UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

and

THE GOVERNMENT OF CANADA

Respondent/Party

MEMORIAL OF THE GOVERNMENT OF CANADA ON PRELIMINARY JURISDICTIONAL OBJECTIONS

FEBRUARY 14, 2002

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UNDER CHAPTER 11 OF THE NAFTA AND UNCITRAL ARBITRATION RULES

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PART I – NATURE OF THE MOTION

A. Overview

1. The claim by United Parcel Service of America, Inc. ("UPS" or "Claimant") against the Government of Canada ("Canada" or "Respondent") is without foundation in the NAFTA. The thrust of the UPS claim is that Canada has breached its obligations in Chapter 15 of the NAFTA to take appropriate action to proscribe anti-competitive business conduct by its government-owned monopoly, Canada Post Corporation ("Canada Post"). The NAFTA is clear that no such complaint by an investor is available under Chapter 11. Such matters are reserved to the Parties: Canada, the United Mexican States and the United States of America.

2. In an attempt to circumvent both the clear language and intent of the NAFTA, UPS baldly asserts that its Chapter 15 complaints fall within the scope of Chapter 11 investor/state dispute settlement. The UPS claims are not arbitrable for two reasons. First, the breaches of obligations pleaded by UPS are clearly not subject to investor/state dispute settlement. Second, UPS seeks to render non-arbitrable claims arbitrable through an untenable and expansive interpretation of other NAFTA

provisions which do provide recourse. However, it is axiomatic that the Tribunal's jurisdiction under Chapter 11 is limited by the Parties' consent. The Parties did not consent to arbitrate allegations of anti-competitive business conduct by a government monopoly. Accordingly, it is not within the jurisdiction of this Tribunal to consider the UPS claim. Should this Tribunal allow the UPS claim to proceed in this respect, the intent of the Parties to the NAFTA, an exhaustively negotiated and carefully prescribed agreement clearly limiting the scope of investor claims, will be frustrated.

3. While the foregoing jurisdictional bar to the UPS allegations is determinative, there are additional impediments to the UPS allegations which reinforce the fundamentally defective nature of the Amended Statement of Claim.

4. First, the UPS allegation that the Publications Assistance Program breaches Canada's obligation under Article 1102 of the NAFTA to provide national treatment, is outside the Tribunal's jurisdiction. The NAFTA cultural exemption (Article 2106 and Annex 2106), together with the subsidy exception (Article 1108(7)(b)), are conclusive in this regard. Second, UPS seeks to challenge the application of a federal taxation measure, the Goods and Services Tax, as a breach of Article 1105 which it cannot do under the express terms of Article 2103.

5. Third, UPS has failed to meet the basic requirements for bringing a claim under Chapter 11. The Amended Statement of Claim improperly includes allegations of, and claims for, damages relating to U.S. subsidiaries that fall clearly outside the scope of Chapter 11. It is also deficient with respect to the minimum requirements of a permissible claim; in particular, UPS fails to specify, other than in the most vague terms, the relationship between the impugned measures, alleged breaches of measures and resultant damages.

B. Specific Redress Sought by Canada

6. Canada brings this motion, pursuant to Article 21(4) of the UNCITRAL Arbitration Rules, to dismiss various claims made by UPS that are outside the

jurisdiction of the Tribunal. Specifically, the UPS claim for violations by Canada of Articles 1501 and 1502(3)(d) should be dismissed as non-arbitrable claims under the investor/state dispute settlement mechanism of Chapter 11. First, on the clear language of the NAFTA, the UPS claim for violations of Articles 1501 and 1502(3)(d) cannot be subject to investor/state dispute settlement. Second, UPS cannot maintain these prohibited claims indirectly by reading their terms into Articles 1502(3)(a), 1503(2) or Article 1105, forcing an interpretation of these distinct provisions which they cannot bear, in an attempt to activate Chapter 11 dispute settlement. For these reasons, paragraphs 16(f) and (g), 22, 23 27-32 and 34 and the reference to Article 1502(3)(d) in paragraph 36 of the Amended Statement of Claim should be struck.

7. The allegation regarding the collection of Goods and Services Tax in paragraph 33(a) of the Amended Statement of Claim should be struck as a taxation measure exempted from the scope of Article 1105 by Article 2103.

8. Canada further seeks to strike paragraph 18 of the Amended Statement of Claim relating to the Publications Assistance Program on the basis it is outside this Tribunal's jurisdiction by virtue of Articles 2106 (and Annex 2106) and 1108(7)(b) of the NAFTA.

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

   (i) establish that the investor's non-Canadian subsidiaries or related foreign companies are investments in the territory of Canada – as required by NAFTA Article 1101; and

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

These objections are, alone, a sufficient basis on which to strike the Amended Statement of Claim in its entirety.

C. Decision on Jurisdiction is Appropriate

10. The foregoing are fundamental jurisdictional issues that must be addressed and determined at the threshold. To do otherwise would be to conduct an arbitration contrary to the Agreement signed by the Parties.

11. First, there are strong legal grounds that support a decision at this stage. No facts are raised or challenged here; indeed, none would assist in resolving this motion. This Tribunal is asked to determine whether, regardless of their veracity, the allegations made by UPS in relation to anti-competitive conduct by Canada Post and to the Publications Assistance Program are within the scope of the investor/state dispute settlement mechanism that was agreed to by the Parties. This jurisdictional challenge raises legal issues that can be resolved simply on the basis of NAFTA alone.

12. Second, considerations of fairness support the need for a decision at this stage. There is no justification for imposing on Canada the burden associated with the over-broad UPS claims. The UPS allegations extend far beyond the prescribed sphere of investor/state complaints in the NAFTA. If these improper claims are not struck before the arbitration proceeds further, UPS will effectively exploit this Tribunal process to access documents and elicit a response in areas of sophisticated fact and expert evidence that it has no right to explore. The burden on Canada to respond to such expansive claims, particularly in terms of document collection, case development and expert advice, would be enormous. If the claims proceed, and are ultimately found to be outside this Tribunal's jurisdiction, Canada will have been prejudiced. Canada submits that this Tribunal should not accept what is in fact a strategic manoeuvre by UPS to disadvantage Canada, particularly when Canada has squarely raised the question of the jurisdictional foundation for these claims.

13. There are sound practical considerations favouring a decision on jurisdiction at this time. Without confining the UPS claims to their proper sphere, it will be unnecessarily and exceedingly difficult for this Tribunal to regulate the proceedings. As the UPS pleading stands, the scope of testimony, documentary evidence, expert opinion and argument that will be required from both parties, and with which the Tribunal will be forced to address, is daunting, if not unmanageable.

14. Accordingly, there is no legal rationale for delaying a decision on jurisdiction; further, doing so would result in the wasting of costs and time. Canada should not be required to defend allegations in relation to issues for which it did not consent to arbitration.

PART II – FACTS

15. The Amended Statement of Claim is replete with allegations, either explicit or implicit, of breaches of Articles 1501 and 1502(3)(d). UPS contends that Canada has failed to take appropriate action to proscribe anti-competitive business conduct with respect to Canada Post. UPS does not indicate how such conduct, if established, falls within the investor/state recourse mechanisms provided by the NAFTA. It cannot do so. On the clear language of the Agreement, these matters are not arbitrable.

16. While Canada disputes allegations of fact in the UPS Amended Claim, <u>for the purposes of this motion only</u>, Canada accepts the facts as pleaded.

17. The objections to the Amended Statement of Claim raised by this motion relate *exclusively* to questions of law and jurisdiction. Canada expressly reserves its right to raise, in the future, jurisdictional objections to the UPS Amended Statement of Claim with respect to which legislative, adjudicative or other facts may be relevant.

PART III – ISSUES

18. The issues on this motion are:

(i) whether the UPS claim under paragraphs 16(f) and (g), 22, 23, 27, 28, 29, 30, 31, 32 and 34 of the Amended Statement of Claim for violations of Article 1501(1) and Article 1502(3)(d) of the NAFTA should be dismissed as outside the jurisdiction of the Tribunal;

(ii) whether the UPS claim under paragraph 18 of the Amended Statement of Claim that the Publications Assistance Program breaches NAFTA Article 1102 should be dismissed as outside the jurisdiction of the Tribunal;

(iii) whether the claim under paragraph 33(a) relating to the Goods and Services Tax (GST) should be struck as taxation measures exempt under Article 2103; and

(iv) whether the UPS Amended Statement of Claim should be struck in whole or in part, for failing to satisfy NAFTA requirements including the failure to establish:

(a) that the investor's non-Canadian subsidiaries or related foreign companies are investments in the territory of Canada; and

(b) all alleged breaches of obligations under Chapter 11 and the damages associated therewith.

