

REDACTED

AMENDED PUBLIC VERSION

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

**COUNTER-MEMORIAL
(Merits Phase)**

(June 22, 2005)

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PART I. INTRODUCTION AND OVERVIEW

1. The dispute before this Tribunal is not an investment dispute. It does not in reality seek a remedy for a breach of a NAFTA Chapter 11 obligation. What the Claimant is truly seeking, is to tie the hands of Canada Post, impose additional disciplines on Canada Post and increase the cost of its products not subject to the exclusive privilege or monopoly.

2. In this case the Claimant complains about the customs treatment of mail, Canada Post's benefiting from its infrastructure and the privileges related to its monopoly, the Publications Assistance Program, a commercial dispute between Fritz Starber and Canada Post, and certain labour rights having nothing to do with UPS.

3. At the heart of the dispute are two very different entities. On the one hand, Canada Post is a Crown corporation that delivers the mail. It has a limited monopoly with respect to certain of the products it delivers. It has a social and public policy role and is subject to governmental obligations not imposed on private enterprises. It is also responsible for the implementation of Canada's universal service obligation and operates in an international context governing postal traffic. On the other hand, the Claimant is a global multinational that provides courier, brokerage, logistics, transportation and other associated services in Canada and worldwide and is focussed primarily on the more lucrative business-to-business deliveries and higher value items. The Claimant's case is predicated on a refusal to recognize these differences between it and Canada Post and the way in which they operate and the public policy considerations these differences entail.

The Claimant ignores the legal framework of the NAFTA

Article 1102

4. In its Award on Jurisdiction, the Tribunal found that the claim of cross-subsidization and anti-competitive conduct did not fall within the scope of Article 1105. The Tribunal established that it had jurisdiction to consider breaches of obligations in

Section A of Chapter 11, Articles 1503(2) and 1502(3)(a) only where the monopoly has acted in a manner inconsistent with an obligation in Section A of Chapter 11. It found it did not have jurisdiction over claims for breaches of Article 1502(3)(d). The Tribunal allowed the Claimant to reposition certain of its claims as breaches by Canada of its national treatment obligation. The Tribunal recognized that the investor agreed to drop its taxation claims. The Tribunal joined to the merits Canada's objections with respect to the Publications Assistance Program and the US subsidiaries.

5. Notwithstanding the Claimant's attempt to recast its claim in response to the Tribunal's Award on Jurisdiction, the claim remains fundamentally flawed because:

- it does not fit within the terms of the NAFTA obligations it claims to rely on; and
- it does not respect the jurisdictional requirements for a NAFTA Chapter 11 claim.

6. Throughout its Memorial, the Claimant disregards the terms of the NAFTA obligations at issue. Instead, it relies on its own views of the objectives of the NAFTA as set out in Article 102 of NAFTA. These objectives are not a cause of action for any claim that a foreign company may have, and do not create new obligations. The factual and legal claims the Claimant makes are only relevant to the extent they constitute a breach of obligations over which the Tribunal has jurisdiction.

7. In order to find a breach of national treatment, the Tribunal must identify the treatment; determine whether it is accorded in like circumstances and if so, whether it accords less favourable treatment to the foreign investor than to the domestic investor. The purpose of the national treatment obligation is to prevent nationality-based discrimination, not to prevent a government from making legitimate policy choices or to allow Tribunals to review these choices. The fact that a domestic and a foreign investment are in the same loosely defined business sector does not establish that the treatment is accorded in like circumstances.

Article 1105

8. The minimum standard of treatment obligation protects investments against

serious breaches of customary international law obligations with respect to treatment of aliens, such as denial of justice. The Claimant would have it become the basis of an equitable jurisdiction for Chapter 11 tribunals to review any measure that an investor feels is unfair. This Tribunal has already dismissed the Claimant's expansive interpretation of the minimum standard of treatment. None of the allegations on their face either fall within the recognized subject matter of the minimum standard of treatment or rise to the level of seriousness required in order to constitute a breach of Article 1105. Vague references to the principles of good faith and abuse of rights do not suffice for the Claimant to establish breaches of customary international law obligations for the treatment of aliens. The Claimant's allegations are, moreover, replete with inaccuracies and mischaracterizations of the facts.

9. Notwithstanding several opportunities to amend its statement of claim, and a memorial of several hundred pages, the claim in respect of NAFTA Article 1103 remains unclear. The Claimant has not explained what more favourable treatment is contained in the other investment treaties to which it refers. It has not shown that the treatment was accorded in like circumstances. And it has not established that the alleged more favourable treatment has resulted in damage to the Claimant.

10. Having disregarded the legal basis for the claims it makes, the Claimant then disregards relevant facts and important elements of context such as those that would establish whether a treatment is accorded in like circumstances. Moreover, the claim is replete with factual allegations and expert reports not relevant to obligations over which this Tribunal has jurisdiction. Notwithstanding the Tribunal's Award on Jurisdiction, the claim makes extensive allegations regarding cross-subsidization, cost allocation and other competition law issues.

Chapter 15

11. The Claimant also fails to distinguish between measures of Canada and actions of Canada Post. The NAFTA makes clear that claims with respect to actions of Canada Post can only be brought through Chapter 15. Claims regarding Canada Post's leveraging of its infrastructure, its internal costing and other conduct, like its actions in

respect of Fritz Starber, can only be brought before this Tribunal where the impugned conduct relates to the exercise of a delegated governmental authority and constitutes a breach of Chapter 11. General principles of state responsibility cannot serve to circumvent the NAFTA's clear rules of responsibility for actions of state enterprises and monopolies. None of the claims involve the exercise of delegated governmental authority as the term is intended in the context of NAFTA. They relate to purely commercial conduct of Canada Post. There is therefore no need to examine whether Canada Post's conduct breaches NAFTA Chapter 11 obligations.

Jurisdictional Issues

12. The claim must also fail because the Claimant has not established the basic requirements for this Tribunal's jurisdiction and many of the claims are not admissible:

- The Claimant has not established that it is an investor within the meaning of the NAFTA.
- The Claimant has stated in general terms, but not established as required by Article 1116, that it has itself (as opposed to UPS Canada) suffered damage by reason of the breaches of NAFTA it alleges.
- The claims with respect to Canada Post's leveraging of its infrastructure, the Publications Assistance Program, and the customs related allegations are time-barred because they arise out of events that took place more than three years before the claim was filed.
- The claim with respect to Fritz Starber is based on events that took place after the claim was filed.
- Competition law issues are not within the Tribunal's jurisdiction; they were left to domestic competition authorities as set out in Article 1501 and state to state dispute settlement for matters covered by Article 1502(3)(d).
- NAFTA Article 1102 is not applicable to the Postal Imports Agreement because it is procurement.
- NAFTA Article 1102 is not applicable to the Publications Assistance Program because of the cultural exemption and the subsidy exception.

SPECIFIC TREATMENTS**Customs treatment of mail and courier**

13. The Claimant argues there is discrimination because Canada Post receives preferential customs treatment.

14. The different treatment of mail and courier is not accorded in like circumstances. The differences in the way mail items and courier shipments arrive in Canada explain the different customs streams and treatment customs accords them, not the nationality of the entities involved. UPS Canada is not in the same situation to Canada Post receiving mail from foreign postal administrations pursuant to the UPU Convention. UPS Canada is an express consignment operator that imports highly time-sensitive items on behalf of its customers into Canada through the Courier/LVS stream. It performs different functions than Canada Post does: it acts as a freight forwarder, a courier, a broker and a warehouse operator. As a result, UPS Canada knows the sender and has end-to-end control of the package. Canada Customs can therefore have a high degree of confidence that the package contains what is indicated on the declaration. In contrast, Canada Post receives huge volumes of non time-sensitive mail from other postal administrations without any knowledge of the sender or the content of the package. Customs, whose mandate is to protect Canada's national security and economic interests through regulation of Canada's borders, has designed different streams to take into account these differences in ensuring effective enforcement of Canadian laws and revenue collection.

15. The World Customs Organization and the Universal Postal Union recognize the distinct nature of postal traffic as compared to courier products, and indeed the need for different customs treatment. Canada's customs treatment of postal items and courier shipments is in line with the practices of most other countries.

16. Moreover, the Claimant does not compare treatment of domestic investors with that of a foreign investor. The Claimant blurs the line between the treatment it receives and that received by UPS Canada. Moreover, the factual basis for the Claimant's argument is wrong. It is the customs treatment of foreign mail, not that of Canada Post,

to which the Claimant invites the tribunal to draw a comparison. It is not a proper comparison for the purpose of a national treatment claim. Canada Post must accept foreign mail sent to Canada pursuant to Canada's Universal Postal Union obligation. Canada Post presents it to customs on behalf of foreign postal administrations.

17. The facts do not indicate any less favourable treatment or damage to UPS Canada. UPS Canada is not interested in receiving the same treatment as mail. To the contrary, the customs treatment that UPS Canada receives in Canada is a result of its own demands and those of the courier industry to accommodate their needs for speedier delivery.

Postal Imports Agreement

18. The Claimant argues that the Postal Imports Agreement confers certain discriminatory benefits to Canada Post.

19. The Claimant ignores the nature of the agreement and the overall context of the so-called "advantages". Because the Postal Imports Agreement is procurement by Customs for the provision of services (data entering, material handling and collection of customs duties) by Canada Post, it is not subject to the national treatment obligation. The provision of these services by Canada Post is based on sound policies to streamline the customs international mail process. In the alternative, there are no like circumstances with UPS Canada with respect to the treatment accorded to Canada Post under this Agreement.

Failure to collect duties and taxes on imports

20. The Claimant complains that Canada fails to ensure that Canada Post charges duties and taxes to Canadian importers on packages imported through the postal system.

21. The Claimant's allegations are factually incorrect and do not amount to a breach of national treatment or minimum standard of treatment. They are based on an expert report that is flawed. There is no evidence that customs officers improperly administer and enforce customs law. Canada Post collects duties and taxes as agent for Customs. There is no evidence that it does not do so.

Canada Post's "leveraging" its infrastructure

22. The Claimant complains that Canada gave Canada Post an exclusive right to develop and maintain a "monopoly postal infrastructure", as well as other related privileges, such as the right to place its mailboxes in public places and to access apartment mailboxes, and has allowed Canada Post to take advantage of the associated economies of scale and scope.

23. The claim fails to distinguish between the measures of Canada and the actions of Canada Post and to indicate clearly the measures of which it complains. Either the Claimant is complaining of Canada's granting to Canada Post a partial monopoly in respect of letter mail, or it is complaining of Canada Post's conduct in taking advantage of economies of scale and scope. Neither constitutes a breach of national treatment.

24. In so far as the allegations are directed at Canada, the NAFTA recognizes that Canada may designate a monopoly and that this monopoly may compete in the non-monopoly market. The only requirement is that in doing so, the monopoly should not engage in anti-competitive behaviour as set out in Article 1502(3)(d). By implication, as long as this requirement is met, the monopoly may take advantage of its economies of scale and scope. Notwithstanding this, the Claimant argues that any competitive advantage for Canada Post resulting from these economies must be neutralized. The Claimant's position has no merit.

25. Initially the Claimant tried unsuccessfully to shoehorn its claims of anti-competitive conduct by Canada Post into Article 1105, and into Article 1502(3)(a) in addition to raising violations of Article 1502(3)(d). This Tribunal ruled in its Award on Jurisdiction that this could not be done. The Claimant now tries to transform these claims into violations of Article 1102. This, too, must fail. As Canada has argued in the jurisdictional phase, the Claimant may only bring claims for breaches of national treatment for the conduct of Canada Post if it is in the exercise of governmental authority. What is at issue here is the commercial conduct of Canada Post.

26. The Claimant complains that Canada Post leverages its infrastructure by taking

advantage of the economics of scale and scope that may exist by reason of Canada Post' "Monopoly Infrastructure". This, the Claimant argues, creates a lack of "equality of competitive opportunities", which is a violation of Article 1102 of NAFTA. In order to achieve equality of competitive opportunity, the Claimant puts forward a new and unrecognized economic test, market rate, without any basis in the text of the NAFTA.

27. The Claimant's argument does not fit within Article 1102 because it doesn't involve a comparison of the treatment of a foreign investor or investment, and that received by a domestic investor or investment. Accepting the Claimant's arguments would turn the Article 1102 national treatment obligation into a broad, all-encompassing and imprecise competition law obligation that goes well beyond the specific competition obligations agreed to by the Parties in Chapter 15 of NAFTA. The NAFTA Parties did not agree to an international competition law regime in the NAFTA. Rather they left it to domestic competition authorities as set out in Article 1501.

28. Even assuming that the Tribunal finds that it is appropriate to examine this claim under Article 1102, there is no basis on which to draw comparisons between Canada Post's use of its own infrastructure and the fact that the Claimant cannot "leverage" Canada Post's infrastructure. Underlying the Claimant's argument is an assumption that in 1981, when Parliament created the Canada Post Corporation, its predecessor, had what it calls a "Monopoly Infrastructure". This is assumption is false. In fact, the post office has always had a single infrastructure through which it delivered both letter mail and other mail products including parcels.

29. The Claimant states in its Memorial that it is not seeking access to Canada Post's infrastructure but rather that it seeks changes to Canada Post's internal costing to nullify any benefits flowing from its monopoly. This is not a remedy a tribunal can grant in the context of a national treatment breach, and in any event, there is no treatment accorded in like circumstances.

30. The Claimant argues UPS Canada is in like circumstances with Canada Post because it competes with it and is in the same business sector. The Claimant overlooks factors that are relevant to determining like circumstances with respect to the measure at

issue including:

- Canada Post's role as an instrument of Canada's public and social policy - at times the only federal presence in Canada's more remote communities;
- Canada Post has Universal Service Obligation. The USO requires Canada Post to maintain an extensive infrastructure for the delivery and pick up of mail including letter mail and parcels whether or not it is commercially advantageous to do so. The provision of commercial services finances the USO. UPS has no similar obligation; and
- fundamental differences between the postal and courier businesses that are relevant to the treatments at issue.

The Publications Assistance Program

31. The Claimant complains that Canada Post receives preferential treatment because of the requirement for publishers to use Canada Post in order to receive subsidies under the Publications Assistance Program.

32. The Publications Assistance Program is part of the Government of Canada's cultural policy and provides distribution assistance to eligible publications. As a measure with respect to cultural industries, it falls squarely within the scope of the cultural exemption. Moreover, the national treatment obligation does not apply to the program because it is a subsidy.

33. In any event, there would not be a breach of national treatment. Publications only receive the subsidy if they are delivered by Canada Post. The Claimant and Canada Post are not in like circumstances in this respect. Canada Post offers the widest possible distribution of publications across the country at the most affordable prices because it already delivers to every address in Canada because of its universal service obligation. The Government's decision as to how it provides the subsidy is connected to the goals of the program and not based on nationality of the delivery service provider.

Labour rights violation

34. The Claimant argues that the fact that Canada Post's Rural Route Contractors could not be unionized for some time and were prevented from negotiating pension

benefits constitutes a breach of the minimum standard of treatment.

35. The Claimant has simply no standing under Chapter 11 of NAFTA to make this claim, nor does it constitute a breach of NAFTA Article 1105. This is not the proper forum to bring such claims.

Fritz Starber

36. The Claimant argues that Canada Post's decision not to award a contract to Fritz Starber for certain transportation services to Latin America was a retaliation measure for the Claimant's Chapter 11 claim against Canada.

37. This claim rests on mischaracterization of the facts. Discussions with Fritz Starber were held in the context of exploring alternatives to Canada Post's current transportation arrangements to Latin America. The decision not to proceed to a tender call was commercially justified. None of this constitutes a breach of NAFTA Article 1105.

Lack of regulation of Canada Post

38. The Claimant complains of Canada's lack of regulation of Canada Post without clearly indicating the legal basis for its complaint.

39. The NAFTA allows NAFTA Parties to have state enterprises and monopolies. It provides that they must ensure that these entities act consistently with the obligations contained in NAFTA Chapter 15. Canada's regulation and supervision of Canada Post does this. The NAFTA does not stipulate *how* Canada should regulate Canada Post.

INACCURACIES IN THE CLAIMANT MEMORIAL – A non-exhaustive list

40. Canada has identified a number of mischaracterisations or misunderstandings in the Investor's Memorial that result in an inaccurate portrayal of the facts. Canada has also identified a number of instances in which the Claimant's authorities do not support the propositions for which they are cited.

41. The Memorial's description of Canada's customs processes contains numerous

errors, and in particular blurs the distinct roles played by Customs, the Claimant, UPS Canada and Canada Post. For example:

- The Claimant attempts to link Canada Post to services offered by the United States Postal Service by calling them “jointly produced USPS/Canada Post services”.¹ In fact, Canada Post has nothing to do with the design or pricing of these services. It merely completes delivery in Canada on behalf of all foreign postal administrations, as required by treaty.
- Almost everything that the Claimant describes as a Canada Post “privilege” under the *Postal Imports Agreement* is actually standard Customs practice based either in the *Customs Act* or on long-standing practice.²
- The Claimant describes Customs officers as performing brokerage services for Canada Post³ when they are merely performing their statutory responsibilities.
- The Claimant claims Canada “exempts” Canada Post from numerous bonds that UPS Canada must post.⁴ In fact, while UPS Canada operates as a customs broker and suffrance warehouse, Canada Post does not. Canada Post cannot be exempted from requirements to which it is not otherwise subject.

42. Similarly, the Memorial’s description of the postal infrastructure also results in a false picture. The Claimant refers to “Canada Post’s Monopoly Infrastructure”, saying its “extent and density” exist largely because of the monopoly.⁵ In fact, the opposite is true: the monopoly exists to support the extent and density of the infrastructure, which itself is a product of Canada Post’s need to provide universal postal service. Postal service has always included monopoly letter mail, but it has also always included non-monopoly parcel post. Without the monopoly, funding the infrastructure would be exceedingly difficult.

43. The Claimant attempts to impugn the audit reports of KPMG through the expert

¹ Investor’s Memorial, para. 129.

² Investor’s Memorial, para. 278. Of the items listed at (a) through (e), only the last is actually created by the *Agreement*.

³ Investor’s Memorial, para. 293 *et. seq.*

⁴ Investor’s Memorial, para. 323 *et. seq.*

⁵ See for example, Investor’s Memorial, para. 141.

report provided by Kenneth Dye. The Dye report faults KPMG for not using an independent expert and relying on Dr Michael Bradley, who had a previous association with Canada Post.⁶ In fact, KPMG engaged Dr Bradley as an independent expert, and Dr Bradley had not previously been engaged by Canada Post.

44. The Memorial and the expert report of Melvyn Fuss both leave the reader with the impression that Canada Post and Purolator Courier Ltd. operate as a single business.⁷ In fact, Canada Post and Purolator Courier are separate companies and operate at arm's length.

45. Furthermore, a number of the Claimant's authorities do not support the propositions for which they are cited. For example:

- The Claimant cites Professor Robert Campbell in support of its conclusion that Canada Post is unregulated.⁸ On the page cited, Professor Campbell went on to say explicitly that Canada Post is regulated, just not by means of a third-party regulator.
- The Claimant cites a human rights case as an example of an international tribunal finding that prescription periods “do not apply where the allegations concern a continuing situation”.⁹ In fact, the case was decided under a procedure with two separate rules – one for “continuing situations” and one for situations that had already been resolved domestically. Thus, the prescription period at issue did not apply only because a different limitations rule applied.
- The Claimant cites *Lauder v. Czech Republic* as authority for the meaning of arbitrary conduct.¹⁰ While the Tribunal in that case undoubtedly considered the meaning of arbitrary conduct, it did so in the context of a treaty that contained separate obligations prohibiting arbitrary treatment and requiring fair and equitable treatment and full protection and security in accordance with international law. Its analysis can have no application in the NAFTA, which contains no arbitrariness standard.

⁶ Dye Report, para. 19. (Investor's Brief of Witness Statements and Expert Reports, Tab 6).

⁷ See, for example, the chart at 43 of the Investor's Memorial.

⁸ Investor's Memorial, para. 210.

⁹ Investor's Memorial, para. 496.

¹⁰ Investor's Memorial, para. 617.

- The Claimant cites broad and general statements in Canada’s NAFTA *Statement of Implementation* to support its claim that the Free Trade Commission’s interpretation of Article 1105 as applying to customary international law is an amendment.¹¹ In fact, the *Statement of Implementation* states explicitly Canada’s view that Article 1105 enshrines a customary standard, as the Claimant admits some 25 paragraphs later.

46. Over-all the claim is a colourable attempt to portray a public policy dispute into what it is not – an investment dispute. While the Claimant has characterized its case as being about “unfair” and “discriminatory” conduct to bring it within the purview of this Tribunal, many of the issues raised in this case are the very same that the Claimant and UPS Canada have raised for years in other forums: domestically, before Canada’s Competition Bureau and government review commissions, internationally, in the World Trade Organization services negotiations and in the World Customs Organizations. They are also similar to issues that UPS has litigated against other postal administrations around the world, including before the European Court of Justice, and before the United States Postal Rate Commission. The Claimant is now asking this Tribunal to adjudicate and make factual findings on these issues that have nothing to do with NAFTA Chapter 11 and are not within the Tribunal’s jurisdiction.

¹¹ Investor’s Memorial, para. 690.

47. In this Memorial, Canada will describe the factual basis relevant to the UPS claim and correct the factual mischaracterization contained in the Investor's Memorial. Second, Canada will demonstrate that the UPS claim must fail because it does not meet jurisdictional and admissibility requirements. Third, Canada will show that the Claimant's national treatment claims are outside the scope of Article 1102 or otherwise without merit. In this section, Canada will set out the proper legal test and apply it to measures of Canada (customs allegations, Publications Assistance Program and Canada's establishment of a monopoly) and measures of Canada Post (Canada Post's leveraging of its infrastructure). Fourth, Canada will address the Claimant's minimum standard of treatment claims and showing that in addition to being factually incorrect, they neither fit within the scope of Article 1105 nor rise to the threshold of gravity required. Finally, Canada will demonstrate that the Claimant has failed to establish a breach of Articles 1103 and 1104.

PART II. STATEMENT OF FACTS

I. THE CLAIMANT – UPS OF AMERICA

48. The Claimant in this case is *United Parcel Service of America Inc.*

49. As it acknowledges in paragraph 35 of its memorial, the Claimant is the world's largest express carrier and package delivery company, in terms of both revenue and volume.¹² Operating in more than two hundred countries and territories, the Claimant has a vast network of employees, vehicles, and planes for distribution and delivery of over 14 million packages daily.¹³ It is a multi-faceted corporation offering a variety of services to its clients. In addition to courier services it also provides “logistics and distribution services, transportation and freight services, freight forwarding services and customs brokerage services.”¹⁴

50. Its business continues to grow: in 2004 it experienced double-digit export volume growth in every region in the world.¹⁵

51. It entered the Canada express consignment market in 1974.

52. The Claimant sees its global reach and scale, including in respect of its Canadian operations, as among its competitive strengths. It claims to be the only carrier in Canada to offer guaranteed 8:00 a.m. next day delivery to most major metropolitan

¹² Investor's Memorial, para. 35.

¹³ Investor's Memorial, para 36.

¹⁴ Investor's Memorial, para. 35.

¹⁵United States Securities and Exchange Commission, Form 10-K, fiscal year ended December 31, 2004, *United Parcel Service Inc.* [UPS 2004, 10-K] Online: <<http://www.sec.gov/Archives/edgar/data/1090727/000119312505049642/d10k.htm>>. (Respondent's Book of Documents, Tab 1).

cities in Canada.¹⁶ It manages package movements between the U.S. and Canada by combining its small package, freight and brokerage capabilities to create an integrated, streamlined and economical door-to-door solution for customers with complex cross-border distribution needs.¹⁷ It describes itself as the only company in its industry that has “one operating network for all types of shipments: domestic, international, air, ground, commercial, residential.” This, it states, “makes for economies of scope and scale that improve operating efficiency as well as customer service.”¹⁸

53. UPS Canada Inc. is the Canadian arm of the UPS corporate family. The relationship between UPS of America and UPS Canada is still unclear to Canada. The evidence available to Canada, including the evidence provided by the Claimant appears to be contradictory.¹⁹

54. In this counter-memorial, when Canada refers to the Claimant as UPS, it refers to UPS of America. However, because of the imprecision in UPS’ Memorial, all arguments are applicable to both the Claimant and UPS Canada, *mutatis mutandis*, except where stated otherwise.

II. THE MAIL IN CANADA

55. The postal system in Canada, through its long history to current day, has provided affordable, accessible universal postal service across the country. This universal service is provided as a matter of public policy in Canada and in accordance with Canada’s international obligations under the Universal Postal Union. In addition to providing universal postal service, the postal authority fulfils other social and policy

¹⁶ *UPS 2004 10-K*, at 1-2. (Respondent’s Book of Documents, Tab 1).

¹⁷ *UPS 2004 10-K*, at 7. (Respondent’s Book of Documents, Tab 1).

¹⁸ “*Every Minute Around the World*,” UPS Annual Report 2004, at 5 (Respondent’s Book of Documents, Tab 2).

¹⁹ See Part III, III A below.

objectives of the Government of Canada.

56. In 1981 the federal Post Office Department was transformed into a Crown corporation, the Canada Post Corporation (“Canada Post). Like the Post Office Department before it, Canada Post offers limited services under an exclusive privilege and a variety of services that are open to competition. All of these services are processed within a single integrated postal network – or “pipeline”.

57. While the granting of an exclusive privileged assists Canada Post in funding its obligation to provide universal affordable services across the country, it is important to recognise that not all of the services that Canada Post is required to offer under its universal service obligation are protected by the exclusive privilege. Given this fact, and the vast geography, and in many areas, sparse population of Canada, Canada Post’s the competitive services are also essential to the funding of the universal service obligation.

58. While Canada Post and a courier company both deliver messages and parcels, they are very different entities. Its operations focus on universal service in the pick up and delivery of mail across Canada, at the expense of optimum profit, speed and reliability. The operations of private couriers are profit oriented, focused on expedited, reliable, time definite service primarily written high population densities.

59. Finally, contrary to the assertions of the Claimant, Canada Post is extensively regulated.

A. Canada’s Postal System

60. The postal system in Canada, and in the British North American colonies before it, has been in operation for over 150 years. With Confederation in 1867, the Provinces of Canada, New Brunswick and Nova Scotia were unified into the Dominion of Canada. What had previously been local postal operations were formally integrated into the Canadian Postal Service

61. The unified Canadian Postal Service was mandated to deliver “Mailable Matter”, both to and from Canada and within Canada. In addition to letters, packets and

packages, the Post Office Act of 1867 stipulated that mailable matter included items, such as pamphlets, circulars and newspapers.²⁰

62. The Postal service was assigned the responsibility for assisting in the economic expansion of Canada by providing an accessible, effective and inexpensive system of national communication. In addition, the Postal service provided inexpensive and reliable delivery of books and newspapers to promote education and democratic awareness to connect citizens across the regions as the nation was being built.²¹

63. The Post Office Act also provided an international component. The Postmaster General could make any arrangements necessary with the United Kingdom, the United States or any other foreign country for the transmission of the mail and for the necessary accounting between the various Postal administrations.

64. Since its inception the Canadian Postal Service has been involved in the collection, processing, transportation and delivery of printed matter, packages and parcels through a complex transportation and communications infrastructure.

65. From the beginning of the Canadian Postal Service, only a small portion of mailable matter has been protected by its exclusive privilege.²²

66. The Canadian postal system, has always, and continues to provide affordable, accessible postal services across the country. The infrastructure of the postal system has

²⁰ *The Post Office Act 1867*, S.C. 1867, c. 10, contemplated the delivery of a wide variety of items through the post including: pamphlets, printed circulars, handbills, books and newspaper manuscripts, printer proof sheets, maps, prints, drawings, engravings, certain photographs, sheet music, packages of seeds, cuttings, bulbous roots, scions or grafts, patterns or samples of merchandise or goods may be delivered by mail. (Respondent's Book of Authorities, Tab 19). See John Willis, "The Canadian Colonial Posts: Epistolary Continuity, Postal Transformation" in Derek Pollard, Ged Martin (eds.) *Canada 1849: a Selection of Papers given at the University of Edinburgh, Centre for Canadian Studies Annual Conference, May 1999* (Edinburgh: University of Edinburgh, Centre of Canadian Studies, 2001) (Respondent's Book of Authorities, Tab 101).

²¹ Campbell Report, para. 12. (Respondent's Book of Expert Reports and Affidavits, Tab 5).

²² *The Post Office Act, 1867*, S.C. 1867, c. 10, s. 37, for example, provided for the establishment and maintenance of a parcel post by the Postmaster (a parcel post had been started by the pre-Confederation Post Office in 1859) but did not grant any exclusive privilege with respect to that service. (Respondent's Book of Authorities, Tab 19).

operated as a single, integrated network, or “mail pipeline”, that has been used for all letters, parcels (both regular and expedited), mass mailings of advertising mail, publications and other services provided in competition with others.

67. Chantal Amyot and John Willis eloquently describe the role of the Post traditionally and currently in Canada:

“... the [traditional role] of the Post Office remains the same today as it was a century ago. It is because the postal system developed first as a public service that it has forged a place in people’s hearts. No other government department has had such an intimate and personal impact on the daily lives of Canadians. Today, the population still expects to have a local post office and to receive the same range of services as before. The whole question is linked with how rural people conceive of their daily lives. For a majority of the population, a post office is deemed an essential service. It is built into their social and economic expectations.”²³

B. Canada’s Universal Service Obligation: A Domestic and International Imperative

68. The primary public policy function of the Postal service is to provide an affordable, domestic, and an inbound and outbound postal service to all addresses in Canada in a timely fashion. This concept of accessible and universal service is known as the “universal service obligation” or (“USO”).²⁴ Canada’s universal service obligation includes more than just the letter mail service. It also includes basic parcel services, which have been delivered competitively for more than a century. [Redacted]²⁵ As noted above, the fulfilment of the universal service obligation has been a domestic policy

²³ Chantal Amyot and John Willis, *Country Post Rural Postal Service in Canada, 1880 to 1945* (Gatineau, Quebec: Canadian Postal Museum, 2003) [*Amyot and Willis*], at 178. (Respondent’s Book of Authorities, Tab 86).

²⁴ While its precise formulation varies in its application from country to country, the USO always requires “Ubiquity of service and uniformity of price” as well as uniformity of service standards. Crew Report, para. 9. (Respondent’s Book of Expert Reports and Affidavits, Tab 9) and Campbell Report, para. 16. (Respondent’s Book of Expert Reports and Affidavits, Tab 5).

²⁵ [Redacted].

imperative in Canada since the Post Office Act of 1867.

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

1. Universal Postal Union: A Global Postal Regime

70. Today, the Universal Postal Union is a specialised agency of the United Nations composed of 190 member states the primary purpose of which is to establish and maintain “a single postal territory” for the reciprocal exchange of postal items.²⁶ Canada, the United States and Mexico have been members of the Universal Postal Union since the late 1800s.

71. The Universal Postal Union has broad social and cultural objectives. Its mission is to develop social, cultural and commercial communications between all peoples throughout the single postal territory by the efficient operation of the postal services described in the Acts.²⁷ To fulfil this mission, the members of the Union undertake to, among other things:

- ensure that all postal users/customers enjoy the right to a universal postal service;

²⁶ Campbell Report, para. 17. (Respondent’s Book of Expert Reports and Affidavits, Tab 5).

²⁷ *Universal Postal Union Constitution*. NOTE: *The Acts of the Universal Postal Union* [“Acts of the UPU”] are in four parts: *The Constitution and General Regulations*, 10 July 1964, 611 U.N.T.S. 7 as amended (entered into force 1 January 1966), reprinted in, *Universal Postal Union: Constitution and General Regulations* (Berne: International Bureau of the Universal Postal Union, 2000) [“UPU Constitution”] (Respondent’s Book of Authorities, Tab 1), *the Manual of Postal Payment Services*, (Berne: International Bureau of the Universal Postal Union, 2000), *the Letter Post Manual*, (Berne: International Bureau of the Universal Postal Union, 2001), and *the Parcel Post Manual*, (Berne: International Bureau of the Universal Postal Union, 2001) (Respondent’s Book of Authorities, Tabs 1-4). The parts of the *UPU Convention* relevant to parcel post and letter post are found in the *Parcel Post Manual* (Respondent’s Book of Authorities, Tab 4), and the *Letter Post Manual* (Respondent’s Book of Authorities, Tab 3) respectively. Online: <<http://www.upu.int/acts/en/>>

- guarantee freedom of transit and the free circulation of postal items; and
- ensure the interoperability of postal networks by implementing a suitable policy of standardization.²⁸

72. The Union’s aim is to knit together a seamless network of postal services to provide accessible, affordable postal services to every person in the world and facilitate the unimpeded exchange of mail between them. In doing so, the Universal Postal Union co-operates with other United Nations specialized agencies²⁹ and intergovernmental and non-governmental organizations.³⁰

2. The Universal Service Obligation Ensures the Operation of a Single Postal Territory

73. The Universal Postal Union has adopted a series of treaties, known together as the Acts of the UPU, that are binding on its member States. The Union’s key substantive treaty is the Universal Postal Convention.³¹ Together with its Regulations, the Convention imposes a universal service obligation to ensure the operation of a single postal territory.³²

74. Article 1 of the Universal Postal Convention requires Members to effectively implement a postal service that offers permanent, quality, basic postal services at all points in their territory at affordable prices. Article 1 states:

- i) “In order to support the concept of the single postal territory of the Union, member countries shall

²⁸ *UPU Constitution*, Article 1, Commentary, para. 2. (Respondent’s Book of Authorities, Tab 1).

²⁹ Such as, for example, the International Telecommunications Union, the International Civil Aviation Organization and the International Labour Organization.

³⁰ Such as, for example, the World Customs Organization, the International Air Transport Association, the International Standardization Organization and the World Trade Organization and the International Express Carriers Conference (now the Global Express Association) which represents the Claimant along with DHL, FedEx and TNT.

³¹ *Acts of the UPU*. (Respondent’s Book of Authorities, Tabs 1, 2, 3 & 4).

³² Canada, the United States and Mexico, like other UPU member states, have ratified and are required under international law to comply with the provisions of all of these treaties.

ensure that all users/customers enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices.

- ii) With this aim in view, member countries shall set forth, within the framework for their national postal legislation or by other customary means, the scope of the postal services offered and the requirement for quality and affordable prices, taking into account both the needs of the population and their national conditions.
- iii) Member countries shall ensure that the offers of postal services and quality standards will be achieved by the operators responsible for providing the universal postal services.”³³

75. Article 1 establishes the universal service obligation at a high level. But the real definition of the universal service obligation is found in the more than 400 pages of detailed regulations set out in the Universal Postal Convention and its Regulations.

76. Contrary to the Claimant’s allegation at paragraph 84 of its Memorial, Canada’s primary obligation is not to adopt a definition of the universal service obligation. Instead, Canada’s obligation is to implement the universal service obligation set out in the Universal Postal Convention and its Regulations. These obligations establish the standards that ensure a single postal territory throughout the world.

77. The provisions of the Universal Postal Convention and its Regulations include, among others, the following matters:

- a) the principle of freedom of transit, which requires each postal administration to forward postal items by the quickest routes and most secure means which it uses for its own items;³⁴

³³ *UPU Convention, Parcel Post Manual*. (Respondent’s Book of Authorities, Tab 4).

³⁴ *UPU Convention, Article 2, Commentary of International Bureau (“Commentary”) 2.1*. (Respondent’s Book of Authorities, Tab 4).

- b) rules respecting the charges for international postal services, including guidelines for these charges in respect of various items, allowable exemptions and special charges;³⁵
- c) requirements for postal security;³⁶
- d) requirements for classifying postal items depending on the speed of treatment and content;³⁷
- e) rules, forms and other requirements respecting special services, including registered items, recorded delivery items, insured items, cash-on-delivery items, express items, advice of delivery items (under which the sender is provided with notice and confirmation that the addressee has received the item), delivery to the addressee in person, international business reply service, international reply coupons, fragile parcels and radioactive materials;³⁸
- f) rules respecting the submission to customs of postal items, the requirements for customs declaration on postal items, and the maximum amount that can be charged for a Presentation-to-Customs charge;³⁹
- g) rules concerning the transmission, routing and receipt of postal items, including detailed regulations respecting the treatment of different kinds of postal items on the basis of speed of delivery requested (e.g. surface mail, airmail, express) and other criteria;⁴⁰
- h) rules requiring the provision of quality of service targets and verification of those targets for postal items addressed to or sent from the Universal Postal Union member states;⁴¹

³⁵ *UPU Convention*, Articles 7, 8, 11 and 12; Regulations 113-116, 301-302, 305-310; Commentary 7-7.6, 8.2.4-8.3, 11, 12.1-12.2.6, 302.3-302.4, 306.1, 308.1, 309.6-309.13, 310.2. (Respondent's Book of Authorities, Tabs 3 & 4).

