content of which is closely related to the specific facts of any given case.**[17] [emphasis added]

33. Finally, Canada has simply asserted the meaning of "customary international law" without providing any test for how the Tribunal should identify the content of such law. Discerning the content of customary international law is a difficult task that will require this Tribunal to make determinations about legal theory, and evidence of *opinio juris*. Such questions are simply not appropriate for a jurisdictional determination and must be joined to the hearing of the merits.

---

[17] Sir Eli Lauterpacht, *Aspects of the Administration of International Justice* (1991) at 118, 119, and 122.

34. Accordingly, any consideration of whether the unfair and inequitable treatment by Canada and Canada Post directed towards the Investor and its Investment violates the obligations under the Treaty, is a matter that can only be determined by reference to the actual facts and evidence led at the merits phase.

B. Reply to further submission on Note of Interpretation by the Free Trade Commission

35. Canada has again argued the applicability of the Note of Interpretation, raised first in its Memorial at paragraphs 89 *ff.* and in its Reply Memorial at paragraphs 94-96. The new proposition advanced is that the NAFTA Chapter 11 Tribunal decisions in *S.D. Myers*, *Pope & Talbot* and *Metalclad* arbitrations, which Canada previously ignored, are either irrelevant or wrongly decided, because they were decided before the Free Trade Commission ("FTC") Note of Interpretation was released. In this connection, Canada again seeks to rely upon the decision of a single judge in a British Columbia court of first instance, which adopted a different interpretation of NAFTA Article 1105. The Investor submits, however, that any reliance upon the decision of the British Columbia court is misplaced.[18]

> Finally, the specialized expertise for which arbitrators are often selected, so vital to the accurate resolution of complex international disputes, is largely lost at the appeals stage where review is by a national court of general jurisdiction. As mentioned earlier, even the most sophisticated judges are unlikely to have extensive experience dealing with the technical details, overlapping systems of law, and other problems that typically characterize international disputes. As a result, a reviewing court may be even less likely to 'get it right' than was the original arbitral tribunal, raising the possibility of compounding arbitrator error with further misunderstanding or mistake at the review stage.[19]

---

[18] It should reiterated that the governing law of a NAFTA Chapter 11 arbitration is the NAFTA and international law, as provided under NAFTA Article 1131(1).

[19] Knull and Rubin, "Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?", [2000] 11 American Review of International Arbitration, 531 at 550.

Accordingly, the Investor maintains its argument at paragraphs 73-76 of its Counter-Memorial that the decisions in *S.D. Myers, Pope & Talbot* and *Metalclad* remain the most relevant sources of jurisprudence irrespective of the FTC Interpretation.

C. The Note of Interpretation does not have the effect Canada contends

36. In any event, the Investor's response to the submissions advanced at paragraphs 92-99 of Canada's Reply are as follows:

(a) The FTC Note of Interpretation cannot have the effect advocated by Canada[20] because:

(i) the FTC interpretation is inconsistent with the plain meaning of the NAFTA, and inconsistent with the interpretive principles set out in Article 102 of NAFTA;[21]

(ii) the NAFTA Free Trade Commission does not have jurisdiction to interpret the Treaty in a manner inconsistent with its terms or in a way that amends the Treaty. Under NAFTA Article 2202 amendments must be made by the three parties and must be approved by each party's domestic parliament;

(iii) International law has developed specific rules for exempting or reserving provisions from the application of other treaty provisions. The Tribunal

---

[20] As the Investor indicated at paragraph 70 of its Counter-Memorial, the validity of the FTC Interpretation is presently at issue in three other NAFTA Chapter 11 arbitrations (*Pope & Talbot, Loewen and Methanex*). For example, see: *Methanex and United States of America*, NAFTA/UNCITRAL Arbitration, Investor's Submission on FTC Interpretation, and Second Opinion of Professor Sir Robert Jennings, Q.C., September 6, 2001. Moreover, the FTC Note of Interpretation cannot be reconciled with the Most-Favoured Nation (MFN) treatment principle set out under NAFTA Articles 102(1) and 1103. The *Pope & Talbot* Tribunal recognized this flaw. See *Pope & Talbot and Canada*, NAFTA/UNCITRAL Arbitration, Award on the Merits of Phase 2, April 10, 2001 at para. 115 (Investor's Counter-Memorial, Book of Authorities, Vol. 1, Tab 1). Also see, a recent ICSID decision relating to the application of MFN to an investor-state treaty, in: *Emilio Agustin Maffezini and the Kingdom of Spain*, Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction January 25, 2000.