PART IV - ARGUMENT

A. The Analytical Framework

(i) The Architecture of the NAFTA – Chapter 11

19. The NAFTA is a treaty between three parties: Canada, the United States and Mexico. It includes specific mutual obligations with respect to a range of international trade matters. The NAFTA addresses matters such as trade in goods, cross-border trade in services, investments, temporary entry of business personnel,

competition policy and review of anti-dumping and countervailing duty cases. Each Chapter of the NAFTA is devoted to a particular subject matter.

20. Chapter 11 deals with the obligations with respect to investment. It is divided into three Sections, Section A (Investment), Section B (Settlement of Disputes) and Section C (Definitions).

21. Section A of Chapter 11 sets out the substantive obligations of each Party to the other Parties respecting measures relating to investors and their investments.

22. Section B of Chapter 11 provides investor/state dispute settlement procedures which may be invoked by investors of Parties under certain conditions. The Section B investor/state dispute settlement procedures are in addition to the Party/Party dispute settlement procedures in Chapter 20.

23. The NAFTA Parties have consented in advance to arbitrate claims brought by investors which concern breaches of obligations listed in Articles 1116 and 1117, provided the requirements and procedures set out in Section B of Chapter 11 are respected (Article 1122).

24. Articles 1116 and 1117 set out the scope of permissible investor/state claims. A claim under Section B of Chapter 11 must be based on a breach by a Party of an obligation under Section A, Article 1503(2), or Article 1502(3)(a) only where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A. If no breach of an obligation under Section A has occurred, there can be no claim.

Article 1116 provides:

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

   (a) Section A or Article 1503(2) (State Enterprises), or

   (b) Article 1502(3) (a) (Monopolies) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

   and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

24. Dispute settlement under the NAFTA takes three forms. First, any question involving the application or interpretation of the NAFTA can be submitted by a Party to a dispute settlement panel established under Chapter 20. This is "Party/Party" dispute resolution and cannot be invoked by an investor. Second, a private party directly affected by a final determination made under another Party's antidumping or countervailing duty laws may seek review of the final order by a binational panel established under Chapter 19. Finally, in the procedure relevant to this case, an investor who fulfills the requirements of Section B of Chapter 11 may, in narrowly prescribed circumstances, submit a claim to arbitration for loss or damage arising out of an alleged breach of a Party's obligations under Section A of Chapter 11. NAFTA Parties may also submit a claim in respect of these obligations under Chapter 20.

25. Under international law, violations of treaty obligations are usually resolved through state to state dispute settlement mechanisms. This is the case for the WTO Agreements and other trade agreements. Traditionally, aggrieved investors ask their home state to espouse their claim. NAFTA Chapter 11 provides direct recourse for an aggrieved investors against a Party for violation of certain obligations in relation to investments and investors.

Source: Sorharajah, M., "*The International Law on Foreign Investment*" (Cambridge, Cambridge University Press, 1999), p. 265-6, Tab 1

26. Chapter 11 creates a limited right of action. The breaches of obligations about which an investor can complain are limited to those obligations expressly identified in Chapter 11. *If a matter does not fall squarely in the terms of Article 1116 and 1117,*

an investor has no recourse. The balance of the rights and obligations in the NAFTA, to the extent that they are subject to dispute settlement, can only be enforced by the NAFTA Parties under the Party/Party dispute settlement provisions.

27. This limit to investor recourse was acknowledged by the British Columbia Supreme Court in a recent decision setting aside, in part, a decision of a Chapter 11 Tribunal in *Metalclad* v. *Mexico*. In this regard, Tysoe J. held that:

> Section B of Chapter 11 establishes a separate arbitration procedure. It allows investors to a NAFTA Party (who are not themselves a party to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other then the obligations imposed by Section A of Chapter 11 and the two Articles of Chapter 15 [Article 1502(3)(a) and 1503(2) where a breach of Chapter 11 or 14], the investor would have to prevail upon its country to espouse an arbitration on its behalf against the other Party. [emphasis added]
>
> *Mexico* v. *Metalclad Corp.*, [2001] B.C.J. No. 950, at para. 58 (B.C.S.C.), Tab 2

(ii) The Architecture of the NAFTA – Chapter 15

28. Chapter 15 addresses issues of competition policy, monopolies and state enterprises. In this Chapter, the Parties made binding commitments to proscribe anti-competitive business conduct, to encourage mutual cooperation on issues of competition law enforcement and policy.

29. Article 1501(1) sets out a general obligation requiring the NAFTA Parties to "adopt and maintain measures to proscribe anti-competitive business conduct" and to "take appropriate action with respect thereto". The Parties agree to "consult from time to time about the effectiveness" of the measures adopted by one another in this regard. However, each Party retains full discretion in how to comply with these obligations to make and enforce its domestic competition law.

30. Article 1501(3) makes the general nature of this commitment and the Party's independence explicit: No Party has any right of recourse to dispute settlement under the NAFTA with respect to these Article 1501 obligations. Nor does any investor. Note 43 provides that "no investor may have recourse to investor/state arbitration under the Investment Chapter for any matter arising under this Article."

31. Accordingly, each Party is responsible for the establishment, implementation and enforcement of its own competition law, with the discretion to enforce competition law solely vested in the domestic competition authorities of each Party. Should issues arise among the Parties regarding the effectiveness of their measures, their only obligation is to consult from time to time.

32. Article 1502 contains the Parties' obligations with respect to their monopolies. Article 1502(1) explicitly provides that Parties are free to designate monopolies: "Nothing in the NAFTA prevents, or should be construed to prevent, the right of a Party to maintain or establish a monopoly". Where a Party maintains or designates a monopoly, the NAFTA Parties agreed that four discrete obligations will apply to government monopolies in *certain* prescribed circumstances:

- 1502(3)(a): where the monopoly exercises delegated regulatory, administrative or other governmental authority, the Parties shall ensure that its monopoly does not act in a manner inconsistent with the Parties' obligations under the NAFTA;

- 1502(3)(b) and 1502(3)(c): where a monopoly is purchasing or selling the monopoly good or service, certain specific obligations apply;

- 1502(3)(d): where a monopoly is acting in non-monopolized markets in its territory, the Parties shall ensure that the monopoly does not engage in anti-competitive practices that adversely affect investments of an investor, including through cross-subsidization or predatory conduct.

33. Article 1503 contains the Parties' obligations with respect to state enterprises. In keeping with the Parties' approach to monopolies, Article 1503(1) confirms that

nothing in the NAFTA should be construed to prevent a Party from maintaining or establishing a state enterprise.

34. Article 1503(2) requires that the Parties shall ensure, through appropriate regulatory control or other measures, that where the state enterprise is exercising delegated administrative, regulatory or governmental authority, the state enterprise shall act in a manner not inconsistent with the Party's obligations under Chapters 11 and 14.

35. Except for Articles 1502(3)(a) and 1503(2), alleged violations of the obligations in Articles 1502 and 1503 are subject only to Party/Party dispute settlement procedures under Chapter 20. As stated above, Article 1501 obligations are subject only to the Parties' obligation to consult from time to time and are exempt from both investor/state and Party/Party arbitration.

36. Consistent with the restrictive dispute settlement rights agreed between the Parties, investor claims with respect to Chapter 15 obligations also are expressly limited. Articles 1116 and 1117 provide that an investor may bring a claim for an alleged breach of Articles 1503(2)[1], or 1502(3)(a) only where the monopoly or state enterprise of a Party has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11.

(iii) Nature of a Chapter 11 Tribunal's Jurisdiction

37. The jurisdiction of a tribunal constituted under Chapter 11 of the NAFTA is defined exclusively by what the Parties negotiated. As the Tribunal in *Ethyl Corp.* v. *The Government of Canada* observed: "The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties."

[1] Article 1503(2) contemplates breaches of Chapter 14 as well. Chapter 14 is irrelevant to this Claim; accordingly, no further reference is made herein to Chapter 14.