³⁶ *UPU Convention*, Article 9; Commentary 9. (Respondent's Book of Authorities, Tabs 3 & 4).

³⁷ *UPU Convention*, Article 10; Regulations 102-107, 205-206; Commentary 10.7, 101.2. (Respondent's Book of Authorities, Tabs 3 & 4).

³⁸ *UPU Convention*, Articles 13 to 26; Regulations 201-206, 300bis-302, 401-411; Commentary 15, 17.1, 405.3, 501. (Respondent's Book of Authorities, Tabs 3 & 4).

³⁹ *UPU Convention*, Articles 31-33; Regulations 401-403, 601, 603. (Respondent's Book of Authorities, Tabs 3 & 4).

⁴⁰ *UPU Convention*, Article 39; Regulations 601-618, 801-833; Commentary 801, 802.1, 812.2, 820.2, 820.4. (Respondent's Book of Authorities, Tabs 3 & 4).

⁴¹ *UPU Convention*, Article 42; Commentary 43. (Respondent's Book of Authorities, Tabs 3 & 4).

- i) rules respecting transit charges, “terminal dues” and air conveyance dues that allocate the costs of international post among the states involved, including specific provisions granting preferences to developing countries;⁴² and
- j) requirements to adopt, or propose to legislatures, various penal measures with respect to postal offences.⁴³

78. The obligations of the Acts of the Universal Postal Union apply not just to letter mail but to parcel post as well. In addition, there are a multitude of rules that apply to the express letter mail⁴⁴ and parcel services⁴⁵ that are offered by member states pursuant to the Universal Postal Convention. Canada Post and other postal administrations have operated in the express letter and parcel market for years, prior to the entrance of companies such as the Claimant into the market.

79. Postal administrations like Canada that have an express mail service are required to process and deliver incoming express items by special messenger as soon as possible⁴⁶. This includes a requirement to present them to Customs as soon as possible.⁴⁷ The allowable charges for express items are set by the Universal Postal Convention and its Regulations.

80. The Universal Postal Convention also provides for the establishment of Express Mail Service (EMS). This is an international postal express service that provides customers with a high quality express mail service for the global delivery of documents

⁴² *UPU Convention*, Articles 46-54; Regulations 1001-1006, 1006bis, 1006ter, 1007-1026, 1101-1111; Commentary 47, 1006.ter. (Respondent’s Book of Authorities, Tab 3 & 4).

⁴³ *UPU Convention*, Article 63. (Respondent’s Book of Authorities, Tabs 3 & 4).

⁴⁴ *UPU Convention*, Article 17. (Respondent’s Book of Authorities, Tab 4). This article sets out a series of obligations governing express mail.

⁴⁵ *UPU Convention*, Parcel Post Manual. (Respondent’s Book of Authorities, Tab 4).

⁴⁶ *UPU Convention*, Article 17.1. This includes the requirement in Article 17.2 to enter express items into the faster internal letters stream and thereafter handle these items in the speediest manner possible. (Respondent’s Book of Authorities, Tabs 3 & 4).

⁴⁷ *UPU Convention*, Regulation 405(3.5.1 and 3.5.2) of Article 17. (Respondent’s Book of Authorities, Tabs 3 & 4).

and merchandise at an affordable price.⁴⁸ One of the primary purposes of the EMS programme is to facilitate economic development in developing countries by providing the necessary delivery infrastructure for businesses to send and receive documents and goods. In many countries, EMS is the only practical means to provide universal access to international express services.⁴⁹

3. International Implementation of the Universal Service Obligation

81. At the international level, the universal service obligation is implemented through the cooperative exchange of mail between postal administrations.⁵⁰ Member States are always required to forward postal items from foreign postal administrations by the “quickest routes and the most secure means which it uses for its own items.”⁵¹

82. The Universal Postal Union has developed an accounting mechanism, called “terminal dues” that is applied when mail is exchanged between two or more postal administrations. Terminal dues are designed to compensate postal administrators for the cost of handling incoming letters and non-parcel mail. The terminal dues owed by one Universal Postal Union Member to another are periodically settled through a Universal Postal Union settlements mechanism.⁵²

⁴⁸ Article 61(1) of the *UPU Convention* requires that “EMS shall be the quickest postal service by physical means and, in relations with administrations which have agreed to provide this service, EMS takes priority over other postal items”. (Respondent’s Book of Authorities, Tab 4).

⁴⁹ EMS is currently available in more than 95 per cent of countries worldwide. EMS items are delivered by postal administrations as well as couriers. In addition, the EMS rules expressly allow postal administrations to contract with couriers to deliver EMS items on a priority basis and perform track and trace function.

⁵⁰ Harding Affidavit, para. 13. (Respondent’s Book of Expert Reports and Affidavits, Tab 16).

⁵¹ *UPU Convention*, Article 2 of the Letter Post regulations (Respondent’s Book of Authorities, Tab 3); and the Parcel Post regulations. (Respondent’s Book of Authorities, Tab 4). For a discussion of the standards set by the Universal Postal Union for the transit of mail see Campbell Report, at 21-22. (Respondent’s Book of Expert Reports and Affidavits, Tab 5).

⁵² A discussion of the accounting system for the exchange of international mail can be found in Part D of the Harding Affidavit. (Respondent’s Book of Expert Reports and Affidavits, Tab 16).

4. Canada's Domestic Implementation of its Universal Service Obligation

83. Canada implements its universal service obligation through its postal authority, Canada Post. In 1981, the federal Post Office Department, Canada's Postal authority, was transformed into Canada Post Corporation.⁵³

84. Mirroring Canada's Universal Postal union obligations, the Canada Post Corporation Act implements the universal service obligation by requiring Canada Post to provide "basic customary postal service" (s. 5(2)) at "fair and reasonable rates" (s. 19(2)). To implement the universal service obligation, Canada ensures through Canada Post the provision of, among other things:

- a universal letter service at uniform national rates (notwithstanding the higher costs of providing service, and the lower revenues generated, in low population density areas versus higher revenues generated in high population density urban areas);
- a universal parcel service at low rates;
- regular and convenient collection and delivery;
- the maintenance of an express mail service, and
- standards and regulations to implement to detailed rules of the Universal Postal Convention and its Regulations.

85. While the Canada Post Corporation Act establishes the overall commitment to basic customary service and fair and reasonable rates, the detailed implementation of the universal service obligation is found in Canada Post's regulations,⁵⁴ policies and

⁵³ For a discussion of the transformation of the Post Office department of Canada into a Crown corporation, see Campbell Report, paras. 86-103. (Respondent's Book of Expert Reports and Affidavits, Tab 5).

⁵⁴ *International Letter-Post Items Regulations* (SOR/83-807). (Respondent's Book of Authorities, Tab 27); *Letter Mail Regulations* (SOR/88-430). (Respondent's Book of Authorities, Tab 29); *Materials for the Use of the Blind* (C.R.C., c. 1283), s. 3(f). (Respondent's Book of Authorities, Tab 31); *Postage Meter Regulations*, (SOR/83-748). (Respondent's Book of Authorities, Tab 35); *Non-Mailable Matter Regulations* (SOR/90-10). (Respondent's Book of Authorities, Tab 33); *Posting Abroad of Letter-Post Items* (C.R.C., c. 1288) s. 5(f), s. 9(f), s. 12(f). (Respondent's Book of Authorities, Tab 36); *Special Services and Fees Regulations* (C.R.C., c. 1296) (Respondent's Book of Authorities, Tab 38); *Undeliverable and Redirected Mail Regulations* (C.R.C., c. 1298). (Respondent's Book of Authorities, Tab 39). *Deficient Postage Regulations* (SOR/85-567). (Respondent's Book of Authorities, Tab 24).

practices.⁵⁵ These include: *International Letter-Post Items Regulations* (SOR/83-807), the *Letter Mail Regulations*(SOR/88-430), the *Materials for the Use of the Blind Regulations*(C.R.C., c. 1283), s.3(f) and the *Postage Meter Regulations* (SOR/83-748) (implementing Articles 9, 10 and 12 of the Universal Postal Convention respecting the size and shape of postal items and the indicia that must appear on them), the *Non-Mailable Matter Regulations* (SOR/90-10) (implementing the list in Article 25 of the Universal Postal Convention of articles that national authorities must prohibit from being mailed) and the *Posting Abroad of Letter-Post Items* (C.R.C., c. 1288), s.5(f)), the *Special Services and Fees Regulations* (C.R.C., c. 1296),s.9(f)), the *Undeliverable and Redirected Mail Regulations* (C.R.C., c. 1298), s.12(f)), and the *Deficient Postage Regulations*(SOR/85-567) (implementing Articles 27, 28, 34 to 38 and 41 of the Universal Postal Convention respecting circumstances in which items require redirection, are withdrawn and readdressed, are undeliverable or are lost).

86. The International Bureau of the Universal Postal Union has published a Memorandum on Universal Postal Service Obligations and Standards (updated as of 2002) that lists the universal service obligation incumbent on Universal Postal Union Member countries and provides guidelines as to quality of service standards to be provided. The Memorandum states, among other things, that “[i]deally, at least one collection at each collection point should be guaranteed every working day”.⁵⁶ Canada complies with these and other guidelines in the Memorandum by providing, through Canada Post, once-a-day delivery and collection and conveniently located mailboxes.

5. An Exclusive Privilege is Granted to Fund the Universal Service Obligation

87. To ensure the viability of the universal service obligation, nearly all countries have historically operated their domestic letter delivery services under a form of reserved

⁵⁵ *Canada Post Corporation’s Annual Filing for 2003*, Campbell Report, Appendix B. (Respondent’s Book of Expert Reports and Affidavits, Tab 5).

⁵⁶ Universal Postal Union Memorandum “on Universal Postal Service Obligations and Standards”, International Bureau, Berne 2001, at 3; online: < http://www.upu.int/ups/en/memorandum_en.pdf>. (Respondent’s Book of Documents, Tab 3).

area.⁵⁷ With the exception of Finland, Sweden and New Zealand, all other states provide a specified reserved area for letters up to a certain weight to be collected, transmitted and delivered by the national postal administration only.⁵⁸

88. Postal administrations are granted such reserved areas so that they can provide basic postal services across a country for a uniform low price. The uniform low price is achieved by setting an average price that will exceed the cost of delivery in high-density urban areas but be lower than the cost of delivery in low-density rural areas.

89. [Redacted]⁵⁹

90. The exclusive privilege of the Post Office Department and now Canada Post, even when it was historically at its broadest, has always been limited to classes of letter mail only, whereas the universal service obligation, as described above, applies to letter mail, parcels and various forms of express mail. The proportion of Canada Post's volumes and revenues from exclusive privilege services has declined as the scope of materials subject to exclusive privilege has been narrowed and the use of letters has been replaced in many instances by email, fax, electronic banking and other services.⁶⁰

6. Canadian Case Law Confirms Canada's Universal Service Obligation

91. Contrary to statements in the Claimant's Memorial, the Canada Post Corporation Act confirms that Canada Post is indeed subject to the universal service obligation to deliver mail to all Canadians at a reasonable price. Canadian case law confirms this obligation. In *Société canadienne des postes v. Postpar Inc.*, the Quebec

⁵⁷ Robert M. Campbell, *The Politics of Postal Transformation: Modernizing postal systems in the electronic and global world* (Montreal: McGill-Queen's University Press, 2002) [Campbell, *The Politics of Postal Transformation*] at 14. The weight of the letters subject to the monopoly has varied from country to country but was typically approximately 500 grams. (Respondent's Book of Authorities, Tab 90).

⁵⁸ Campbell, *The Politics of Postal Transformation*, at 54. (Respondent's Book of Authorities, Tab 90).

⁵⁹ Crew Report, para. 46. (Respondent's Book of Expert Reports and Affidavits, Tab 9). [Redacted]

⁶⁰ [Redacted]; See also Campbell, *The Politics of Postal Transformation*, pp. 3, 16. (Respondent's Book of Authorities, 90).

Superior Court described the obligation as follows:

In my respectful opinion, the dominant and controlling aim of the Postal Act is what the text itself discloses, namely to provide through a Crown corporation a universal postal service throughout Canada with the object of providing a standard of service that will meet the needs of the people of Canada at rates that are fair and reasonable, and yet so far as possible sufficient to defray the cost of operations.⁶¹

92. In a similar vein, the Ontario Superior Court held in *Canada Post Corp. v. Key Mail Canada Inc.* that the purpose of the *Canada Post Corporation Act* is “the provision to Canadians of a universal service at reasonable cost”.⁶²

93. In its Memorial, at paragraphs 65 to 79 and 90, the Claimant relies on various decisions of courts in Canada to argue that Canada Post's discretion to determine the provision of postal services to Canadians is so wide that it is under no universal service obligation at all. This is inaccurate. In fact, the cases cited by the investor at paragraphs 65 to 79 and 90 of its Memorial stand for only very narrow propositions -- that Canada Post, in the implementation of the universal service obligation, has the exclusive privilege to carry letter mail; that it is not required to provide door-to-door service;⁶³ and that it is

⁶¹ *Société canadienne des postes v. Postpar Inc.*, [1988] Q.J. No. 1726, para. 45. (Respondent's Book of Authorities, Tab 81).

⁶² *Canada Post Corp. v. Key Mail Canada Inc.*, [2004] O.J. No. 3446, para. 3. (Respondent's Book of Authorities, Tab 76).

⁶³ In the Ontario High Court decision of *Re City of Nepean and Canada Post Corp.* (1986), 57 O.R. (2d) 297 for example, the Court addressed the issue of whether Canada Post was legally required to provide door-to-door service to all of its customers. Canada Post wished to replace door-to-door service in a particular suburban community with group or community mail boxes. In holding that Canada Post did not have a statutory duty to provide door-to-door service, the Court in no way commented on or detracted from Canada Post's continuing requirement to implement Canada's universal service obligation. Indeed, in this case, Canada Post continued to comply with the universal service obligation to provide mail to all Canadians through accessible collection and delivery points. (Investor's Schedule of Documents, Tab 71).

not required to maintain Canada-Post-run post offices in all communities.⁶⁴

94. These cases, as well as the Federal Court's decision in *Canadian Union of Postal Workers v. Canada Post Corp.*,⁶⁵ also cited by UPS, all deal with circumstances in which the *Canada Post Corporation Act* and the *Universal Postal Convention* and its *Regulations* provide Canada Post with the flexibility to adapt to changing economic and technological conditions in the provision of the universal service obligation. None of these cases diminish the applicability or importance of the universal service obligation to Canada Post.

7. Private Couriers like the Claimant do not have a Universal Service Obligation

95. The existence of the universal service obligation distinguishes providers of postal services from other commercial shippers, including private courier companies such as UPS of America Inc.

96. Private courier companies like the Complainant are quintessentially commercial enterprises that normally have no service obligations beyond those to which they decide to commit in their own business interests. Private couriers are not required to comply with a universal service obligation. As Professor Crew underlines:

“The USO is an extremely important distinguishing feature of POs [Post Offices]. Unregulated carriers, or couriers, the competitors of POs, do not have such an obligation”⁶⁶

⁶⁴ In *Rural Dignity of Canada v. Canada Post Corp.*, [1992] F.C.J. No.28, the Federal Court Trial Division examined the issue of whether Canada Post was empowered to replace community post offices with retail postal outlets. In holding that Canada Post did not have a statutory duty to provide a local post office in each community in Canada, the Court made no findings as to the universal service obligation. In fact, the Court commented that the retail postal offices served the same functions as the postal offices had previously in the communities they served. Accordingly, through the retail outlets, Canada Post continued to fulfill universal service obligation. (Respondent's Book of Authorities, Tab 78).

⁶⁵ *Canadian Union of Postal Workers v. Canada Post Corp.*, [1994] F.C.J. No. 317. (Investor's Book of Authorities, Tab 69).

⁶⁶ Crew Report, para. 11. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

C. The Public Policy Function of the Postal Authority

97. As discussed above, the Postal Service in Canada fulfils a number of important public policy functions, including and in addition to the universal service obligation⁶⁷.

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

5. (1) The objects of the Corporation are

(a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;

(b) to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; and

(c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.

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

5.(2) While maintaining basic customary postal service, the Corporation, in carrying out its objects, shall have regard to:

(a) the desirability of improving and extending its products and services in the light of developments in the field of communications;

(b) the need to conduct its operations on a self-sustaining financial basis while providing a standard of service that will meet the needs

⁶⁷ See discussion in Part II, IIA - Canada's Postal System; and Campbell Report, at 29. (Respondent's Book of Expert Reports and Affidavits, Tab 5).

of the people of Canada and that is similar with respect to communities of the same size;

(c) the need to conduct its operations in such manner as will best provide for the security of mail;

(d) the desirability of utilizing the human resources of the Corporation in a manner that will both attain the objects of the Corporation and ensure the commitment and dedication of its employees to the attainment of those objects; and

(e) the need to maintain a corporate identity program approved by the Governor in Council that reflects the role of the Corporation as an institution of the Government of Canada.

100. It is clear from this legislative mandate that the operations of Canada Post are not governed solely by commercial considerations. In a 1995 report, the Auditor General of Canada emphasized this point:

Corporations in the private sector operate with the understanding that maximizing shareholder wealth is the major priority. However, the primary objectives for public sector entities is not as clear cut. Many Crown corporations are required to achieve self-sufficiency while at the same time meeting public policy objectives (such as delivering needed public services even when they may not be commercially viable). Varied and sometimes even conflicting purposes shape complex Crown corporations that may use revenues generated by their commercial activities to help support non-profit-oriented endeavours devoted to serving the public interest.⁶⁸

101. [Redacted]⁶⁹ [Redacted]⁷⁰ In doing so, Canada Post often serves as the only federal governmental presence in these locations, and plays an important role in rural life. Cynthia Patterson, spokesperson for the group Rural Dignity of Canada explains:

⁶⁸ *Crown Corporations: Fulfilling Responsibilities of Government*, (Report to the House of Commons), Auditor General of Canada, (Ottawa: 1995 c. 10) at 10; online: [online: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9510ce.html>](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9510ce.html). (Respondent's Book of Documents, Tab 4).

⁶⁹ [Redacted]

⁷⁰ [Redacted]

“The threat to rural post offices is a threat to rural life itself ... The post office plays a unique role in a rural community; there is no urban equivalent. The post office is the only federal presence in most villages and small towns, and aside from the contribution it makes to the social and economic health of the community, many people depend on it – small businesses, seniors, the handicapped, those who need help reading and filling out government forms – they all depend on a regular use of the traditional post office and, just as important, the attention of the postmaster.⁷¹

102. Canada Post also is subject to the Official Languages Act⁷² which is a cornerstone of federal public policy. This Federal language policy promotes the recognition and advancement of English and French in Canada by ensuring that all of its communications with the public are conducted in both languages.

103. Canada Post also provides free or discounted rates in certain circumstances in furtherance of Canada’s public policy objectives. For example, the Canada Post Corporation Act allows visually impaired persons and institutions for the visually impaired to mail specific items for the visually impaired free of postage.⁷³ The Act also facilitates communication between Canadians and their government by requiring that Canada Post provide free mailing privileges to Members of the House of Commons and the Senate, the Parliamentary Librarian and the Governor General. For public policy reasons, Canada Post is required to provide a discounted mailing rate to libraries that send books to other libraries, to persons who are disabled, “shut-ins”, or receive books-by-mail service because they are living in remote locations of Canada.⁷⁴ As well, Canada Post provides postal subsidies to eligible Canadian magazines, non-daily newspaper and periodicals mailed for delivery in Canada as part of the Publications Assistance Program, described in more detail below.

⁷¹ As cited in *Amyot and Willis* at 178. (Respondent’s Book of Authorities, Tab 86).

⁷² *Official Languages Act*, R.S. 1985, c. 31 (4th Supp.) s. 22. (Respondent’s Book of Authorities, Tab 18).

⁷³ Ferguson Affidavit, para 24. (Respondent’s Book of Expert Reports and Affidavits, Tab 11).

⁷⁴ Ferguson Affidavit, para. 24. (Respondent’s Book of Expert Reports and Affidavits, Tab 11).

D. [Redacted]

104. [Redacted]⁷⁵ [Redacted]:

[Redacted]⁷⁶

1. Canada Post’s Current Services Provided under Exclusive Privilege

a) The Limited Scope of the Exclusive Privilege

105. [Redacted]⁷⁷

106. **Lettermail.** Canada Post delivers domestic standard letters for a uniform price.⁷⁸ However, not all lettermail is subject to the exclusive privilege. While a “letter” is generally defined as one or more messages or information in any form, the total mass of which does not exceed 500grams⁷⁹, the Canada Post Corporation Act sets out a wide array of exclusions from the exclusive privilege, including letters that are of an urgent nature and are transmitted by a private messenger for at least three times the regular rate of postage.⁸⁰

⁷⁵ [Redacted]

⁷⁶ [Redacted]

⁷⁷ [Redacted]

⁷⁸ Currently 50 cents for letters weighing up to 30 grams; 85 cents for letter weighing 31 to 50 grams. Increased rates apply to letters that are non-standard because they are, for example, oversize or heavier.

⁷⁹ *Letter Definition Regulations*, SOR/83-481. (Respondent’s Book of Authorities, Tab 28).

⁸⁰ Subsection 15(2) of the *Canada Post Corporation Act* [*Canada Post Corporation Act*] excludes the following from the exclusive privilege:

- (a) letters carried incidentally and delivered to the addressee thereof by a friend of the sender or addressee;
- (b) commissions, affidavits, writs, processes or proceedings issued by a court of justice;
- (c) letters lawfully brought into Canada and forthwith posted thereafter;
- (d) letters concerning goods for delivery therewith, carried by a common carrier without pay, reward, advantage or profit for so doing;

107. Letters subject to the exclusive privilege have the following delivery standards: 2 business days within major urban centres; 3 business days within a province; and 4 business days between provinces, subject to certain exceptions. A standard letter must also conform to size and other restrictions.

108. **Addressed Admail.** Addressed Admail allows senders to send a large volume of identical advertising material to individual addresses within Canada, including catalogues, newsletters, notices or announcements, offers of goods or services and product samples. Rates vary depending on volumes and the amount of sortation performed by the customer as opposed to Canada Post. Addressed Admail falls within the exclusive privilege because it is addressed, whereas other advertising materials like flyers are not addressed and therefore not subject to the exclusive privilege.

b) Pricing Exclusive Privilege Services

109. Exclusive privilege letter mail rates are subject to the *Canada Post Corporation Act*, which requires that rates be fair and reasonable, and that they contribute to defraying the costs of Canada Post's operations. Until changes to the Letter Mail Regulations in 2000, government policy never allowed rate increases to exceed inflation.

110. [Redacted]⁸¹

(e) letters of an urgent nature that are transmitted by a messenger for a fee at least equal to an amount that is three times the regular rate of postage payable for delivery in Canada of similarly addressed letters weighing fifty grams (the courier exclusion);

(f) letters of any merchant or owner of a cargo vessel or the cargo therein that are carried by such vessel or by any employee of such merchant or owner and delivered to the addressee thereof without pay, reward, advantage or profit for so doing;

(g) letters concerning the affairs of an organization that are transmitted between offices of that organization by an employee thereof;

(h) letters in the course of transmission by any electronic or optical means; and

(i) letters transmitted by any naval, army or air forces of any foreign country that are in Canada with the consent of the Government of Canada.

⁸¹ [Redacted]

2. Competitive Services

a) Canada Post Must Provide Competitive Services To Fund The Universal Service Obligation

111. From its earliest days, the Post Office Department, now Canada Post, has been a multi-product firm offering both exclusive and competitive services.

112. The key competitive services currently offered by Canada Post (most of which have been offered by Canada Post and its predecessor the Post Office Department for more than a century) are listed below. All of these services are provided to help ensure that Canada Post can meet its international and domestic social and policy obligations, in particular the universal service obligation.

113. Some competitive services (such as basic parcel service as well as express services for incoming mail) are required as part of Canada's universal service obligation under the *Universal Postal Convention*. For example, as explained above, Canada is obliged to provide a parcel service to and from all addresses in Canada, to have express letter and parcels services to deliver incoming letters and parcels received from other postal administrations marked "express".

114. Other competitive services are required to fund Canada Post's universal service obligation. After commenting on the fact that in advanced economies the exclusive privilege is under constant scrutiny with a view to reducing it, Professor Crew a leading world expert in the area of postal economics explains in his report:

By design therefore, exclusive privilege is not intended to cover alone the entire burden of the USO. CPC [Canada Post Corporation] is subject to a number of pressures to make it fund the USO by other means. These include competitive pressure on traditional letter mail from electronic media arising from the Internet, the objective of the Canadian Government to keep universal service affordable and its intent to provide only minimal government funding. Competitive services provide other means to fund the USO, primarily through parcels and featured letters.⁸²

⁸² Crew Report, para. 61. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

115. Canada Post engages in competitive services to take advantage of its economies of scale and scope in order to fund the universal postal obligation. These competitive services are expected to be profitable and thus contribute to the common fixed costs of the infrastructure required to fulfil Canada’s universal service obligation.⁸³

b) Competitive Services Provided by Canada Post

116. [Redacted]⁸⁴

117. [Redacted]

118. [Redacted]⁸⁵

119. [Redacted]⁸⁶

120. [Redacted]⁸⁷

121. [Redacted]⁸⁸. [Redacted]⁸⁹

122. [Redacted]⁹⁰

123. [Redacted]⁹¹

⁸³ Crew Report, paras. 63-68. (Respondent’s Book of Expert Reports and Affidavits, Tab 9). [Redacted]

⁸⁴ [Redacted]

⁸⁵ [Redacted]

⁸⁶ [Redacted]

⁸⁷ [Redacted]

⁸⁸ [Redacted]

⁸⁹ [Redacted]

⁹⁰ [Redacted]

⁹¹ [Redacted]

c) [Redacted]

124. [Redacted]⁹²⁹³

125. [Redacted]⁹⁴:

[Redacted]⁹⁵

126. [Redacted]

127. [Redacted]⁹⁶

3. Canada Post's Products are not comparable to those of UPS Canada

128. [Redacted]

129. [Redacted]

130. [Redacted].

131. [Redacted]:

[Redacted]⁹⁷

132. [Redacted]:

[Redacted]

[Redacted]⁹⁸

⁹² [Redacted]

⁹³ [Redacted]

⁹⁴ [Redacted]

⁹⁵ [Redacted]

⁹⁶ [Redacted]

⁹⁷ [Redacted]

⁹⁸ [Redacted]

133. [Redacted]:

[Redacted]⁹⁹

134. [Redacted]¹⁰⁰ [Redacted]:

[Redacted]¹⁰¹

135. [Redacted]

136. [Redacted]:

[Redacted]¹⁰²

137. The fact that both couriers and Canada Post deliver goods and messages only tell a very small part of the story. While they may compete for the same customer in the same sense as a bicycle vendor competes against a car salesperson, they both sell means of transportation (and no doubt a car salesperson would like to persuade the bicyclist to adopt a more efficient way to get to their destination) it would be simplistic to suggest that the two are in the same business. This point comes into stark relief if we remove non-Canada Post products from the analysis. [Redacted]

138. The Post and courier companies are very different entities.

⁹⁹ [Redacted]

¹⁰⁰ [Redacted]

¹⁰¹ [Redacted]

¹⁰² [Redacted]

E. The Services offered by Canada Post are not Comparable to those offered by Couriers

139. The operations of courier companies are profit oriented, focused upon expedited, reliable, time-definite service primarily within high population densities. This is in direct contrast to Canada Post's activities, which are focused upon universal service in the pick-up and delivery of mail across Canada, at the expense of optimum profit, speed and reliability.¹⁰³

1. Varied Nature of Goods

140. [Redacted]¹⁰⁴

141. [Redacted]¹⁰⁵

2. Knowledge of Identity of Sender and Contents of Goods

142. [Redacted]¹⁰⁶ Couriers, as common carriers, are statutorily required to ship goods with a bill of lading. The bill of lading discloses the identities of the sender and receiver and the contents of the goods. In contrast, Canada Post is not a common carrier. Canada Post has no obligation to know (and indeed does not know) the identity of the sender, the receiver, or the contents of the mail it carries.

143. As will be discussed more fully below in Part II, VI, knowledge of the identity of the sender and the contents of goods also affords the Claimant and other couriers, with more efficient treatment at the Canadian border by the Canada Border Services Agency (the "CBSA").

¹⁰³ Tobias Affidavit, paras. 45-51. (Respondent's Book of Expert Reports and Affidavits, Tab 35); and [Redacted]

¹⁰⁴ [Redacted]

¹⁰⁵ [Redacted]

¹⁰⁶ [Redacted]; and Tobias Affidavit, at 46. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

3. Ability to “Track and Trace”

144. The fact that couriers like Purolator or the Complainant can trace goods from pick-up to delivery is one of the reasons customers may choose the services offered by these companies over most of the services offered by Canada Post. As Kal Tobias, former President and CEO of DHL International points out:

The ability to track and trace a shipment from its point of origin through to its eventual destination can be crucial for some shippers. The ability to track and trace international shipments is unique to couriers. This ability arises from the fact that international couriers have end-to-end control of a shipment and a seamless computer system throughout their delivery network. The mail, however, is transferred through a patchwork of postal administrations until it reaches the country of destination. Thus for international mail, no one entity has control of the shipment from origin to destination. Moreover, the various postal administrations involved in the chain of delivery of the mail are not linked one to the other through computers. Without one entity continuously having care and control of the shipment and without computers communicating between postal administrations, the track and trace feature is simply not possible for internationally mailed goods.¹⁰⁷

4. Speed of Delivery

145. Couriers offer shipment of goods at transit times that cannot be matched by Canada Post. Couriers operations are designed to specifically address its customers’ need for quick turnaround times from the collection point to the delivery destination.

146. [Redacted]¹⁰⁸ [Redacted] a courier’s knowledge of the identity of the sender and the receiver, and the nature of the goods, enables it to have an induction, processing and delivery process that is highly orderly and precise.

147. [Redacted]¹⁰⁹ This contributes a predictable, reliable and rapid service standard.

¹⁰⁷ Tobias Affidavit, para. 51. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

¹⁰⁸ [Redacted]

¹⁰⁹ [Redacted]

As Kal Tobias explains:

The services offered by postal administrations and those offered by international couriers are distinguished by these service standards. In my experience, sophisticated international shippers often select an international courier company to deliver their shipments because of the guaranteed delivery of their item within an expedited or time definite delivery cycle. Courier customers pay a premium for these services. Time definite delivery permits businesses to plan ahead for the arrival of shipments and is of particular importance for companies employing “just in time” inventory practices. Generally speaking, people who choose the post to deliver their shipment do not place as great an emphasis on rapid delivery times and/or need not know the delivery date and time in advance.¹¹⁰

5. Focus on Population Densities

148. [Redacted]¹¹¹ [Redacted]¹¹² While a courier may provide services to almost anywhere in Canada for a price, by focusing on the provision of services in highly populous areas it is able to conduct its business with a degree of certainty as to the source and destination of its deliveries and the nature of the goods it will be moving. This is a luxury not shared by Canada Post, which is required to deliver to every address in Canada in order to carry out its universal service obligations.

F. The Single Mail Pipeline

1. The Fallacy of the “Monopoly Infrastructure”

149. In its Memorial, the Claimant argues that Canada Post has developed and maintains an extensive network – or “Monopoly Infrastructure” - to deliver its exclusive

¹¹⁰ Tobias Affidavit, para. 49. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

¹¹¹ [Redacted]

¹¹² [Redacted]

privilege lettermail. The Claimant asserts that “Canada has delegated to Canada Post complete discretion to control access to the Monopoly Infrastructure and the terms on which it gives that access.”¹¹³

150. The Claimant and the economist it has retained, Mr. Neels, suggest that Canada’s network has been built up as a result of its substantial volumes of lettermail that Canada Post “alone is permitted to process and deliver”.¹¹⁴ But the universal service obligation is not a privilege or a competitive advantage. It is an onerous domestic and international obligation that, has not “enabled” Canada Post to develop and maintain a delivery network, but rather, has required substantial investment and requires ongoing costs for its fulfilment.¹¹⁵

151. The challenges posed by the universal service obligation are considerable. Canada is the world’s second largest land mass, comprising over 9 million square kilometres. Although 80 per cent of its population lives within 150 kilometres of the United States border, Canada includes thousands of communities from coast to coast and in the north. Canada’s immense geography and modest population create low densities that challenge the efficiency and cost structure or distribution networks. Each year the requirements of the universal service obligation become more demanding as Canada grows by more than 200,000 new addresses.¹¹⁶

152. Canada Post’s network currently serves over 31 million Canadians and over one million businesses, comprising 13.7 million individual delivery addresses.¹¹⁷ Canada Post has over 24,000 retail points of purchase where customers can access its postal services, including over 7,500 postal outlets.¹¹⁸ There are more than 700,000 locations where

¹¹³ Investor’s Memorial, para 138.

¹¹⁴ Investor’s Memorial, para 179.

¹¹⁵ Crew Affidavit. (Respondent’s Book of Expert Reports and Affidavits, Tab 9).

¹¹⁶ Meacham Affidavit, para. 10. (Respondent’s Book of Expert Reports and Affidavits, Tab 27).

¹¹⁷ Meacham Affidavit, para. 10. (Respondent’s Book of Expert Reports and Affidavits, Tab 27).

¹¹⁸ Meacham Affidavit, para. 22. (Respondent’s Book of Expert Reports and Affidavits, Tab 27).

Canadians can deposit mail,¹¹⁹ 21 major plants where mail is processed and hundreds of local letter carrier depots and delivery hubs.¹²⁰

153. While the Claimant complains throughout its Memorial about its lack of access to Canada Post's infrastructure, in reality it has no interest in incurring the costs that would be required to maintain or use this infrastructure for its own operations.

154. In addition, the suggestion that Canada Post has "developed" the postal network as a "monopoly infrastructure" is incorrect.¹²¹ Over the course of more than a century, the Post Office Department and Canada Post have created a single, integrated operating network -- the mail "pipeline", to deliver all of their services; exclusive and competitive, letter and parcel, domestic, international, air, ground, commercial and residential.¹²² Canada Post has developed this network to serve *all* of its products -- not just its lettermail services under the exclusive privilege.¹²³

155. Like the Claimant, Canada Post is entitled to take advantage of economics of scope and scale to improve its operating efficiency and customer service. Unlike the Claimant, Canada Post has also developed this infrastructure, and must maintain it, to help fulfil Canada Post's various social and policy obligations, including the universal service obligation.

2. Key Components of Canada Post's Single Mail Pipeline

156. As described in the affidavit of Douglas Meacham, former Vice-President of Field Operations at Canada Post, Canada Post has developed and continues to refine the

¹¹⁹ Contrary to what the Claimant appears to suggest at paragraph 150 of the Investor's Memorial, these 950,000 locations include only 32,000 street letter boxes. The rest are community mail boxes, group mail boxes, kiosk sites and rural mail boxes.

¹²⁰ Meacham Affidavit, para. 22. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹²¹ Investor's Memorial, para. 137.

¹²² Campbell Report, para. 14. (Respondent's Book of Expert Reports and Affidavits, Tab 5).

¹²³ Campbell Report, para. 16. (Respondent's Book of Expert Reports and Affidavits, Tab 5).

most effective operational network possible to fulfil its mandate. He asserts that:

It is both unrealistic and in fact wholly incorrect, however, to view the network infrastructure of Canada Post only in relation to any particular product or group of products serviced by the company. It is a single integrated pipeline.¹²⁴

157. [Redacted]¹²⁵ The single pipeline consists of four major components: induction, processing, transportation and delivery.

a) Induction

158. Induction refers to the means by which a customer gets his or her mail into the Canada Post system. Canada Post’s induction processes reflect its universal service obligation to provide accessible letter and parcel collection delivery. As a result of these obligations, Canada Post’s induction processes are different than those of other firms that transport parcels.