[21] Any interpretation by the FTC of NAFTA Article 1105 must meet two requirements: the Commission is required to interpret the NAFTA in light of its objectives in NAFTA Article 102(1), and do so in accordance with the "applicable rules of international law", including the *Vienna Convention on the Law of Treaties*.

ought not to permit the NAFTA Free Trade Commission to use an "interpretation" to achieve the same effect.

(b) Even if Canada is correct that NAFTA Article 1105 incorporates only the "customary international law minimum standard of treatment of aliens",[22] the content of that standard in 2002 cannot be defined solely by reference to one case from 1926, nor without reference to the actual facts established. This Tribunal ought to be significantly influenced by the development of the modern regulatory economy and the economic integration between states in articulating that standard; and

(c) Even if the FTC Note of Interpretation is accepted, the measures in dispute violate the customary international law standard of treatment of aliens in any event.

D. Reply to Canada's submission there is no International Competition Law

37. Canada, at paragraph 103 of its Reply Memorial, argues that "UPS has not identified any principle of international law that prescribes a standard of treatment regarding monopolies". While Canada is correct, the proposition entirely misses the point. The question is not whether there is a sufficiently developed customary international law of anti-trust, but rather, whether Canada and Canada Post's conduct towards the Investor and its Investment has violated the standards of treatment established by NAFTA Articles 1102 and 1105. Whether or to what extent there exists an international law of competition, or a customary international law of competition, or the extent to which such laws have developed or are developing, may well be relevant in establishing whether the conduct in issue has violated the applicable standard set by these articles, but it is certainly not an essential component which the Investor need establish for

---

[22] To limit the scope of "international law" in NAFTA Article 1105 to any one of the four sources of international law set out under Article 38 of the *Statute of the International Court of Justice* is not in accord with the plain meaning of the phrase, nor would such an interpretation be consistent with the objectives and purpose of the NAFTA.

this phase of the arbitration.

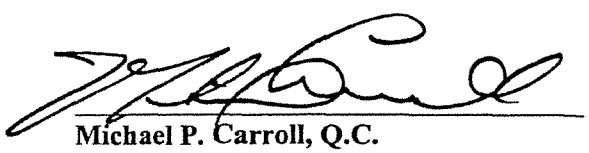
38. Moreover, Canada's argument seems to suggest that monopolies are somehow subject to separate standards of international law. In its NAFTA *Statement on Implementation*, Canada has confirmed that Canada Post is a "government monopoly" under the provisions of NAFTA Article 1502(3).[23] Canada is clearly required to ensure that its government monopoly Canada Post does not act inconsistently with the obligations of the NAFTA "Agreement", including those standards set out under NAFTA Chapter 11.

39. Lastly, Canada argues, at paragraph 101 of its Reply, that there "are no multilateral treaties setting out either substantive or procedural competition law obligations". This is simply not correct. The very existence of competition law obligations contained in NAFTA Article 1502(3)(d) is in and of itself evidence that these obligations are indeed a part of the corpus of international law.

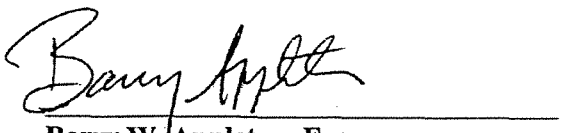
VII. CONCLUSIONS AND RELIEF SOUGHT

40. The Investor respectfully requests the Tribunal dismiss Canada's Motion Concerning Preliminary Jurisdictional Objections and award costs of this motion to the Investor.

All of which is respectfully submitted this 19th day of April, 2002



Michael P. Carroll, Q.C.
Counsel



Barry W. Appleton, Esq.
Counsel

[23] Canadian *Statement on Implementation*, Canada Gazette, Part I, January 1, 1994, 68, at 181.