Ethyl Corp. v. *The Government of Canada* (June 24, 1998), (Award on Jurisdiction), para. 59 , Tab 3

See also: *Pope & Talbot, Inc.* v. *The Government of Canada* (January 26, 2000), (Preliminary Motion), para. 23, Tab 4
Azinian v. *United Mexican States*, ICSID Case No. ARB (AF)/97/2 (November 1, 1999), paras. 80-82 ("*Desona*"), Tab 5

38. The Parties have consented to arbitration only in accordance with the procedures set out in the NAFTA. Therefore, the Parties have not consented to arbitration for any claims not specifically listed in Articles 1116 and 1117.

39. To engage a tribunal's jurisdiction, a claim must clearly fall within the parameters of Chapter 11; it is not sufficient that the claim be "plausibly" or "arguably" connected to the Chapter 11 obligations relied upon.

Case Concerning Oil Platforms (*Islamic Republic of Iran* v. *United States of America*), (1996) I.C.J. 803 (Preliminary Objection), para. 16, Tab 6

40. Mere assertion by the claimant that its claim falls within a class of arbitrable claims is no satisfaction of jurisdiction. In determining whether there is jurisdiction, the Tribunal cannot restrict itself to a consideration of the terms of the claim. Rather, the Tribunal must determine on the basis of the plain text of the arbitral agreement whether the allegations fall within the Tribunal's jurisdiction .

Case Concerning Certain German Interests in Polish Upper Silesia, Series A, No. 6 (1925), P.C.I.J 4 at 15, Tab 7

Fisheries Jurisdiction Case (*Spain* v. *Canada*), (1998) I.C.J.432, (Jurisdiction of the Court), para. 16, Tab 8

41. A tribunal remains bound to analyze objectively the foundation for its jurisdiction beyond the mere subjective characterization of the claims by the claimant. A tribunal's jurisdiction cannot depend solely on the wording of the claim.

Case Concerning Certain German Interests in Polish Upper Silesia, supra at 15, Tab 7

Ambatielos Case (Greece v. United Kingdom), (1953), I.C.J. 10 (Obligation to Arbitrate), at 17-18, Tab 9

42. Accordingly, for the purpose of establishing jurisdiction, this Tribunal must go behind the UPS assertions that its claim can be finessed to fit within the scope of permissible Chapter 11 claims, and satisfy itself that, in fact, the allegations relate to an arbitrable claim. In doing so, the Tribunal must apply the text of Chapter 11, and Articles 1116 and 1117 in particular, which dictate the beginning and the end of its jurisdiction, to ensure that, measured objectively, the claim is arbitrable.

(iv) Applicable Rules of Interpretation

43. The NAFTA is interpreted according to the customary rules of international law governing treaty interpretation. Article 102(2) expressly adopts these rules by providing that:

> The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

44. Similarly, Article 1131(1) makes the rules of international law governing treaty interpretation applicable to disputes under Chapter 11. It states:

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

45. The applicable rules of international law relevant to the interpretation and application of international treaties are set out in the *Vienna Convention on the Law of Treaties ("Vienna Convention")*, which is accepted as reflecting customary international law.

Vienna Convention on the Law of Treaties, May 23, 1969, Can. T.S. 1980 No. 37 (also published at 1155 U.N.T.S. 331, (1969) 8ILM 679), Articles 31-32, Tab 10

United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996), (WTO Appellate Body) at 17, Tab 11

see also: *Japan – Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body), at 10, Tab 12

46. NAFTA Chapter 11 tribunals have recognized the *Vienna Convention* as the appropriate rules of treaty interpretation for investor/state proceedings.

Myers Inc. v. Government of Canada, (Nov. 13, 2000), (Partial Award), paras. 200-202, Tab 13

Pope & Talbot, Inc v. Government of Canada (June 26, 2000), (Interim Award), paras 64-69, Tab 14

Waste Management Inc. v. United Mexican States, ICSID Case No. ARB (AF)/98/2 (June 2, 2000), paras. 8-9, Tab 15

47. The NAFTA is not to be construed either broadly or restrictively, but rather in accordance with Articles 31 and 32 of the *Vienna Convention.*

Ethyl Corp. v. The Government of Canada, (June 24, 1988) (Award on Jurisdiction), para. 55, Tab 3

48. Article 31 of the *Vienna Convention* provides:

> Article 31: General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

49. Article 32 of the *Vienna Convention* allows recourse to supplementary means of interpretation only if the application of the rules in Article 31 result in an interpretation which is ambiguous or obscure, or leads to a manifestly absurd or unreasonable conclusion.

(a) Ordinary Meaning

50. The ordinary meaning of Chapter 11 is found in the text of the Agreement, including its preamble and annexes. As noted by the Appellate Body of the WTO, "interpretation must be based above all on the text of the treaty."

> *Japan – Taxes on Alcoholic Beverages, supra* at 12, Tab 12

51. Treaty interpretation should give effect to the intention of the Parties as expressed in the words used by them in light of the surrounding circumstances.

> ... the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*... neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.
>
> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (December 19, 1997), (WTO Appellate Body), at 18, Tab 16

(b) Context

54. Treaty interpreters must also take into account the basic architecture of the treaty they are interpreting:

> In light of the interpretative principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously." An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.

Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, December 14, 1999, WT/DS98/AB/R, (WTO Appellate Body), at 27-8, Tab 17

55. The context for the purpose of interpreting a treaty also includes instruments made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as such. The *Canadian Statement of Implementation* and the U.S. *Statement of Administrative Action* are such instruments and have been relied upon by NAFTA Chapter 11 Tribunals.

(c) Object and Purpose

56. Article 31 of the *Vienna Convention* mandates interpretation of a treaty in accordance with the object and purpose of the treaty. This requires examination of the treaty in light of the entirety of the agreement, including its Preamble and objectives.

In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, (1996), 1.T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 122 , Tab 18

57. Article 102(1) states the objectives of the NAFTA. These objectives are "elaborated more specifically through its principles and rules, including national treatment…".

(d) Ancillary Principles

58. Three further interpretive principles are particularly relevant in this proceeding. First, the principle of *expressio unius est exclusio alterius,* namely, that the express mention of a circumstance or condition excludes others; *noscitur a sociis,* "a word is known by its company"; and *ejusdem generis*, that general words are limited by the meaning indicated by accompanying specific words. All have direct application to the reading of NAFTA in this case.

Brownlie, I., *Principles of Public International Law,* (5th ed., 1998) p. 634, Tab 19

59. Finally, the presumption of effectiveness in treaty interpretation means that an interpreter cannot adopt a reading that would reduce whole clauses or paragraphs of the treaty to redundancy or inutility.

> *Japan – Taxes on Alcoholic Beverages*, *supra*, (WTO Appellate Body) at 12, Tab 12

B. Claims Relating to Anti-Competitive Business Conduct are Not Arbitrable under Chapter 11

(i) The Fundamental Error

60. The focus of the UPS claim is that Canada breached its NAFTA obligations by failing to ensure that its government monopoly, Canada Post, not engage in anti-competitive business conduct by leveraging its monopoly business to benefit its business in non-monopoly markets. While UPS is not always explicit in relying on Article 1501, or Article 1502(3)(d), the claims in paragraphs 16(f) and (g), 22, 23, 27-32 and 34 of the Amended Claim clearly fall within the ambit of these Articles.

61. First, UPS itself characterizes the conduct complained about as "anti-competitive" practices and/or "cross-subsidizing conduct" by Canada Post in its non-monopoly markets, the explicit subject of Article 1502(3)(d). For example:

- UPS claims that the allegations of cross-subsidization and predatory conduct exemplify "*anti-competitive practices*" (paragraphs 22 and 23);
- UPS characterizes the conduct complained of in paragraph 27 as "*anti-competitive conduct*";
- UPS characterizes the conduct complained of in paragraph 28 as Canada Post "*cross-subsidiz[ing]*" "*its non-monopoly products*";
- UPS characterizes its complaint in paragraphs 30 and 31 as Canada's failure to prevent "*anti-competitive practices*" by Canada Post, to the advantage of its non-monopoly business".