159. First, Canada Post’s pick-up operation (i.e. collecting items directly from customers for delivery) is very small. Most postal items transported by Canada Post are dropped off by customers at induction points such as mail boxes and retail outlets.

160. Second, Canada Post’s induction points are usually small buildings, lower capacity vehicles and mail boxes. Unlike couriers like UPS of America Inc., Canada Post’s core market is therefore small products. Canada Post is effectively restricted from moving large volumes of large parcels or freight because of this limited collection capacity.

161. The points of induction into the Canada Post mail pipeline are as described below:

Mailboxes

¹²⁴ Meacham Affidavit, para. 12. (Respondent’s Book of Expert Reports and Affidavits, Tab 27).

¹²⁵ [Redacted]

162. Canada Post collects its mail from a variety of mail boxes, including street letter boxes, community mail boxes, group mail boxes, kiosk sites and rural mail boxes.¹²⁶ Canada Post has been given the authority to install mail boxes to fulfil its universal service obligation to provide reasonable access to the postal system to all persons in Canada. The mail boxes have always been used not just for the monopoly letter product, but to fulfil Canada's obligations to provide universal letter *and* parcel service. They are not, contrary to the Claimant's assertion, part of a "monopoly" infrastructure.¹²⁷

163. Also, contrary to the Claimant's assertions, the placement, maintenance and servicing of mail boxes in fact places a substantial operational and financial burden on Canada Post. A private sector competitor has the freedom to operate induction points only in higher volume, more profitable locations. By contrast, Canada Post must place induction points in locations that support its social obligations but are otherwise not conducive to earning a profit.

164. As well, given the universal service obligation, induction points must facilitate broad and effective access to the postal network for all Canadians. A courier does not have that obligation. In Montreal, for example, UPS operates only one induction point for the entire city. Canada Post, on the other hand, has to maintain and service more than 5522 mailboxes in Montreal.

165. Many of Canada Post's mail boxes sustain only limited use but must nevertheless be inspected and, in most cases, cleared by Canada Post personnel on a daily basis. Canada Post's authority to place its mail boxes on public property is, from a strictly business perspective, more of a burden than a benefit. This burden, however, is part and parcel of Canada Post's requirement to provide a presence across the country in fulfilment of its universal service obligation.

¹²⁶ These are described in detail in the Meacham Affidavit, para 22. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹²⁷ *Mail Receptacles Regulations*, SOR/83-430, s. 3, [*Mail Receptacles Regulations*] provides that Canada Post "may install, erect or relocate or cause to be installed, erected or relocated in any public place, including a public roadway, any receptacle or device to be used for the collection, delivery or storage of mail." (Respondent's Book of Authorities, Tab 30).

166. As Professor Crew states in his affidavit:

It is because of its USO that CPC and other POs have many more outlets than they would in the absence of a USO. A privately-owned company that did not have a USO would have many fewer retail outlets than CPC. One measure of CPC's burden is the extra outlets it is obligated to operate.¹²⁸

167. The Claimant's statement in paragraph 150 that "Canada Post does not allow consumers to deposit UPS Canada products in Canada Post's mail boxes" is similarly disingenuous. If UPS were to tell its customers they could deposit their UPS packages in a Canada Post mailbox, there would no doubt be impact on the established UPS brand and UPS would be unable to offer high service standards for items deposited in the Canada Post mailboxes. Although in theory the Claimant could contract with Canada Post to deliver those items, UPS would then be relegated to shipping its packages on trucks using Canada Post logos.

168. In fact, UPS has never asked Canada Post to grant it access to Canada Post's mailbox system and has never asked the Canadian government for the right to establish its own parallel mailbox system. The Claimant has developed its own customer pick-up model that allows it to offer high quality service standards and guarantees that exceed those of Canada Post. It would make no economic sense for it to offer the kinds of services that Canada Post is obliged to offer.

169. **Retail Points of Purchase.** There are approximately 24,000 retail points of purchase in Canada.

170. Canada Post has entered into an arms-length agreement on commercial terms with its subsidiary, Purolator, for Purolator products to be sold and deposited at most Canada Post retail outlets. However, contrary to the Claimant's assertions at paragraph 154 of its Memorial, Canada Post has offered these same services to UPS Canada and other major couriers. [Redacted]¹²⁹

¹²⁸ Crew Report, para. 17. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

¹²⁹ [Redacted]

171. [Redacted]¹³⁰

172. **Pick-Up from Customers.** Unlike shipments carried by companies like UPS, only a very small proportion of Canada Post's product is inducted through customer pick-up.¹³¹ Priority Courier is, in fact, the only Canada Post product that includes on demand pick-up from customers as a standard product feature.

173. **Priority Courier Drop Boxes.** Priority Courier drop boxes are specially marked street boxes, located in major urban centres, into which customers can deposit Priority Courier packages and envelopes. As noted above, Priority Courier items cannot be deposited in mail boxes.

174. [Redacted]

175. [Redacted]

176. [Redacted]

177. [Redacted]

178. [Redacted]¹³²

179. Finally, Customers with large volume mailings can deposit mail at any of Canada Post's processing plants or deposit their messages, with addressing information, electronically at Canada Post's Volume Electronic Mail Hub location

b) Processing and Transportation

180. Processing takes place at one or more of Canada Post's mechanized mail processing plants. Processing involves the separation of mail into processing streams, the verification of payment, the coding of mail items and their sortation to their destination.

¹³⁰ [Redacted]

¹³¹ [Redacted]; See also Meacham Affidavit, para 22. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹³² [Redacted]

Mail may be transported from an induction point to a processing centre, and between processing plants (from a primary processing location to a final processing location), and is ultimately transported to the point from which delivery will be made.¹³³

181. In order to provide universal service to all communities throughout Canada's vast geography, Canada Post maintains the single largest and most complex transportation network in Canada.¹³⁴

c) Delivery

182. The delivery process involves the receipt, sortation and sequencing of mail items by a Canada Post delivery agent, and their final delivery by that agent to the addressee. Three main "modes" of delivery exist: letter carriers (who deliver on foot in urban areas, including to centralized points such as apartment lobby boxes), motorized delivery and postal box and General delivery. The Claimant suggests at paragraph 161 of its Memorial that letter carriers also market courier services and deliver courier services sales brochures. However, the only Canada Post delivery personnel who participate in product sales are the motorized delivery personnel, and even then only in a small number of urban areas, on a pilot project basis.¹³⁵

d) Apartment mailboxes

183. Canada Post delivers to boxes located in the lobbies of residential apartment buildings. These boxes are constructed, maintained and owned by the owner of the apartment building. An apartment owner that wishes Canada Post to deliver to apartment lobby boxes typically approaches Canada Post to arrange for such delivery. Canada Post requires the consent of the apartment owner to enter the building and deliver to the lobby boxes. Canada Post's access to such boxes is in this way established through agreement between Canada Post and the apartment building owner. The *Mail Receptacles Regulations* specifies the minimum size and security features required if an apartment

¹³³ Meacham Affidavit, para. 30. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹³⁴ Meacham Affidavit, para. 29. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹³⁵ Meacham Affidavit, para. 32(a). (Respondent's Book of Expert Reports and Affidavits, Tab 27).

owner wishes Canada Post to deliver to lobby mail boxes and once all box specifications are met Canada Post is required to deliver under the regulations.¹³⁶

184. The Claimant states at paragraph 166 of its Memorial that it is denied access to Canada Post's apartment mailboxes. There is nothing that prevents a delivery company such as the Claimant from making an arrangement, similar to Canada Post's, with an apartment building owner for the delivery of its own items. In fact flyer delivery racks and other types of compartments are used in apartments to facilitate deliveries by couriers.¹³⁷

185. Section 10(b) of the *Mail Receptacles Regulations* also allows for mail to be delivered to a central office located adjacent to the main entrance of the building to which mail may be delivered for all occupants, for those apartments that have such offices.¹³⁸ This is a method that is equally available and in fact regularly used by delivery companies, such as the Claimant.¹³⁹

G. Purolator Courier Inc. is a Separate Corporate Entity that Deals at Arms-length with Canada Post

186. The Claimant's Memorial and the expert report of Dr. Fuss filed by the Claimant may leave the impression that Canada Post and Purolator Courier Ltd. (Purolator) are part of the same operation. This is not a correct.

187. Purolator is a courier company. [Redacted]¹⁴⁰ [Redacted]¹⁴¹

188. [Redacted]¹⁴²

¹³⁶ Meacham Affidavit, para. 34. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹³⁷ Meacham Affidavit, para. 35. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹³⁸ Meacham Affidavit, para. 36. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹³⁹ Meacham Affidavit, para. 36. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

¹⁴⁰ [Redacted]

¹⁴¹ [Redacted]

189. [Redacted]¹⁴³

190. [Redacted].¹⁴⁴

191. [Redacted]¹⁴⁵ [Redacted]¹⁴⁶

H. Governance and Accountability of Canada Post

1. Canada’s Oversight and Control of Canada Post is Effective and Appropriate

192. The Claimant alleges at paragraph 210 of its Memorial that the regulatory structure of Canada Post is “highly unusual, both in Canada, and throughout the rest of the industrial world: a Government owned corporation which benefits from a guaranteed monopoly, yet faces no regulation of the use of that monopoly against competitors providing complementary services.”

193. This assertion is fundamentally wrong. As described in detail above, Canada Post is subject to a range of regulatory constraints. The Claimant relies on statements by Professor Campbell in his book, *The Politics of the Post*, to suggest that Canada Post is “unregulated”. But these selective excerpts mischaracterize and grossly simplify Professor Campbell’s views. As Professor Campbell states in his Report:

In UPS Memorial (point 210 at page 73), I am quoted (from my book *The Politics of the Post*, p. 352) as saying: “*This complete absence of third-party regulation of a public postal corporation is unique in the industrial world.*” A similar point is made (228) at page 70. The conclusion attributed to me is that CPC was and is

¹⁴² [Redacted]

¹⁴³ [Redacted]

¹⁴⁴ [Redacted]

¹⁴⁵ [Redacted]

¹⁴⁶ [Redacted]

unregulated. This is an unfair conclusion and a mistaken use of my study.

The passage on page 352 of *The Politics of the Post* continues as follows (bold for emphasis): **But we should not conclude that CPC became ‘unregulated.’** Indeed, the remainder of the paragraph goes on to describe how the ‘light regulatory touch’ adopted by both Liberal and Conservative Governments was working according to planned objectives -- confirming the political and policy judgment of the day that a more heavy-handed, formal, third-party regulation was not required. Page 352 continues: “lack of formal institutional regulation or direct government intervention, **rather than attesting that CPC was not regulated** instead demonstrated how CPC had acted in pursuing the commercial mission that the government had set for it.”¹⁴⁷

194. The Claimant is essentially arguing that without a postal regulatory authority as in the United States, Canada Post is unregulated. However as Professor Campbell notes:

...There is no ‘optimal’ or universal model for the Posts that is ready to be discovered, constructed or applied to the postal scene. Countries have particular cultures, histories, and traditions that play out in different postal realities, and their place in the world economy also offers constraints on and opportunities for postal development.¹⁴⁸

...most countries have tried to ease the regulatory and governance environment in which their corporatized Posts operate, in order to encourage innovation, risk-taking, productivity improvement, a commercial orientation, and the development of a corporate culture. ...there is an emerging notion of “light-handed” or “passive” regulation as the appropriate mode for this sector.¹⁴⁹

195. [Redacted]¹⁵⁰ [Redacted]:

[Redacted]

¹⁴⁷ Campbell Report, paras. 124-125. (Respondent’s Book of Expert Reports and Affidavits, Tab 5).

¹⁴⁸ Campbell, *Politics of Postal Transformation*, at 4. (Respondent’s Book of Authorities, Tab 90).

¹⁴⁹ Campbell, *Politics of Postal Transformation* at 27. (Respondent’s Book of Authorities, Tab 90).

¹⁵⁰ [Redacted]

[...]

[Redacted]¹⁵¹

196. [Redacted]¹⁵² [Redacted]¹⁵³

2. Regulatory and Legislative Control

197. Contrary to the assertions of the Claimant,¹⁵⁴ Canada Post operates under extensive regulatory control.

198. Canada Post is a Crown corporation, the sole shareholder of which is the Government of Canada. While the governance structure of a Crown corporation is based on the private firm model, there are, nevertheless, significant differences between them. In particular, Canada Post's interaction with the Government as shareholder necessitates that it interact with, and be responsive to, a broad range of Governmental actors (for instance, Parliament, the Governor in Council, the Prime Minister's Office and Privy Council Office, Treasury Board, the Ministers of Finance and Canada Post and Crown Corporation Secretariat), each performing the dual role of shareholder and guardian of the public interest.¹⁵⁵

199. Second, and as a Crown corporation, Canada Post must carry out the public policy imperatives entrusted to it, which in turn makes its governance far more complex than that of a private firm. As the 1995 report of the Auditor General of Canada indicated,

Corporations in the private sector operate with the understanding that maximizing shareholder wealth is the major priority.

¹⁵¹ [Redacted]

¹⁵² [Redacted]

¹⁵³ [Redacted]

¹⁵⁴ Investor's Memorial, Chapter IV.

¹⁵⁵ Ferguson Affidavit, paras. 17 and 18. (Respondent's Book of Expert Reports and Affidavits, Tab 11).

However, the primary objectives for public sector entities are not as clear cut. Many Crown corporations are required to achieve self-sufficiency while at the same time meeting public policy objectives (such a delivering needed public services even when they may not be commercially viable). Varied and sometimes even conflicting purposes shape complex Crown corporations that may use revenues generated by their commercial activities to help support non-profit-oriented endeavours devoted to serving the public interest.¹⁵⁶

200. Through the Canada Post Corporation Act (the CPCA), the Financial Administration Act (the FAA) and various other legislation and practice, the Government influences and controls Canada Post's policies and operations in many different ways, while at the same time requiring that it achieve financial self-sufficiency. Canada Post is, in fact, heavily regulated in a manner that would be counter-intuitive to any private firm.

201. Canada's regulatory control of Canada Post is fully set out in the Affidavit of Gordon Ferguson and, among other things, includes:

- the specification of operations, financial and basic policy objectives in the CPCA, which bind Canada Post in terms of its day-to-day operations;
- the appointment by the Government of Canada of the Board of Directors and President of Canada Post;
- the involvement of the Government of Canada in the corporate planning and budgeting process, including its approval of Canada Post corporate plans (including dividend proposals) and budgets;
- the requirement that Canada Post comply with ministerial directives, including the practical application of informal Government directives (In this respect, while no formal directive has been issued to Canada Post, numerous informal Government directives have nevertheless been imposed with equal impact. In the early 1990's, for example, Canada Post's initiative to close certain rural post offices came under criticism as a violation of its obligation to provide basic customary postal service, and thus carry out the USO. In response, in 1994 the shareholder imposed an indefinite moratorium on the closure of rural and small town post offices.);
- the imposition of a price cap on Canada Post's ability to raise its basic Lettermail rate;

¹⁵⁶ Ferguson Affidavit, para. 20. (Respondent's Book of Expert Reports and Affidavits, Tab 11).

- use by the Government of Canada of the regulation-making process to oversee various of the day-to-day activities of Canada Post. Matters which private firms would decide in the normal and ordinary course of carrying on their businesses but which in Canada Post's context, are subject to regulatory constraints include basic product pricing, product definition and specifications (for example, letter mail standards) and basic operational matters (for example, placement of product induction points, process for undeliverable and redirected product, etc.);
- the supervision and control by the Government of various corporate proceedings (corporate by-laws, the appointment of auditors, etc) ;
- the requirement of authorization from the Government of Canada for borrowing, including of the terms thereof;
- legislative restrictions on certain transactions, such as the sale of substantial assets;
- various other reporting requirements, such as annual auditor's reports, corporate annual reports and annual audit reports of the Annual Cost Study (ACS);
- the creation, following the Radwanski Mandate Review and the TD Securities Study, of the Multi-Year Policy Framework, which established service, productivity and financial performance targets for Canada Post; and
- the requirement that Canada Post comply with legislation that applies to the Government of Canada and entities related to it, such as the Official Languages Act, the Federal Privacy Act and the Competition Act.

3. Competition Bureau Oversight

202. Canada Post, like other corporations in Canada, is subject to the Competition Act, Canada's antitrust law that applies to all private businesses as well as to Crown corporations, in order to promote and maintain fair competition in Canada.

203. As described in the Affidavit of Richard Annan, many of the Claimant's allegations are allegations of anti-competitive conduct. Through its oversight role, the Competition Bureau, upon receipt of a complaint, would investigate whether Canada Post operates in an anti-competitive manner by, for instance, engaging in anti-competitive cross-subsidisation. This oversight fulfils Canada's obligations under Article 1102 of the NAFTA and NAFTA Article 1501(1), as well as ensures that Canada meets its obligation under Article 1502(3)(d).

204. Specifically, the Competition Bureau has two mandates of particular relevance to the issues raised by the Claimant in this case.

205. First, the Competition Bureau has a mandate to enforce the abuse of dominance provisions of the Competition Act¹⁵⁷. These provisions prohibit firms that substantially or completely control a class or species of business from engaging in anti-competitive acts that have prevented, or are likely to prevent or substantially lessen competition in a market. For example, if Canada Post used its revenues from the exclusive privilege services to cross-subsidize its competitive services in a manner which has or is likely to lessen competition substantially in a market, that would constitute abuse of dominance under the Competition Act.

206. The role of the Bureau is to carry out investigations arising from complaints of abuse of dominance by competitors and, where grounds warrant, make application to the Competition Tribunal for a remedial order. Where the Tribunal finds abuse of dominance, it may make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively it may make an order directing any actions that are reasonable and necessary to overcome the effects of anti-competitive practices.

207. Second, the Competition Bureau has a mandate to review mergers to ensure that they do not prevent or lessen, or are not likely to prevent or lessen, competition substantially.¹⁵⁸ If a merger fails this test, the Bureau can apply to the Competition Tribunal, which, among other things, can order that a proposed merger not proceed or that a completed merger be dissolved or that there be a disposal of shares or assets. As part of its analysis of whether the merger is likely to substantially lessen or prevent competition, the Competition Bureau may consider whether the merged firms engage or are likely to engage in anti-competitive cross-subsidization.

¹⁵⁷ *Competition Act*, R.S.C. 1985, c. C-34, ss. 78 and 79. (Investor's Schedule of Documents, Tab U408) [*Competition Act*].

¹⁵⁸ *Competition Act*, ss. 91 and 92. (Investor's Schedule of Documents, Tab U408).

208. The Competition Bureau oversees Canada Post. It has, in fact, investigated whether Canada Post engages in anti-competitive cross-subsidization on three occasions and on all three occasions found no cross-subsidisation.

a) Competition Bureau’s Reviews of Canada Post

209. 1993 Review of Canada Post/Purolator Merger Finds No Cross-Subsidization

210. The Competition Bureau’s review of the 1993 merger between Canada Post and Purolator investigated whether Canada Post was anti-competitively cross-subsidising its Priority Courier product with funds from its exclusive privilege lettermail. It found no evidence of cross-subsidization.

211. [Redacted]:

[Redacted].¹⁵⁹

212. 1998 Review of Canada Post/Purolator Business Practices Found No Cross-Subsidization

213. Second, in response to complaints by the Claimant and other courier companies brought before the Radwanski Mandate Review, discussed below, the Competition Bureau conducted an examination to consider, among other things, allegations that Canada Post had used its dominant position in exclusive letter mail to engage in anti-competitive cross-subsidization of its competitive courier operations and those of Purolator with revenues from its exclusive letter mail operations. The Claimant and other courier companies alleged that this had allowed Canada Post’s courier operations to be priced at a predatory level.

214. [Redacted]:

[Redacted].¹⁶⁰

¹⁵⁹Letter from George N Addy, Director of Investigations and Research at the Competition Bureau to Kent E. Thomson and Tim Kennish, dated November 26, 1993. (Respondent’s Book of Documents, Tab 5).

215. 1999 Review of Canada Post/Purolator Merger Found No Cross-Subsidization

216. Third, the Competition Bureau’s 1999 review of the acquisition by Canada Post of a substantial portion of the remaining shares of Purolator addressed the cross-subsidization issues. In a letter dated July 23, 1999 from the Commissioner of Competition to counsel for the Canadian Courier Association the Bureau reviewed its analysis and findings from 1993 and 1998 that there was no evidence of cross-subsidisation in the operations of Canada Post.

217. [Redacted]:

[Redacted]¹⁶¹

218. The Competition Bureau has repeatedly found no evidence of cross-subsidisation by Canada Post.

219. Given this fact, the Claimant is now attempting to dress up its complaint of anti-competitive behaviour as a breach of NAFTA Chapter 11. These arguments have no basis in the NAFTA.

b) Other Reviews of Canada Post

220. In addition to the continuous regulatory oversight described above, Canada Post has been subject to additional *ad hoc* postal reviews. In its Memorial, the Claimant discusses these reviews in a manner that is inaccurate and incomplete.¹⁶²

221. The Postal Services Review Committee

222. In 1988, the Government announced the creation of the Postal Services Review

¹⁶⁰ Letter from André Lafond, Deputy Director of Investigation and Research (Civil) (as he then was), to Lawson A.W. Hunter, Q.C., dated October 30, 1998. (Respondent’s Book of Documents, Tab 6).

¹⁶¹ Letter from Konrad von Finckenstein, Commissioner of Competition, to Robert Kwinter, dated July 23, 1999. (Respondent’s Book of Documents, Tab).

¹⁶² Investor’s Memorial, paras. 217 to 244.

Committee (PRSC), headed by Mr. Marchment. In its Memorial, the Claimant characterises the Marchment review and discontinuance of the PRSC as an example of Canada not creating an adequate postal regulatory mechanism.

223. Contrary to the Claimant’s assertions, the PSRC was given only modest review powers and only the authority to make recommendations to the Government. The Progressive Conservative Government of the time preferred a deregulated environment. As Professor Campbell states, the PSRC was intended to “advise” the Government on Canada Post’s rate and regulation proposals, not to be a regulator.¹⁶³

224. [Redacted]¹⁶⁴ [Redacted]:

[Redacted]

[Redacted].¹⁶⁵

225. Radwanski Mandate Review

226. The Claimant relies substantially on statements made by George Radwanski in his Mandate review, conducted and released in 1996. Mr. Radwanski was a former journalist and speech writer. [Redacted]¹⁶⁶

227. The Radwanski Mandate Review was originally intended to be a modest, inexpensive process with a small steering committee comprised of government officials. However, as Professor Campbell states in *The Politics of Postal Transformation*, “Radwanski transformed [the steering committee] into an advisory committee, which he

¹⁶³ Robert M. Campbell, *The Politics of the Post: Canada’s Postal System from Public Service to Privatization*, (Peterborough Ont.: Broadview Press, 1994) at 346. (Respondent’s Book of Authorities, Tab 89).

¹⁶⁴ [Redacted]

¹⁶⁵ [Redacted]

¹⁶⁶ [Redacted]

ignored, hiring and using his own staff instead”¹⁶⁷. [Redacted]¹⁶⁸ As Mr. Campbell states:

[Mr. Radwanski] wrote the report on his own. He did not take up the offers of advice made by senior executives of Australia and New Zealand Post and the International Postal Corporation. The report that he produced shocked most postal observers -- including the Government, Canada Post (which had not seen the report or any draft before it was issued), and the postal community abroad. His recommendations comprised a total rupture from past postal-policy development in Canada and from the evolving postal practice of the progressive postal regimes.¹⁶⁹

228. Contrary to the Claimant’s assertions, the Radwanski Mandate Review is lacking in credibility and its findings should be given no weight by this Tribunal. Professor Campbell concludes that the Mandate Review was “ill conceived, a throwback to pre-1981 days, and a real setback for the evolution of postal policy in Canada” and that “after all the time and money expended, the report was not terribly useful in a policy sense”.¹⁷⁰

229. The Review concluded, among other things, that Canada Post should provide only core mail services and that there be a stamp tax on mail not carried by Canada Post to provide a subsidy to Canada Post. As Professor Campbell states, no modern postal regime uses a direct postal subsidy to maintain the universal service obligation. In addition, as set out above, Mr. Radwanski’s statements in the Mandate Review respecting cross-subsidization were not corroborated by the Competition Bureau.

230. The TD Securities Study

231. After receiving Mr. Radwanski’s Report, the Government initiated another study, by TD Securities. The mandate of TD Securities was, among other things, to assess the impact of the recommendations in the Radwanski Mandate Review on Canada

¹⁶⁷ Campbell, *The Politics of Postal Transformation*, at 300. (Respondent’s Book of Authorities, Tab 30).

¹⁶⁸ [Redacted]

¹⁶⁹ Campbell, *Politics of Postal Transformation*, at 301. (Respondent’s Book of Authorities, Tab 90).

¹⁷⁰ Campbell, *Politics of Postal Transformation*, at 302-303. (Respondent’s Book of Authorities, Tab 90).

Post's ability to remain financially self-sustaining.

232. In its summary of key findings, TD Securities came to the following conclusion respecting the Mandate Review recommendations:

Analysis of the Mandate Review Case reveals that the financial performance of CPC would deteriorate and not be financially self-sustaining if competitive businesses are exited. The financial results would worsen by improving the delivery standard and replacing urban community mailboxes. The combination of the 5 cent stamp price increase, the 50 cent stamp requirement on courier packages, the tax on unaddressed Admail, and labour savings of approximately \$200 million per annum would make the Mandate Review Case financially self-sustaining, at least in the near term. However the cost of postal and courier services to Canadian businesses and individuals would increase by approximately \$500 million per annum.¹⁷¹

233. Following the publication of the TD Securities Report, Canada Post and the Government of Canada entered into the Multi-Year Policy Framework. The Framework, as discussed in greater detail in the Ferguson Affidavit, established service, productivity and financial performance targets for Canada Post, and provided for a rate-capping mechanism for basic lettermail.

¹⁷¹ TD Securities Inc., *Summary Report regarding Canada Post Corporation to the Minister Responsible for Canada Post Corporation*, April 17, 1997, at 3. (Respondent's Book of Documents, Tab 9).

III. CANADA POST EXCLUSIVE PRIVILEGE PRODUCTS DO NOT CROSS-SUBSIDISE COMPETITIVE PRODUCTS

Introduction

234. As explained above, Canada Post employs a common infrastructure -- a single integrated network -- to offer its range of postal services. This infrastructure has been developed over more than a century not just to carry out Canada Post's exclusive privilege letter mail service, but also to provide competitive services, such as parcel post and express post services.

235. As a multi-product firm, it is sound business practice for Canada Post to take advantage of its economies of scope and scale in pricing so long as the price of its competitive services exceeds their long-run incremental cost. As professor Kleindorfer affirms:

The efficiency rationale for [a multi-product firm to offer both competitive and monopoly products] is to take advantage of economies of scope in using the same network to provide multiple services. To assure that this is done without giving rise to cross-subsidies (either from monopoly products to competitive products or vice versa), detailed cost accounting procedures have been developed that allow firms and regulators to identify the presence of cross-subsidies. The basic test for the absence of cross-subsidies is that revenues from each product and from each group of products offered by the firm be above an incremental cost floor.¹⁷²

236. This long-run incremental cost test for cross-subsidisation has been long accepted.¹⁷³ The Claimant recognises this. Its expert, Dr Neel's refers to this test as a "widely used standard for detecting instances of cross-subsidisation".¹⁷⁴

237. Since 1984, Canada Post has carried out a review known as the Annual Cost

¹⁷² Kleindorfer Report, para. 52. (Respondent's Book of Expert Reports and Affidavits, Tab 20).

¹⁷³ [Redacted]

¹⁷⁴ Neels Report, para. 11. (Investor's Brief of Witness Statements and Expert Reports, Tab 5).

Study. It uses an activity-based, incremental costing methodology to allocate costs among its services. It is designed to determine long-run incremental costs.

238. As set out more fully in the affidavit of William Price, the Annual Cost Study was developed and implemented with the assistance of expert accountants and economists.¹⁷⁵ The Annual Cost Study provides costing data that assists Canada Post in making business and product-pricing decisions and serves as the basis for ensuring that Canada Post does not cross-subsidise its competitive services with revenues from exclusive privilege services.

239. For the past eight years, as directed by the Government of Canada, Canada Post has retained an outside auditor that has reviewed the Annual Cost Study annually and has certified that Canada Post is not cross-subsidizing its competitive services with revenues from exclusive privilege services. In addition, Canada has retained leading experts in the area of pricing and costing who have confirmed that the Annual Cost Study is an appropriate and effective means for testing for cross-subsidy.

1. Canada Post's Annual Cost Study

a) Creation of the Annual Cost Study

240. In the early 1980s, as Canada Post came into being, the newly formed Crown corporation turned its attention to the need for a more sophisticated product costing review system than had been in place for the Post Office Department. Until 1979, it had utilized a national product costing review called the Revenue and Expense Apportionment System. The discontinuance of this system resulted from a combination of management's recognition of the inadequacies of fully-distributed costing, the emerging refinement of the long-run incremental cost approach before the United States Postal Rates Commission, and the commencement of detailed planning for the creation of Canada Post as a Crown corporation.¹⁷⁶

¹⁷⁵ Price Affidavit, paras. 13-17. (Respondent's Book of Expert Reports and Affidavits, Tab 31).

¹⁷⁶ Price Affidavit, paras. 11-12. (Respondent's Book of Expert Reports and Affidavits, Tab 31).

241. The corporation required better costing data for a number of business reasons, including, among other things, to price its products more effectively as it moved toward financial self-sufficiency and to obtain appropriate compensation from the Government of Canada for government-directed free or artificially low-priced services such as Parliamentary Free Mail. In addition, because the Canada Post Corporation Act confirmed the mandate of Canada Post to provide both exclusive privilege and competitive services, Canada Post required costing information to demonstrate it was not cross-subsidizing its competitive services with revenues from its exclusive privilege services.¹⁷⁷

242. To design the new system Canada Post hired experienced economic and financial experts, many from Bell Canada which was at the time the Canadian leader in regulatory product-costing.¹⁷⁸ [Redacted]¹⁷⁹ [Redacted]¹⁸⁰

243. Canada Post also took into account the postal rate hearings and related legal proceedings that had taken place in the United States during the 1970s and that had changed the approach in the United States to cost accounting in the United States postal industry. These changes caused the United States Postal Service to discontinue its own fully-distributed costing system and to adopt activity-based costing, focusing on long-run incremental costs, as the appropriate costing system in the early 1970s.¹⁸¹

244. Implementation of the Annual Cost Study began in 1984, when certain interim cost reports were produced. Over subsequent years, the Annual Cost Study has been further refined and improved.¹⁸²

¹⁷⁷ Price Affidavit, para. 12. (Respondent's Book of Expert Reports and Affidavits, Tab 31).

¹⁷⁸ Price Affidavit, para. 12. (Respondent's Book of Expert Reports and Affidavits, Tab 31.)

¹⁷⁹ [Redacted]

¹⁸⁰ [Redacted]

¹⁸¹ Price Affidavit, para. 16. (Respondent's Book of Expert Reports and Affidavits, Tab 31).

¹⁸² Price Affidavit, at 33-39. (Respondent's Book of Expert Reports and Affidavits, Tab 31).

b) How the Annual Cost Study Works

245. The Annual Cost Study is an activity-based-costing (“ABC”) system. ABC is a standard approach to costing used around the world. ABC treats the production process as a sequence of activities -- for example, sales, processing and transportation. Each of the activities associated with the provision of a product causes the use of resources, and therefore causes the corporation to incur costs. The system links activities and costs, and then, where appropriate, links those costs to products. As Professor Bradley states:

[Redacted]¹⁸³

246. The Annual Cost Study has three key elements:

- allocation of revenue to product;
- allocation of cost to product; and
- comparison of product revenue to product cost.

247. Allocating revenue to product [Redacted]¹⁸⁴

248. *Allocating costs to products* The Annual Cost Study identifies the specific activities needed to produce each product, calculates the costs of those activities and sums those costs in order to arrive at a product’s incremental costs.

249. [Redacted]¹⁸⁵

250. [Redacted]¹⁸⁶:

[Redacted]¹⁸⁷

¹⁸³ [Redacted]

¹⁸⁴ [Redacted]

¹⁸⁵ [Redacted]

¹⁸⁶ [Redacted]

251. [Redacted]

252. [Redacted]¹⁸⁸

253. [Redacted]¹⁸⁹

2. Results of the Annual Cost Study

a) Annual Audits of the Annual Cost Study

254. Since the 1996/1997 fiscal year, pursuant to a requirement imposed by the Minister responsible for Canada Post, Canada Post has been required to have an annual audit of its Annual Cost Study carried out and include an auditor's statement in the annual report certifying as to the existence or absence of cross-subsidization between the non-commercial and commercial products of the corporation.

255. [Redacted]¹⁹⁰ During this period, it was not possible to obtain an audit opinion respecting the Annual Cost Study, as there were no audit standards in place in Canada with respect to this kind of assurance opinion.

256. [Redacted]¹⁹¹

3. [Redacted]

257. [Redacted]:

[Redacted]

[Redacted]¹⁹²

¹⁸⁷ [Redacted]

¹⁸⁸ [Redacted]

¹⁸⁹ [Redacted]

¹⁹⁰ [Redacted]

¹⁹¹ [Redacted]

258. [Redacted]¹⁹³

259. In its memorial the Claimant asserts at paragraph 249 and through the report of Mr. Kenneth M. Dye that:

“Canada Post retained an economist [Professor Bradley] to develop the methodology and its auditors did not retain an independent expert to review this economic analysis, as required by relevant audit guidelines”.

260. This is incorrect.

261. [Redacted]¹⁹⁴ [Redacted]¹⁹⁵

262. The Raymond Chabot Grant Thornton Audits

263. Since 1999/2000 Raymond Chabot Grant Thornton (“RCGT”) have been the auditors of the Annual Cost Study. The audits by RCGT from 1999 to 2004 have confirmed that Canada Post did not cross-subsidise its competitive services group or any market grouping of competitive services.¹⁹⁶

a) Expert Support for the Annual Cost Study

264. In preparation for this proceeding, Canada retained three internationally recognised and respected economics and accounting experts who have been asked, among other things, to evaluate the Annual Cost Study and provide their opinions with respect to its appropriateness and effectiveness as a means for ensuring that revenues from Canada Post’s exclusive privilege services are not used to cross-subsidize its

¹⁹² [Redacted]

¹⁹³ [Redacted]

¹⁹⁴ [Redacted]

¹⁹⁵ [Redacted]

¹⁹⁶ Price Affidavit, para. 42. (Respondent’s Book of Expert Reports and Affidavits, Tab 31); and Audit Reports of RCGT contained in Price Affidavit, Exhibits G, H, I K [Redacted]. (Respondent’s Book of Expert Reports and Affidavits, Tab 31).

competitive services.

265. The first, Dr. John Panzar, is the Louis W. Menk Professor of Economics at Northwestern University in Chicago. He is a recognised expert in the area of pricing and costing in multi-product network industries, such as postal services.

266. Dr. Panzar states in his expert affidavit that it is appropriate and necessary for Canada Post, because of Canada’s universal service obligation, to be providing both monopoly and competitive postal services.¹⁹⁷ Dr. Panzar states that the appropriate test for determining whether or not a firm like Canada Post is engaged in cross-subsidization is the long-run incremental cost test, which he states requires that: “[t]he revenues collected from any service (or group of services) must be at least as large as the additional (or incremental) cost of adding that service (or group of services) to the enterprise’s other offerings.”¹⁹⁸ Dr. Panzar describes this as

... a very intuitive fairness standard. For if a service’s revenues do not cover the additional costs the enterprise incurs in providing it, the users of that service are receiving a subsidy from the enterprise’s other customers. On the other hand, if the revenues from all services (or groups of services) are at least as large as their incremental costs, then no user or group of users is burdened by their provision.¹⁹⁹

267. [Redacted]²⁰⁰ [Redacted]²⁰¹

268. The second expert consulted, Dr. Michael Bradley, is an expert on the theory and practice of postal service costing. Dr. Bradley is a Professor of Economics at George Washington University in Washington, D.C. and has studied postal economics and costs for more than two decades. He has also written numerous books and articles on these

¹⁹⁷ Panzar Report, at 3. (Respondent’s Book of Expert Reports and Affidavits, Tab 29).

¹⁹⁸ Panzar Report at 25. (Respondent’s Book of Expert Reports and Affidavits, Tab 29).

¹⁹⁹ Panzar Report at 25. (Respondent’s Book of Expert Reports and Affidavits, Tab 29).

²⁰⁰[Redacted]

²⁰¹ [Redacted]

subjects, and appeared before the Postal Rate Commission as an expert on postal costs on no less than ten different occasions.

269. Dr. Bradley is very familiar with the details of Canada Post's Annual Cost Study. He has advised on it since 1984. He confirms that it is perfectly appropriate for Canada Post to make use of economies of scale and scope and use its single network for both monopoly and non-monopoly products.²⁰² He, like Dr. Panzar, confirms that long-run incremental costing is the appropriate costing method to determining costs in a multi-product firm and to test for cross-subsidy. He states that the Annual Cost Study embodies this approach and accurately tests for cross-subsidy.²⁰³

270. Professor Robin Cooper is a leading expert in the area of cost management systems. He is the father of activity-based costing movement, upon which the annual cost Study is based. Canada engaged Professor Cooper for the purposes of this case to carry out an exhaustive analysis of the Annual Cost Study.

271. Professor Cooper examined 12 different activities representing the four different kinds of costs -- product-specific, separable, dependent and common/fixed costs. He has described his analysis and set out his conclusions as follows:

[Redacted]

[...]

In summary, at the Canada Post every competitive and concessionary product segment earns revenues in excess of its long run incremental cost and is therefore adding contribution to Canada Post's bottom line. If such products were excluded from the product lineup, then the costs of the exclusive privilege products would increase. They would also increase if the Canada Post was forced to raise prices above optimum levels, thereby causing the contribution earned by the competitive and concessionary products to fall. In either scenario, if Canada Post could not find other products to deliver to compensate for this lost

²⁰² Bradley Report, at 4-5. (Respondent's Book of Expert Reports and Affidavits, Tab 3).

²⁰³ Bradley Report, at 17-23. (Respondent's Book of Expert Reports and Affidavits, Tab 3).

contribution, then the price of the exclusive privilege products must increase.²⁰⁴

4. The Claimant’s “Equal Treatment” Approach is Contrary to All Accepted Economic Theory and Regulatory Practice

272. The Claimant criticizes the adequacy of Canada Post’s Annual Cost Study and the audits of the Annual Cost Study, arguing that Article 1102 of the NAFTA requires Canada to ensure “equality of competitive opportunities” for the Claimant.²⁰⁵ The Investor bases this argument on the affidavit of its economist Kevin Neels, who asserts that:

Canada Post’s competitive services should be sufficient not only to cover the incremental costs of those services, but also to generate a contribution margin for use of Canada Post’s network comparable to what a private firm would be willing to pay to buy access to that network.²⁰⁶

273. [Redacted]²⁰⁷ As Canada has amply demonstrated above, the long-run incremental cost test, as measured through an activity-based costing system, is the appropriate means to make that determination.

274. Indeed Mr. Neels himself acknowledges that:

When conducted in a thorough and rigorous manner, the general approach employed in the ACS can serve two valuable purposes. First, it provides data that can be used either to (a) detect the existence of services or groups or services that are benefiting from or are the sources of cross subsidy, or (b) to establish that cross-subsidies do not exist.²⁰⁸

²⁰⁴ [Redacted]

²⁰⁵ Investor’s Memorial, para. 536.

²⁰⁶ Neels Report, para. 9. (Investor’s Brief of Witness Statement and Expert Reports, Tab 5).

²⁰⁷ [Redacted]

²⁰⁸ Neels Report, para. 34. (Investor’s Brief of Witness Statements and Expert Reports, Tab 5).

275. Mr. Neels' "equal treatment approach", in contrast, is untested and speculative. Not surprisingly Mr. Neels' makes no reference to academic writings or regulatory decisions that support his analysis.

276. Canada has asked three highly distinguished experts to respond to Mr. Neels' Report, Professor Panzar, Professor Cooper and Paul Kleindorfer.

277. Professor Panzar notes that the essence of Mr. Neels' position is concisely summarized in the following excerpt from his Affidavit:

So defined, equal treatment requires that the revenues generated by Canada Post's competitive services should be sufficient not only to cover the incremental costs of those services, but also to generate a contribution margin for use of Canada Post's network comparable to what a private firm would be willing to pay to buy access to that network. In other words, Canada Post should attempt to maximize the contribution it earns by providing competitive services, just as it would attempt to maximize the contribution it would earn if it chose to allow a private firm to use its network.²⁰⁹

278. Professor Panzar responds to this position as follows:

[Redacted]²¹⁰

279. Professor Cooper indicates that he has read the report of Dr. Neel several times and subjected it to significant scrutiny. He states that:

[T]he report contains a number of statements that need to be addressed. In particular, five major issues are raised by the report:

1. Canada Post has unfair economic advantages that should be negated by the use of equal treatment based transfer prices.

²⁰⁹ Neels Report, para. 9. (Investor's Brief of Witness Statements and Expert Reports, Tab 5).

²¹⁰ [Redacted]

[Redacted]²¹¹

280. After a detailed and carefully studies analysis, Professor Cooper concludes his findings contradict those of Mr. Neels. He explains:

[Redacted]²¹²

281. Professor Kleindorfer is a distinguished professor of economics at the Wharton School of the University of Pennsylvania and is a renowned international expert on the postal sector. [Redacted]:

[Redacted]²¹³

282. [Redacted]:

[Redacted]²¹⁴

283. [Redacted]:

[Redacted]²¹⁵

284. [Redacted]

285. [Redacted]²¹⁶ The Royal Mail access policy, posted on the internet²¹⁷ and requires the Royal Mail to track delivery zone patterns and other cost drivers and to charge customers for access accordingly. Generic access rates are to be posted and,

²¹¹ [Redacted]

²¹² [Redacted]

²¹³ [Redacted]

²¹⁴ [Redacted]

²¹⁵ [Redacted]

²¹⁶ [Redacted]

²¹⁷ United Kingdom Royal Mail: *Access to Royal Mail Postal Facilities*, Explanatory Note on Non-Uniform Access Pricing, 15 October, 2004. (Respondent's Book of Documents, Tab 9).

where costs diverge from the national average, specific access rates are to be resolved in good faith between the Royal Mail and the customer involved. As Professor Kleindorfer points out, there is nothing in these policies that requires the Royal Mail to charge its own divisions the same access prices it charges external customers.

IV. FRITZ STARBER

286. Following the Statement of Claim, in early 2001, Leslie Ross, a sales representative at Fritz Starber Inc. (“Fritz Starber”), met Don Lavictoire, a Canada Post officer in the Transportation Group, at a transportation conference.

287. At the time, Lavictoire was exploring whether there were reasonably-priced air transport alternatives to the use by Canada Post of the USPS’ land and surface transportation services for parcels originating in Canada and destined for the Caribbean, Central and South America. In that context, Lavictoire had discussions with Ross at the conference as well as with other representatives from the industry, including AE & I Danza.

288. In April 2001, Lavictoire followed up on these discussions with further requests for information from various freight forwarders including AE & I Danza and Kyehn & Nagal and Fritz Starber.²¹⁸

289. In response to these requests, Lavictoire received pricing information from the various companies he had approached, including Fritz Starber. While Fritz Starber’s prices appeared to be more interesting than those of the other freight forwarders, none of these companies offered better prices than Canada Post’s then current arrangement for transportation of mail destined for the Caribbean, Central and South America. The USPS preferential rates offered to Canada Post for land transportation services for this mail were significantly cheaper.²¹⁹ As a result, Lavictoire did not explore the matter further;²²⁰

²¹⁸ Lavictoire Affidavit at 5. (Respondent’s Book of Expert Reports and Affidavits, Tab 24); e-mail to Ross attaching spreadsheets with general information respecting volumes and destination. (Investor’s Book of Documents, Tab U194). (confidential)

²¹⁹ Lavictoire Affidavit. (Respondent’s Book of Expert Reports and Affidavits, Tab 24)

he did not contact Canada Post's Procurement Unit to ask them to proceed with a tender call for this business.²²¹

290. The decision not to proceed with a tender was based on business considerations, not on any subsequent UPS ownership of Fritz Starber²²² or because of this litigation. Canada Post's policy is to pursue all business opportunities that are advantageous to it, even with companies that have legal actions against Canada Post.²²³ [Redacted]²²⁴

291. In December 2001, Fritz Starber initiated a complaint with the Canadian International Trade Tribunal ("CITT") in relation to the provision of these transportation services to Canada Post. After having requested certain documentation²²⁵ and having reviewed exchanges between Fritz Starber and Canada Post, "[t]he Tribunal [was] unable to conclude from the evidence submitted that a designated contract exist[ed] at this time". It went on to say: "There is no evidence that CPC has issued solicitation documents pertaining to a current or future procurement". In referring to the Lavictoire e-mail to Ross, it was of the view that "the E-Mail from a representative of CPC, dated April 12, 2001, enclosing a spreadsheet, does not constitute tender documentation."²²⁶ On this basis, the Tribunal refused to accept Fritz Starber's complaint.

²²⁰ Lavictoire Affidavit. (Respondent's Book of Expert Reports and Affidavits, Tab 24)

²²¹ Lavictoire Affidavit. (Respondent's Book of Expert Reports and Affidavits, Tab 24); Craven Affidavit. (Respondent's Book of Expert Reports and Affidavits, Tab 8)

²²² According to the Investor's Memorial, at para. 46, UPS acquired Fritz Starber on May 24, 2001.

²²³ Craven Affidavit. (Respondent's Book of Expert Reports and Affidavits, Tab 8).

²²⁴ [Redacted]

²²⁵ Letter from Canadian International Trade Tribunal, dated December 20, 2001. (Respondent's Book of Documents, Tab 12).

²²⁶ Decision of the Canadian International Trade Tribunal, December 27, 2001. (Respondent's Book of Authorities, Tab 72).

V. PUBLICATIONS ASSISTANCE PROGRAM

1. The PAP is an element of Canada's cultural policy

292. Canada's cultural and social policy with respect to publications is designed to achieve two main purposes: to connect Canadians to each other through the provision of accessible Canadian cultural products; and to sustain and develop the Canadian publishing industry.²²⁷ Because of high subscription sales and low newsstand sales in Canada, the Government of Canada has sought to achieve these goals through the subsidization of the costs of mail delivery.

293. Canada has provided subsidies to publications since prior to confederation in 1867. Early on, Canada established a postal subsidy program, whereby it offered reduced postal rates to eligible publications. Other countries such as Austria, Australia, Belgium, France and the United States, have also adopted preferential postal rates to support access to national publications.

294. Over the years, Canada has adjusted its postal subsidy for Canadian publications. Distribution assistance is currently provided through the Publications Assistance Program ("PAP").

295. The PAP is part of a broader Government cultural policy that supports the Canadian periodical publishing industry.²²⁸ This policy includes provisions of the *Income Tax Act* on original Canadian content and investment review in the foreign publishing sector. It also includes provisions of the *Foreign Publishers Advertising Services Act* regarding advertising directed at Canadians.

²²⁷ These two objectives have been recognized since early on by the Government of Canada. See The O'Leary Commission: The Royal Commission on Publications (Ottawa: Queen's Printer, 1961) at 58, 86. (Respondent's Book of Documents, Tab 11); Fizet Affidavit, Exhibit A. (Respondent's Book of Expert Reports and Affidavits, Tab 12); The Glassco Commission: The Royal Commission on Government Organization in the 1960's (Ottawa: Queen's Printer, 1962-1963) at 326. (Respondent's Book of Documents, Tab 10). Fizet Affidavit, Exhibit B. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

²²⁸ Fizet Affidavit, para. 8. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

2. Operation of the Publications Assistance Program

296. The PAP provides subsidies to a broad range of eligible Canadian publications, including magazines and periodicals (e.g. *Active Living Magazine* and *Geoscience Canada*), small community weekly newspapers (e.g. the *Dundalk Herald* and the *Bowen Island Undercurrent*), and certain other weekly newspapers (e.g. the *Ukrainian News* and the *Sackville Tribune Post*) mailed in Canada for delivery in Canada.²²⁹ Last year, the PAP supported the distribution of more than 200 million copies of Canadian publications to Canadian readers and retailers.

297. The operation of the Program is described in the affidavit of William Fizet, Director at the Department of Canadian Heritage, responsible for periodical publishing programs.²³⁰ The Program, in its current form, results from the 1996 review and the 1997 World Trade Organization decision.²³¹ It provides subsidy payments directly to eligible publications through individual accounts at Canada Post to be used against the cost of Canada Post's publication mail distribution services.²³²

298. [Redacted]²³³ The Heritage Department sets the eligibility criteria for publishers to gain access to the PAP. The eligibility criteria, reviewed regularly, reflect the overall cultural policy objectives of the PAP. Currently, approximately 1200 Canadian publications are eligible for the PAP.

299. [Redacted].

300. [Redacted].

²²⁹ <http://www.pch.gc.ca/progs/ac-ca/pubs/ic-ci/pubs/report-rapport/papar_e.html.>

²³⁰ Fizet Affidavit, paras. 10-19. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

²³¹ *Canada - Certain Measures Concerning Periodicals*, Report of the Appellate Body, WT/DS31/AB/R, 20 June 1997. (Investor's Schedule of Documents, Tab U65).

²³² See Facts, section "Services provided by Canada Post" for a description of the Canada Post publication mail services.

²³³ [Redacted]

3. Providing the distribution assistance through Canada Post

301. The Heritage Department periodically consults on, and re-examines the delivery of programs such as the PAP to make sure they continue to be the best way to achieve Canada's cultural policy objectives. [Redacted]²³⁴ In August 2001, the Heritage Department consulted its stakeholders and clients on various issues, including whether to pursue alternatives to the program delivery by Canada Post. The consultations included professional publishing associations, representing all niches of publications and independent publishers. Representations from the industry were generally supportive of Canada Post's involvement in the delivery of the PAP.

302. Ultimately, the Heritage Department determined that delivery through Canada Post continued to be the best and most cost effective way to meet its policy objectives for the following reasons:²³⁵

- Canada Post provides the most effective way of reaching all of their subscribers across Canada at a reasonable price, given its existing universal service obligation. Courier companies, including the Claimant and UPS Canada, focus on time-definite delivery within densely populated areas. They do not, as a matter of course, go to every address in Canada. No Canadian courier company could carry out the affordable distribution of these publications to all points across the country.²³⁶
- Given the volume of goods transported by Canada Post pursuant to the PAP, the Heritage Department is able to negotiate more favourable rates for mailing Canadian publications than would otherwise be possible. Furthermore, Canada Post also contributes significant funds to the PAP. In addition, as part of the current arrangement, the Heritage Department negotiated special favourable rates

²³⁴ [Redacted]

²³⁵ Fizez Affidavit, para. 20-24. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

²³⁶ Investor's Memorial, para. 354: UPS recognizes this.

from Canada Post for library mailings between public libraries and their patrons and for inter-library loans.

- In comparison with traditional contribution programs, the PAP is administratively streamlined, efficient and a model of accountability in terms of public spending. The fact that funds are placed by the Heritage Department directly into individual publishers accounts at Canada Post ensures that PAP publishers can only spend their funding for its intended purpose.

VI. CUSTOMS TREATMENT OF MAIL AND COURIER

303. Customs processes goods imported as mail and by courier in its capacity as the regulator of Canada's borders. Customs makes determinations on the admissibility of goods in the context of national security concerns and economic interests of Canada. While in the context of economic interests of the country, Customs makes determinations on the applicability of duties and taxes. The manner in which mailed goods arrive is different from courier shipments and accordingly Customs has designed separate processes for mailed goods and courier shipments.

304. In its claims against Canada, the Claimant raises, confuses or impugns three separate and distinct Customs treatments, which are accurately described as follows:

305. *Customs International Mail Processing System:* The Customs International Mail Processing System is the treatment that Customs applies to goods imported as mail. It is fully described in Customs Memorandum D5-1-1 and in Part 3(c) "Description of the Customs International Mail Processing System" below. In substance the Customs International Mail Processing System has been in existence for over a hundred years and its essential elements have remained virtually unchanged.

306. Customs has no information about international mail coming from a foreign postal administration prior to its presentation by Canada Post. Expedited delivery or time definite delivery is ordinarily not a major factor in the transmission of mailed items.

307. Because of the nature of their business, courier companies are in a position to provide detailed and reliable advance information about their shipments to Customs authorities. Couriers have end-to-end control of their shipments thereby increasing security of the supply chain on which Customs can rely. Clients of courier companies demand time expedited and time definite deliveries.

308. *Courier Low Value Shipment (LVS) Program:* The Courier/LVS Program is the treatment that Customs applies to goods imported by courier and it differs in major respects from Customs International Mail Processing System. The Courier/LVS fully

described in Customs Memorandum D17-4-0 and in Part 4(c) “Description of the Customs process for goods imported ‘by courier’ (Courier/LVS program)” below. With the advent of the courier industry in the late 1970s, the Courier LVS Program was introduced in 1993 to respond in part to the time-sensitive and time-definite business exigencies of the courier industry in respect of low value shipments. The Claimant, UPS Canada, or both had a large part in the creation of the Courier LVS Program. Over forty courier companies, including UPS Canada, currently participate in the Courier LVS Program.

309. *The Postal Imports Agreement:* The Agreement Concerning Processing and Clearance of Postal Imports (“Postal Imports Agreement”) is a formal contract for services entered into on an interim basis on June 30, 1992 between Customs and Canada Post and formalized on April 25, 1994. The terms of the Postal Imports Agreement are fully described in the agreement itself and in parts 3(d) “Changes to the Processing System of International Mail” and 3(d) “Fee Payments for the Provision of Services” below. The Postal Imports Agreement is not a Customs treatment applicable to goods imported as mail or to goods imported by courier. Rather, under the Postal Imports Agreement, Customs has contracted out to Canada Post certain material handling, data entry and, as agent of Customs, collections functions for the processing and collection of duties and taxes on goods imported as mail. In return for these services, Customs pays Canada Post a fee.

1. Mandate, Organization, and Principles of Customs

310. *Mandate:* The role of a customs agency is to protect a country’s national security and economic interests through regulation of the nation’s borders.

311. Canada Customs’ mandate is to control the movement of people and goods into Canada, and where applicable, to assess and collect duties and taxes on those goods.²³⁷ Customs administers aspects of over 90 federal and provincial statutes and regulations,

²³⁷ Jones Affidavit para. 17. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

ranging from the collection of provincial taxes to the enforcement of the provisions of Canada's *Criminal Code*.²³⁸ Customs:

- i) facilitates the movement of low-risk goods and people while focusing targeted inspections on goods or people of high-risk;
- ii) prevents dangerous and inadmissible goods and people from entering Canada;
- iii) protects Canadians and the environment from prohibited, hazardous or toxic products;
- iv) detects contraband and health and safety threats;
- v) assesses and collects duties, taxes and fees on imported goods; and
- vi) ensures the accuracy of trade data for the benefit of the Canadian economy.²³⁹

312. *Organization:* With the passage of time, the place of Customs within the organizational structure of the Canadian Government has varied, but the mandate of protection of national security and economic interests has remained constant. Between 1997 and 2002, the relevant period for this arbitration, Customs was reorganized twice. During this time, Customs was known, respectively, as the Department of National Revenue (Customs and Excise) and as the Canada Customs and Revenue Agency.²⁴⁰

313. Increased concerns for public safety and security caused the Government of Canada to create in December 2003 the Canada Border Services Agency ("CBSA"), as part of the new Department of Public Safety and Emergency Preparedness. With the establishment of CBSA within the Department of Public Safety and Emergency Preparedness Canada, the Government of Canada has brought all regulatory matters dealing with the movement of goods and people across Canada's national borders under a

²³⁸ Jones Affidavit para. 17. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

²³⁹ Jones Affidavit para. 17. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

²⁴⁰ Jones Affidavit para. 9. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

single governmental agency. The CBSA is comprised of customs, immigration, food safety, animal health and plant protection. This structure is similar to that adopted by the government of the United States with the US Customs and Border Protection comprising a critical element of the Department of Homeland Security.²⁴¹

314. For the sake of clarity, references to “Customs” or “Canada Customs” should be taken as references to Customs and Excise, Canada Customs and Revenue Agency, and CBSA, depending on the timeframe.

315. *Customs Considerations for the Creation of Import Programs*: All goods imported into Canada are subject to the provisions of the *Customs Act* and *Customs Tariff*²⁴². The *Customs Act* provides the authority to Customs to assess and collect duties. The *Customs Tariff*²⁴³ sets out the legal basis on which imported goods are entitled to particular tariff treatment, on which the country of origin is determined, and for the granting of remission of duties and taxes. Also applicable are Customs’ memoranda known as “D-memos” that provide traders with the information necessary to comply with all customs requirements. The D-memos publish the relevant legal and administrative guidelines to the trade community. Commercial enterprises in the international movement of goods, [Redacted]²⁴⁴, subscribe to the D-memos and receive regular updates communicating, among other matters, the requirement and procedures associated with importing goods.²⁴⁵

316. The tenets underlying all Customs programs are voluntary compliance (through self-assessment), with the use of selective physical examination and post-audit

²⁴¹ Jones Affidavit paras. 10-12. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁴² *Customs Act*, R.S. 1985, c.1 (2nd Supp.). (Investor’s Schedule of Documents, Tab U383); and Jones Affidavit, paras. 18-19. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁴³ *Customs Tariff* (1997, c. 36). (Respondent’s Book of Authorities, Tab 16).

²⁴⁴ [Redacted]

²⁴⁵ Jones Affidavit, para. 22. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

verification, effective risk management and effective sanctions.²⁴⁶

317. Customs assesses and collects duties and taxes in one of two ways: through a determination by a Customs officer or by self-assessment and remittance.²⁴⁷ In the first case, a Customs officer may examine the imported goods and exercise his or her statutory authority to make a determination of any duties and taxes owing. In the case of self-assessment and remittance, Customs officers do not intervene directly. Rather, Customs relies on the importer, the owner of the goods or an agent acting on behalf of the importer to understand and comply with the applicable requirements through self-assessment, to account for the goods, and remit the duties and taxes owed within a prescribed time frame.

318. Customs relies extensively on voluntary compliance for the effective and efficient administration of its various programs. Self-assessment and remittance programs are particularly appropriate when dealing with knowledgeable, technically competent and responsible commercial enterprises engaged in importing activity. Given the complexity of international trade transactions, many importers rely on professional expertise such as that provided by licensed customs brokers to assist them in meeting their compliance obligations.²⁴⁸

319. Customs programs for both goods imported “as mail” and goods imported “by courier” are developed with the objective of responsible and effective enforcement, taking into account the circumstances surrounding the importation, including the risks of non-compliance and the needs and demands of the importing community. In developing its programs, Customs manages the risks of non-compliance by the application of various risk management strategies.²⁴⁹

²⁴⁶ Jones Affidavit, para. 87. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁴⁷ Jones Affidavit, paras. 89-90 and 144-149. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁴⁸ Jones Affidavit, paras. 88 and 89. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁴⁹ Jones Affidavit, para. 91. (Respondent’s Book of Expert Reports and Authorities, Tab 19).

320. A key consideration in Customs import program design is the capacity of private-sector trade and transport enterprises to co-operate with Government security authorities such as Customs to promote greater security throughout the supply chain from the time goods are packed through to arrival at their destination.

321. The aim of supply chain security is to encourage and support producers and international transporters to introduce co-operative, voluntary measures designed to enhance the exchange of information with authorities and to use employee awareness and management controls and systems to lessen the likelihood of unwitting involvement of company staff, assets and shipments in illicit import activity.²⁵⁰

322. In developing the programs specific to postal imports and courier shipments, Customs took into account the following considerations:²⁵¹

- The existence and extent of any international obligations through the World Customs Organization, the Universal Postal Union, and any bilateral treaty obligations;
- The nature and value of the goods generally imported;
- Whether the goods generally imported are for commercial or casual use;
- The extent to which the importer/exporters are known;
- Whether the information provided is reliable;
- By whom and at what time in the process information is made available;
- The mode of carriage/transport utilized;
- The susceptibility of a legitimate import transaction to be subverted for illicit purposes; and
- The involvement, if any, of third party service providers and, in particular, customs brokers.

²⁵⁰ World Customs Organization Task Force Report, *High Level Guidelines for Cooperative Arrangements Between Members and Private Industry to Increase Supply Chain Security and Facilitate the Flow of International Trade*, (TF0004E3), Brussels, 13 May 2003. (Respondent's Book of Documents, Tab 14).

²⁵¹ Jones Affidavit, para. 92. (Respondent's Book of Expert Reports and Authorities, Tab 19).

2. World Customs Organization

323. The World Customs Organization is an international organization whose mission is the standardization, simplification and harmonization of customs procedures. Its 162 Members are responsible for processing more than 95% of the world's trade. To fulfil its mission, the World Customs Organization:²⁵²

- Establishes, maintains, supports and promotes international instruments for the harmonization and uniform application of simplified and effective Customs systems and procedures;
- Endeavours to maximize Members' co-operation with each other and with international organizations and agencies that combat transnational offences;
- Assists Members in their efforts to meet the challenges of the modern business environment and adapt to changing circumstances.

324. In an effort to standardize and simplify customs procedures so as to encourage international trade, in 1973 the Members of the World Customs Organization adopted the "International Convention on the Simplification and Harmonization of Customs Procedures" ("*Kyoto Convention*"), which entered into force in 1974.²⁵³

325. The *Kyoto Convention* is divided into two parts: the body and the Annexes. The body contains 19 Articles on matters essential for implementation, such as the treaty's scope, structure and management. The 31 Annexes each cover separate customs procedures open for each member government to adopt. For instance, Annex A.3, deals with Customs formalities applicable to commercial means of transport, which would include express consignment or courier shipments. Annex F.4, by contrast, pertains to the customs formalities applicable to postal traffic.

326. In 1995, the World Customs Organization commenced a four-and-a-half-year

²⁵² World Customs Organization website <<http://www.wcoomd.org/ie/En/AboutUs/aboutus.html>>; see also Parsons Affidavit, para. 10. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

²⁵³ *International Convention on the Simplification and Harmonization of Customs Procedures*, 18 May 1973, 950 U.N.T.S. 270 (entered into force 25 September 1974) [*Kyoto Convention*]. (Respondent's Book of Authorities, Tab 6); for greater explanation see Parsons Affidavit, paras. 15-23. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

review process of the *Kyoto Convention*. [Redacted]²⁵⁴ In the view of the World Customs Organization membership, significant differences between postal traffic and other types of commercial traffic, including express consignment traffic, justified a separate annex and thus separate treatment for the postal imports.²⁵⁵

327. The *Revised Kyoto Convention* was unanimously adopted in June of 1999 but has not yet entered into force.²⁵⁶ It contains a separate annex dealing with the distinct nature of the postal traffic.²⁵⁷ The fact that most of the relevant provisions remained the same is an acknowledgement by the contracting parties that the principles and practices agreed to in the 1970s were still fundamentally applicable in the 1990s.²⁵⁸

328. The *Revised Kyoto Convention* comprises a Body, a General Annex and Specific Annexes. The General Annex contains the core principles relating to all Customs procedures and practices. It is comprised of 10 Chapters containing a total of 120 provisions set out as Standards which all contracting parties must accept without reservation. Most Specific Annexes are divided into Chapters each of which covers distinct Customs procedures. Each is made up of Standards which are binding.²⁵⁹

329. The express consignment industry, which had not yet grown to a significant degree when the 1973 *Kyoto Convention* was adopted, has special needs that differ from

²⁵⁴ [Redacted]

²⁵⁵ Parsons Affidavit, para. 42. (Respondent's Book of Expert Reports and Affidavits, Tab 30); For more discussion on the differences between mail and express consignment see also Parsons Affidavit para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30); and Rigdon Affidavit, para. 22-29. (Respondent's Book of Expert Reports and Affidavits, Tab 32)

²⁵⁶ Parsons Affidavit, para. 24-27. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

²⁵⁷ *Revised Kyoto Convention*, Annex J.2 "Postal Traffic" (Respondent's Book of Authorities, Tab 9); for greater explanation see Parsons Affidavit, para. 31. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

²⁵⁸ Parsons Affidavit, para. 24-33. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

²⁵⁹ Parsons Affidavit, para. 28-29. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

the needs and special circumstances of postal traffic.²⁶⁰ The World Customs Organization recognised the needs of this industry to provide for the rapid release of very large quantities of low value consignments by adopting in 1994 the “Guidelines on the clearance of express consignments.”²⁶¹ The Guidelines assisted both the express consignment industry and the Customs administrations of the World Customs Organization.²⁶²

330. The Guidelines are not legally binding but are meant as recommended best practices. In 2003, the World Customs Organization approved the Revised Guidelines for the Immediate Release of Consignments by Customs.²⁶³

3. Goods Imported “as mail”

331. Since its inception, prior to Canadian Confederation in 1867, Customs has dealt with international mail. Key Customs activities with respect to international mail have always included preventing dangerous and illegal goods from entering Canada; protecting Canadians and the environment from prohibited, hazardous, and toxic products; facilitating the movement of low-risk goods while focusing on those deemed to be high-risk; detecting contraband and health and safety threats; and assessing and collecting duties, taxes, and fees on imported goods.

a) Characteristics of international mail

332. For Customs, certain distinctive characteristics of mail are relevant in ensuring proper application and enforcement of customs laws for imported goods. The common characteristics of mail items play a crucial role in shaping Customs’ process for goods

²⁶⁰ Parsons Affidavit, para. 60 and paras. 60-62 describing the rationale for the two different systems. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁶¹ Parsons Affidavit, para. 49-50. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁶² Rigdon Affidavit, para. 18. (Respondent’s Book of Expert Reports and Affidavits, Tab 32).

²⁶³ Parsons Affidavit para. 58 (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

imported “as mail”.

333. *Lack of Information:* Canada Post has no advance knowledge of the mail item prior to its receipt of the item upon exchange with the foreign postal administration. The international mail remains under the control of foreign postal administrations until exchange occurs. Customs has no advance information about the foreign sender/exporter, the addressee/importer, or the value or contents of the mail item.²⁶⁴ As a result, Customs is largely unable to conduct risk assessment and other checks prior to the arrival of the goods imported as mail, as it can with courier items.²⁶⁵

334. Goods originating with foreign posts must be accompanied by a standard UPU customs declaration form (“CN22 or CN23”) completed and attached to the mail item by the sender prior to deposit with the foreign posts. For mail destined to Canada, this form is to be completed in either English or French but it often arrives in another language. Despite the requirement, it is estimated that up to 30% of the mailed parcels arriving in Canada have no usable CN22 or CN23 affixed.²⁶⁶ Incomplete, illegible, absent or foreign language CN22 or CN23 forms make it necessary for Customs officials to open and examine the parcels.²⁶⁷

335. *Lack of Contractual Relationship:* In contrast to courier items, no contractual relationship exists between the foreign sender of the goods and Canada Post.²⁶⁸ The sender deposits the goods with and pays its country’s postal administration to have the goods mailed to Canada. [Redacted] In the case of a sender located in the United States it is with the U.S. postal administration, USPS, with whom the sender deposits the goods

²⁶⁴ Jones Affidavit, paras. 129-131. (Respondent’s Book of Expert Reports and Affidavits, Tab 19); Rigdon Affidavit, para. 23. (Respondent’s Book of Expert Reports and Affidavits, Tab 32).

²⁶⁵ Parsons Affidavit, para. 62. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁶⁶ Jones Affidavit, para. 130. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁶⁷ Jones Affidavit, para. 130. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁶⁸ Parsons Affidavit, para. 62. (Respondent’s Book of Expert Reports and Affidavits, Tab 30); Jones Affidavit, para. 53. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

and with USPS with whom the Claimant competes.

“32. [Redacted]...²⁶⁹

“129 ...[Redacted]²⁷⁰

336. *Large Volumes:* The volumes of international mail arriving annually are large²⁷¹ and customs systems have to be devised for efficient processing of these volumes. Each year, approximately 400 million mail items arrive in Canada in a continuous flow, six days a week. Of these, it is estimated that [Redacted] are referred to Customs secondary for revenue collection or regulatory enforcement purposes.²⁷²

337. *Not Expedited or Time-Definite:* Postal traffic is constituted generally of communications or exchange of casual goods between individuals, such as gifts, small business correspondence, mail order and internet purchases.²⁷³ While expedited or time definite deliveries are an absolute business imperative in the express consignment industry, expedited delivery or time definite delivery is ordinarily not a major factor in the transmission of mail.²⁷⁴

b) International Commitments Regarding Mail

338. Canada’s international commitments regarding the movement of international mail are found under the conventions of the Universal Postal Union and the World

²⁶⁹ [Redacted]

²⁷⁰ [Redacted]

²⁷¹ Jones Affidavit, para. 132. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁷² [Redacted] Section 42 of the *Canada Post Corporation Act* states:

42. (1) All mail arriving in Canada from a place outside Canada that contains or is suspected to contain anything the importation of which is prohibited, controlled or regulated under the *Customs Act* or any other Act of Parliament shall be submitted to a customs officer.

²⁷³ Jones Affidavit, para. 134. (Respondent’s Book of Expert Reports and Affidavits, Tab 19) See also Parsons Affidavit, para. 62. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁷⁴ Parsons Affidavit, para. 62. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

Customs Organization. Both the UPU and WCO have recognized the special nature of mail²⁷⁵ and members of those organizations, including Canada, have agreed to adopt procedures in recognition of this distinct nature.

339. The international disciplines governing the international movement of mail under the UPU²⁷⁶, the principles established in the *Kyoto Convention* applicable to mail, in conjunction with any bilateral or regional agreements applicable to mail have had a direct impact on the development of the Customs programs and procedures applied in Canada to facilitate the clearance of postal items. Canada has put these obligations into effect through the *Customs Act* and the *Canada Post Corporation Act* and regulations.²⁷⁷

c) Description of the Customs International Mail Processing System for Goods Imported “as mail”

340. Customs has designed a process for goods imported “as mail”, Customs International Mail Processing System, taking into account the special nature of postal items and Canada’s international commitments and is described in detail in the affidavit of Brian Jones, the video annexed to the Jones affidavit, D-memo D5-1-1²⁷⁸, and the *Fees in Respect of Mail Regulations*.²⁷⁹

341. The time required for mailed goods to be cleared through Customs varies and

²⁷⁵ See for example, Article 1(1) of the *UPU Convention* setting out a “single postal territory” and Annex F.4. of the *Kyoto Convention*. (Respondent’s Book of Authorities, Tabs 1 and 7).

²⁷⁶ See for example Chapter 5 Customs Control of *Manual of rules and procedures for forwarding international mail*, Universal Postal Union, Berne 1996 (Respondent’s Book of Documents, Tab 15); and Section E *Special provisions and Customs matters*, UPU Parcel Post Manual, 2001 Berne. (Respondent’s Book of Authorities, Tab 4).

²⁷⁷ Jones Affidavit, para. 115. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁷⁸ Department of Customs, Canada Memorandum [*D Memo*] D5-1-1, “*Customs International Mail Processing System*”, September 23, 2002. (Investor’s Schedule of Documents, Tab U253).

²⁷⁹ *Fees in Respect of Mail Regulations*, SOR/92-414. (Investor’s Schedule of Documents, Tab U406).

the date and time of clearance are uncertain.²⁸⁰

Prior to Arrival

342. An important consideration in the design of the Customs process for goods imported “as mail” is the series of transactions involving the mail, including the varied number of postal administrations involved, prior to the mail’s arrival in Canada and its presentation to Customs.