62. Second, the allegations in the above-noted paragraphs, by their nature, inescapably concern either anti-competitive practices (which include cross-subsidization and predatory conduct) or Canada's failure to take appropriate action to prevent them; as such, they fall squarely within Articles 1502(3)(d) and 1501, respectively. For example:

- Paragraph 27 refers to "*predatory conduct*" and "*cross-subsidization*". Such "anti-competitive practices" are specifically identified in Article 1502(3)(d). The apparently additional claims of "*unfair use of its monopoly infrastructure and network*" and "*not properly attributing costs of doing so*" are simply allegations of cross-subsidizing behaviour. Indeed, all the allegations in paragraph 27 are merely examples of cross-subsidization or predatory conduct or both; as such, they fall within Article 1502(3)(d). (The same analysis applies to the allegations in paragraphs 16(f) and (g), 22, 23 and 29 of the claim.);

- Paragraph 28 alleges that Canada Post "*cross-subsid[izes]*" its non-monopoly products, and uses these "advantages" "to develop and compete" in non-monopoly markets. Such allegations are, on their face, claims of cross-subsidization. Moreover, the claim of pricing "*non-monopoly products at or below properly or fairly attributable* costs" is no more than a complaint of predatory pricing or predatory conduct. As noted above, they are therefore the express subject of Article 1502(3)(d);

- The claims in paragraphs 30 and 31 refer to Canada's failure "to *implement...measures*" to ensure that no "*anti-competitive practices*" are engaged in by its monopoly Canada Post. As such, the allegations fall clearly within the terms of Articles 1501 and 1502(3)(d), respectively, and are non-arbitrable;

- Similarly, on any reading of paragraph 34, the "issues raised *therein*" all relate to claims of anti-competitive conduct. The failure "to enforce Canadian law in relation to the issues raised herein" refers to the taking of appropriate action to proscribe anti-competitive business conduct, the subject of Article 1501 ; in turn, anti-competitive practices are the explicit subject of Article 1502(3)(d).

63. UPS, recognizing that its allegations, whether framed as explicit or implicit violations of Article 1502(3)(d) or 1501, are non-arbitrable, seeks to re-characterize the same conduct as breaches of Articles 1502(3)(a), 1503(2), 1102 and 1105. As will

be discussed below, this effort to circumvent the clear language of Chapter 11 by recasting the allegations in various forms, all meet with the same result, that of non-arbitrability.

64. A clear reading of the NAFTA reveals that the Parties specifically did not include in Articles 1116 or 1117 claims related to the obligations in Articles 1501 and 1502(3)(d). Any complaint under Articles 1501 and 1502(3)(d) was reserved for resolution to the Parties, through consultation (in the case of Article 1501) or to the Party/Party dispute settlement process under Chapter 20 (in the case of Article 1502(3)(d)). Accordingly, the Parties have not consented to investor challenge under Chapter 11 for these alleged breaches, however they may be characterized by UPS. Therefore, this Tribunal can have no jurisdiction over the UPS claim.

(ii) A Claim Under Article 1501 or Article 1502(3)(d) is Prohibited

65. The Tribunal's jurisdiction to arbitrate investor complaints is exhaustively defined by Section B of Chapter 11, and specifically Articles 1116 and 1117. Articles 1116 and 1117 allow an investor of a Party to bring a claim only where the investor (or, in the case of Article 1117, an enterprise it owns or controls) has incurred loss or damage by reason of, or arising out of, a breach of an obligation under Section A of Chapter 11, or Article 1503(2) or Article 1502(3)(a) where the monopoly or state enterprise has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11. In this case, UPS has brought a claim under Article 1116, which reads in relevant part:

> Article 1116: Claim by an Investor of a Party on Its Own Behalf
>
> Article 1116(1): An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

66. The ordinary meaning of Article 1116 is clear. Eligible Chapter 11 claims are limited to those listed in the Article:

(a) an alleged breach of Section A of Chapter 11;
(b) an alleged breach of Article 1503(2); or
(c) an alleged breach of Article 1502(3)(a);

but in (b) and (c), only where the alleged breach has arisen as a result of a monopoly or state enterprise acting inconsistently with obligations under Section A of Chapter 11.

67. Article 1116 is exhaustive. There are no qualifying clauses such as "including" or "such as" to suggest that the enumeration of eligible claims in Article 1116 was meant to be merely illustrative. The *expressio unius* interpretive rule precludes supplementing the list in Article 1116 with other NAFTA obligations.

68. The NAFTA Parties specifically and clearly chose to limit, in Article 1116, the provisions that could give rise to an investor claim. They chose to subject only certain provisions of Chapter 15, and not Chapter 15 in its entirety, to Chapter 11 investor dispute settlement procedures. Neither Articles 1501 or 1502(3)(d) are included in the list of eligible claims.

69. The NAFTA Parties have chosen to attain the NAFTA objective of promoting fair competition (in Article 102(1)(b)) by reserving disputes related to obligations within Article 1501 to Party/Party consultation, and those within Articles 1502(3)(b), (c) and (d) to the general Party/Party dispute settlement provisions of Chapter 20. Chapter 11 confers no authority to change the Parties' clearly chosen means to satisfy the NAFTA objectives.

(iii) Article 1502(3)(a) or 1503(2) do not allow Claims of Anti-Competitive Conduct

70. For the reasons noted above, UPS cannot directly bring a Chapter 11 claim for alleged breaches of Article 1501 or Article 1502(3)(d). Recognizing this, UPS has attempted to recast its claims to shoehorn them into those provisions of the NAFTA which are arbitrable under Chapter 11, and thereby seek to evade the clear text of the NAFTA and the intent of the Parties. In this way, UPS attempts to arbitrate matters that the Parties did not consent to arbitrate.

71. As stated above, Article 1116 limits the scope for Chapter 11 claims. These include alleged violations of Articles 1503(2) and 1502(3)(a) only where the alleged violation is inconsistent with a Party's obligations under section A of Chapter 11.

72. The plain text of Article 1116 expressly limits investor/state claims relating to a breach of Article 1502(3)(a) to those where the government monopoly has acted in a manner inconsistent with its obligations of Section A of Chapter 11. In other words, Article 1116 carves out a subset of claims from the potential universe of Article 1502(3)(a) claims, and these alone are arbitrable; namely, those claims involving alleged violations of Section A of Chapter 11. The plain text is consistent only with this interpretation.

73. In the case of Article 1503(2), the text of the article itself makes clear that it does not include an obligation for state enterprises to act in a manner consistent with other Chapter 15 obligations.

> Article 1503(2) Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent **with the Party's obligations under Chapters 11 (Investment) and Fourteen (Financial Services)** wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges. (emphasis added)

74. Notwithstanding the clear language of Article 1502(3)(a) read together with Article 1116(1)(b), and the language of Article 1503(2), UPS claims that conduct

covered by Articles 1501 and 1502(3)(d), such as the obligation that government monopolies not engage in anti-competitive practices, should be included within the scope of arbitration.

75. To include claims for matters addressed by Articles 1501 and 1502(3)(d) would expand the scope of claims arbitrable under investor/state settlement, offending the text and intent of the NAFTA Parties in Articles 1116 and 1117 . While the foregoing analysis is determinative, sound principles of interpretation serve to confirm that the UPS attempt to shoehorn its claims into either Article 1502(3)(a) or Article 1503(2) has no merit.

76. First, the content and context of Article 1116 do not support expanding the class of arbitrable claims beyond those specifically listed.

77. Second, if Article 1502(3)(a) were to be interpreted to allow investor/state claims for violations of other provisions of the NAFTA, it would render meaningless the express words in Article 1116 limiting arbitrable breaches to alleged breaches of obligations of Section A of Chapter 11. Similarly, if Article 1503(2) were interpreted to cover claims of other Chapter 15 obligations, it would be contrary to the express words of Article 1503(2). In both cases, such an approach would contravene the principle that an interpreter is not free to adopt an interpretation that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

See: U.S. Standards for Reformulated Gasoline and Conventional Gasoline, *supra*, at 22, Tab 11

78. Third, limiting arbitrable claims under Article 1502(3)(a) and Article 1503(2) to those pertaining to a Section A breach is coherent. It allows equal recourse by an investor irrespective of whether the breach is effected by the Party itself or by a government monopoly or state enterprise. Reading Articles 1116(1)(a) and (b) as creating rights for investors against Parties for the actions of their monopolies or state enterprises in these circumstances serves the logical purpose of ensuring that a Party

does not avoid liability by delegating to its monopoly or state enterprise the types of governmental functions the Party would otherwise perform.