343. Mail posted abroad destined for an address in Canada is generally deposited with the sender’s country’s postal administration. In addition to paying the postage, the sender completes a UPU customs declaration (“CN22 or CN23”) form identifying the value and description of the goods and whether the goods are a gift or commercial sample.²⁸¹

344. The foreign postal administration then arranges for the transportation of mail items from the country of export to Canada. The mail may be routed through a number of intermediate countries and transferred to a number of postal administrations on its way to Canada.²⁸²

Arrival in Canada

345. Upon arrival in Canada, mail remains under the control of the foreign postal administration until it is “exchanged” with Canada Post. The exchange of mail occurs at

²⁸⁰ This is to be contrasted with couriers who offer rapid transport, release and delivery. Parsons Affidavit, para. 62. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁸¹ Jones Affidavit, para. 127. (Respondent’s Book of Expert Reports and Affidavits, Tab 19); Cardinal Affidavit, para. 10. (Respondent’s Book of Expert Reports and Affidavits, Tab 4); Parsons Affidavit, para. 71. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁸² Harding Affidavit, paras. 13, 20-21. (Respondent’s Book of Expert Reports and Affidavits, Tab 16).

one of Canada's three inland International Mail Exchange Offices.²⁸³

346. Once Canada Post assumes control of the international mail, Canada Post employees submit all mail suspected of containing goods to Customs for processing²⁸⁴. For reasons of efficiency, and in keeping with World Customs Organization recommended practices, Customs Mail Centres have been co-located with each of the three designated International Mail Exchange Offices where Canada Customs personnel determine admissibility and rate and assess duties and taxes.²⁸⁵

347. Canada Post employees have been instructed to sort mail items and unless otherwise directed by Customs officers, to induct mail not containing goods directly into Canada's mail system without further review by Customs. Canada Post employees stage mail suspected of containing goods on conveyor belts for primary screening by Customs officers. This practice has been in existence for a number of decades, is in compliance with Canada Post's duties under s. 42(1) of the *Canada Post Corporation Act*²⁸⁶, and is consistent with Recommended Practice 15 of the *Kyoto Convention*.²⁸⁷ Contrary to the

²⁸³ Jones Affidavit, paras. 62-63. (Respondent's Book of Expert Reports and Affidavits, Tab 19); Rigdon Affidavit, para. 22, indicates that the United States have a similar exchange process. (Respondent's Book of Expert Reports and Affidavits, Tab 32).

²⁸⁴ This is mandated by s. 42(1) of the *Canada Post Corporation Act*, s. 42(1). (Investor's Schedule of Documents, Tab 218).

²⁸⁵ Jones Affidavit, paras. 63-64. (Respondent's Book of Expert Reports and Affidavits, Tab 19); Parsons Affidavit, para. 20. (Respondent's Book of Expert Reports and Affidavits, Tab 30); see also *Kyoto Convention*, Annex F.4. (Respondent's Book of Authorities, Tab 7), Standard 5 provides that:

“The Customs authorities, with any necessary agreement of the postal authorities, shall designate the Customs offices or other places at which postal items may be cleared.

Notes 1. Joint Customs/post offices may be set up, or Customs officers may be stationed permanently or for certain hours of the day at post offices; in these latter circumstances the postal authorities may provide the Customs with office accommodation.

2. Customs offices may be set up at exchange post offices, which are post offices responsible for exchanging postal consignments with the appropriate foreign postal authorities.”

²⁸⁶ *Canada Post Corporation Act*, s. 42(1). (Investor's Schedule of Documents, Tab 218).

²⁸⁷ Jones Affidavit, para. 135-136. (Respondent's Book of Expert Reports and Affidavits, Tab 19) quotes the Recommended Practice as follows:

Claimant's allegation²⁸⁸, this practice by Canada Post employees does not constitute the performance of "customs duties". Sorting of mail items by Canada Post employees is done at the direction of Customs. Thus, these Canada Post activities are more correctly described as materials handling.

Primary Screening

348. At the primary screening stage, Customs officers visually inspect each piece of mail to determine admissibility and confirm whether the mail contains dutiable goods. If the Customs officer determines that the mail is not subject to duties and taxes and not otherwise prohibited from importation, the Customs officer releases it to Canada Post for delivery.²⁸⁹

Secondary Processing

349. Customs officers refer for further customs processing, known as "secondary processing", mail containing goods which attract duty and taxes or mail warranting further examination.²⁹⁰ Every piece of mail that is referred from primary inspection to secondary processing is affixed with an identifying barcode and basic data appearing on the parcel is entered into a computer system, the Customs' Postal Imports Control System ("PICS").²⁹¹ [Redacted]²⁹²

"15. Recommended Practice

The Customs authorities should not, as a general rule, require the following categories of imported letter-post items to be produced to them:

- (i) postcards, and letter containing personal messages only;
- (ii) literature for the blind;
- (iii) printed papers not subject to import duties and taxes."

²⁸⁸ Investor's Memorial, paras 298-305, 585(d).

²⁸⁹ Jones Affidavit, paras. 65-66. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

²⁹⁰ Jones Affidavit, para. 66. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

²⁹¹ Jones Affidavit, paras. 67. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

350. A Customs officer then conducts a further examination of the mail to determine whether the item is subject to duties or taxes, import controls such as import permits or certificates, enforcement action or inspection by another government department.²⁹³ This examination may include various types of non-intrusive scanning or opening the item to obtain additional information or to verify the representations made by the sender on the Customs declaration form.²⁹⁴ When applicable, the Customs officer determines the origin, tariff classification and value for duty of the imported good and calculates the duties and taxes owing.²⁹⁵ Mail items determined not to be subject to duties and taxes are released by the officer and returned to Canada Post for delivery.

351. If mailed goods are determined to be subject to duties and taxes, an invoice known as an “E-14”, Customs Postal Import Form, is generated and affixed to the mail item. Customs then releases the mail to Canada Post for delivery and revenue collection.²⁹⁶ Canada Post does not complete delivery of the mail to the addressee/importer until the latter has remitted duties, taxes and fees owing.²⁹⁷

d) Changes to the Processing System for International Mail

352. As part of a series of legislative and program reforms introduced by the Government of Canada in 1992, Customs modernized and streamlined its mail processing system by updating an automated system and by contracting out some functions, such as data entry, material handling and revenue collection to Canada Post pursuant to the Postal

²⁹² Jones Affidavit, para. 176. (Respondent’s Book of Expert Reports and Affidavits, Tab 19); [Redacted]

²⁹³ Jones Affidavit, para. 68. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁹⁴ Jones Affidavit, para. 130. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁹⁵ *Customs Act*, Subsection 58(1). (Investor’s Schedule of Documents, Tab U383); see also Jones Affidavit, para. 68. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

²⁹⁶ Jones Affidavit, para. 70. (Respondent’s Book of Expert Reports and Affidavits, Tab 19); see Rigdon Affidavit, para. 27. (Respondent’s Book of Expert Reports and Affidavits, Tab 32) which indicates that US Customs also uses the postal authority to collect duties and taxes; see also Parsons Affidavit, para. 73. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

²⁹⁷ Elliott Affidavit, para. 25. (Respondent’s Book of Expert Reports and Affidavits, Tab 10).

Imports Agreement.²⁹⁸ The Postal Imports Agreement is a contract for these three services. In return for these services, Canada Post collects a fee.

353. Changes were introduced with respect to the way Customs processes incoming international mail. The key factors that led to the changes were:

- i) an increase in the value of the Canadian dollar, relative to the U.S. dollar, which led to an increase in cross-border shopping;
- ii) the introduction of a 7% Goods and Services Tax (the “GST”) in 1991;
- iii) strong pressure from the Canadian mail order and retail businesses who were experiencing a loss of business, indirectly due to the GST and the value of the Canadian dollar; and
- iv) the uneven playing field and incentive created by the relatively high \$40 value of duty and tax free exemption of imported mail order goods.²⁹⁹

354. The Postal Imports Remission Order (the “PIRO”), the *de minimus* value or rate below which no duties or taxes are imposed on mail items (with some exceptions), was reduced from \$40 to \$20.³⁰⁰ The PIRO allows for quick processing of negligible valued goods where it has been determined that the cost of collection outweighs the revenue to be gained.

355. The reduction of the PIRO was expected to cause a surge in the volume of dutiable international mail requiring Customs processing.³⁰¹ At that time, Customs officers were required to determine the admissibility of all goods, the origin, tariff classification and value for duty of dutiable goods, open and reseal packages when

²⁹⁸ Jones Affidavit, para. 173. (Respondent’s Book of Expert Reports and Affidavits, Tab 19); [Redacted]

²⁹⁹ Elliot Affidavit , para. 4. (Respondent’s Book of Expert Reports and Affidavits, Tab 10).

³⁰⁰ Elliot Affidavit , para. 5. (Respondent’s Book of Expert Reports and Affidavits, Tab 10); see also Jones Affidavit, para. 65. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

³⁰¹ Elliott Affidavit, paras. 17-18. (Respondent’s Book of Expert Reports and Affidavits, Tab 10).

necessary, prepare invoices, accept and process mailed revenue payments, and pursue delinquent payments.³⁰² The existing system of collection of duties and taxes, based on an “honour system” whereby goods were released directly to the addressee/recipient with an invoice for the amount of duties and taxes owing and a return envelope, resulted in unacceptable collection rates.³⁰³ Canada needed to improve the collection system then existing. In addition, in an era of budgetary constraints, Customs did not have the resources to continue to carry out all those duties in light of an expected volume surge.³⁰⁴

356. *Maintenance of Core Functions:* The Government of Canada decided to approach Canada Post for the provision of collection of duties and taxes services to Customs³⁰⁵ as had been done on occasion in the past.³⁰⁶ The rationale for this was threefold. First, Customs operations for international inbound mail were already co-located within Canadian postal facilities. Second, Canada Post already had an extensive delivery network and collection-on-delivery system that could easily be utilized for additional collection work in relation to customs duties and taxes.³⁰⁷ Use of this existing network to assist Customs is consistent with Canada Post’s statutory mandate to provide services to or on behalf of other departments “that are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.”³⁰⁸ Third, the

³⁰² Elliott Affidavit, para. 19. (Respondent’s Book of Expert Reports and Affidavits, Tab 10).

³⁰³ Jones Affidavit, para. 175. (Respondent’s Book of Expert Reports and Affidavits, Tab 19); Elliott Affidavit, para. 20. (Respondent’s Book of Expert Reports and Affidavits, Tab 10).

³⁰⁴ Elliott Affidavit, para. 19. (Respondent’s Book of Expert Reports and Affidavits, Tab 10); Cardinal Affidavit, para. 7. (Respondent’s Book of Expert Reports and Affidavits, Tab 4).

³⁰⁵ Cardinal Affidavit, para. 5. (Respondent’s Book of Expert Reports and Affidavits, Tab 4).

³⁰⁶ For example: Department of Customs, Canada, Memorandum 955B, *British and Foreign Packages and Parcels*, December 4, 1897, indicated that certain postmasters at locations not served by a customs office were authorized to collect customs duties on all packages sent to them under Customs manifest. (Respondent’s Book of Documents, Tab 16); Department of Customs, Canada, Memorandum 1259B, *Allowance to Postmasters, Mounted Police Officers and other Officers collecting Customs duties on a Commission bases*, dated January 22, 1904, provided for the payment of a commission by Customs to Canada Post of 10% of duties collected to a maximum of \$75 per calendar month. (Respondent’s Book of Documents, Tab 17).

³⁰⁷ Cardinal Affidavit, para. 8. (Respondent’s Book of Expert Reports and Affidavits, Tab 4).

practice of contracting out the collection function to postal authorities is in line with the practice of many other countries and is in conformity with Recommended Practice 25 of the *Kyoto Convention*, which provides that when customs authorities release goods to the postal administration prior to the payment of duties and taxes, they should make the simplest possible arrangements for the collection of those charges.³⁰⁹ In many countries, including the United States and the United Kingdom, this has resulted in the collection function being performed by the postal authority rather than Customs.³¹⁰

357. The changes to the Customs International Mail Processing System came into effect on July 1, 1992 when Canada Post started performing services for Customs pursuant to an interim agreement signed on June 30, 1992 which was later formalized as the Postal Imports Agreement on April 25, 1994.³¹¹ Since July 1, 1992, Customs has maintained the traditional core Customs' functions, including physical examinations, admissibility determinations, determinations of origin, tariff classification and value for duty, appeals, and inquiries. Material handling functions are contracted out to Canada Post, including separating mail not containing goods (under Customs' direction), closing of parcels, keying data, and attaching invoices.³¹² [Redacted]³¹³ Canada Post was also empowered to act as an agent for Customs for the collection of duties and taxes with respect to goods imported as mail.³¹⁴

³⁰⁸ *Canada Post Act*, s. 5(1)(c). (Investor's Schedule of Documents, Tab U218); see also Jones Affidavit, para. 169. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁰⁹ Parsons Affidavit, para. 73. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

³¹⁰ Parsons Affidavit, paras. 73-74. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Rigdon Affidavit, paras. 27 and 46. (Respondent's Book of Expert Reports and Affidavits, Tab 32)

³¹¹ Cardinal Affidavit, para. 14. (Respondent's Book of Expert Reports and Affidavits, Tab 4); interim agreement dated June 30, 1992 signed by Otto Jelinek and Donald Lander. (Respondent's Book of Documents, Tab18). [Redacted]

³¹² Elliott Affidavit, paras. 21 and 24.. (Respondent's Book of Expert Reports and Affidavits, Tab 10).

³¹³ [Redacted]

³¹⁴ Section 147.1 *Customs Act*, (Investor's Schedule of Documents, Tab U383); Jones Affidavit, para. 174. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

358. The Postal Imports Agreement is a contract for the provision of three services: collection of duties and taxes, data entry, and material handling by Canada Post.³¹⁵ Clause 4 of the Postal Imports Agreement³¹⁶ sets out these responsibilities. Although commercially sensitive details about the amounts Canada Post charged for these services were not released, non-sensitive elements of the contract were made public.³¹⁷

359. This agreement, authorized by section 147.1 of the *Customs Act*,³¹⁸ freed up Customs resources in order to respond to the anticipated volume surge and to focus on its core functions.³¹⁹

³¹⁵ Jones Affidavit, paras. 174 and 176. (Respondent's Book of Expert Reports and Affidavits, Tab19); Elliott Affidavit, paras. 21 and 26.. (Respondent's Book of Expert Reports and Affidavits, Tab 10).

³¹⁶ *Postal Imports Agreement*, Clause 4. (Investor's Book of Documents, Tab U66).

³¹⁷ See below Part 3(f) Changes to International Mail Process Public Knowledge.

³¹⁸ *Canada Customs Act*, s. 147.1. (Investor's Book of Documents, Tab U383).

147.1(3) The minister and the [Canada Post] Corporation may enter into an agreement in writing whereby the Minister authorizes the [Canada Post] Corporation to collect, as agent of the Minister, duties in respect of mail and the [Canada Post] Corporation agrees to collect the duties as agent of the Minister.

(4) An agreement made under subsection (3) relating to the collection of duties in respect of mail may provide for the terms and conditions under which and the period during which the [Canada Post] Corporation is authorized to collect the duties and for other matters in relation to the administration of this Act in respect of such mail.”

Section 147.1 of the *Customs Act* simply confirms that Customs and Canada Post can enter into a contract for service. Paragraph 5(1)(c) of the *Canada Post Corporation Act* provides that Canada Post can provide to or on behalf of departments and agencies of the Government of Canada services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation. Section 24 of the *Canada Post Corporation Act* provides that Canada Post can enter into contracts with the Government of Canada. Customs was at the time of the signing of the Postal Imports Agreement a department of the Government of Canada pursuant to the *Department of National Revenue Act*, R.S.C. 1985, c. N-16 [Repealed, 1999, c. 17, s. 187]. (Respondent's Book of Authorities, Tab 17). Today, section 61 of the *Canada Customs and Revenue Agency Act*, 1999, c. 17, provides that Customs may enter into contracts, agreements or other arrangements with governments, public or private organizations and agencies or any person in the name of Her Majesty in right of Canada or in its own name. (Respondent's Book of Authorities, Tab 15).

³¹⁹ Jones Affidavit, para. 173. (Respondent's Book of Expert Reports and Affidavits, Tab 19); Elliott Affidavit, para. 24. (Respondent's Book of Expert Reports and Affidavits, Tab 10); Cardinal Affidavit, para. 7. (Respondent's Book of Expert Reports and Affidavits, Tab 4).

360. Much remained unchanged in Customs' process for international mail even after the introduction of these changes. For instance:

- Customs Mail Centres and International Mail Exchange Offices are still co-located,³²⁰
- Canada Post still presents all mail that contains or is suspected to contain goods,³²¹
- Customs officers in the Customs Mail Centres still perform the traditional core customs functions of determining admissibility, origin, tariff classification and value for duty of imported goods via primary inspection and secondary processing.³²²
- Customs still incurs the cost of “manufacturing” Customs E-14 forms. Customs supplies these forms to Canada Post,³²³
- Customs officers still examine and detain goods imported as mail which are prohibited, controlled, regulated by, or under any Act of Parliament; and³²⁴
- Customs still handles requests for re-determination or further re-determination and appeals.³²⁵

361. *The Postal Import Control System (“PICS”)*: Also in July 1992, Customs redesigned its automated Custom's Postal Import Control System (“PICS”). Capitalizing on advances in technology, Customs re-designed PICS to facilitate: Customs' processing

³²⁰ Customs Mail Centers have been co-located with International Mail Exchange Offices since at least 1982 see para 18 of Revenue Canada Customs and Excise, Memorandum D5-1-1 *Customs International Mail Processing System*, July 1, 1982 [*D Memo*]. (Respondent's Book of Documents, Tab 19).

³²¹ Since at least 1970 this has been a requirement of postal employees, see *Post Office Act*, 1970, R.S.C. 1970, c. P-14, s. 46(1). (Respondent's Book of Authorities, Tab 20).

³²² *D Memo D5-1-1 “Custom International Mail Processing System”* dated July 1, 1982, paras. 25-25 (Respondent's Book of Documents, Tab 19).

³²³ Customs invoice E-14 were a part of the Customs International Mail Processing System since at least 1982, *D Memo D5-1-1 “Custom International Mail Processing System”* dated July 1, 1982, para 29. (Respondent's Book of Documents, Tab 19).

³²⁴ *D Memo D5-1-1 “Custom International Mail Processing System”* dated July 1, 1982, para 3. (Respondent's Book of Documents, Tab 19).

³²⁵ *D Memo D5-1-1 “Custom International Mail Processing System”* dated July 1, 1982, paras 38-39. (Respondent's Book of Documents, Tab 19); see also *Customs Act*, R.S.C. 1985, c. C-52.6, as amended, ss. 67-70. (Investor's Schedule of Documents, Tab U383).

of mail, the control of mail packages referred for examination, the consistent application of duties and taxes, and the application of financial controls.³²⁶ PICS is different from the Customs' Electronic Data Interface (EDI) and CADEX. EDI allows taxpayers to communicate with government and fulfil statutory requirements. Couriers, including UPS Canada, use EDI to submit advance reports on consolidated shipments to Customs. CADEX is a telecommunication infrastructure that allows importers and brokers, including UPS Canada, to file customs accounting documents electronically.³²⁷

e) **Fee Payments for the Provision of Services**

362. The Postal Imports Agreement sets out a payment schedule for fees for the procurement of services provided by Canada Post. Reflecting concepts of governmental fiscal restraint and the beneficiary or user pay principle, [Redacted]³²⁸

363. [Redacted]³²⁹ In 1992, Canada introduced the *Fees in Respect of Mail Regulations* that set the fee paid by the addressee at \$5.³³⁰ [Redacted]³³¹ [Redacted]³³²

364. The compensation scheme set out in the Postal Imports Agreement encourages efficient and effective collection of duties. The fee of [Redacted] per transaction satisfied Canada Post that it would make “a positive contribution to the financial ‘bottom line’ of the company.”³³³ Canada Post receives the fee only on international mail items for which

³²⁶ Martin Affidavit, para. 2 (Respondent's Book of Expert Reports and Affidavits, Tab 26).

³²⁷ Martin Affidavit, para. 30-37 (Respondent's Book of Expert Reports and Affidavits, Tab 26).

³²⁸ [Redacted]

³²⁹ *Fees in Respect of Mail Regulations*, SOR/92-414. (Investor's Schedule of Documents, Tab U406); [Redacted]

³³⁰ *Fees in Respect of Mail Regulations*, SOR/92-414. (Investor's Schedule of Documents, Tab U406); [Redacted]

³³¹ [Redacted]

³³² [Redacted].

³³³ [Redacted]

Customs has issued an E-14 for the collection of duties or taxes.³³⁴

365. [Redacted]³³⁵ [Redacted].³³⁶

f) Changes to International Mail Process Were Public Knowledge

366. The changes to the Customs processing system were made public through a number of means. On February 12, 1992, the Minister Responsible for Canada Post and the Minister of Revenue jointly announced that Canada Post would perform many of the material handling and revenue collection functions for Customs.³³⁷

367. The *Customs Act* was amended by Bill C-74, which received Royal Assent on June 11, 1992.³³⁸ Bill C-74 was the result of the public legislative process that involved public notices, standing committee reports, and parliamentary debate. Section 147.1 of the *Customs Act*³³⁹ and its regulations expressly contemplated an agreement between Customs and Canada Post, stating that an administrative fee may be charged by Canada Post or its agents for services rendered.³⁴⁰

368. The Government of Canada provided extensive public information about the Postal Imports Agreement with the exception of commercially sensitive information

³³⁴ [Redacted]

³³⁵ Canada's Interrogatory responses questions 48 -53. (Investor's Schedule of Documents Tab U290).

³³⁶ Jones Affidavit, paras. 157 and 174 (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³³⁷ Revenue Canada Communications, "Government Announces measures on Cross-Border Shopping and Tobacco Smuggling", Ottawa, February 12, 1992. (Respondent's Book of Documents, Tab 20).

³³⁸ Bill C-74, *An Act to amend the Customs Act, the Customs Tariff and the Excise Tax Act*, Third Session, Thirty-fourth Parliament, 40-41 Elizabeth II, 1991-92. (Respondent's Book of Documents, Tab 21).

³³⁹ *Customs Act*. (Investor's Book of Documents, Tab U383).

³⁴⁰ "Fees in respect of Mail Regulations" SOR/92-414. (Investor's Book of Documents, Tab U406).

which the Government was obliged to protect.³⁴¹ In particular, information was made public about Customs duties to be delegated under the Postal Imports Agreement and the \$5 handling fee to compensate Canada Post. This information was provided through the following processes, among others:

- i) *Parliamentary Notice*: The changes to the postal processing system, including the Postal Imports Agreement, were publicized through a Ways and Means motion tabled in Parliament on April 29, 1992³⁴² and released to the public the same day by the Department of Finance.³⁴³ The Department of Finance News Release explained that Canada Post would assume the handling and collection function and that there would be a cost recovery/user pay handling fee of \$5.
- ii) *Parliamentary Debate*: The Postal Imports Agreement was debated in the House of Commons in May, June and September 1992. On second reading of Bill C-74 on May 13, 1992, Peter McCreath (Parliamentary Secretary to Minister of State for Finance and Privatization) stated that Revenue Canada “would engage Canada Post to perform specific functions currently performed by Customs”, including collecting duty, provincial sales tax and GST.³⁴⁴ On third reading on June 11, 1992, Barry Moore (Parliamentary Secretary to Minister of National

³⁴¹ *Dussault v. Canada (Customs and Revenue Agency)*, 2003 FC 973. (Respondent’s Book of Authorities, Tab 77); See also Question No. 362, *House of Commons Debates*, September 14, 1992 (Respondent’s Book of Documents,).

³⁴² Notice of Ways and Means Motion to Amend the *Customs Act, the Customs Tariff and the Excise Tax Act*, Sessional Paper – 343-1/311 C, House of Commons, April 29, 1992, at 9839. (Respondent’s Book of Documents, Tab 21).

³⁴³ Department of Finance News Release April 29, 1992 “re: *Tabling of Notice of ways and means motion to amend the Customs Act*” makes reference to Canada Post assuming and handling and collection function and cost recovery/user pay \$5 handling fee. (Respondent’s Book of Documents, Tab 22).

³⁴⁴ Bill C-74, *Customs Act* (first reading,) *House of Commons Debates*, April 30, 1992 at 9887; Bill C-74, *Customs Act* (second reading,) *House of Commons Debates*, May 13, 1992, at 10651 (House of Commons Debates-Introduction of debate by Mr. Peter McCreath, Parliamentary Secretary to Minister of State (Finance and Privatization). (Respondent’s Book of Documents, Tab 23).

Revenue) explained that the new postal imports process would include collection by Canada Post on behalf of Customs and Excise by Canada Post a \$5 handling fee to cover the costs of such services such as collection of duty, sales tax and GST. He also stated that “there exists very solid valid reasons for the proposed legislation”³⁴⁵. On September 14, 1992, the Honourable Harvey Andre described in further detail the data entry duties under the Postal Imports Agreement that Canada Post had subcontracted Adminserv.³⁴⁶

- iii) *Customs Notices, Departmental D-Memos*: Revenue Canada prepared and circulated notices to customs professionals, Departmental D-memos and other information describing the new postal imports and Courier/LVS processes.³⁴⁷ In addition, the attendance records and minutes of a Customs seminar in 1992 confirm that UPS Canada was informed and had knowledge of the changes in the postal process.³⁴⁸
- iv) *Media*: The general public was also informed about the Postal Imports Agreement through the media.³⁴⁹

³⁴⁵ Bill C-74, *Customs Act* (third reading) *House of Commons Debates*, June 11, 1992, at 11800. House of Commons Debates –Government Orders-Resumption of consideration of Bill by House of Commons of Bill C-74, as reported by Standing Committee on Finance (Respondent’s Book of Documents, Tab 24).

³⁴⁶ Question No. 362, *House of Commons Debates*, September 14, 1992, at 13081-13082. (Respondent’s Book of Documents at Tab 25).

³⁴⁷ The importing public was informed particularly through Revenue Canada Customs and Excise, *Processing of International Postal Shipment* (Customs Notice N-712, June 24, 1992. (Respondent’s Book of Documents, Tab 26).

³⁴⁸ *Customs ’92 Trade Seminar*, Canadian Association of Customs Brokers Bulletin, June 12, 1992 with attached list of attendees Winnipeg Trade Seminar, refers to a seminar on “low value shipments, including the new postal system”. The list of attendees at the seminar includes UPS employee Edgar Arends (Respondent’s Book of Documents, Tab 27).

³⁴⁹ There was interest in the press about the changes in the postal process with newspaper reports providing additional details. “Post office agrees to collect duties, GST before delivery”, *The Globe and Mail*, Tuesday March 3, 1992. (Respondent’s Book of Documents Tab 28) and “Buying for Less will cost more; New fees target shopping in U.S.” *The Edmonton Journal*, (June 22, 1992) at A3. (Respondent’s Book of Documents, Tab 29) which states:

369. Individual mail recipients, of course, if not made aware through these other means directly learned of the change through its application when Canada Post delivered their mailed goods and collected duties and taxes owing as well as the \$5 fee.

g) Revenue Collection Compliance

370. An important objective of Custom’s international mail processing system is ensuring that duties and taxes are collected in accordance with the *Customs Act* and the requirements of other legislation, such as the prohibited goods prevented from importation, are met. In order to fulfil this objective, Customs carries out periodic sampling of mail items that have been released by Customs to Canada Post for delivery to ensure proper assessments have been made.³⁵⁰

371. In addition to the statutory requirements to ensure that duties and taxes are collected, there are financial incentives for Canada Post to present dutiable goods to Customs for processing given that it receives a fee from the importer and from Customs for mail [Redacted]³⁵¹

372. The Claimant presented a study prepared by James Nelems (“the Nelems Study”), a marketing researcher, in an effort to support the allegations that UPS Canada is efficient in the collection of duties and taxes and that “Canada Post consistently fails to collect customs charges”³⁵².

373. The Nelems Study’s conclusions are based on an incorrect factual foundation

“Canada Customs has hired Canada Post as the customs collecting agent for mailed-in goods. The post office will be charging \$5 per package for handling on every parcel subject to duty or tax which comes into the country – every package worth between \$20 and \$1,200.

It will also collect an additional \$3-a-package payment from Customs for the work, making the postal corporation’s potential net take about \$76 million – assuming the volume of mail-order packages stays at 1991 levels.”

³⁵⁰ Jones Affidavit, paragraph 170. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

³⁵¹ [Redacted]

³⁵² Report of J.H. Nelems, at 1, para. 5. (Investor’s Brief of Witness Statements and Expert Reports).

and are the result of an erroneous application of statistical methodology and therefore the Nelems Study should be given no weight by the Tribunal. As Dr. Mills states in her expert report, “[w]hile the report contains extensive tables of data, most of them are of no use in answering the questions posed and merely overwhelm a reader with uninformative numbers. Statistical results are incorrectly computed and reported. Conclusions drawn are unsupportable by the analyses conducted.”³⁵³

374. As indicated in the Affidavit of Darwin Satherstrom, the Nelems study fails to understand that Canada Post does not import mail posted with foreign postal administrations and it misunderstands the role that Canada Post plays in the processing of international mail on behalf of CBSA.³⁵⁴

375. This study is critically flawed in a number of material respects, including:

- a) The Nelems Study fails to recognize and afford the importation of “commercial samples” the most appropriate and beneficial tariff classification available to them under international convention and Canadian customs tariff provisions.³⁵⁵
- b) At best, the Nelems Study could only purport to contrast the self-assessment of duties and taxes by UPS Canada with determinations and assessments made by Customs officers.³⁵⁶
- c) UPS Canada has no legal obligation to “collect” customs charges. For this reason, UPS Canada cannot be cited as “highly compliant” as regards to collection of customs charges.³⁵⁷
- d) The Nelems Study, rather than avoiding seasonality issues, invites them.³⁵⁸

³⁵³ Mills Report, at 4. (Respondent’s Book of Expert Reports and Affidavits, Tab 28).

³⁵⁴ Satherstrom Affidavit, paras. 6-13. (Respondent’s Book of Expert Reports and Affidavits, Tab 33).

³⁵⁵ As explained in the Satherstrom Affidavit, paras. 14-18. (Respondent’s Book of Expert Reports and Affidavits, Tab 33), “commercial samples” are subject to concessionary duty free entry under various international treaties and agreements and Canadian customs regulations which are intended to facilitate and promote trade.

³⁵⁶ *Customs Act*, Subsections 58(1) and 58(2). See Satherstrom Affidavit, para. 13. (Respondent’s Book of Expert Reports and Affidavits, Tab 33).

³⁵⁷ Report of J.H.Nelems, at 1. (Investor’s Brief of Witness Statements and Expert Reports, Tab 7); Satherstrom Affidavit, para. 7. (Respondent’s Book of Expert Reports and Affidavits, Tab 33).

- e) The nature of the goods shipped and mailed is problematic.³⁵⁹ The Nelems Study misinterprets the basis on which goods are determined to be either commercial or casual goods.³⁶⁰
- f) The Nelems Study was conducted outside the relevant time frame for the arbitration.³⁶¹

4. Customs Process for Goods imported “by courier”

376. The customs process for goods imported by courier has been tailored to the unique needs and characteristics of the courier industry. As will be described in more detail below, the Courier/LVS Program, a cooperative effort between Customs and courier companies such as UPS Canada, created a special and more efficient system for the treatment of courier shipments at the Canadian border.³⁶² This program came into effect in April of 1993.³⁶³ Throughout this document the terms express consignment operator and courier are used interchangeably.

a) Characteristics of courier shipments

377. Like international mail, courier shipments exhibit certain typical characteristics pertinent to Customs. These characteristics have enabled Customs to devise a clearance process for low-value shipments -- an expedited clearance and elimination of individual paper submissions for each shipment, while at the same time providing Customs with the

³⁵⁸ See Report of J.H.Nelems, Timing, at 5. (Investor’s Brief of Witness Statements and Expert Reports, Tab 7); Satherstrom Affidavit, para. 28. (Respondent’s Book of Expert Reports and Affidavits, Tab 33); and Mills Report, at 5. (Respondent’s Book of Expert Reports and Affidavits, Tab 28).

³⁵⁹ Expert Report of J.H.Nelems, Appendix III, Example A. (Investor’s Brief of Witness Statements and Expert Reports, Tab 7). The distinction between the goods identified on the courier waybill as “samples” as opposed to the goods imported as mail and declared as “commercial samples”, although not obvious to a lay person, may legitimately render the two groups of goods subject to different customs tariff classifications and hence different dutiable status.

³⁶⁰ For greater explanation see Satherstrom Affidavit, paras. 19-27. (Respondent’s Book of Expert Reports and Affidavits, Tab 33).

³⁶¹ Shipping dates were November 15, 2004 – December 3, 2004, see Report of J.H.Nelems, Appendix I, at 3. (Investor’s Brief of Witness Statements and Expert Reports, Tab 7).

³⁶² Jones Affidavit, paras. 71-72. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

³⁶³ Tobias Affidavit, para. 35. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

necessary assurance that goods will be properly accounted for.

378. *Supply Chain Security*: Courier companies have end to end care and control of their shipments.³⁶⁴ Throughout their distribution network they have systems, controls and checks through which information pertaining to the shipment is shared up and down the delivery chain. Customs can rely on this multi-layered security network to ensure legitimate traffic is not subverted for illicit purposes.³⁶⁵ Customs encourages information sharing through its Partners in Protection program.³⁶⁶ Under the Partners in Protection program the business or organization agrees to develop a joint plan of action, conduct security assessment, participate in awareness sessions, and consult with Customs. UPS is member of the Partners in Protection program.³⁶⁷

379. *Expedited or Time-Specific*: The key characteristic of courier shipments is their expedited or time specific nature.³⁶⁸ To meet these stringent demands of their clients, courier companies have sought virtually immediate clearance of their shipments by Customs. They have also sought a reduction in the amount of paperwork required by Customs for individual shipments in an effort to increase efficiencies.³⁶⁹

380. *Knowledge of Sender and Content of Goods*: International courier shipments are typically under the care and control of a single courier company from door to door. Some courier companies offer premium “track-and-trace” features which enable a courier to locate any item and trace its movement within their transportation and distribution

³⁶⁴ Rigdon Affidavit, para. 25. (Respondent’s Book of Expert Reports and Affidavits, Tab 32); Jones Affidavit, para. 44. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

³⁶⁵ Jones Affidavit, para. 94. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

³⁶⁶ “Partners in Protection, (Fact sheet)” online: Canada Border Services Agency, < <http://www.cbsa-asfc.gc.ca/newsroom/factsheets/2005/0125pip-e.html> >. (Respondent’s Book of Documents, Tab 30).

³⁶⁷ See “Partners in Protection” online: Canada Border Services Agency, at <http://www.cbsa-asfc.gc.ca/general/enforcement/partners/list-e.html>.. (Respondent’s Book of Documents, Tab 31).

³⁶⁸ Parsons Affidavit, para. 62. (Respondent’s Book of Expert Reports and Affidavits, Tab 30); Tobias Affidavit, para. 41. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

³⁶⁹ Tobias Affidavit, paras. 30-40. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

system.³⁷⁰ For Customs, this means that if there are any discrepancies found in the shipment, there will only be one party responsible and the offending item can be identified.³⁷¹

381. Couriers collect information necessary to report the goods to Customs in advance of shipping the goods to Canada.³⁷² Couriers can supply this information, in some cases electronically, prior to or upon the arrival of the goods into Canada, to permit Customs to carry out risk assessments and other checks.³⁷³ Given their direct link to the sender, couriers can also obtain any missing information from the customer in time for the Customs officers to review.³⁷⁴

382. *Contractual Relationship Between Courier and Sender:* Couriers have contractual relationships with their clients and, in many cases, repeat customers, resulting in detailed, historical knowledge of their clients.³⁷⁵ In addition, the typical courier shipment, unlike the typical mail shipment, is a business-to-business consignment.³⁷⁶

b) International Best Practices Regarding Couriers

383. Customs' process for courier shipments is in line with international best practices with respect to shipments imported by courier.³⁷⁷ Canada's Courier/LVS

³⁷⁰ Jones Affidavit, para. 44. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁷¹ Rigdon Affidavit, para. 14. (Respondent's Book of Expert Reports and Affidavits, Tab 32); Jones Affidavit, para. 44. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁷² Jones Affidavit, para. 77. (Respondent's Book of Expert Reports and Affidavits, Tab 19); [Redacted]

³⁷³ Parsons Affidavit, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

³⁷⁴ Tobias Affidavit, para. 48. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

³⁷⁵ Parsons Affidavit, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Investor's response to interrogatory question 63 states: "Yes, UPS Canada delivers international courier products only on behalf of customers with whom UPS Canada directly or indirectly (through an agent/UPS affiliate) has a contractual relationship."

³⁷⁶ Parsons Affidavit, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

³⁷⁷ Jones Affidavit, para. 110. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

process is consistent with the World Customs Organization's previous "Guidelines for the Immediate Release of Consignments by Customs"³⁷⁸ and with the principles underlying the World Customs Organization's current Immediate Release Guidelines.³⁷⁹

c) Description of the Customs process for goods imported "by courier" (Courier/LVS program)

384. As referred to above, Customs' international obligations, as well as the particular nature of courier shipments, prompted the development of the Courier/LVS Program. This process is significantly faster than the process for international mail, described above. Virtually instantaneous clearance permits couriers to meet the rigorous demands of their clients for speedy and/or time specific delivery standards.³⁸⁰

385. The procedures related to the customs process with respect to Customs' courier/LVS program are described in detail in the affidavit of Brian Jones³⁸¹, [Redacted], and in D-memo D17-4-0, "Courier/Low Value Shipment Program – Low Value Commercial Goods"³⁸².

386. Typically the process begins when a courier accepts a shipment from its customer in the country of export (or through an affiliated agent of the courier operating in that country). The courier collects from the customer the information necessary to report the goods to Canada Customs. The courier enters into a contract with its customer for the transport and delivery of the goods to an addressee/importer in Canada.³⁸³ It is

³⁷⁸ World Customs Organization, *Guidelines for the Immediate Release of Consignments by Customs* (IRG-Version, 9 October 2002) [*Immediate Release Guidelines*]. (Respondent's Book of Documents, Tab 32).

³⁷⁹ Parsons Affidavit, paras. 23 and 76. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Rigdon Affidavit, para. 63. (Respondent's Book of Expert Reports and Affidavits, Tab 32).

³⁸⁰ Tobias Affidavit, paras. 37 and 40. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

³⁸¹ Jones Affidavit, paras. 71-85. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁸² D-memo D17-4-0, "Courier/Low Value Shipment Program – Low Value Commercial Goods", May 31, 2002. (Respondent's Book of Documents, Tab 33).

³⁸³ Jones Affidavit, para. 77. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

possible the courier will also enter into a second contract with the recipient of the shipment for additional services such as customs clearance services, customs brokerage, etc.³⁸⁴ The shipment is then transported to Canada via the courier's international distribution network.

387. In the case of the Claimant, and as noted in Paré affidavit,

“23. [Redacted]”³⁸⁵

388. Prior to or at the time of the importation of the goods into Canada,³⁸⁶ the courier transmits this information to one of 32 approved Customs offices located at the border or inland. The courier presents to Customs a consolidated report (“Cargo Release List”) providing information about the importer, exporter, quantity, weight, value, description and country of origin³⁸⁷ of each shipment.

389. Contrary to what takes place in the Customs International Mail Processing System; the primary screening in Courier/LVS process does not consist of a visual examination of each shipment. Instead, a Customs officer reviews the Cargo Release List provided by the courier to identify and select shipments requiring examination. This primary screening of the Cargo Release List occurs either before or on arrival of the goods in Canada. Shipments which have not been identified from the Cargo Release List for secondary examination are immediately released for delivery.³⁸⁸

390. The Courier Imports Remission Order (the “CIRO”) is set at the same level as the postal stream's PIRO, i.e., \$20. Thus, courier shipments valued at under \$20 will have no duties or taxes imposed (with some exceptions) to allow for quick processing and

³⁸⁴ Jones Affidavit, para. 23. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁸⁵ [Redacted]

³⁸⁶ Jones Affidavit, para. 79. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁸⁷ Jones Affidavit, para. 138. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁸⁸ Jones Affidavit, para. 79. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

reduced paperwork of negligible-valued goods.³⁸⁹

391. In the Courier/LVS Program, when a Customs officer identifies shipments for examination from the Cargo Release List he or she will notify the courier and physically examine the goods identified and will make a determination on admissibility and of duties and taxes. Where secondary examination is necessary, it may be conducted at the courier's premises.³⁹⁰

392. Customs enters into agreements with courier companies that provide for cost recovery when couriers request Customs officers to attend to courier facilities outside of normal business hours to expedite the clearance of their shipments or out of the normal "first in first out" sequence.³⁹¹ As stated in the Affidavit of Kal Tobias, "[t]his cost recovery process is considered a normal cost of doing business and was embraced by UPS and all other courier companies who joined the Canadian Courier/LVS program. UPS was one of the most vocal courier companies within the CCA pursuing this arrangement with Canada Customs"³⁹²

393. *Courier Self-Assessment:* Couriers, acting on behalf [or in lieu] of their clients, have knowledge and expertise to assess origin, tariff classification and the value for duty. Utilizing this expertise and knowledge, Customs can employ the self-assessment model for courier companies.³⁹³ In the case of UPS Canada, and as noted in the Witness Statement of Ms. Lisa Paré, [Redacted]³⁹⁴

394. Most courier companies, in their alternate roles of carriers, customs brokers, and sufferance warehouse operators, address Customs' concerns about the collection of duties

³⁸⁹ Jones Affidavit, para. 75. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁹⁰ Jones Affidavit, paras. 79-80. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁹¹ Jones Affidavit, paras. 81-83. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁹² Tobias Affidavit, para. 43. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

³⁹³ Jones Affidavit, para. 89. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁹⁴ [Redacted]

and taxes by posting a financial bond sufficient to guarantee the outstanding duties and taxes eventually owing on the shipment.³⁹⁵ This practice permits Customs to release goods,[Redacted]³⁹⁶, prior to payment of duties.

395. Under the Courier/LVS program, unlike the process for international mail, couriers can defer payment of duties and taxes and use a simplified, consolidated accounting process.³⁹⁷ Courier/LVS shipments, released at points all over country and for the deferred period, may be accounted for at one Customs office. As a result of separating the admissibility decision from payment of duties and taxes, the courier obtains release for goods prior to payment of amounts owing.³⁹⁸

d) UPS Canada contributed to the design of the Courier/LVS program

396. The Courier/LVS program is the result of a consultative process between Customs and key industry stakeholders including the courier industry³⁹⁹. A working group, which included representatives from UPS Canada⁴⁰⁰, worked with Customs in the design of the Courier/LVS program. As stated by Kal Tobias who was President of the Canadian Courier Association at the relevant time, UPS was instrumental in orchestrating the industry's approach to and participation in the development of the Courier/LVS program.⁴⁰¹ The introduction of the Courier/LVS program was, in part, the result of a

³⁹⁵ Rigdon Affidavit, para. 25. (Respondent's Book of Expert Reports and Affidavits, Tab 32).

³⁹⁶ [Redacted]

³⁹⁷ Jones Affidavit, para. 156-160. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

³⁹⁸ Tobias Affidavit, para. 38. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

³⁹⁹ Hahn Affidavit, paras. 31-41. (Respondent's Book of Expert Reports and Affidavits, Tab 14); Tobias Affidavit, paras. 30-40. (Respondent's Book of Expert Reports and Affidavits, Tab 35). See also "Highlights of Minister Jelinek's Press Release" (February 21, 1992), Canadian Association of Customs Brokers Bulletin No. 4 at 2. (Respondent's Book of Documents, Tab 34).

⁴⁰⁰ [Redacted]; Hahn, para. 32. (Respondent's Book of Expert Reports and Affidavits, Tab 14); Tobias Affidavit, para. 37. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

⁴⁰¹ Tobias Affidavit, para. 3. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

lobbying campaign conducted by the CCA.⁴⁰² The courier industry viewed the Customs commercial process in place prior to the introduction of the Courier/LVS program as inefficient and as creating a documentary burden.⁴⁰³

397. In fact, some of the complaints of the CCA from the early 1990s are similar to if not identical to allegations raised by the Claimant in its memorial.⁴⁰⁴

398. The Courier/LVS Programme resulted in significant efficiency gains for the courier industry. Individual paper submissions for each shipment were eliminated, reducing costs associated with paperwork. Information provided in advance to Customs expedited clearances.⁴⁰⁵ [Redacted]⁴⁰⁶ As then UPS Canada President, Chris Mahoney wrote in 1993, “[w]e believe that the new system will substantially impact on our industry and wanted you to know of our support for this initiative.”⁴⁰⁷ The Canadian Courier Association has described it as “one of the most progressive and business

⁴⁰² See: *Canada Post*, (Presentation to the House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations by United Parcel Service Canada Ltd.), December 6, 1989 (Respondent’s Book of Documents, Tab 35). See also: *Deliberations on the Future of Canada Post*, (Presentation to the House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations by Canadian Courier Association), March 9, 1990. (Respondent’s Book of Documents, Tab 36).

See also: letter dated July 16, 1991 from Kal Tobias, President CCA, to Mr. Doug Smee, Assistant Deputy Minister of Finance at 1. (Respondent’s Book of Documents, Tab 37).

“3. Canada’s private carriers are burdened with Customs regulatory delays and tremendous handling charges on each shipment, thereby making it virtually impossible for carriers to compete with the Post Office on transportation costs pertaining to transborder international shipments.”

And see: letter dated August 20, 1991 from Kal Tobias, President CCA, to Dr. Patricia Close, Director, Tariffs Division, Department of Finance, at 6-7 referring Dr. Close to the expedited clearance system in place in the United States for courier shipments. (Respondent’s Book of Documents, Tab 38).

⁴⁰³ Tobias Affidavit, para. 31. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

⁴⁰⁴ Letter dated 16 July 1991 from Kal Tobias, President CCA, to Mr. Doug Smee, Assistant Deputy Minister of Finance. (Respondent’s Book of Documents, Tab 37).

⁴⁰⁵ Tobias Affidavit, para. 36. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

⁴⁰⁶ [Redacted]

⁴⁰⁷ Letter from Chris Mahoney, President UPS Canada to The Hon. Otto Jelinek, Minister Revenue Canada, dated April 19, 1993. (Respondent’s Book of Documents Tab 39.).

facilitative customs clearance systems in the world.”⁴⁰⁸

399. The Courier/LVS program is a voluntary program which currently has over forty participating courier companies.⁴⁰⁹ Included in the list of participants is UPS Canada.⁴¹⁰ Both Canadian and foreign investors own various participants in the program. Regardless of the nationality of the investor, qualifying shipments from all Courier/LVS program participants are governed⁴¹¹ by the process described in D-memo 17-4-0, “Courier/Low Value Shipment Program – Low Value Commercial Goods”.⁴¹²

e) Processes similar to Courier/LVS program exist elsewhere

400. The United States also has a distinct customs process for express consignment shipments, through which the express consignment operator may receive expedited customs service if the operator complies with requirements of the program.⁴¹³ The UK also has customs procedures in place to accommodate the express consignment industry.⁴¹⁴

f) Other service providers involved in import of goods through the Courier/LVS Programme

401. In addition to couriers engaged in the international movement of goods, three other key service providers are involved in the Courier/LVS Program and other

⁴⁰⁸ Jones Affidavit, para 110 citing Canadian Courier Association’s “Position on Carrier Re-Engineering”. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴⁰⁹ Jones Affidavit, para. 49. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴¹⁰ [Redacted]

⁴¹¹ *D-memo* D-17-4-0, “Courier/Low Value Shipment Program – Low Value Commercial Goods”. (Investor’s Schedule of Documents, Tab U246).

⁴¹² *D-memo* D17-4-0, “Courier/Low Value Shipment Program – Low Value Commercial Goods”. (Investor’s Schedule of Documents, Tab U246).

⁴¹³ Ridgon Affidavit, paras. 49-61. (Respondent’s Book of Expert Reports and Affidavits, Tab 32).

⁴¹⁴ Parsons Affidavit, para. 23. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

commercial shipments: bonded carriers, sufferance warehouse operators, and customs brokers. UPS Canada is engaged in each of these commercial activities and is licensed and bonded as required by Customs to transact business in these capacities. Canada Post, given its role as a postal administration responsible for the delivery of international mail, is engaged in none of these activities. Customs regulations and licensing of these other service providers, therefore, are only applicable to UPS Canada and not Canada Post.

402. *Bonded Carriers:* Bonded carriers are international transportation companies involved in the carriage of goods for hire. In order to move goods for which duties and taxes have not been paid beyond the border for processing or storage, carriers must post acceptable financial security (bonds) to cover potential duties and taxes on the items under carriage.⁴¹⁵

403. The amount of security that a carrier is required to post depends on the mode of transport. Customs requires carriers to post security to facilitate the carriers' compliance with Canadian laws and regulations. If a shipment does not reach the intended destination for customs clearance, the bonded carrier becomes responsible for the payment of duties and taxes owing on the shipment.⁴¹⁶

404. [Redacted]⁴¹⁷ [Redacted]⁴¹⁸

405. Carriers of international mail arriving in Canada are not required to be bonded and are not required to "report" at the point of entry into Canada. This is because international mail originates with a foreign postal administration and UPU tenets suggest freedom from customs formalities for transiting mail.⁴¹⁹ Canada Post does not take

⁴¹⁵ Jones Affidavit, para. 27. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁴¹⁶ Jones Affidavit, paras. 27-30. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁴¹⁷ Jones Affidavit, [Redacted] (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁴¹⁸ Jones Affidavit, [Redacted]. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁴¹⁹ Jones Affidavit, paras. 51-56. (Respondent's Book of Expert Reports and Affidavits, Tab 19); Parsons Affidavit, para. 19. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Reference to Standard 12 of Annex F.4 to the *Kyoto Convention* specifying "Postal items shall not be subject to Customs formalities whilst they are being conveyed in transit." (Respondent's Book of Authorities, Tab 7).

control of the international mail until the exchange at one of the International Mail Exchange Offices at which point it is processed by Customs.

406. The legislative authorities and administrative guidelines with respect to bonded carriers are set out in D-memo D3-1-1, “Regulations Respecting the Importation, Transportation and Exportation of Goods”.⁴²⁰

407. *Sufferance Warehouse Operators:* Sufferance warehouses are employed for the secure storage of imported goods for which duties and taxes have not been paid and for which customs clearance is pending. Such goods remain under Customs’ control, in these secure facilities. They are short-term storage facilities run by private sector operators licensed by Customs.⁴²¹

408. Because international mail inbound to Canada is submitted directly to Customs and stored under Customs control in a designated Customs office, there is no need for a sufferance warehouse facility.⁴²²

409. UPS Canada operates [Redacted] of the 1222 sufferance warehouse locations licensed by Customs and is subject to the same requirements as any other commercial enterprise engaged in this activity.⁴²³

410. UPS Canada has paid approximately \$5, 000 each year of the relevant time period in licensing fees for all eleven of their sufferance warehouse locations.⁴²⁴ UPS

⁴²⁰ D Memo D3-1-1 “*Regulations Respecting the Importation, Transportation and Exportation of Goods*”, February 26, 2004; (Respondent’s Book of Documents, Tab 41); see also Jones Affidavit, para. 29. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴²¹ Jones Affidavit, paras. 31-35. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴²² Jones Affidavit, para. 54. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴²³ Jones Affidavit, [Redacted] (Respondent’s Book of Expert Reports and Affidavits, Tab 19); Paré Statement, [Redacted]. (Investor’s Brief of Witness Statements and Expert Reports, Tab 2).

⁴²⁴ Customs Sufferance Warehouse Operations, SOR-86-1065. (Investor’s Schedule of Documents, Tab U164).

Canada [Redacted].⁴²⁵

411. Contrary to the Claimant's assertion in its Memorial that Canada Post has been exempted from any bonding requirement, it must be noted that there has been no such exemption granted. Rather, Canada Post does not operate any such facilities.

412. *Customs Brokers*: Customs brokerage is a specialized field regulated by the Government of Canada. To become a licensed customs broker in Canada, an individual, corporation, or partnership must apply to Customs and pass a certification process.⁴²⁶ Prior to the issuance of a licence, customs brokers are required to post a customs brokers license bond.⁴²⁷

413. Customs brokers offer a variety of services⁴²⁸, including:

- the provision of strategic advice to traders about international transportation, logistics and importing and exporting requirements.
- obtaining release of the imported goods;
- paying any duties and taxes that apply on behalf of their client;
- obtaining, preparing, and presenting or transmitting the necessary documents or data to Customs;
- maintaining records;
- and responding to any of Customs' concerns after payment.

414. UPS Canada is licensed to operate as a customs broker at [Redacted] locations.

⁴²⁵ [Redacted]

⁴²⁶ Hahn Affidavit, para. 16. (Respondent's Book of Expert Reports and Affidavits, Tab 14); Jones Affidavit, para. 38. (Respondent's Book of Expert Reports and Affidavits, Tab 19). The procedures related to broker licenses are detailed in *D-memos* D1-8-1, *Licensing of Customs Brokers*, (Respondent's Book of Documents, Tab 43); and *D Memo* D1-7-1, *Posting Security for Transacting Bonded Operations*. (Respondent's Book of Documents, Tab 44).

⁴²⁷ Hahn Affidavit, paras. 14 and 16. (Respondent's Book of Expert Reports and Affidavits, Tab 14).

⁴²⁸ Jones Affidavit, para. 39. (Respondent's Book of Expert Reports and Affidavits, Tab 19); Hahn Affidavit, para. 12. (Respondent's Book of Expert Reports and Affidavits, Tab 14).

A licensing bond is posted for each location for a total licence bond of [Redacted]⁴²⁹
Customs brokers are required to post security to cover 100% of all duties and taxes
including GST, up to a maximum of \$10 million. [Redacted]⁴³⁰

415. Canada Post does not operate as, and is not licensed as a customs broker in
Canada. Canada Post has neither the knowledge nor the legal relationship to perform
customs brokerage services in connection with goods imported as mail, nor are they
authorized or licensed by Customs to perform such services.⁴³¹

416. Customs brokers are not involved in Customs clearance of low value
international mail. If commercial goods are valued at over \$1600, formal customs entry
must be completed. Under these circumstances, the importer may account for their
international mail or a customs broker may be engaged.⁴³²

417. *Persons Authorized to Account:* A customs broker acts as the lawful agent of the
importer or owner of the goods for the purposes of accounting and payment of duties and
taxes and fulfilment of any other regulatory requirements that may be applicable.⁴³³

418. The importer or owner remains liable, however, for the information provided to
Customs and for the payment of the duties and taxes, with the exception of casual goods
imported under the Courier/LVS program. Nineteen courier companies, [Redacted], have
been given express authority under the *Customs Act* to account for casual goods ‘in lieu’

⁴²⁹ [Redacted]

⁴³⁰ [Redacted]

⁴³¹ Jones Affidavit, para. 52-53. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴³² Jones Affidavit, para. 53. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴³³ Jones Affidavit, para. 43. (Respondent’s Book of Expert Reports and Affidavits, Tab 19). The
procedures related to the authority of customs brokers to act as agent of the importer are set out in detail in
D-memos D1-6-1, Authority to Act As Agent. (Respondent’s Book of Documents, Tab 47); and *D1-6-2,
Agents’ Accounting for Imported Goods and Payment of Duties.* (Respondent’s Book of Documents, Tab
48).

of the importer or owner.⁴³⁴

419. The duties of Customs Officers within Customs Mail Centres are to determine admissibility of mailed items and to determine their value, duty and origin. These responsibilities are not customs brokerage services, as alleged by the Claimant, but are clearly the roles and responsibilities of customs officers, exclusively granted to it by statute.

g) Enforcement of Compliance in Courier/LVS Programme

420. Customs performs random periodic studies to measure the level of compliance by participants in the Courier/LVS program. In addition, post-entry audits are conducted to ensure the proper functioning of revenue assessments and remittances.⁴³⁵

⁴³⁴ [Redacted]

⁴³⁵ Jones Affidavit, para. 172. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

PART III. LEGAL ARGUMENT

I. OVERVIEW OF THE LEGAL ARGUMENT

421. The claim is outside the Tribunal's jurisdiction, not admissible and exceptions are applicable to many of the legal obligations being invoked. In particular:

- The requirement that the Claimant own or control an investment in Canada has not been clearly established
- The claims are time-barred
- The Claimant should have brought its claims under Article 1117
- The Claimant has failed to establish fact of damage
- The procurement exception applies in respect of the Postal Imports Agreement
- The Fritz Starber claim is inadmissible

422. In any event, the claims with respect to Article 1102, 1103, 1104, 1105, 1502(3)(a) and 1503(2) are without merit.

423. The Claimant's interpretation of the national treatment obligation is wrong.

424. Canada will establish that the national treatment claims against Canada are without merit. This section will deal with the customs treatment, the Publications assistance program and the claim of leveraging of the Canada Post infrastructure, to the extent it can be brought against Canada directly.

- Customs treatment alleged by the Claimant to be in breach of Article 1102 is either factually incorrect, flows from the existence of two separate customs programs (the International Mail Processing System and the Courier/LVS Program) or results from the Postal Imports Agreement. The different customs programs and the Postal Imports Agreement do not constitute a breach of Article 1102 *inter alia* because the treatment is not accorded in like circumstances.
- The Publications assistance program is a measure with respect to cultural industries and it is a subsidy. As such it is outside of the scope of Chapter 11 of

the NAFTA and exempt from Article 1102. In any event, there are no like circumstances.

- As phrased, the Claimant's allegation that Canada Post leverages its monopoly infrastructure is not a claim against Canada. If the complaint is that Canada failed to take positive steps to neutralise the effect of creating a monopoly that also competes in non-monopolised markets, such an allegation is outside the scope of Article 1102. It does not identify a treatment accorded to the Claimant or its investment other than the direct and natural result of the creation of the monopoly. Even if it did identify a treatment, such treatment would not be accorded in like circumstances, and in any event would be no less favourable.

425. Canada will then demonstrate that Chapter 11 claims against actions of a monopoly or state enterprise such as Canada Post can only be brought through Chapter 15. In this case, the claims brought against Canada Post do not relate to the exercise of governmental authority as required by Articles 1502(3)(a) and 1503(2). In any event, the Claimant has not established that Canada Post's taking advantage of economies of scale and scope can amount to a violation of national treatment. Nor has the Claimant established that any alleged treatment was accorded in like circumstances.

426. The Claimant fails to prove the existence of a single rule of customary international law to which Canada has failed to adhere, resulting in a breach of Article 1105. In any event, the claims made with respect to Customs treatment, collection of duties and taxes by Canada Post, collective bargaining rights of Canada Post employees and Fritz Starber are factually inaccurate and do not raise to the required threshold.

427. The Claimant has failed to identify a measure or treatment that results in a breach of Article 1103. Where there is no breach of Article 1102 or 1103 there can be no breach of Article 1104.

II. INTERPRETATION OF NAFTA AND EVIDENTIARY ISSUES

428. Article 1131 of the NAFTA sets out the Tribunal's governing law, namely the NAFTA and applicable rules of international law. The applicable rules of international law include the *Vienna Convention on the Law of Treaties*, 1969 ("Vienna Convention"). It requires interpretation "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".

A. Principles of Interpretation

429. The general rule of treaty interpretation is embodied in Article 31 of the *Vienna Convention*:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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.

430. While the above provision contains three separate elements (ordinary meaning, context and object and purpose), it is entitled 'The General Rule of Interpretation'

because it mandates a single combined operation.⁴³⁶ As a result, the Tribunal must identify the plain and ordinary meaning of the words in the context in which they appear and also must take due account of the object and purpose of the treaty.

1. Ordinary Meaning

431. The ordinary meaning of a term is most likely to reflect the parties' intent, as expressed in the words used by them in the light of the surrounding circumstances.⁴³⁷

432. The surrounding circumstances, meaning the context, are therefore vital to a proper understanding of the ordinary meaning.

433. Throughout its Memorial, the Claimant fails to give proper weight to the ordinary meaning of the words of the provisions it relies upon.

2. Context

434. The text of the treaty must be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part.⁴³⁸

435. The context of any given provision includes both the provisions of the same treaty as well as the relevant provisions from other agreements.⁴³⁹

436. As the Appellate Body has recognized with respect to the *General Agreement Tariffs and Trade*, it "is not to be read in clinical isolation from public international

⁴³⁶ See the Commentaries to the International Law Commission's ("ILC") Draft Articles on the Law of Treaties, which also state that the "Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule." *United Nations on the Law of Treaties*, OR, First and Second Sessions, UN Doc. A/CONF.39/11/Add.2 (Sales No. E. 70.V.5) (1971), at 39. (Respondent's Book of Authorities, Tab 5).

⁴³⁷ Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge: University Press, 2000), at 188, (Respondent's Book of Authorities, Tab 87) citing A. McNair, *Law of Treaties*, 2nd ed. (Oxford: Clarendon Press 1961), at 365.

⁴³⁸ I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester University Press, 1984), at 127. (Respondent's Book of Authorities, Tab 99).

⁴³⁹ *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331; (1969) 8 ILM 679 ["*Vienna Convention*"], Article 31(2) and (3). (Investor's Book of Authorities, Tab 89).

law.⁴⁴⁰

437. This idea is confirmed with respect to the NAFTA by Article 103, which provides:

Relation to Other Agreements

1. The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party.
2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

438. Article 103(1) makes clear that Canada, Mexico and the US have affirmed their existing rights and obligations with respect to each other under other agreements.

439. This provision is merely a restatement of a basic presumption in international law that because States negotiate their treaty obligations in good faith,⁴⁴¹ their obligations under one treaty are presumed to be consistent with their obligations under another.

440. Therefore, other rules of international law, such as the norms that stem from the

⁴⁴⁰ *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, adopted 20 May 1996, at 17. (Respondent’s Book of Authorities, Tab 67). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998, paras. 130-131 (Investor’s Book of Authorities, Tab 46) in which it refers to non-WTO agreements in its effort to define “exhaustible natural resources” as found in GATT Article XX(g). It referred to: the 1982 *United Nations Convention on the Law of the Sea*, 1982, 21 ILM 1261, Arts. 56, 61 and 62; *Agenda 21*, 1992, UN Doc. A/CONF. 151/26/Rev.1; and the *Convention on the Conservation of Migratory Species of Wild Animals*, 1979, 19 ILM 11, at 15.

⁴⁴¹ *Vienna Convention*, Article 26. (Investor’s Book of Authorities, Tab. 89).

*Acts of the UPU*⁴⁴² and the *Kyoto Convention*⁴⁴³, continue to exist and are only rendered inconsequential if they are in conflict with the NAFTA.

441. Conflict between treaty obligations occurs when compliance with one obligation necessarily entails failure to comply with another, and the two cannot be reconciled.⁴⁴⁴ There is no provision in the *Acts of the UPU* or the *Kyoto Convention* that conflicts with an obligation in NAFTA Chapter 11. Therefore, the norms contained in these agreements must be considered by this Tribunal.

442. While the rules of these other agreements are not to be *applied* to the dispute at hand, they, together with the context, should inform the interpretation of NAFTA Chapter 11 obligations. This is clear from Article 31(3)(c) of the *Vienna Convention*, which provides for interpreters to take into account “any relevant rules of international law applicable in the relations between the parties.”

443. The *Acts of the UPU* and the provisions of the *Kyoto Convention* are relevant to the Tribunal’s resolution of this dispute. In the words of the International Court of Justice:

a rule of international law, whether customary or conventional,
does not operate in a vacuum; it operates in relation to facts and in

⁴⁴² *Universal Postal Union Constitution*. NOTE: *The Acts of the Universal Postal Union* [“*Acts of the UPU*”] are in four parts: *The Constitution and General Regulations*, 10 July 1964, 611 U.N.T.S. 7 as amended (entered into force 1 January 1966), reprinted in, *Universal Postal Union: Constitution and General Regulations* (Berne: International Bureau of the Universal Postal Union, 2000) [“*UPU Constitution*”] (Respondent’s Book of Authorities, Tab 1), *the Manual of Postal Payment Services*, (Berne: International Bureau of the Universal Postal Union, 2000), *the Letter Post Manual*, (Berne: International Bureau of the Universal Postal Union, 2001), and *the Parcel Post Manual*, (Berne: International Bureau of the Universal Postal Union, 2001) (Respondent’s Book of Authorities, Tabs 1-4). The parts of the *UPU Convention* relevant to parcel post and letter post are found in the *Parcel Post Manual* (Respondent’s Book of Authorities, Tab 4), and the *Letter Post Manual* (Respondent’s Book of Authorities, Tab 3) respectively. Online: <<http://www.upu.int/acts/en/>>

⁴⁴³ *Kyoto Convention*. (Respondent’s Book of Authorities, Tab 6).

⁴⁴⁴ Wilfrid Jenks, “The Conflict of Law-Making Treaties” (1953) 30 BYIL 401 at 427-429, (Respondent’s Book of Authorities, Tab 93); as applied, for example, in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Appellate Body, WT/DS60/AB/R, adopted 25 November 1998, para. 65 (Respondent’s Book of Authorities, Tab 93).

the context of a wider framework of legal rules of which it forms only a part.⁴⁴⁵

444. The Court therefore considered other relevant treaties, including the Constitution of the WHO, to aid its interpretation of the treaty provision at issue. Otherwise, in the opinion of the Court, “its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization.”⁴⁴⁶

445. Another example of the application of this basic principle of treaty interpretation is found in the decision in the *Kronprins Gustaf Adolf* arbitration. In that case, the Tribunal had to contend directly with the question of applicable law. The United States specifically argued that the arbitrator’s jurisdiction is limited to a consideration of whether two specific treaties have been violated. In the United States’ view, this was the only matter put before the arbitrator in the Special Agreement to arbitrate. The Tribunal responded that:

The decision to be given is undoubtedly to be governed by the Treaties, and the Arbitrator is not asked to look for other rules in the field of international law. On the other hand, it is clear that the Treaties themselves are part of the international law as accepted by both contracting Powers and it may be safely assumed that, when the said Treaties were concluded, both parties considered them as being agreed upon as special provisions to be enforced between them in what may be called the atmosphere and spirit of international law as recognized by both of them.⁴⁴⁷

446. The Tribunal's jurisdiction is governed by NAFTA Chapter 11 and Articles 1502(3) and 1503(2)(c). In interpreting and applying the provisions over which it has jurisdiction, the Tribunal must take account of the other provisions in the NAFTA as well as the other rules applicable between the United States, Canada and Mexico, including

⁴⁴⁵ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73, at 76. (Respondent’s Book of Authorities, Tab 55).

⁴⁴⁶ *Ibid.* (Respondent’s Book of Authorities, Tab 55).

⁴⁴⁷ *The Kronprins Gustaf Adolf; The Pacific*, 18 July 1932, 2 RIIA 1239 at 1246-47 (Respondent’s Book of Authorities, Tab 59).

the *Acts of the UPU* and the *Kyoto Convention* of 1973.

a) The Acts of the Universal Postal Union

447. When the NAFTA was negotiated, the United States, Canada and Mexico were party to the *Universal Postal Union*. They had accepted to apply the special rules that govern international postal relations. Today, the NAFTA Parties continue to be party to the UPU, including the Convention, the Letter Post Regulations and the Parcel Post Regulations, which are all updated every five years.

448. Through its membership in the UPU, Canada has undertaken an obligation to deliver letters and parcels to their destination in Canada once they have been posted in another UPU member's territory and delivered by that postal authority to an exchange office in Canada. Article 1 of the *Universal Postal Convention* specifies that the Universal Service Obligation (USO) is binding on all member states. This Article provides:

1.(1) In order to support the concept of the single postal territory of the Union, member countries shall ensure that all users/customers enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices.

...

(3) Member countries shall ensure that the offers of postal services and quality standards will be achieved by the operators responsible for providing the universal postal services.

449. The UPU's Commentary to these provisions states, among other things, that:

This commitment includes, in particular, the obligation to ensure the provision and accessibility of postal services, at affordable prices, in areas which strict commercial logic would not consider as offering sufficient value added potential (for instance, in areas which are difficult to get to).

450. They impose an obligation on each postal administration to forward postal items from foreign postal administrations "always by the quickest routes and the most secure means which it uses for its own items".

451. The USO applies to all mail items, including both letter post and parcel post.⁴⁴⁸

452. The Claimant argues that Canada's obligation to provide a universal postal service is vague. These arguments miss the point, because no matter how one defines the USO, the fact remains that the UPS corporate family operates free of any such obligation in Canada. This is because the rules of the *Universal Postal Convention* do not apply to couriers.

453. It is clear that Canada's domestic measures relating to the mail, including those at issue in this arbitration, arise out of Canada's treaty commitments and are implemented as part of Canada's domestic policy. In contrast, Canada's measures applicable to the express consignment industry, which includes UPS Canada, do not emanate from the *Acts of the UPU*, or from any other international treaty. Rather, they were designed and implemented domestically in response to the request of the express consignment industry for a system of importation that suited its needs of speed and efficiency.

454. The *Acts of the UPU* provide relevant context in that they:

establish obligations upon Canada in respect of the treatment of foreign mail as distinguished from courier or express consignment; and

impose obligations upon Canada, which are carried out by Canada Post, to accept mail from all foreign postal administrations for delivery throughout Canada, pursuant to the USO.

455. This context is key to understanding the differences in treatment that Canada accords to the mail and to the Claimant and UPS Canada for the purposes of applying Article 1102. It is also important to a determination of whether Canada's treatment breaches Article 1105, since a measure of Canada consciously made in the context of an operating system of international law is not the mark of an arbitrary act or inequitable treatment.

⁴⁴⁸ Article 10 of the *UPU Convention* provides that "Postal administrations shall provide for the acceptance, handling, conveyance and delivery of [...] postal parcels [...] as laid down in the Convention". In the case of Canada, parcels are limited to 30 kilograms". (Respondent's Book of Authorities, Tab 4).

b) The Kyoto Convention

456. During the NAFTA negotiations, the Parties were and continue to be members of the World Customs Organisation. The international norms applicable to international customs recognise that the special nature of postal traffic requires special Customs formalities.

457. The language used in the “Text and Commentary” of Annex F.4 of the *Kyoto Convention*, 1973, provides:

The Customs are necessarily involved in international postal traffic since, just as in the case of goods imported and exported by other means, they have to ensure that the appropriate duties and taxes are collected, enforce import and export prohibitions and restrictions, and in general, ensure compliance with the laws and regulations which they are responsible for enforcing.

Because of the special nature of postal traffic, however, the Customs formalities in respect of items carried by post are somewhat different from those applied to goods carried by other means. While individual postal items are restricted in size, their numbers are enormous and, to avoid creating unacceptable delays, special administrative arrangements are necessary to deal with them. They are made possible because in virtually all countries the postal services are furnished by public administrations or authorities, and the two public bodies involved in postal traffic, the post and the Customs, co-operate very closely with one another.⁴⁴⁹ [Emphasis added]

458. The particularities of international postal traffic has led Customs authorities around the world to accord postal international items a treatment that is different from that accorded to commercial importers.⁴⁵⁰ For example, Standard 4 of Annex A.3 provides that all commercial means of transport shall be subject to Customs control. On the other hand, Standards 10, 12 and 21 of Annex F.4 provide that Customs authorities shall confine themselves to examinations on a selective or random basis of postal items and that “postal items shall not be subject to Customs formalities whilst they are being

⁴⁴⁹ Parsons Affidavit, paras. 21-23. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

⁴⁵⁰ Parsons Affidavit, para. 19. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

conveyed in international traffic.”⁴⁵¹

459. A further example is that Customs authorities have undertaken, as far as possible, to allow commercial importers to accomplish Customs formalities at places other than a Customs office for a charge or a fee. On the other hand, they have recognized the importance of working together with postal authorities to clear international mail. For example, Standard 5 of Annex F.4 provides as follows:

The Customs authorities, with any necessary agreement of the postal authorities, shall designate the Customs offices or other places at which postal items may be cleared.

Notes

- i) Joint Customs/post offices may be set up, or Customs officers may be stationed permanently or for certain hours of the day at post offices; in these latter circumstances the postal authorities may provide the Customs with office accommodation.
- ii) Customs offices may be set up at exchange post offices, which are post offices responsible for exchanging postal consignments with the appropriate foreign postal authorities.⁴⁵²

460. The *Kyoto Convention* leaves some discretion to contracting parties to determine how they will implement their obligations, such as the manner in which they collect duties. Recommended Practice 25 of Annex F.4 proposes that when Customs releases goods to the post prior to the payment of duties and taxes, it should make the simplest possible arrangements for the collection of those charges. In many countries that resulted in the post collecting any duties and taxes chargeable when the item was delivered by the postal worker.⁴⁵³

⁴⁵¹ Parsons Affidavit, para. 19. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

⁴⁵² Parsons Affidavit, para. 19. (Respondent’s Book of Expert Reports and Affidavits, Tab 30). See also Jones Affidavit, para. 140. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁴⁵³ Parsons Affidavit, para. 92-3. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

461. Annex J.2 of the *Revised Kyoto Convention*, which has not yet entered into force, maintains most of the provisions found in the original Annex F.4.⁴⁵⁴ It also recognizes the particularity of the postal traffic:

Because of the volume and largely unreported nature of postal traffic, the Customs formalities for items carried by post are somewhat different from those applied to goods carried by other means. While individual postal items are restricted in size, their numbers are enormous and, to avoid creating unacceptable delays, administrative arrangements have been made to deal with them. These administrative arrangements and related risk assessment techniques may change in some administrations as national postal services become more deregulated, start to compete in new markets and increase their efforts in developing standard electronic messages for postal traffic.⁴⁵⁵

462. Although the *Revised Kyoto Convention* has not yet entered into force, the re-adoption of a postal annex proves that the customs administrations around the world continue to see the special role played by the Mail as compared to other kinds of imports.