79. Fourth, if the class of permissible claims under Article 1502(3)(a) or Article 1503(2) were expanded to include all NAFTA obligations beyond those pertaining to breaches of Section A of Chapter 11, investors would be granted greater recourse when monopolies or state enterprises are concerned, than when the alleged offending conduct was that of the Party directly. There is no basis for construing the NAFTA text to give investors greater rights against Parties for the acts of government-owned monopolies and state enterprises than for the acts of the Parties themselves. Indeed, such a result would be absurd and should be rejected.

(iv) In Any Event, Canada Post is not Exercising "Delegated Regulatory, Administrative or Other Governmental Authority"

80. The UPS attempt to sweep its complaints of anti-competitive business conduct by Canada Post into Article 1502(3)(a) or Article 1503(2) and thereby, into the jurisdiction of this Chapter 11 Tribunal, cannot succeed for a third reason. The activity addressed in Article 1502(3)(a) and Article 1503(2) is of a specific type; namely, activity whereby a monopoly or state enterprise "exercises any regulatory, administrative or other governmental authority that the Party has delegated to it."

81. The express limitation "whenever such monopoly/state enterprise exercises any regulatory, administrative or other governmental authority" would be rendered meaningless were the mere existence of the monopoly or state enterprise a sufficient trigger. Therefore, the assertion in paragraph 2 of the Amended Statement of Claim that "Canada Post exercises delegated government authority *in operating the Postal Monopoly and its related businesses*", is predicated on a fundamentally incorrect and unsustainable reading of Articles 1502(3)(a) and 1503(2).

82. The UPS pleading does not (and could not) identify any exercise of delegated regulatory, administrative or other governmental authority by Canada Post as is required to bring a claim within the bounds of Article 1502(3)(a) or Article 1503(2). Commercial activities do not on their face, or in substance, relate to the exercise of regulatory, administrative or other governmental authority. The ordinary meaning of the terms in Article 1502(3)(a) (and, likewise, Article 1503(2)) confirms that the scope of contemplated activity falls within the classic understanding of acts by government in its sovereign capacity:

- The term "regulatory" is a form of the word "regulate", whose ordinary meaning is to control, govern or direct by rule or regulations; subject to guidance or restrictions.

- The term "administrative" is a form of the word "administration" whose ordinary meaning is "the action of administering something (a sacrament, justice, remedies, an oath, etc.) to another. The management of public affairs; government."

- "Governmental" is a term whose ordinary meaning is "of or pertaining to government, especially of a State."

  The New Shorter Oxford English Dictionary (Oxford: Clarendon Press, 1993) at 2350, 28, 1123, Tab 20

83. Furthermore, the expression "other governmental" should be construed, in accordance with the *ejusdem generis* rule, as referring to authority that is akin to "regulatory" or "administrative" authority.

84. The "ordinary meaning" recited above is confirmed by the examples provided in Article 1502(3)(a) and Article 1503(2) themselves. The "granting of licences", "the approval of transactions", "the imposing of quotas or fees" and, in the case of Article 1503(2), "expropriation" evoke conduct associated with the regulatory and supervisory functions of government, as distinct from commercial activities. The powers specified in this Article relate to the regulation or administration by the monopoly or state enterprise of the activities of others, and not to the conduct by the monopoly or state enterprise of its own activities. Indeed, the mere creation of a

monopoly or engagement by a monopoly in commercial activity cannot be the "exercise" of governmental authority to which Articles 1502(3)(a) and 1503(2) refer. Such an interpretation would be contrary to the *ejusdem generis* principle.

85. The obligations in Article 1502(3)(a) and Article 1503(2) recognize that governments sometime delegate regulatory or administrative functions to their monopolies and state enterprises, and require that, when delegated and exercising such authority, such monopolies and state enterprises act in a manner consistent with certain or all of the Party's NAFTA obligations. If they do not, investors can claim for damages under Chapter 11. However, if the conduct is not of this regulatory, administrative or government-like character, no obligation in Article 1502(3)(a) or Article 1503(2) arises and, hence, no Chapter 11 arbitration is available.

86. Even taking the allegations in the UPS pleading as proved, for the purposes of this motion (which allegations are denied), there is no conduct by Canada Post that falls within the types of activity covered by Article 1502(3)(a) and 1503(2). The conduct complained of involves no delegation of governmental authority; rather, it is purely commercial in nature.

Canada Post Corporation Act, R.S. 1985, c. C-10, as amended, Tab 21

(v) Alleged Breaches of Articles 1501 and 1502(3)(d) Do Not Give Rise to a Claim under Article 1105

87. Articles 1116 and 1117 make it clear that investor/state claims are limited to breaches of Section A of Chapter 11, and Article 1503(2) or Article 1502(3)(a) only where the monopoly has acted in the manner inconsistent with Chapter 11. Had the Parties intended for breaches of Article 1501 or Article 1502(3)(d) to be arbitrable under Chapter 11 they would have so provided. They did not. In an obvious attempt to circumvent this jurisdictional limitation, UPS seeks to import into Article 1105 separate and distinct obligations found in NAFTA Chapter 15 which are otherwise not arbitrable under NAFTA Chapter 11.

(a) Article 1105 – The Customary International Law Minimum Standard of Treatment

88. Article 1105(1) provides:

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

89. On July 31, 2001, the Free Trade Commission ("The Commission") established under Article 2001 issued a binding Note of Interpretation clarifying and reaffirming the applicable standard under Article 1105:

> Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
>
> Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001, Tab 22

90. The Commission comprises cabinet-level representatives of each Party, specifically, the Ministers of the three Parties responsible for international trade, including investment issues arising under Chapter 11. The Commission is the Parties to the NAFTA acting collectively under that Agreement.

91. The Commission is vested with the prime and final authority as the interpreter of the NAFTA. Article 1131(2) makes that clear: "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section [i.e., Section B of Chapter 11]." Article 1131(2) forms

part of the governing law that a tribunal established under Section B of Chapter 11, such as this one, is required to apply. The Commission's authority as the prime and final interpreter of the NAFTA reflects the NAFTA Parties' long-term institutional interest in the proper functioning of the NAFTA. Hence, the Tribunal need look no further.

92. Any attempt by UPS to encourage this Tribunal to apply a different legal standard under Article 1105 must fail. It would be contrary to the governing law of this proceeding as set out in Article 1131. This Tribunal must interpret and apply Article 1105 in accordance with the Commission's Interpretation.

93. That the Note of Interpretation clarified and reaffirmed the applicable standard under Article 1105 since the NAFTA entered into force on 1 January 1994 is confirmed by the Canadian Statement of Implementation for the NAFTA which provides:

> National Treatment provides a relative standard of treatment while this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law. (emphasis added)
>
> *North American Free Trade Agreement,* Canadian Statement of Implementation, Canada Gazette, Part I, January 1, 1994, p. 149, Tab 23

94. In its review of the award rendered by the Chapter 11 Tribunal in *Metalclad Corp* v. *Mexico,* the British Columbia Supreme Court also recognized that the reference to international law in Article 1105 is limited to customary international law. To this effect, the court held that the words "international law" in NAFTA Article 1105 refer to customary international law, which must be distinguished from conventional international law (comprised of treaties between States including provisions of the NAFTA other than Article 1105 and other provisions of Chapter 11). The court also recognized that customary international law, and therefore Article 1105, does not embody or give rise to obligations of transparency.

Mexico v. *Metalclad Corp.*, *supra*, at paras 59-76, Tab 2

95. Given the above, this Tribunal can have no doubt that Article 1105 simply incorporates the customary international law minimum standard of treatment of aliens, and nothing more. The binding Note of Interpretation also makes clear that the concepts of "fair and equitable treatment" and "full protection and security" referred to in Article 1105 are aspects of that minimum standard of treatment and do not expand the protection afforded by the minimum standard of treatment.

96. To constitute a violation of the minimum standard of treatment at customary international law, the treatment of an investment must amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.

> *United States (Neer)* v. *United Mexican States* (1926), 4 R.I.A.A. (Mexico-U.S. General Claims Commission), Tab 24
>
> *United States (Chattin)* v. *United Mexican States* (1928), 22 A.J.I.L. 677 (Mexico-US General Claims Commission), Tab 25
>
> *Mexico* v. Metalclad Corp., *supra*, paras 61-65, Tab 2

97. The only issue within the jurisdiction of this Tribunal is whether Canada's alleged conduct toward UPS violated the customary international law minimum standard of treatment of aliens under Article 1105. In this regard, UPS alleges that the following anti-competitive practices violate Article 1105:

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

monopoly infrastructure and network and pricing such non-monopoly products below those allocated costs.

Amended Statement of Claim, para. 22

98. UPS also appears to claim that Canada breached its obligations to provide "treatment in accordance with international law" under Article 1105 by failing to enforce its laws relating to goods and services tax and customs duties and failing to ensure the existence of a transparent and effective regime for the supervision and regulation of Canada Post in the non-monopoly postal market in Canada.

Amended Statement of Claim, para. 33a

99. The UPS Claim fails to allege, much less identify, conduct by Canada that is not in accordance with the customary international law minimum standard of treatment of aliens. There can be no doubt that there is insufficient state practice to establish customary international law on matters of competition. Moreover, it is the existing minimum standard for the treatment of aliens under customary international law that must be applied and against which conduct being alleged and challenged by UPS must be measured.

100. In this regard, no treatment amounting to an outrage, wilful neglect of duty or insufficiency of action so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency has been pleaded. Similarly, there are no allegations of denial of access to justice, gross deficiency in the administration of judicial or remedial process or a failure to provide guarantees that are generally considered indispensable to the proper administration of justice. On the facts of this case, as pleaded by UPS, no breach of Article 1105 can be claimed.

(b) Article 1105: A Stand-Alone Provision

101 Article 1105 is a stand-alone provision with its own substantive content, separate and distinct from other provisions of the NAFTA. This accords with the ordinary meaning of Article 1105, the context in which it is found and its object and purpose. To conclude otherwise would make breaches of every other provision of the NAFTA subject to arbitration under Chapter 11 merely by pleading Article 1105. Not only is this an absurd result, but it also violates the interpretive presumption against redundancy in treaties.

See also: *Japan-Taxes on Alcoholic Beverages*, *supra*, at 12, Tab 12

102. The binding Note of Interpretation is also wholly consistent with, and supportive of, interpreting Article 1105 as a stand-alone provision. To this effect, it states that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)".

103. The absurdity of the UPS position is illustrated by way of example. The NAFTA Parties agreed under Chapter 15 to certain supervisory obligations over their state enterprises and monopolies, including to ensure that their monopolies do not engage in anti-competitive practices in non-monopoly markets. This obligation is found in Article 1502(3)(d). This obligation would be redundant if Article 1105 captured its content within the meaning of minimum standard of treatment as suggested by UPS. Such an interpretation would also run counter to the express intention of the NAFTA Parties that complaints respecting anti-competitive practices under Article 1502(3)(d) be subject only to Party/Party dispute resolution under Chapter 20, and not to investor/state procedures.

104. To accept the UPS argument that Article 1105 incorporates other obligations in the NAFTA would render meaningless the NAFTA Parties' express intent in Articles 1116 and 1117 to limit arbitral claims under Chapter 11 to breaches of Section A obligations and the two specific provisions of Chapter 15 mentioned therein.

105. This Tribunal should reject what is clearly an attempt by UPS to circumvent jurisdictional limits imposed by Article 1116 by importing into Article 1105 obligations found in other provisions of the NAFTA. Therefore, the UPS claim on this matter should be rejected in its entirety.

C. Other Allegations Beyond the Scope of the Tribunal's Jurisdiction

(i) Taxation Measures

105. The allegations that Canada has failed to enforce certain of its tax laws, even if accepted (which is denied), are outside the scope of Article 1105 and beyond the jurisdiction of this Tribunal. It is necessary to recall that the general rule in the NAFTA is that it does not apply to taxation measures. UPS has simply chosen to disregard the clear and unequivocal language of Article 2103(1) which states:

> "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."
>
> Amended Statement of Claim, para. 33

106. None of the exceptions to this general rule apply to Article 1105. Had the Parties intended to allow a claim under Article 1105 with respect to taxation measures, they would have specifically and expressly said so. They did not. Therefore, there can be no doubt that this Tribunal has no jurisdiction to consider any allegations that Canada has breached its obligations under Article 1105 by failing to enforce its taxation laws. Hence, this matter must be rejected and dismissed by the Tribunal as outside its jurisdiction without any further inquiry.

> Amended Statement of Claim, para. 33

(ii) The Allegations Regarding the Publications Assistance Program are Outside the Tribunal's Jurisdiction

107. The allegation that Canada's Publications Assistance Program ("PAP") breaches Article 1102 is not within the Tribunal's jurisdiction because it is a measure with

respect to cultural industries and therefore not subject to NAFTA obligations, including those of Chapter 11.

108. Cultural industries are defined in Article 2107.

> NAFTA 2107 –Definitions
>
> For purposes of this Chapter:
>
> cultural industries means persons engaged in any of the following activities:
>
> a) the publication, **distribution**, or sale of books, **magazines**, **periodicals** or **newspapers** in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
>
> b) the production, distribution, sale or exhibition of film or video recordings;
>
> c) the production, distribution, sale or exhibition of audio or video music recordings;
>
> d) the publication, distribution or sale of music in print or machine readable form; or
>
> (a) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;" (emphasis added)

109. Article 2106 and Annex 2106 provide that measures adopted or maintained with respect to cultural industries shall be governed exclusively by the Canada-United States FTA, with the exception of Article 302 regarding tariff elimination.

> Article 2106: Cultural Industries
>
> Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries.
>
> Annex 2106 - Cultural Industries
>
> Notwithstanding any other provision of this Agreement, as between Canada and the United States, **any measure adopted or maintained with respect to cultural industries**, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, **shall be governed under this Agreement exclusively in accordance with the provisions of the Canada - United States Free Trade Agreement**. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States. (emphasis added)

110. Article 2005 of the Canada-U.S. FTA specifies that cultural industries are exempt from the Canada-U.S. FTA.

> "cultural industries are exempt from the provision of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter."

111. Annex 2106 of the NAFTA has the effect of making applicable, as between Canada and the United States, the FTA provisions that govern cultural industries including the exemption in FTA Article 2005(1), the FTA investment and services chapters and FTA grandfathering provisions. The NAFTA Annex 2106 requirement that measures with respect to cultural industries be governed exclusively by the FTA has the effect of exempting these measures from NAFTA provisions that were not in the FTA, with the exception of NAFTA Article 302 regarding tariff elimination.

> U.S. Statement of Administrative Action, at 221, Tab 26
>
> Johnson, Jon R., *The North American Free Trade Agreement, A Comprehensive Guide* (Aurora: Canada Law Book Inc., 1994), p. 473-4 , Tab 27

112. The *Canadian Statement of Implementation* and *U.S. Statement of Administrative Action* confirm the Parties' understanding regarding the exemption from the NAFTA of measures with respect to cultural industries.

> (...) By virtue of Article 2106 and Annex 2106, the cultural industries specified in Article 2107 are exempt from all NAFTA obligations, except for Article 302 on tariff elimination. (...) Notwithstanding any other NAFTA provision, any measure adopted or maintained with respect to the cultural industries will be governed, under NAFTA, exclusively in accordance with the provisions of the Canada-United States FTA. (...)
>
> Canadian Statement of Implementation, at p. 218, Tab 23
>
> Article 2106, which calls up Annex 2106, carries forward CFTA Article 2005. Article 2005 exempted "cultural industries" (I.e. print, film and video, music radio and television sectors) from a number of the obligations of the CFTA. Article 2005 also exempted from all CFTA obligations "measures of equivalent commercial effect" taken in response to actions that would have been inconsistent with the CFTA but for the exception. (...)
>
> U.S. Statement of Administrative Action, at 221, Tab 26

113. Therefore, Chapter 11 obligations are not applicable to measures adopted or maintained with respect to cultural industries. NAFTA experts have noted:

> ...as between Canada and the United States and Canada and Mexico, cultural industries are exempt from the investment obligations of the NAFTA under the exemption for cultural industries [...].
>
> Johnson, Jon, The North American Free Trade Agreement, A Comprehensive Guide, *supra*, at 293, Tab 27
>
> With the cultural exemption clause of Annex 2106 applying equally to investment, any measure relating to a cultural industry as defined in Article 2107 can be exempted from the obligations of Chapter 11 (investment), at least in the relations between Canada and the United States and those between Canada and Mexico.
>
> Bernier, Ivan, "Cultural Goods and Services in International Trade Law", in Dennis Browne, ed., *The Culture/Trade Quandary: Canada's Policy Options*, p. 108 at p. 139, Tab 28

114. It is also clear that provisions regarding the investor/state dispute settlement mechanism established by Chapter 11 and under which this Tribunal is constituted are not applicable to measures affecting cultural industries.