463. The Kyoto Conventions provide context relevant to a determination of whether Canada Customs accords treatment in like circumstances to the mail and to the Claimant and UPS Canada for the purposes of applying Article 1102. They are also significant with respect to Article 1105 because Canadian measures that are applied in the context of an operating system of international law can hardly be described as arbitrary, unfair or inequitable.

464. In summary, the norms found in the Kyoto Conventions and the *Acts of the UPU* are an important part of “the atmosphere and spirit of international law”⁴⁵⁶ and therefore provide context to the application of the obligations at issue in this dispute which involves Canada Post and Customs treatment.

⁴⁵⁴ Parsons Affidavit, para. 32. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

⁴⁵⁵ Parsons Affidavit, para. 33. (Respondent’s Book of Expert Reports and Affidavits, Tab 30).

⁴⁵⁶ *The Kronprins Gustaf Adolf; The Pacific*, 18 July 1932, 2 RIIA 1239 at 1246-47. (Respondent’s Book of Authorities, Tab 59).

3. Object and Purpose

465. The objectives of the NAFTA are set out in the preamble as well as in Article 102. This includes the goal of increasing investment opportunities, but it also includes the Parties expression of their desire to “PRESERVE their flexibility to safeguard the public welfare”.⁴⁵⁷ The preamble and Article 102 strike a balance between the diverse objectives common to the NAFTA Parties.

466. It would be unreasonable to give any one objective too much weight. As the *ADF* Tribunal cautioned, “NAFTA’s objectives, together with the statements set out in the Preamble of NAFTA, are necessarily cast in terms of a high level of generality and abstraction.”⁴⁵⁸ NAFTA itself explains that they are “elaborated more specifically through [the Agreement’s] principles and rules, including national treatment, most-favoured-nation treatment and transparency”.⁴⁵⁹

467. As stated by the Tribunal in *ADF v. United States*, “the object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph.”⁴⁶⁰

468. NAFTA's objectives therefore provide limited interpretative guidance as compared to the ordinary meaning of the terms found in Articles 1102, 1103, 1104 and 1105 and their context, which includes NAFTA Chapters 1, 15, 21 and 22, as well as the international rules applicable between the US and Canada relating to postal services on the one hand and express consignment or courier services on the other.

⁴⁵⁷ NAFTA, Preamble.

⁴⁵⁸ *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, (Award), (9 January 2003), para. 147. (“*ADF* Award”). (Investor’s Book of Authorities, Tab 95).

⁴⁵⁹ NAFTA, Article 102, *chapeau*.

⁴⁶⁰ *ADF* Award, para. 147 (Investor’s Book of Authorities, Tab 95).

B. Evidentiary Issues

1. Burden of Proof

469. There is no dispute between the parties that “each party shall have the burden of proving the facts relied on to support his claim or defence.”⁴⁶¹ However, “burden of proof” can be used both as meaning “evidential burden” or a “legal burden”, which is both procedural and substantive.⁴⁶²

470. An “evidential burden” is a concept, which entails that a party has the responsibility to insure that there is sufficient evidence of the existence or non existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue. To take an example, in *Kimberly-Clark Corp. and Bank Markazi Iran, et al*, the Iran-US Tribunal dismissed a claim because the Claimant presented no persuasive evidence to prove the Tribunal’s jurisdiction.⁴⁶³

471. As a legal burden, a “burden of proof” is an Anglo-American concept that refers to the duty of a party to persuade the trier of the fact by the end of the case of the truth of certain propositions.⁴⁶⁴

⁴⁶¹ UNCITRAL, Rule 24(1).

⁴⁶² Kazazi, Dr. Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Kluwer Law International, The Hague, at 35-37 and 30. (Respondent’s Book of Authorities, Tab 96).

⁴⁶³ *Kimberly-Clark Corp. and Bank Markazi Iran, et al*, Award No. 46-57-2, 25 May 1983, 2 Iran-US CTR, 334 at 338 (Respondent’s Book of Authorities, Tab 57); see also *Melczer Mining Co. Case v. United Mexican States*, (1929), Op. of Com. 1929, at 228 ff. (Respondent’s Book of Authorities, Tab 62), in which the Mexican Claims Commission stated the following:

the Commission must reach a conclusion on the strength of the evidence produced by both parties. Evidence furnished by the respondent Government must of course be considered both with respect to what it may show against contentions advanced in defence to the claim and with respect to what may be revealed in support of such contentions. But the mere fact that such evidence is meagre cannot itself justify an award in the absence of concrete and convincing evidence produced by the Claimant Government.

⁴⁶⁴ Kazazi, Dr. Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Kluwer Law International, The Hague, at 24. (Respondent’s Book of Authorities, Tab 96).

472. If all the Claimant is proposing is that Canada must prove the facts it seeks to rely on in support of the facts it invokes in its defence, then Canada takes no issue. If, on the other hand, the Claimant is attempting to create a legal burden upon Canada where none exists, this must be rejected.

473. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding Article 1102. This is a legal burden that rests squarely with the Claimant. Similarly, the Claimant bears the legal burden to prove that Canada has breached its obligations to:

- Accord treatment to UPS Canada that is no less favourable than that it accords, in like circumstances, to Canada Post;⁴⁶⁵
- Respect a rule of customary international law that forms part of the international minimum standard of the treatment of aliens;⁴⁶⁶ and
- Accord treatment to UPS Canada that is no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party.⁴⁶⁷

2. No Adverse Inference can be drawn

474. The Claimant asks the Tribunal to draw a number of adverse inferences against Canada.⁴⁶⁸ These requests are in relation to allegations on the following:

- Canada Post's Annual Cost Study;
- Purolator's use of monopoly infrastructure;
- Canada Post's use of monopoly infrastructure;
- Canada's supervision of Canada Post; and

⁴⁶⁵ See Part IV, Section B.2, "The Claimant bears the burden of proof", paras. 625-632.

⁴⁶⁶ See Part V, Section A "Legal Test", paras. 898-907.

⁴⁶⁷ See Part VI, Section 1, "Legal test for breach of Article 1103", paras. 994-998.

⁴⁶⁸ Investor's Memorial, paras. 197, 247, 352 and 401.

- The Publications Assistance Program.

475. All of the Claimant's inference requests are without merit and should be rejected. They lack legal justification and factual accuracy.

a) The law

476. UNCITRAL Rule 24(3) allows a tribunal to require production of documents. It provides:

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

477. UNCITRAL Rule 28(3) addresses a failure to comply with a tribunal request. It provides:

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it. [Emphasis added]

478. UNCITRAL Rule 28(3) does not oblige a Tribunal to draw an adverse inference. Rather, it instructs the Tribunal to make a determination based on the available evidence.⁴⁶⁹

479. As NAFTA and UNCITRAL Rules give no specific direction as to when a Tribunal should draw a negative inference, it should be very cautious to take such a

⁴⁶⁹ The IBA Rules on the Taking of Evidence in International Commercial Arbitration are also phrased in permissive and not mandatory terms with respect to the drawing of an adverse inference. (Respondent's Book of Authorities, Tab 14).

"9(4) If a Party fails without satisfactory explanation to produce any document requested in a Request to Produce to which it has not objected in due time or fails to produce any document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party." [Emphasis added]

“radical approach”.⁴⁷⁰

480. A series of criteria must generally be present prior to drawing an adverse inference:⁴⁷¹

- i) “The documents in question must be relevant and material to the proceeding. ...”
- ii) “... [T]he tribunal must be convinced that the requested documents are at the disposal of that party.”
- iii) “... [T]he claim must otherwise appear substantial, i.e., the Claimant should have made a *prima facie* case before the tribunal requests the other party to provide the requested documents or before drawing adverse inferences from a party’s failure to provide evidence.”
- iv) “... [T]he tribunal should have given the party against whom the negative inference is drawn enough time and opportunity to produce the required evidence. ...”
- v) “Adverse inference shall be drawn against a party which has not produced documents in its possession without providing any justification. Thus, explanations provided by a party as reasons for not producing the requested documents should be weighed by the tribunal and taken into account before drawing any adverse inference. For instance, governments might have difficulties arising from their laws or national security concerns. An international tribunal would be more cautious in drawing negative inferences against a government.”
[Emphasis added]

⁴⁷⁰ Kazazi, Dr. Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Kluwer Law International, The Hague, at 313 and 322. (Respondent’s Book of Authorities, Tab 96).

⁴⁷¹ Kazazi, Dr. Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Kluwer Law International, The Hague, at 320-22. (Respondent’s Book of Authorities, Tab 96).

- vi) “Drawing adverse inferences does not mean that the claim of the other party need not be proved. A negative inference has a limited scope of application and may, in fact, not have any practical effect on the proceedings. It is only at the stage of the evaluation of evidence that the tribunal takes negative inferences into account, and the degree of their effect is subjective. If the tribunal is able to base its decision on other documents and grounds, it should do so.” [Emphasis added]

481. Other writers have also noted the requirement for possession of the document prior to an adverse inference being drawn⁴⁷² as did the *Feldman* Tribunal.⁴⁷³ The corollary, of course, is that if the document is not in the possession of the party then no adverse inference should be drawn as a result of the failure to produce.⁴⁷⁴ Thus, no adverse inference should be drawn in a situation where a disputing party would be required to create a document from information stored in a variety of legacy and obsolete databases. This was acknowledged by the *Waste Management* Tribunal in ruling that

⁴⁷² See for example Howard M. Holtzmann, “Fact Finding By The Iran-United States Claims Tribunal” in Richard B. Lillich, ed., *Fact-Finding Before International Tribunals* (New York: Transnational Publishers Inc., 1991) 101 at 127. (Respondent’s Book of Authorities, Tab 92). “The necessary predicate for the inference is the Tribunal’s reasonable certainty that the party against whom the inference is to be drawn has possession of, or access to, the missing evidence.” And

Durward V. Sandifer, *Evidence Before International Tribunals*, Revised Edition, (Charlottesville: University Press of Virginia, 1975), at 150 (Respondent’s Book of Authorities, Tab 98): “Ad hoc tribunals have frequently asserted the existence of a rule empowering them to draw adverse inferences from the failure of a party to produce evidence known or presumed to be in its possession and have given judgement based upon the application of such a rule.” [Emphasis added]

⁴⁷³ *Marvin Feldman v. Mexico* (Case No. ARB(AF)/99/1), (December 16, 2002), (Award), para. 178 [*Feldman* Award], (Investor’s Book of Authorities, Tab 8): “.... If the Respondent had had available to it evidence showing that the Poblano Group companies had not been treated in a more favourable fashion than CEMSA with regard to receiving IEPS rebates, it has never been explained why it was not introduced. Why would any rational party have taken this approach at the hearing and in the briefs if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant, that is, denied IEPS rebates for cigarette exports where proper invoices were available?...” [Emphasis added]

⁴⁷⁴ Howard M. Holtzman, “Fact Finding By The Iran-United States Claims Tribunal”, in Richard B. Lillich, ed., *Fact-Finding Before International Tribunals* (New York: Transnational Publishers Inc., 1991) 101 at 127. (Respondent’s Book of Authorities, Tab 92).

production of documents means existing documents and not the creation of documents.⁴⁷⁵

482. The failure to produce, even with unaccepted justification, does not lead automatically to an adverse inference as can be seen in the WTO Panel decision *Canada-Measures Affecting the Export of Civilian Aircraft*.⁴⁷⁶ The Panel refused to draw an adverse inference, despite Canada's refusal to provide details of a transaction, because Brazil had not demonstrated other sufficient factual basis for the Panel to do so. The Appellate Body denied Brazil's appeal that the Panel erred in law or abused its discretion by declining to make the inference.⁴⁷⁷ The same was true in a case before the Iran-US Tribunal, which functions on the basis of UNCITRAL rules.⁴⁷⁸

483. Accordingly, adverse inferences should only be drawn in limited circumstances and only in the presence of certain criteria. Where other evidence is available the tribunal should rely on that other evidence as the basis of its decision.

b) The Claimant's Specific Requests

484. The Claimant argues that the Tribunal should make certain findings of fact by way of adverse inference, namely⁴⁷⁹:

⁴⁷⁵ *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), (October 1, 2002), (Procedural Order concerning Disclosure of Documents), para 8, "The Tribunal agrees with the parties that the present requests concern documents, not information, and that a party is not required to produce new documents or lists". [Emphasis added]. [*Waste Management* Procedural Order]. (Investor's Book of Authorities, Tab 92).

⁴⁷⁶ *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Panel, WT/DS70/R, adopted 20 August 1999, para. 9.181. (Investor's Book of Authorities, Tab. 137).

⁴⁷⁷ *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, para. 205. (Respondent's Book of Authorities, Tab 40): "...Yet, we do not believe that the record provides a sufficient basis for us to hold that the Panel erred in law, or abused its discretionary authority, in concluding that Brazil had not done enough to compel the Panel to make the inferences requested by Brazil. For this reason, we let the Panel's finding of not proven remain, and we decline Brazil's appeal on this issue."

⁴⁷⁸ See for example *Levitt v. The Government of the Islamic Republic of Iran* (1991), 27 Iran-US Cl. Trib. Rep. 145, paras. 56-66. (Respondent's Book of Authorities, Tab 60).

⁴⁷⁹ Investor's Memorial, para 401.

- The Annual Cost study is flawed or improperly implemented and Canada Post's courier services do not make either an incremental or a "fair" contribution to covering the costs of basic postal services;
- Purolator is using Canada Post employees for the pick up, sorting and transportation or delivery of its services;
- Priority courier and Xpresspost access the monopoly infrastructure in the manner described in the documents requests
- Canada is aware of Canada Post's actions and has refused to supervise or regulate them;
- Canada cannot rely on the Competition Bureau to support the defence of Canada Post's activities;
- There is no justification for the restriction of the distribution under the Publications Assistance program to Canada Post.

485. None of the claims permit an adverse inference to be drawn. In the case of the first four categories, Canada has objected to the disclosure of the documents on the basis that they are not within Canada's control and are irrelevant to the arbitration.⁴⁸⁰ In the absence of a ruling from the Tribunal on Canada's objections, it would be unfair to draw an adverse inference. In addition to the Claimant's ability to satisfy the legal criteria noted above, a ruling rejecting Canada's objections is necessary prior to an adverse inference being drawn.

486. As Canada has already argued, the additional documents the Claimant requests with respect to the Annual Cost Study are irrelevant. The "market rates" test was invented by the Claimant for this arbitration, and should be ignored. With respect to incremental contribution, the Claimant has explicitly argued that absence of cross-subsidization is irrelevant to Article 1102.⁴⁸¹ Since by the Claimant's admission, the evidence cannot establish the absence of an Article 1102 violation, the requested material

⁴⁸⁰ Reply of the Government of Canada to the Investor's Motion on its Information Request dated 29 June 2004, paras. 50 and 67.

⁴⁸¹ Investor's Memorial, para. 762.

is simply irrelevant to this arbitration.⁴⁸² There are no grounds for drawing an adverse inference.

487. The evidence Canada provided is more than adequate to prove the absence of cross-subsidy. The *Annual Cost Study*, the auditors' reports, Professor Bradley's explanations of the methodology and Professor Cooper's review of its application present a complete picture of the facts. The Claimant does not need to generate its own version of the *Annual Cost Study*, or force Canada Post to recreate long-archived legacy systems to make its case.

488. [Redacted]⁴⁸³ [Redacted]⁴⁸⁴

489. The Tribunal has evidence before it regarding governance and regulation of Canada Post. The affidavit of Gordon Ferguson explains how the Government supervises Canada Post.⁴⁸⁵ Many documents have been produced that provide evidence of the relationship between the Government of Canada and Canada Post. These documents speak for themselves.

490. Similarly, Canada has explained how the Competition Bureau provides a certain oversight of Canada Post.⁴⁸⁶ [Redacted]⁴⁸⁷ There is therefore no basis for drawing adverse inferences regarding the Government of Canada's supervision of Canada Post.

⁴⁸² Canada has so maintained since the outset. See, for example, Reply of the Government of Canada to the Investor's Motion on its Information Request dated 29 June 2004, para. 50 and Rebuttal of the Government of Canada to the Investor's Sur-Reply dated 13 August 2004, para. 22.

⁴⁸³ [Redacted]

⁴⁸⁴ [Redacted]. Such reasoning was applied by the *Waste Management* Tribunal which rejected a request for "copies of all invoices issued in the period 1994-1998" as it was "too burdensome, since it is likely to include very large numbers of documents all or most of which are not in dispute as such." *Waste Management* Procedural Order, para. 11. (Investor's Book of Authorities, Tab 92).

⁴⁸⁵ Ferguson Affidavit, paras 13-24 (Respondent's Book of Expert Reports and Affidavits, Tab 11); see also Facts Section H: "Governance and Accountability of Canada Post".

⁴⁸⁶ Refer to Facts Section 3: "Competition Bureau Oversight"; see also Annan Affidavit generally. (Respondent's Book of Expert Reports and Affidavits, Tab 1).

⁴⁸⁷ [Redacted]

491. Similarly, with respect to the documents regarding the *Publications Assistance Program*, there is no basis to draw any adverse inference. Contrary to what the Claimant suggests,⁴⁸⁸ the McCarthy Tétrault discussion paper on the replacement of the Publications Distribution Assistance Program was produced as part of Canada's Document Production.⁴⁸⁹ Indeed, Canada does not deny that over the years the Department of Canadian Heritage has considered other ways of delivering the publications distribution assistance program. However, it has concluded that the current form of the program is the best way of achieving the program's objectives.⁴⁹⁰

492. The remaining two requests from the Claimant regarding Purolator use of Canada Post employees and access of competitive products to the monopoly infrastructure are phrased in vague terms. Regardless of the lack of specificity in the Claimant's requests, in both instances the Tribunal has ample evidence before it on which to rule. The Claimant has posed numerous document requests and interrogatories to which Canada has responded.⁴⁹¹

493. Where a disputing party has produced sufficient documentation, other arbitration tribunals have typically refused to draw adverse inferences.⁴⁹² This Tribunal should do the same. Canada has provided more than enough documentation to allow the Claimant to make its case and the Tribunal to reach its conclusions, without drawing adverse inferences.

⁴⁸⁸ Investor's Memorial, para. 352.

⁴⁸⁹ Canada's Document Production delivered to UPS on March 2, 2004, at Restricted Tab 262(1) although it would appear the last few pages of the Annexes to the document produced were missing. In the Investor's Motion on Canada's Non-Compliance with the Investor's Information Request, Appendix B at page 31 the Investor acknowledges receipt of the report but notes "[t]he document provided is incomplete as it is missing its referenced appendices."

⁴⁹⁰ For a description of the consultations and policy considerations that resulted in this decision, see Fiset Affidavit, paras. 20-24. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

⁴⁹¹ For a description of the consultations and policy considerations that resulted in this decision, see Fiset Affidavit, paras. 20-24. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

⁴⁹² *Waste Management, Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)00/3, para. 15, Procedural Order No. 2 Concerning Disclosure of Documents, November 27, 2002 (Respondent's Book of Authorities, Tab 70).

494. In summary, Canada maintains that this Tribunal has no cause to draw an adverse inference against Canada, since:

- Canada has dutifully and in good faith expended massive resources to produce significant amounts of information and documents in response to the Claimant’s very numerous requests for information;
- Many of the relevant documents are the subject of objections to disclosure on which the Tribunal has not ruled;
- Many of the relevant documents do not exist;
- To create some of the documents requested would impose an unreasonable burden on Canada;
- Canada otherwise has a legitimate excuse for any documents or information not produced;
- The criteria established for the drawing of adverse inferences have not been met; and

495. Finally, Canada submits that any conclusions the Tribunal reaches based “on the evidence before it” must in any event vindicate Canada.

III. ADMISSIBILITY, JURISDICTION AND EXCEPTIONS

496. Canada maintains the objections it raised in its Statement of Defence and Memorial on Compliance with the Award on Jurisdiction with respect to the admissibility of the claims.⁴⁹³ In this section, Canada will address its general objections to jurisdiction, as well as certain exceptions to NAFTA obligations. Some specific objections with respect to specific claims will be addressed in the sections dealing with those claims.

A. UPS Canada’s ownership records are self-contradictory

497. Articles 1116 and 1117 both require that a claim be brought by an “investor of a Party”. The public filings available to Canada concerning the ownership of UPS Canada, as well as the Claimant’s own evidence present a more confusing picture than the

⁴⁹³ Statement of Defence, Part V and Memorial on Compliance with the Award on Jurisdiction.

statement that [Redacted].⁴⁹⁴ As a result, Canada remains uncertain as to Claimant’s exact standing to bring this claim.

498. In support of assertion of standing, the Claimant relies on [Redacted]⁴⁹⁵

499. However, the assertion that the Claimant, UPS of America Inc. [Redacted] during the relevant period is contradicted by the public filings of the UPS corporate family. These filings were obtained by Kroll Lindquist Avey, a leading forensic accounting firm, on Canada’s behalf. They indicate that the Claimant has not held any shares in UPS Canada since November 1999. They show United Parcel Service, Inc. (“UPS Inc.”) as the sole shareholder of UPS Canada since that date.

500. United States securities law requires corporations to file a report known as a “10K”. UPS Inc.’s 10K report for 1999, filed with the United States Securities and Exchange Commission on December 31, 1999,[Redacted]⁴⁹⁶ [Redacted]⁴⁹⁷

501. The Claimant has provided two officer’s certificates on its ownership of UPS Canada. The first, provided during the document production phase, [Redacted]⁴⁹⁸ The second, [Redacted] ⁴⁹⁹

502. These certificates do not agree with the corporate filings Canada has obtained. As Canada understands the concept [Redacted]⁵⁰⁰

⁴⁹⁴ [Redacted]

⁴⁹⁵ [Redacted]

⁴⁹⁶ [Redacted]

⁴⁹⁷ [Redacted]

⁴⁹⁸ [Redacted]

⁴⁹⁹ [Redacted]

⁵⁰⁰ For example, the General Rules and Regulations, Securities Exchange Act of 1934 (17 C.F.R. 240.13d-3) defines beneficial owner as:

503. Canada recognises that even [Redacted], the Claimant may well have standing to bring a claim for loss or damage to its interest in UPS Canada, or to bring a claim on behalf of UPS Canada. However, given the confusion surrounding UPS Canada's ownership, Canada submits that the Tribunal may wish to enquire further before deciding the Claimant has such standing.

B. The claims are time-barred

504. Articles 1116(2) and 1117(2) of the NAFTA provide a definite time limitation in which an investor must bring a claim before a NAFTA tribunal. Article 1116(2) states,

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

505. Article 1117(2) is identical, other than that it is the enterprise that must have the requisite knowledge.

506. These provisions impose a clear and rigid limitation of three years, to begin from the date that the investor or enterprise has actual or imputed knowledge of the breach and loss incurred from that breach. Prescription ceases to run upon receipt of the notice of arbitration.⁵⁰¹ In this case, that date is April 19, 2000.

507. The very purpose of these provisions is to set out a clear limitation period within which an investor may make a claim.

508. To give proper effect to the meaning of the words "first acquired" in their context, and in light of the purpose of Articles 1116(2) and 1117(2), and the NAFTA as a

any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or

⁵⁰¹ NAFTA, Article 1137(2). See also *Feldman*, in which the Tribunal identified the date of receipt by ICSID's Secretary General as the critical date. *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, (December 6, 2000), (Interim Decision on Preliminary Jurisdictional Issues), 40 I.L.M. 615, para. 44 [*Feldman* Interim Decision]. (Respondent's Book of Authorities, Tab 53).

whole, the three-year limitation must be calculated from the first day at which the Claimant became aware, or should have become aware, of the alleged breach and resulting damage. To read these provisions as permitting claims without time limit in the case of a continuing breach would subvert their purpose of promoting certainty and finality.

509. International law recognises the existence of extinctive prescription. A claim can become inadmissible by passage of time, even in the absence of a formal prescription period, and even where the fact situation in dispute continues.⁵⁰² Canada submits that this must also be the case where a treaty prescribes a set time limit, unless the treaty clearly provides otherwise. The NAFTA does not.

510. The Claimant's arguments to the contrary are without merit.⁵⁰³ Certainty is promoted by having a clear and definite time limit, and is undermined by allowing claimants to delay their claims for years. Nor is there anything ineffective or absurd in a procedure that requires claimants to bring their claims within a stated period of time.⁵⁰⁴ To the contrary, the longer a claimant waits, the greater the potential prejudice to the respondent from difficulties in establishing the facts.⁵⁰⁵

511. While the Claimant cited the *Feldman* Tribunal in support of its theory of continuing breach,⁵⁰⁶ it did not cite *Mondev International Ltd. v. United States of*

⁵⁰² See, for example, *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, (Preliminary Objections), 1992 I.C.J. 240, para. 32 [*Nauru v. Australia*]. (Respondent's Book of Authorities, Tab 44). Although the Court held on the facts that Nauru's claim was not rendered inadmissible by the passage of time, it was prepared to reject the claim for that reason. The case concerned a continuing situation, in that Nauru alleged Australia had failed to take actions required of it.

⁵⁰³ Investor's Memorial, paras. 494-500.

⁵⁰⁴ The Claimant's authorities from outside the NAFTA context are also inapplicable. *Peter Blaine v. Jamaica* and *Neville Lewis v. Jamaica* were decided under a treaty providing for two prescription periods: six months for matters that have been subject to a final judgement at the domestic level, and a "reasonable period of time" for matters that are still ongoing, but for which it is impossible to exhaust local remedies. The six-month rule in the European cases cited at footnote 542 also refers specifically to the date of a "final decision".

⁵⁰⁵ *Nauru v. Australia*, para. 36. (Respondent's Book of Authorities, Tab 44).

⁵⁰⁶ Investor's Memorial, para. 495.

America. That Tribunal recognised the importance of continuing actions beginning before a treaty's entry into force.⁵⁰⁷ However, it also found that a continuing breach could be time-barred. It held:

Thus if Mondev's claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 19994, they would now be time-barred. This is a further reason for limiting the Tribunal's consideration of the substantive claims to those concerning the decisions of the United States' courts.⁵⁰⁸

512. The Tribunal therefore has jurisdiction only over claims for which the investor (or enterprise) first acquired, or should have first acquired, the requisite knowledge after April 19, 1997. The evidence demonstrates that the Claimant, UPS Canada or both were aware, or ought to have been aware of most of the alleged breaches many years before that date.

513. Canada submits that under the circumstances, any knowledge the Claimant, UPS Canada or both had or ought to have had with respect to the existence of the breach would also demonstrate imputed knowledge of loss or harm.⁵⁰⁹

514. The extent of this harm is immaterial. In *Mondev*, the Tribunal found that a claimant need have known "only that it has suffered loss or damage, even if the extent or quantification of the loss or damage is still unclear".⁵¹⁰

515. In each of its claims, the Claimant alleges a comprehensive regime to discriminate in favour of Canada Post. As a result, very little time could have passed, if any at all, between the Claimant or UPS Canada first becoming aware of the alleged

⁵⁰⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, (October 11, 2002), (Award), 42 ILM 85 (2003), para. 69 [*Mondev Award*]. (Investor's Book of Authorities, Tab 37).

⁵⁰⁸ *Ibid.*, para. 87.

⁵⁰⁹ The *Pope & Talbot* Tribunal confirmed that the relevant question is when the investor ought to have known of loss or damage, not when it actually knew. Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record (the "Harmac Motion"), (February 24, 2000), para. 12 [Harmac Motion]. (Investor's Book of Authorities, Tab 63).

⁵¹⁰ *Mondev Award*, para. 87. (Investor's Book of Authorities, Tab 37).

breach and first acquiring imputed knowledge that some loss would result from that breach.

516. *“Leveraging” the infrastructure.* Since at least 1989, the Claimant has argued that Canada Post monopoly products cross-subsidize the competitive services.⁵¹¹ These documents clearly demonstrate that the Claimant and/or UPS Canada had knowledge of Canada Post practices well before the three-year limit.

517. *Customs Allegations.* The Claimant attempts to avoid the time limitation in Article 1116(2) by asserting it was unaware of the Postal Imports Agreement until it filed an Access to Information Request in 1999.⁵¹² In fact, the evidence demonstrates that the Claimant, UPS Canada or both knew or ought to have known of the legal and factual differences between the processing of goods imported as mail and goods imported by courier as early as the 1980s. Many of these differences continue to this day. Changes to the processing of international mail, including the outsourcing of the collections and material handling functions to Canada Post under the Postal Imports Agreement in 1992, were made public through D-memoranda, the media, conferences, and the parliamentary process.⁵¹³

518. The Claimant’s allegations with respect to alleged preferential Customs treatment are time-barred. Without accepting the Claimant’s factual characterisations, or the merits of its claims, Canada submits the claims are time-barred for the following reasons:

⁵¹¹ See “Supplementary Comment”, Canada Post, (Presentation to House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations by United Parcel Service Canada Ltd.), December 21, 1989, at 1. (Respondent’s Book of Documents, Tab 49). “Conclusive evidence must come from an independent audit of Canada Post. However, there is ample evidence that demonstrates that Canada Post does cross-subsidize products where it competes with private enterprise.”

⁵¹² Investor’s Memorial, para. 493(c).

⁵¹³ See fact section entitled: “Changes to International Mail Process Were Public Knowledge.” See also Question No. 363, *House of Commons Debates*, November 16, 1992, at 13413. (Respondent’s Book of Documents, Tab 50); *Processing of International Postal Shipments*, (June 26, 1992), Canadian Association of Customs Brokers Bulletin No. 13 at 5.(Respondent’s Book of Documents, Tab 51).

- “Canada Customs charges cost recovery fees to UPS Canada, but not Canada Post”: Customs charges cost recovery fees to UPS Canada under the Courier/LVS Program which was introduced in 1993, and under the *Special Services (Customs) Regulations*.⁵¹⁴
- “Canada Customs charges UPS Canada for computer linkage systems, but not Canada Post”: Canada Post has had limited access to Customs’ PICS system when providing services to Customs under the Postal Imports Agreement since 1992.⁵¹⁵
- “Canada Customs provides Canada Post customers with valuable brokerage services without charge. Customers of UPS Canada must pay for the services”: Customs Mail Centers have been co-located with International Mail Exchange Office since at least 1982. CMC Custom officers have been performing determination functions since at least 1982.⁵¹⁶
- “Canada Customs improperly delegates important duties to Canada Post”: Canada Post employees have been sorting mail to present goods to Customs since at least 1970.⁵¹⁷
- “Canada Customs pays Canada Post for ‘services’ that UPS Canada is required to perform for free”: Customs pays Canada Post for services under the Postal Imports Agreement which was publicly announced in 1992.⁵¹⁸

⁵¹⁴ *Special Services (Customs) Regulations* (SOR/86-1012) (Respondent’s Book of Authorities, Tab 37); Letter dated July 16, 1991 from Kal Tobias, President CCA, to Mr. Doug Smee, Assistant Deputy Minister of Finance, (Respondent’s Book of Documents, Tab 37).

⁵¹⁵ Question No. 363, *House of Commons Debates*, November 16, 1992, at 13081-82. (Respondent’s Book of Documents, Tab 50); Martin Affidavit, para. 44. (Respondent’s Book of Expert Reports and Affidavits, Tab 26).

⁵¹⁶ *D-Memo D5-1-1*. (Respondent’s Book of Documents, Tab 19).

⁵¹⁷ See *Post Office Act*, s. 46(1). (Respondent’s Book of Authorities, Tab 20).

- “Requiring UPS Canada to post bonds, but exempting Canada Post”: The posting of bonds is one of the conditions that a courier must meet in order to participate in the Courier/LVS Program that was introduced in 1993. Couriers are required pursuant to the Accounting for Imported Goods and Payment of Duties Regulations to post a “security for release of goods.”⁵¹⁹
- “Charging UPS Canada GST on handling fees, but exempting Canada Post”: The zero-rating of the fee is reflected in an amendment to the *Excise Tax Act* that came into force in 1992.⁵²⁰

519. Section VI(3) of Part II of this Counter-Memorial contains a full description of the distinctions between the Postal Imports Agreement and other Customs processes for international mail.⁵²¹

520. Canada has presented overwhelming evidence showing that the *Postal Imports Agreement*, and the attributes of the new postal system featuring an enhanced role for Canada Post, were made public in 1992.⁵²² The Claimant, UPS Canada or both must have acquired direct or constructive knowledge of these measures by that date.

521. The Claimant must have been aware of the Customs process for international mail and the distinctions between customs treatment of postal and courier imports ten full years before the Claimant filed the Notice of Intent. Many of the customs allegations can

⁵¹⁸ See fact section “Changes to International Mail Process Were Public Knowledge.” Bill C-74 third reading June 11, 1992 House of Commons Debates –Government Orders-Resumption of consideration of Bill by House of Commons of Bill C-74, as reported by Standing Committee on Finance at 11802. (Respondent’s Book of Authorities, Tab 21); Bill Sass, “Buying for less will cost more; New fees target shopping in the U.S.” in *Edmonton Journal*, June 22, 1992 at A3. (Respondent’s Book of Documents, Tab 29).

⁵¹⁹ *D-Memo* 17-4-0. (Respondent’s Book of Documents, Tab 33).

⁵²⁰ Bill C-74, Third Session, Thirty-fourth Parliament, 40-41 Elizabeth II, 1991-92 “An Act to amend the Customs Act, the Customs Tariff and the Excise Tax Act”. (Respondent’s Book of Authorities, Tab 21).

⁵²¹ Canada’s Counter-Memorial, paras. 331-375.

⁵²² See fact section entitled: “Changes to International Mail Process Were Public Knowledge”, paras. 366-369.

be traced back to issues that were raised in representations by the Claimant, UPS Canada or both directly or through the Canadian Courier Association (of which UPS Canada is a leading participant)⁵²³ dating back as early as 1989.⁵²⁴

522. *Publications Assistance Program.* The claim with respect to this subsidy is also time barred. Although the form of the program and the way it is administered has changed over the years, a postal subsidy for magazines has existed since Confederation. The Claimant itself points to this,⁵²⁵ thereby acknowledging that its claim in this respect does not meet the three-year time limitation of Article 1116. While some elements of the subsidy changed in 1997, the use of Canada Post as the delivery mechanism did not.⁵²⁶

C. To the extent it is an investor, the Claimant should have been brought its claims under Article 1117

523. Under Article 1116, an investor of a Party may bring a claim “on its own behalf” on the grounds that “the investor has incurred loss or damage.” The claim and the damages under Article 1116 are those of the investor, not the investment.

524. By contrast, under Article 1117, an investor may bring a claim “on behalf of an enterprise” that the investor owns or controls, on the grounds that “the enterprise has incurred loss or damage.” While some of the claims may involve allegations of loss or damage to the Claimant, the vast majority of them appear to allege loss or damage to

⁵²³ Tobias Affidavit, para. 3. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

⁵²⁴ See “Presentation to House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations” by Glenn C. Smith, President United Parcel Service Canada Ltd., dated December 6, 1989 at 15. (Respondent’s Book of Documents, Tab 35).

“As matters stand today, customs law does not recognize Canada Post as a parcel carrier, makes no provision for financial security to Canada Customs for importation taxes, does not subject Canada post to any penalties for Customs violations, and does not require the post office to provide documentation for each shipment.

Private carriers are accountable for all of these items and more for each shipment that comes into Canada. In addition the private carrier must provide a secure place for the storage of reported goods until a release is obtained from Customs.”

⁵²⁵ Investor’s Memorial, para. 349.

⁵²⁶ Fizez Affidavit, paras. 3 and 12. (Respondent’s Book of Expert Reports and Affidavits, Tab 12).