115. The PAP provides postal subsidies to eligible Canadian-owned-and-controlled paid circulation publications that are mailed in Canada for delivery in Canada. The PAP is delivered in cooperation with Canada Post and supports the mailing of eligible Canadian periodicals to Canadian readers and retailers.

116. On the face of the allegations in paragraph 18 of the Amended Statement of Claim, the measure complained of, the PAP, relates to the distribution of magazines and as such, it is a cultural industry activity as set forth in Article 2107 and therefore is a measure adopted or maintained with respect to cultural industries within the meaning of Annex 2106 of the NAFTA.

117. Accordingly, the PAP falls within the exemption of Article 2106 and Annex 2106 and is not subject to NAFTA obligations, including those of Chapter 11. It is, therefore, outside the Tribunal's jurisdiction.

118. In the alternative, even if the Tribunal finds that Article 2106 and Annex 2106 do not exempt the PAP from the application of the NAFTA, the PAP is nonetheless exempted from the application of the national treatment obligation of Article 1102 by virtue of Article 1108(7)(b).

119. Paragraph 18 of the Amended Statement of Claim alleges that the PAP subsidizes the Canadian magazine industry and results in a breach of national treatment because of the resulting distribution through Canada Post.

120. Article 1108(7) specifically provides that certain Chapter 11 obligations do not apply to subsidies:

> Articles 1102, 1103 and 1107 do not apply to: [...]
>
> subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.

121. UPS says that the alleged measure, the PAP, is a subsidy provided by a Party, Canada, to the Canadian magazine industry. On the face of the allegations in paragraph 18 of the Amended Statement of Claim, the allegation falls within the exception provided in Article 1108(7)(b).

122. As such, and in accordance with the plain text of the NAFTA, the national treatment obligation of Chapter 11 does not apply to the measure at issue. The ordinary meaning of Article 1108(7) is that it excludes any subsidy measure from the application of Article 1102. As a subsidy by a Party, the PAP program is not subject to Article 1102. Therefore the complaint by UPS that the program breaches Article 1102 is outside the Tribunal's jurisdiction.

123. As a result, paragraph 18 of the Amended Statement of Claim should be struck.

D. The UPS Amended Statement of Claim Fails to Meet the Requirements for a Claim Under Chapter 11 and the UNCITRAL Rules

(i) Chapter 11 Only Covers The "Investment Of An Investor" In The Territory Of Another NAFTA Party

(a) NAFTA Articles 1101 and 1139

> NAFTA Article 1101, entitled "scope and coverage", states in relevant part:
>
> 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; [...]

125. Article 1101 makes it clear that, for a Chapter 11 Tribunal to have jurisdiction over a claim, the measure that is alleged to be contrary to a Chapter 11 obligation must relate to investors of another NAFTA Party or to investments of investors of another Party in the territory of a Party.

126. Article 1101 must be read together with the definitions of "investment of an investor of a Party", "investor of a Party" and "investment" set out in Article 1139, which read:

Investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

Investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years,
but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d) ;

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) ; or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

126. Chapter 11 therefore only covers measures relating to:

a) an investor of a Party that seeks to make, is making or has made an investment in the territory of another NAFTA Party, and

b) an investment in the territory of a NAFTA Party of an investor of another NAFTA Party.

In other words, each NAFTA Party has committed to certain obligations and protections with respect to investments of foreign investors in its territory.

127. This is confirmed by the *Canadian Statement of Implementation* at p. 148:

> Article 1101 states that Section A covers measures by a Party (i.e. any level of government in Canada) that affect:
>
> investors of another Party (i.e. the Mexican or American parent company or individual Mexican or American investor);
>
> investments of investors of another Party (i.e. the subsidiary company or asset located in Canada); [...] (emphasis added)
>
> *Canadian Statement of Implementation, supra* at p. 148, Tab 23

128. The *U.S. Statement of Administrative Action* at page 140 also makes clear that the Chapter 11 obligations of a Party are with respect to investments in its territory:

> Chapter Eleven comprises two parts. Part A sets out each government's obligations with respect to **investors from other NAFTA countries and their investments in its territory**. [...] (emphasis added)
>
> U.S. Statement of Administrative Action, at p. 140, Tab 26

(b) Application to UPS

129. Paragraphs 6 and 7 of the Amended Statement of Claim read:

> UPS is a corporation incorporated under the laws of the State of Delaware in the United States of America. UPS Internet Services, Inc., UPS Worldwide Forwarding, Inc., United Parcel Service Inc. (New York), and United Parcel Service, Inc. (Ohio) (collectively, the "US Subsidiaries") are wholly owned subsidiaries of UPS. UPS also owns United Parcel Service Canada Ltd. ("UPS Canada", or the "Investment"), a company organized under the laws of Ontario, Canada. UPS Canada provides courier and small package delivery and associated services ("Express Delivery Services") and secure electronic communication services in the Non Monopoly Postal Services Market throughout Canada, and with UPS and its related companies, including the US subsidiaries, worldwide.
>
> UPS Canada is an "investment" of UPS, and UPS is an "investor" of a Party, the United States of America, within the meaning of NAFTA Article 1139. The US subsidiaries are investments of UPS under NAFTA Article 1139.

130. These paragraphs do not allege that the U.S. subsidiaries are investments of UPS under Article 1139 that are located in Canada. There is also no claim to that effect anywhere else in the Amended Statement of Claim.

131. Similarly, the Notice of Arbitration does not contain any such allegations. It simply alleges:

> The Investment, United Parcel Service Canada Ltd. ("UPS Canada") is a corporation organized under the laws of Ontario, Canada which has operated since 1975. UPS Canada is owned entirely

by the Investor. The Investor provides courier delivery and associated services throughout Canada and with the Investor, around the world. The Investor's investment includes four wholly owned subsidiaries as follows:

(1) UPS Worldwide Forwarding, Inc.

(2) United Parcel Service, Inc. (New York)

(3) United Parcel Service, Inc (Ohio)

(4) UPS Internet Services, Inc.

Notice of arbitration, at para. 2

132. In order for UPS to bring a claim in respect of its U.S. subsidiaries, it must establish that the subsidiaries constitute investments within the meaning of Article 1139 as well as being investments in the territory of another NAFTA Party in accordance with Article 1101. Instead, the allegations in the Amended Statement of Claim establish that the U.S. subsidiaries of UPS are only investments in the territory of the U.S. and not investments in the territory of Canada.

133. This is confirmed by the documents provided by UPS with its original claim. The four subsidiaries of UPS America, UPS Internet Services, Inc., United Parcel Service, Inc. (New York), United Parcel Service, Inc (Ohio), and UPS Worldwide Forwarding, Inc have provided waivers (see TAB C of the "Submission of Claim under Chapter 11 of the NAFTA and the UNCITRAL Arbitration Rules" filed by United Parcel Service of America on April 9, 2000). The company letterhead of the waiver provided by each of these four subsidiaries makes it clear that these companies are situated in the United States and not in Canada. The letterhead for all four subsidiaries reads "55 Glenlake Parkway, NE, Atlanta, GA 30328, (404) 828-6000". Therefore the U.S. subsidiaries are not investments in the territory of Canada.

134. The allegations in the Amended Statement of Claim relating to the U.S. subsidiaries (UPS Internet Services, Inc., United Parcel Service, Inc. (New York), United Parcel Service, Inc (Ohio), and UPS Worldwide Forwarding, Inc) fall outside the scope of Chapter 11 pursuant to Article 1101 because they are not "investments of an investor" in the territory of another NAFTA Party. They are therefore outside the Tribunal's jurisdiction. As a result, paragraphs 6, 7, 19 and 35 of the Amended

Statement of Claim, as well as any allegation of measures affecting the U.S. subsidiaries or loss in relation to the U.S. subsidiaries, should be struck.

(ii) Minimum Requirements of a Pleading

(a) General Principles

136. Article 1121(1) states, in relevant part:

> A disputing investor may submit a claim under Article 1116 to arbitration only if,
> (a) the Investor consents to arbitration in accordance with the procedures set out in this Agreement; [...]

137. Article 1122(1) states:

> Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

138. Article 1120(2) provides that the applicable arbitration rules (in this case the UNICTRAL Arbitration Rules) shall govern the arbitration, except to the extent modified by Section B of NAFTA Chapter 11. Section B of NAFTA Chapter 11, in turn, sets out the governing law for NAFTA Chapter 11 claims.

139. Pursuant to the UNCITRAL Arbitration Rules, the Statement of Claim, as distinct from the Notice of Arbitration, must contain "a more detailed elaboration of particulars to substantiate the claimant's position". In particular, Article 18(2) of the UNCITRAL Rules requires that the claim contain "particulars", including a statement of facts supporting the claim, the points at issue and the relief or remedy sought.

> See Report of the Secretary General: revised draft set of Arbitration Rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/112/AD.1 (1975), at 18-19, Tab 29

140. The requirements of Article 18(2) of the UNCITRAL Rules include the objectives normally associated with pleadings, namely:

a) Define with clarity the issues between the disputing parties;

b) Give fair notice of the case to be met so that the disputing parties can marshal the relevant evidence; and

c) Assist tribunals in regulating the proceeding before it.

> Redfern, Alan and Hunter, Martin, *Law and Practice of International Commercial Arbitration*, 3rd Edition (London: Sweet and Maxwell 1999)at para 6-48, Tab 30

141. In the context of a claim under Chapter 11, the foregoing objectives translate into an obligation to plead the facts necessary to demonstrate that the Amended Statement of Claim falls within the terms of Chapter 11.

142. Articles 1116 and 1117 are clear as to the elements that must be established in a claim submitted for arbitration under Chapter 11:

> Article 1116: Claim by an Investor of a Party on Its Own Behalf
>
> Article 1116(1): An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach. [emphasis added]
>
> Article 1116(2): An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
>
> Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise
>
> Article 1117(1): An investor of a Party, on behalf of an enterprise or another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. [emphasis added]

> Article 1117(2): An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

143. Articles 1116(1) and 1117(1) emphasize that both breach ***and*** resulting damage must be pleaded in formulating an arbitrable claim. Articles 1116(2) and 1117(2) also preclude an investor/state claim if more than three years have elapsed from the date the investor first acquired, or should have acquired, knowledge of the alleged breach ***and*** knowledge that it has incurred loss or damage. This ensures that only complaints giving rise to recognizable loss or damage, as contemplated by the Parties to the NAFTA, will proceed.

144. Article 1120 further states, in relevant part:

> Except as provided for in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing Investor may submit a claim to arbitration under: [...] (c) the UNCITRAL Arbitration Rules.

145. Unless the claimant pleads material facts with respect not only to **all** alleged breaches of obligations under Chapter 11, but also to the damages associated therewith, including the events, timing and other relevant particulars associated with each allegation, neither the responding party nor the Tribunal can determine whether the claim satisfies the requirements of Articles 1116, 1117 and 1120(1) and, therefore, whether it can be arbitrated at all. In effect, these provisions prohibit an investor from bringing a claim for unspecified breaches and unsubstantiated damages.

146. Accordingly, in addition to the clear mandatory language of Articles 1116 and 1117, the whole scheme of Chapter 11 confirms the requirement to plead:

(i) material facts establishing ***all*** alleged breaches;

(ii) a nexus between the alleged breach and damage; and

(iii) with sufficient specificity as to the nature and quality of the alleged breach and damage, and the timing thereof.

147. The onus is on the investor to ensure that the requirements for initiating a claim under Chapter 11 are met. From a jurisdictional standpoint, a failure to meet these requirements means that the investor has failed to initiate a claim within the terms of Chapter 11.

> Pelonpää, M. and Caron, D. *The UNCITRAL Arbitration Rules as Interpreted and Applied* (Helsinki, Finnish Lawyers' Publishing, 1994) at 338-9, Tab 31

148. Satisfaction of the pleading obligations under the NAFTA and the UNCITRAL Arbitration Rules is monitored by the discretion vested in the Tribunal to control its proceedings. Article 15(1) of the UNCITRAL Arbitration Rules authorizes the arbitral tribunal to:

> ...conduct the arbitration is such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

149. Article 15 (1) of the UNCITRAL Arbitration Rules incorporates a discretionary mechanism to ensure that, at the outset, the parties and the Tribunal know the case to meet, and the responding party has a preliminary understanding of what evidence must be lead in response.

150. The interest of the Tribunal in adjudicating the dispute in a manner that respects the equality of the parties before it requires that the Tribunal be able to monitor pleadings so that no party is deprived of the fundamental right to know the case it needs to meet or is surprised.

151. The broad discretion in the Tribunal includes the power to strike pleadings which are deficient for disclosing no reasonable cause of action. In the alternative, this Tribunal has the power to order particulars to remedy a pleading lacking sufficient detail.

(b) Application to UPS

152. In its Amended Statement of Claim, UPS has failed to plead both the material facts and related particulars to establish a claim under Chapter 11.

153. UPS fails to plead material facts establishing all alleged measures and all resulting breaches of obligations under Chapter 11. In paragraphs 16, 22, 27, 34 and 35 of the Amended Statement of Claim UPS makes vague and open-ended allegations by stating that the measures and breaches in question *"include, but are not limited to"* those listed in these paragraphs. In doing so, UPS effectively asserts that the measures identified in the Amended Statement of Claim are merely examples of how Canada has breached its obligations under Chapter 11 thereby leaving the door open to bring additional claims later. UPS then compounds the confusion and uncertainty by indicating at paragraph 36 of the Amended Statement of Claim that the obligations in issue include, but are not limited to Articles 1102, 1105, 1502(3)(a), 1502(3)(d) and 1503(2), leaving unanswered the question as to which damages arise from which breaches of which articles of the NAFTA.

154. UPS asserts, in imprecise and bold terms, that it has suffered loss. At paragraph 19 of the Amended Statement of Claim UPS alleges that it, and its U.S. subsidiaries and UPS Canada, "have suffered harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share and increased out of pocket expenses". UPS does not address, let alone establish, the nature of the alleged losses, the causal relationship between the alleged breaches of the NAFTA and the damage suffered or the timing of the alleged loss or damage. UPS then repeats verbatim the same allegation at paragraph 35, offering no further insight as to the linkages between measure, breach and resulting damage.

155. The Amended Statement of Claim should be struck in its entirety. In the alternative, UPS should be required to identify, with specificity (including the event timing and other relevant facts), all alleged measures and resulting breaches by

Canada of its Chapter 11 obligations, and the nature of the loss or damage allegedly suffered and the nexus between the alleged measure, resulting breach and loss or damage.

PART IV – ORDER REQUESTED

Canada requests an Order that:

(i) insofar as the UPS claim relates to violations by Canada of its obligations in Articles 1501 and 1502(3)(d) of the NAFTA, the claim is outside the jurisdiction of the Tribunal;

(ii) to give effect to the Order in (i) above, paragraphs 16(f) and (g), 22, 23, 27 – 32 and 34 and the reference to Article 1502(3)(d) in paragraph 36 of the Amended Statement of Claim should be struck;

(iii) insofar as the UPS claim relates to alleged violations by Canada of its obligations in Article 1102 of the NAFTA as a result of designing and implementing the Publications Assistance Program for the Canadian magazine industry, the claim is outside the jurisdiction of the Tribunal;

(iv) to give effect to the Order in (iii) above, paragraph 18 of the Amended Statement of Claim should be struck;

(v) insofar as the UPS claim relates to alleged violations by Canada of Article 1105 as a result of a taxation measure, the Claim pursuant to Article 2103 of the NAFTA is beyond the jurisdiction of the Tribunal;

(vi) to give effect to the Order in (v) above, paragraph 33(a) of the Amended Statement of Claim should be struck;

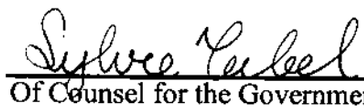
(vii) insofar as the UPS claim fails to plead the material facts and related particulars to establish a claim under Chapter 11 of the NAFTA, the claim is outside the jurisdiction of the Tribunal;

(viii) to give effect to the Order in (vii) above, the Amended Statement of Claim should be struck in its entirety;

(ix) alternatively, to give effect to the Order in (vii) above, paragraphs 16, 19, 22, 23, 27 - 34, 35 and 36 should be struck and UPS directed to provide further and better particulars by identifying all alleged measures and breaches by Canada of its obligations under Chapter 11 of the NAFTA as well as the alleged damage or loss associated with each breach, including the events, timing and other relevant facts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Ottawa, the Province of Ontario, this 14th Day of February, 2002



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