UPS Canada.⁵²⁷ One alleges loss to the former Fritz Starber.

525. The Claimant also asserts its US subsidiaries suffered loss or damage.⁵²⁸ To the extent this is an attempt to claim for losses allegedly suffered by these subsidiaries, Canada repeats its objection to the claim.⁵²⁹ The Claimant may claim for its own damages under Article 1116, and those of its investments in Canada under Article 1117, and nothing else.

526. Furthermore, it is for the Claimant to demonstrate that any losses it suffered were caused by the alleged breach, and were not too remote to be recoverable.⁵³⁰ The Claimant has offered only the bare assertions of Mr Rosen that [Redacted].⁵³¹ This assertion is insufficient to support so tenuous a chain of causation. Canada submits that to the extent the Claimant is pleading under Article 1116, any damage it may have suffered in this manner was not caused by any alleged breach, or is too remote to be recoverable.

527. To the extent the Claimant wishes to seek recovery for damages suffered by its alleged investments, it must do so under Article 1117. The difference between Articles 1116 and 1117 is no “mere formal distinction”. The NAFTA creates a strict separation between claims brought by an investor on its own behalf under Article 1116, and claims brought by an investor on behalf of an enterprise under Article 1117. Pursuant to Article

⁵²⁷ Canada assumes for the purposes of this section that the Claimant owns or controls UPS Canada. Absent such ownership or control, it would lack standing to bring a claim on behalf of UPS Canada.

⁵²⁸ Investor’s Memorial, para. 40; Rosen Report, para. 5. (Investor’s Brief of Witness Statements and Expert Reports, Tab 8). Note that the Rosen report does not claim to have “demonstrated” even \$1 of damage to these subsidiaries. It merely asserts that it is “reasonable and foreseeable” that they would suffer some damage.

⁵²⁹ Canada first raised this objection in its Statement of Defence at paras. 129 to 135. The Tribunal in its Award on Jurisdiction at paras. 120-22 found that UPS was not claiming for losses allegedly suffered by its US subsidiaries, and rejected Canada’s objection “at this stage”. *United Parcel Service of America Inc. v. Government of Canada*, (November 22, 2002), (Award on Jurisdiction) [*UPS Jurisdiction Award*]. (Investor’s Book of Authorities, Tab 48).

⁵³⁰ *S.D. Myers, Inc. v. Government of Canada*, (Second Partial Award), (October 21, 2002), paras. 156 and 161 [*Myers Second Partial Award*]. (Investor’s Book of Authorities, Tab 49).

⁵³¹ [Redacted]

1135(2)(b), the NAFTA also requires that any damages awarded under Article 1117 be paid to the enterprise, not the investor.⁵³²

528. This critical distinction preserves the rights of third parties such as trustees in bankruptcy to seek and satisfy claims against the enterprise. There may also be differences in the tax treatment of any damages awarded. Article 1135(2)(c) therefore requires a Tribunal awarding damages under Article 1117 to provide that the award is made without prejudice to any right that any person may have in relief under applicable domestic law.⁵³³

529. The Claimant cites *Pope & Talbot* for the proposition that Article 1116 allows it to bring a claim “on behalf of an investment that it directly owns and controls”.⁵³⁴ The Tribunal in *Pope & Talbot* relied on Article 1121(1) to conclude that an investor can bring a claim for loss or damage to its interest in an enterprise under Article 1116.⁵³⁵

530. While Canada does not dispute this statement as worded, it is not the same thing as concluding that an investor can bring a claim under Article 1116 “on behalf of” an investment. Loss or damage to an investor’s interest in an enterprise is still loss or damage suffered by the investor, not by the investment. To the extent the *Pope & Talbot* Tribunal intended to allow an investor to recover for loss or damage suffered by its investment, it was wrong.

531. The Claimant also cites *Mondev* for the proposition that international law does not place emphasis on merely formal distinctions.⁵³⁶ In fact, the *Mondev* Tribunal drew a distinction between the conditions precedent in Article 1121 and other procedures. It

⁵³² NAFTA, Article 1135(2)(b).

⁵³³ NAFTA, Article 1135(2)(c).

⁵³⁴ Investor’s Memorial, paras. 502-503.

⁵³⁵ *Pope & Talbot Inc. v. Government of Canada*, (May 31, 2002), (Award in Respect of Damages), 41 ILM 1346 (2002), para. 80 [*Pope & Talbot* Damages Award]. (Investor’s Book of Authorities, Tab 38).

⁵³⁶ Investor’s Memorial, paras. 505-6; *Mondev* Award. (Investor’s Book of Authorities, Tab 37).

found that failure to meet the former “would seem to” invalidate the submission, while failure to meet the latter “might not have that effect, provided the failure was promptly remedied”.⁵³⁷

532. Furthermore, the *Mondev* Tribunal was especially concerned with preserving the distinctions between Article 1116 and 1117 claims:

Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third Parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved. In the present case, there was no evidence of material non-disclosure or prejudice, and Article 1121 was complied with. Thus, the Tribunal would have been prepared, if necessary, to treat *Mondev*'s claim as brought in the alternative under Article 1117. In the event, the matter does not have to be decided, since the case can be resolved on the basis of Claimant's standing under Article 1116. But it is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.⁵³⁸

533. Although the *Mondev* Tribunal stated that international law does not place emphasis on formal considerations in international claims, it clearly opposed the proposition that Article 1116 is broad enough to include a claim that should have been brought under Article 1117. It admonished claimants to “consider carefully” whether to bring a claim under Article 1116 or Article 1117, an admonition the Claimant ignored.

⁵³⁷ *Mondev* Award, para. 44. (Investor's Book of Authorities, Tab 37).

⁵³⁸ *Mondev* Award, para. 86. (Investor's Book of Authorities, Tab 37).

534. Thus, to the extent the Claimant seeks damages for alleged losses of UPS Canada, or any other investment in Canada that is an enterprise, it should have filed its claim under Article 1117. Furthermore, its failure to file the consent to arbitration of those enterprises is an absolute bar to the Tribunal's jurisdiction to hear an Article 1117 claim.⁵³⁹

535. The *Mondev* Tribunal's willingness to treat the claim as though it had been filed under Article 1117 was explicitly conditioned on its finding that Mondev had complied with the jurisdictional requirements of Article 1121. The Claimant has not complied with Article 1121 for the purposes of a claim under Article 1117 because neither UPS Canada nor Fritz Starber has filed its written consent.

536. Even if the Tribunal is minded to "cure" the Claimant's failure to meet the conditions precedent for bringing a claim to arbitration, such a cure could only be effected by the filing of a new claim.⁵⁴⁰ The date of the Claimant's Article 1117 claim on behalf of UPS Canada must therefore be deemed to be the date that it meets the requirements of Article 1121(3).⁵⁴¹ Any other result would render the conditions precedent in Article 1121 inutile.

⁵³⁹ Article 1121(2) provides a claim may be brought under Article 1117 "only if" the investor submits its own consent, as well as the consent of the investment on whose behalf it brings the claim. UPS has not met this condition precedent. In *Waste Management, Inc. v. United Mexican States*, Case No. ARB (AF)98/2, (June 2, 2000), (Arbitral Award), 40 ILM 56, at 70, the majority held that the Tribunal lacked jurisdiction because of the Claimant's failure to abide by the waiver requirement in Article 1121. The consent requirement is at least as fundamental. [*Waste* Arbitral Award]. (Respondent's Book of Authorities, Tab 68).

⁵⁴⁰ On 28 June 2002 a second Tribunal accepted jurisdiction in the case after Waste Management filed an unequivocal waiver. See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)00/3, (June 26, 2002), (Decision of the Tribunal), 41 ILM 1315. [*Waste* Decision]. (Respondent's Book of Authorities, Tab 69). The *Mondev* Tribunal at para. 44 also suggested that failure to meet a condition precedent would seem to invalidate a submission, citing *Waste Management*. Canada has no objection to a new claim being filed directly with this Tribunal, provided it meets the requirements of Articles 1117 and 1121(2).

⁵⁴¹ Pursuant to Article 1137(1)(c), this would normally be the date Canada received the notice of arbitration required by the UNCITRAL Rules. However, since Article 1121(3) provides that the consent and waiver must accompany such notice, the only conclusion open to the Tribunal is that UPS did not submit its claim on behalf of UPS Canada or Fritz Starber until it met the conditions precedent set out in Article 1121.

D. The Claimant has failed to establish the fact of damage

537. Articles 1116 and 1117 provide that an investor may only bring a claim if it (under Article 1116) or its investment (under Article 1117) “incurred loss or damage by reason of, or arising out of” a breach of certain NAFTA obligations. The Claimant must therefore establish both the fact that it or its investment suffered damage, and the fact that such damage was caused by the breach.

538. The Tribunal has already determined that the Claimant must establish the fact of damage at the merits stage. It held:

To repeat, at the merits stage, UPS will have to establish on the evidence how and to what extent within those limits [the jurisdictional limits of Chapter 11] it has suffered damage or losses.⁵⁴²

539. While the Tribunal’s wording was limited to the fact of damage itself, establishing damage without causation would be meaningless.

540. The Claimant has failed to establish the fact of damage. It relies entirely on the report of Howard Rosen, which is so replete with assumptions it cannot demonstrate that the Claimant (or UPS Canada, for the purposes of an Article 1117 claim) suffered even one dollar of damage, or that any damage suffered was caused by an alleged breach of the NAFTA.

541. Ross Hamilton and Ian Wintrip of Kroll Lindquist Avey, provided Canada with an analysis of the Rosen report. Kroll demonstrates that the many assumptions in the Rosen report, both stated and unstated, are without evidentiary foundation. In effect, Mr. Rosen has assumed the fact of damage, rather than demonstrated it.

542. Most of Mr. Rosen’s conclusions are based on an assumption that [Redacted]⁵⁴³ The Kroll report demonstrates that neither Mr. Rosen nor any of the Claimant’s other experts provides any evidence to demonstrate the truth of this assumption. There is no

⁵⁴² *UPS Jurisdiction Award*, para. 122. (Investor’s Book of Authorities, Tab 48).

⁵⁴³ [Redacted]

evidence whatsoever of [Redacted].⁵⁴⁴

543. Mr. Rosen further assumes that [Redacted]⁵⁴⁵ Again, the Claimant does not demonstrate any basis for these assumptions. There may be other factors [Redacted]⁵⁴⁶

544. Even assuming [Redacted]⁵⁴⁷

545. In addition to these general problems, each of Mr. Rosen's conclusions suffers from additional flaws. Taken together, these flaws mean that the report fails to demonstrate any loss or damage. Since the onus to demonstrate loss or damage rests with the Claimant, and since such loss or damage must be demonstrated to establish the Tribunal's jurisdiction, this failure is fatal to each of the claims.

546. *Customs treatment.* At paragraph 34 of his report, Mr. Rosen sets out his theory of loss or damage [Redacted]⁵⁴⁸

547. These conclusions appear to be based on a fundamental misunderstanding of the Claimant's Memorial. All of the complaints relate to customs treatment accorded to items posted in foreign countries, with foreign postal administrations for which Canada Post completes delivery.⁵⁴⁹ Canada Post has no role whatsoever in determining the prices these postal administrations charge. Pursuant to its universal service obligation, it is required to deliver all mail items sent to Canada. For this, it is compensated only by a system of "terminal dues".⁵⁵⁰

⁵⁴⁴ [Redacted]

⁵⁴⁵ [Redacted]

⁵⁴⁶ [Redacted]

⁵⁴⁷ [Redacted]

⁵⁴⁸ [Redacted]

⁵⁴⁹ Investor's Memorial, para. 583.

⁵⁵⁰ The concept of terminal dues is discussed at Part II, Section II(B), para. 82.

548. Furthermore, Canada does not charge foreign postal administrations for processing mail through Customs.⁵⁵¹ Canada's customs formalities therefore have no effect on the prices charged by foreign postal administrations either.

549. The Rosen report therefore provides no basis for concluding that Canada's customs treatment has caused either the Claimant or UPS Canada loss or damage.

550. *Publications Assistance Program.* The Rosen report's conclusion with respect to the Publications Assistance Program is based on UPS Canada's alleged ability to deliver "bulk shipments of publications" to large retailers and other customers near newsstands.⁵⁵²

551. The market for small Canadian periodicals is heavily dependent on subscription sales as opposed to newsstand sales.⁵⁵³ The Publications Assistance Program assists these periodicals by subsidizing their distribution. Even if UPS Canada could deliver to magazine retailers, it would not establish that UPS Canada is able to meet the needs of the Program. Absent such a demonstration, the Claimant cannot demonstrate that either it or UPS Canada has suffered loss or damage by reason of the Publications Assistance Program.

552. Furthermore, Canada Post contributes to the subsidy paid to Canadian publishers. Last year the amount was over \$17 million.⁵⁵⁴ Quite apart from the question of whether UPS Canada would be willing to make a similar contribution, the Rosen report cannot demonstrate that UPS Canada could provide the distribution services profitably under the same conditions as Canada Post, which would include the provision

⁵⁵¹ The only charge for presentation to customs contemplated by the *UPU Convention* is a charge to the recipient, to be paid at the time of delivery of the mail. *UPU Convention*, Article 24(2). (Respondent's Book of Authorities, Tabs 3 & 4).

⁵⁵² Investor's Memorial, para. 354. See also Rosen Report, para. 45. (Investor's Brief of Witness Statements and Expert Reports, Tab 8).

⁵⁵³ See Part II, Section V(1), paras. 292-295.

⁵⁵⁴ See Part II, Section V(2), paras. 296-300.

of this subsidy.⁵⁵⁵

553. *“Leveraging” allegations.* The conclusions in the Rosen report with respect to Canada Post’s “special privileges under the CPC Act” are premised on [Redacted]⁵⁵⁶ [Redacted] is a creation of the Claimant’s for the purpose of this arbitration, and has no foundation in law – domestic or international – or economics.⁵⁵⁷ The very foundation of the Claimant’s argument therefore fails.

554. Even if Canada Post were required [Redacted], the Rosen report cannot establish the fact of damage with respect to any of the Claimant’s allegations. As demonstrated above, Mr. Rosen has provided no justification for any of his assumptions.

555. *Rural route contractors.* The Rosen report’s general flaws are repeated with respect to the allegations concerning rural route contractors. Mr. Rosen [Redacted].⁵⁵⁸ As demonstrated above, none of these assumptions is well-founded.

556. *Canada Post pension plan.* Mr. Rosen concludes that [Redacted]⁵⁵⁹ [Redacted]

557. His report makes no mention of the fact that Canada Post was itself prohibited from negotiating any changes to its pension plan until that date.⁵⁶⁰ Canada Post’s pension plan is far more generous than any plan a private-sector employer would agree to.⁵⁶¹ It is therefore just as reasonable to assume that Canada Post would have lowered its costs by

⁵⁵⁵ The basis for the Rosen report’s conclusion that UPS Canada suffered loss or damage is the assumption that UPS Canada’s profits would increase as a result of an increase in magazine shipment volumes. See para. 47. (Investor’s Brief of Witness Statements and Expert Reports, Tab 8).

⁵⁵⁶ [Redacted]

⁵⁵⁷ Canada demonstrated the lack of foundation for the Neels’ test in Part II, Section III(4), paras. 272-285.

⁵⁵⁸ [Redacted]

⁵⁵⁹ [Redacted]

⁵⁶⁰ Bass Affidavit, paras. 3-4. (Respondent’s Book of Expert Reports and Affidavits, Tab 2).

⁵⁶¹ In his affidavit, Robert Bass describes the pension plan as “among the most generous and therefore costly of Pension Plans in Canada”. Bass Affidavit, para. 1 at 3. (Respondent’s Book of Expert Reports and Affidavits, Tab 2).

negotiating benefits down.

558. The Rosen report's complete lack of analysis with respect to pensions prevents it from establishing any loss or damage resulting from any alleged breach of NAFTA Chapter 11.

559. *Fritz Starber*. The conclusions in the Rosen report regarding the Fritz Starber bid are premised on an incomplete understanding of the facts. Mr. Rosen assumes that [Redacted].⁵⁶² He had no facts concerning the price Canada Post was already paying for these services.

560. In fact, the price [Redacted]⁵⁶³ Thus, regardless of whether or not Canada Post refused to deal with Fritz Starber as a result of its connection to the Claimant, it was simply not a competitive alternative. Canada Post would not have contracted with Fritz Starber in any event, for purely commercial reasons.

561. Even if the facts alleged by the Claimant amounted to a breach of Article 1105, [Redacted].⁵⁶⁴

E. The Postal Imports Agreement is a procurement and as such it is not subject to Article 1102 and 1103 obligations

562. The Postal Imports Agreements is a procurement of services by Customs. Those services are provided by Canada Post. The Agreement is a contract by which Customs, an agency of the Government of Canada, purchased services from Canada Post for government purposes. This is a procurement under any definition of the term. As such, it is exempted from Articles 1102 and 1103, and the Claimant's claims under those articles with respect to the Postal Imports Agreement must fail.

563. Article 1108(7)(a) of NAFTA provides that procurements by a Party or a state

⁵⁶² [Redacted]

⁵⁶³ [Redacted].

⁵⁶⁴ [Redacted]

enterprise are not subject to Articles 1102 and 1103.⁵⁶⁵ Canada submits that Customs' contracting of services for a government purpose is a procurement, under any definition of the term.

564. The term "procurement" is not defined in the NAFTA, but Article 1001(5) provides context for its interpretation. It lists the methods by which a procurement can be entered into as including "purchase, lease or rental, with or without an option to buy." Sub-paragraphs (a) and (b) exclude certain items from being procurements, none of which apply to Customs paying Canada Post for the provision of services.

565. The absence of a definition of "procurement" is itself a suggestion that the Parties intended the term to be given its ordinary meaning throughout the NAFTA, subject to the exclusions in Article 1001(5). This was the approach taken in the only Chapter 11 arbitration to consider the exception in Article 1108(7). In *ADF v. United States*, the Tribunal accepted the following definition of procurement:

In its ordinary or dictionary connotation, "procurement" refers to the act of obtaining, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry, "procurement" may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth. Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery.⁵⁶⁶

566. Under the Agreement, Customs obtains services by purchase from Canada Post. This falls squarely within the definition applied in *ADF*. Clauses 4 and 6 of the agreement describe the services that Canada Post is required to perform for Customs. Clause 9 sets out the compensation that Customs is required to pay to Canada Post for the services it provides. Clause 13 provides that the Post may determine in its discretion how

⁵⁶⁵ The relevant part of the provision reads, "Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise..." Note also that Article 1108(8)(b) provides that Article 1106(1) (b), (c), (f) and (g), and (3) (a) and (b), dealing with performance requirements, do not apply to procurement by a Party or a state enterprise.

⁵⁶⁶ *ADF* Award, para. 161. (Investor's Book of Authorities, Tab 95).

it performs its obligations under the agreement, including by sub-contracting some of its obligations. Thus, contrary to the Claimant's assertion,⁵⁶⁷ Canada Post is clearly providing services.

567. The Postal imports agreement is a contract. It is a mutual exchange for value, creating binding legal obligations. It contains termination and dispute settlement provisions at Clause 18.1 and 18.2. The Claimant recognizes the binding nature of the agreement, and itself refers to its containing a contractual obligation.⁵⁶⁸ A Canadian court recognized the agreement as a "fee for service contract".⁵⁶⁹

568. Canada therefore submits that the Agreement must be a procurement within the meaning of Article 1108(7), however narrowly the term is defined. The necessary conclusion is that the Agreement is excluded from Articles 1102 and 1103.

569. As a result, the three services Customs has procured from Canada Post under the Agreement and the fee Customs pays for them are not subject to national treatment. Contrary to the Claimant's representations, the services performed pursuant to Agreement only cover materiel handling, data entry and duty collection. If the Tribunal agrees with the Claimant that additional elements flow from the Agreement, than these additional elements would also be exempt from the national treatment obligation.⁵⁷⁰

570. If the Tribunal agrees with the Claimant that payments under the Agreement are not for the procurement of services,⁵⁷¹ then the payments would still be exempt from

⁵⁶⁷ Investor's Memorial, para. 588.

⁵⁶⁸ For example, the Claimant states that Customs "is contractually bound to make additional payments to Canada Post", Investor's Memorial, para. 311.

⁵⁶⁹ *Dussault v. Canada (Customs and Revenue Agency)*, 2003 FC 973, 238 F.T.R. 280, paras. 4-5. [Dussault v. Canada]. (Respondent's Book of Authorities, Tab 77).

⁵⁷⁰ At paragraph 278 of the Memorial, UPS lists five items it claims are "privileges" arising from the Postal Imports Agreement. If UPS' characterisation were correct, all five items would be excluded from the scope of Articles 1102 and 1103. However, only item (e) comes from the contract – the "services" mentioned are the three described above. The remainder of the list covers actions Customs officers take in performing their duties under the *Customs Act*.

⁵⁷¹ Investor's Memorial, paras. 311 and 313, paras. 277-78. [RESTRICTED]

national treatment as subsidies.⁵⁷²

F. The Fritz Starber claim is inadmissible

571. Canada maintains its objection to the admissibility of the claim that Canada Post breached Article 1105 by not awarding a contract to Fritz Starber. NAFTA Articles 1119 and 1120 require that prior to submitting a claim to arbitration, at least six months must have elapsed since the events giving rise to the claim and 90 days must have elapsed since the delivery of the notice of intent specifying the issues in dispute.

572. The Tribunal is not free to disregard the time limitations and procedural requirements set out in the NAFTA for submissions of claims to arbitration. The Claimant did not follow these requirements. The Fritz Starber claim was not included in the Notice of Intent. Rather, this claim was introduced in the Revised Amended Statement of Claim, after the Award on Jurisdiction. Canada objected and continues to object to the introduction of this new claim.⁵⁷³

573. There is no basis in the NAFTA for the Claimant's proposition that it is "entitled to make further or ancillary claims" when they are not sufficiently related to the original claim. Chapter 11 Tribunals are not standing tribunals having jurisdiction to hear any complaint that may arise in a matter related to the dispute they have been established to decide. The Fritz Starber claim is not an ancillary claim; it is an entirely new claim arising out of events that took place in the latter part of 2001, well after the Claimant submitted its claim to arbitration. It raises new issues altogether.

⁵⁷² NAFTA, Article 1108(7)(b).

⁵⁷³ Canada objected to this claim in its Memorial on Compliance with the Award on Jurisdiction, paras. 54-55.

IV. THE CLAIMS UNDER ARTICLE 1102 ARE WITHOUT MERIT**A. The Claimant's test for treatment accorded in like circumstances is wrong**

574. The Claimant did not read the terms of Article 1102 according to their ordinary meaning in their context, and in light of the NAFTA's object and purpose. Instead, it chose selectively from previous NAFTA arbitrations and GATT cases to construct a test that in no way reflects the terms of the Article.

575. Rather than the text, the Claimant appears to base its claim on a generic national treatment obligation:

While appearing several times throughout the NAFTA, the term national treatment is not further defined in the NAFTA because it is a term of art. The term and the obligation originated over a century ago but the main influences on NAFTA Article 1102 are equivalent provisions in the WTO's GATT and GATS.⁵⁷⁴

576. This statement reveals a signal misinterpretation of Article 1102, which does not use national treatment as a "term of art". Rather, it defines the content and scope of an obligation that it describes in its title as "national treatment".

577. Based on this term of art, the Claimant created a three-part test, informed largely by GATT jurisprudence and its own view of the NAFTA's broad objects. It made no attempt to relate its test to the ordinary meaning of Article 1102's terms read in their context.⁵⁷⁵ While the Claimant made some effort to bring the NAFTA's object and purpose into its interpretation, its analysis is seriously deficient.⁵⁷⁶

⁵⁷⁴ Investor's Memorial, para. 512. See also paragraph 693, where the Claimant appears to make the beginnings of an argument that national treatment is a customary international law obligation.

⁵⁷⁵ The only reference to the context of Article 1102 Canada has identified in the Claimant's interpretation is in the heading preceding paragraph 510 of the Memorial. While the subsequent analysis makes no explicit reference to context, it appears UPS offers GATT Article III and GATS Article XVII as context for NAFTA Article 1102.

⁵⁷⁶ See, for example paras. 511 and 530. The Claimant misreads Article 102. National treatment is one of the rules in which the NAFTA's objectives are "elaborated more specifically". It is not an interpretive principle. See NAFTA Article 102(1).

578. As a result, the Claimant’s “like circumstances” test runs directly counter to the text of Article 1102. It is clear from the text that the question of like circumstances is not a simple matter of determining whether two investors or investments are in the same economic sector. Still less is it a matter of determining whether they offer “like products” as that term is understood in the GATT.⁵⁷⁷

579. The Claimant’s test is not even supported by the cases it cites as authority. For example, it cites the *S.D. Myers* and *Pope & Talbot* Tribunals for the proposition that “economic sector” is the sole appropriate test for “likeness”.⁵⁷⁸ Neither Tribunal applied economic sector as the sole test for likeness. The Claimant itself recognises this, and thus attempts to demonstrate they were wrong to consider other factors.⁵⁷⁹

580. Similarly, the Claimant cites the Appellate Body in *EC – Asbestos* for the proposition that “likeness” is about competitive relationships.⁵⁸⁰ The Claimant ignores the Appellate Body’s reasoning in the same case that textual differences require that the word “like” not always have the same meaning, even in different paragraphs of the same Article.⁵⁸¹ Canada submits this applies *a fortiori* when the word appears in a similar phrase in a different treaty, covering different subject matter.

581. The Claimant also ignored the Appellate Body’s statement – still in the same case – that products in a competitive relationship are not necessarily “like”:

We are not saying that all products which are in some competitive relationship are 'like products' under Article III:4.⁵⁸²

⁵⁷⁷ This appears to be the Claimant’s real test, as set out in paragraphs 525-26 of the Investor’s Memorial.

⁵⁷⁸ Investor’s Memorial, paras. 522-23.

⁵⁷⁹ Investor’s Memorial, paras. 527-28.

⁵⁸⁰ Investor’s Memorial, para. 526.

⁵⁸¹ See, for example, *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, adopted 5 April 2001, paras. 94-96. (Investor’s Book of Authorities, Tab 135).

⁵⁸² *Ibid.*, para. 99. Emphasis in the original. (Investor’s Book of Authorities, Tab 135).

582. The Claimant made no attempt consider the text of the NAFTA to determine its object and purpose, as required by *Vienna Convention* Article 31. Nor did it account for the careful balance of objects set out in the Preamble, in which the Parties resolve both to ensure a predictable framework for investment and preserve their flexibility to safeguard the public welfare.

583. As Canada will demonstrate below, the claimant's interpretation of Article 1102 is wrong in law, and must be rejected.

B. The Correct Legal Test under Article 1102

1. Article 1102 sets out the elements of the national treatment obligation it creates

584. Article 1102 provides:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

585. Article 1102 must be interpreted according to the rules set out in Article 31 of the *Vienna Convention*. The terms of Article 1102, read in their context and in light of the NAFTA's object and purpose set out the precise content of the national treatment obligation it prescribes. They also reveal the article's general purpose of preventing nationality-based discrimination.

586. Three critical elements emerge from the text:

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

- Second, the Tribunal must determine that Canada accorded these treatments “in like circumstances”.⁵⁸³ It is in this context that nationality-based discrimination is important.
- And third, the Tribunal must determine whether the treatment accorded to the Claimant or UPS Canada was “no less favorable”.

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

a) The Claimant must establish that it (or its investment) and a domestic investor (or its investment) have been accorded treatment

588. Given that the very basis of Article 1102 is a comparison of the treatment accorded to foreign and domestic investors (or their investments), it is critical that the Tribunal identify which treatment it is comparing to which. The Claimant’s identification of the treatment at issue is vague at best, and sometimes lacking entirely.⁵⁸⁴

589. The treatment in question must be “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”. While this is a broad statement, covering treatment accorded from the time of establishment or acquisition to the time of disposition,⁵⁸⁵ it is not unlimited. It does not apply, for example, to treatment accorded to investors unless that treatment is

⁵⁸³ Previous arbitrations have not established a consistent interpretive approach, although treatment “in like circumstances” appears to have been a particular focus. It was largely the determinative factor in *S.D. Myers, Inc. v. Government of Canada*, (Partial Award), (November 12, 2000), 40 ILM 1408 (2001), [*Myers* Partial Award] (Investor’s Book of Authorities, Tab 4); *Pope & Talbot Inc. v. Government of Canada*, (Award on the Merits of Phase 2), (April 10, 2001) [*Pope & Talbot* Merits Award]. (Investor’s Book of Authorities, Tab 7); *The Loewen Group, Inc. et al v. United States of America*, (Award), (June 26, 2003); 42 ILM 811 [*Loewen* Award], (Respondent’s Book of Authorities, Tab 61), and *GAMI Investments, Inc. v. Government of the United Mexican States*, (November 15, 2004), (Final Award), [*GAMI* Award]. (Investor’s Book of Authorities, Tab 100).

⁵⁸⁴ For example, the Claimant never clearly identifies whether its complaint regarding Canada Post’s “leveraging” of its infrastructure involves treatment accorded to the Claimant itself, or to its alleged investment UPS Canada. With respect to its complaint regarding Canada’s customs treatment, the Claimant similarly never states whether it is itself or UPS Canada that imports items into Canada through the Courier/Low Value Shipment programme.

⁵⁸⁵ *ADF* Award, para. 153. (Investor’s Book of Authorities, Tab 95).

accorded with respect to their investments in the territory of the Party.⁵⁸⁶

590. Requiring the proper identification of the treatment at issue is consistent with the scope of Chapter 11. Article 1101 provides that Chapter 11 applies to measures of a Party relating to investors of another Party or investments of investors of another Party. Measures that do not meet this test cannot be “treatment” within the purview of Article 1102.

591. Thus, the Tribunal must first isolate the treatments Canada allegedly accorded to the Claimant or its investment, and to a domestic investor or its investment. This is of particular significance in this case for a number of reasons:

- Only by isolating the treatment at issue can the Tribunal determine whether the claim is time-barred, and whether the Claimant has established the fact of damage;
- Only by focusing on the treatment can the Tribunal determine whether Canada has accorded the Claimant or its investment any treatment at all;
- Only by establishing the treatments at issue can the Tribunal determine whether those treatments were accorded “in like circumstances”.

592. In the *Loewen* award, the Tribunal recognised the importance of identifying the treatment at issue. The Tribunal found that Article 1102(3) is a comparison of treatment to treatment:

What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.⁵⁸⁷

⁵⁸⁶ NAFTA, Article 1102(1).

⁵⁸⁷ *Loewen* Award, para. 140. (Respondent’s Book of Authorities, Tab 61). Note that the standard of comparison in Article 1102(3) is different from the standard in paragraphs (1) and (2), in that it uses the phrase “most favorable treatment”.

593. Thus, no comparison can be made where the Claimant has not properly identified the treatments in question.

594. As Canada will demonstrate below, the Claimant has characterised a number of issues as treatment that are neither a treatment of a domestic investment, nor of the Claimant. For example, the allegation relating to Customs treatment of the mail lacks a domestic comparator because Canada does not accord treatment to Canada Post – it treats the mail. Conversely, the allegation that Canada Post takes advantage of the economies of scale and scope inherent in a postal business is not a treatment of the Claimant.

b) The Tribunal must determine whether Canada accorded these treatments “in like circumstances”

595. The words of Article 1102 are clear. The phrase “treatment no less favorable than that it accords, in like circumstances” calls for a contextual analysis to determine whether the treatments in question were less favourable for the Claimant than for a domestic investor. In other words, the Tribunal must look at the totality of the circumstances in which treatment is accorded in order to determine whether those circumstances are “like”.

596. The Claimant suggests that it need only demonstrate that two investments are in the same business or economic sector.⁵⁸⁸ The fact that two businesses are in the same business sector may be the beginning of an examination of the circumstances of the particular treatments. However, it cannot be made the sole or determining factor – the mere fact that two businesses are in the same economic sector may not demonstrate that their circumstances are “like” in respect of the treatment at issue. Article 1102 is concerned with the question of whether treatment was accorded “in like circumstances”, not whether it was accorded to “like investors”.

597. Article 1102 calls on the Tribunal to examine all of the factors surrounding the treatment, including the nature of the two businesses, whether they share any characteristics beyond being in the same business sector, the purposes the businesses

⁵⁸⁸ Investor’s Memorial, para. 521.

serve within the community, and the policy context in which the treatments were accorded.

598. This interpretation is well-supported by the ordinary meaning of the terms used by the Parties. According to the *New Shorter Oxford English Dictionary*⁵⁸⁹, the term “circumstance” includes “that which stands around or surrounds; surroundings” or “the material, logical or other environmental conditions of an act or event”. The *Webster’s Dictionary*⁵⁹⁰ definition of “circumstance” includes “a condition, fact, or event accompanying, conditioning, or determining another”. The *Funk and Wagnalls Standard Handbook of Synonyms, Antonyms and Prepositions*⁵⁹¹ explains that a circumstance is “something existing or occurring in connection with or relation to some other fact or event, modifying or throwing light upon the principal matter without affecting its principal character”.

599. Canada’s interpretation also finds favour in the decisions of previous Tribunals.

600. In *S.D. Myers v. Canada*, the Tribunal stated that the phrase “like circumstances” is open to a wide variety of interpretations in the abstract and in the context of a particular dispute.⁵⁹² Citing the OECD Declaration on International and Multinational Enterprises, the Tribunal found:

⁵⁸⁹ *The New Shorter Oxford English Dictionary*, vol. 1 (Oxford: Clarendon Press, 1993) at 405. (Respondent’s Book of Authorities, Tab 84).

⁵⁹⁰ *Merriam-Webster’s Collegiate Dictionary*, 10th ed. (Ontario: Thomas Allen & Son Ltd., 1993) at 208. (Respondent’s Book of Authorities, Tab 83).

⁵⁹¹ James C. Fernald, ed., *Funk & Wagnalls Standard Handbook of Synonyms, Antonyms, and Prepositions*, (New York: Harper & Rowe, Publishers) at 123. (Respondent’s Book of Authorities, Tab 91).

⁵⁹² *Myers Partial Award*, para. 243. (Investor’s Book of Authorities, Tab 4) The Tribunal noted this is consistent with the WTO Appellate Body’s interpretation of ‘like’ in relation to the phrase “like product” in *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R; WT/DS810/AB/R; WT/DS11/AB/R, adopted 1 November 1996 at 22. (Respondent’s Book of Authorities, Tab 56).

OECD practice suggests that an evaluation of ‘like situations’ in the investment context should take into account policy objectives in determining whether enterprises are in like circumstances.⁵⁹³

601. The Tribunal concluded “like circumstances” must take into account general principles emerging from the NAFTA’s context, including “its concern with the environment”. The assessment must also “take into account circumstances that would justify governmental regulations” that treat investors differently.⁵⁹⁴

602. In *Pope & Talbot v. Canada*, the Tribunal also looked to public policy considerations in determining whether treatment was accorded “in like circumstances”. It called business or economic sector the “first step” of the test.⁵⁹⁵ In applying its test to the facts, the Tribunal explicitly found an absence of “likeness” based on public policy considerations.⁵⁹⁶

603. In the *Loewen* case, the Tribunal found that two operators of funeral homes were not accorded treatment in like circumstances. It concluded that their “circumstances as litigants were very different”, and refused to engage in any comparison between them.⁵⁹⁷

604. In *GAMI Investments Inc. v. Mexico*, the Tribunal was faced with domestic and foreign investments, each of which operated five sugar mills. Each was operating at a loss, each was in debt to its cane growers, and each secured its debt with its sugar inventories.⁵⁹⁸ Nevertheless, the Tribunal concluded:

The Arbitral Tribunal has not been persuaded that GAM’s circumstances were demonstrably so “like” those of non-

⁵⁹³ *Myers* Partial Award, para. 248. (Investor’s Book of Authorities, Tab 4).

⁵⁹⁴ *Ibid.*, para. 250.

⁵⁹⁵ *Pope & Talbot* Merits Award, para. 78. (Investor’s Book of Authorities, Tab 7).

⁵⁹⁶ For example, paras. 87-88. (Investor’s Book of Authorities, Tab 7).

⁵⁹⁷ *Loewen* Award, para. 140. (Respondent’s Book of Authorities, Tab 61).

⁵⁹⁸ *GAMI* Award, para. 113. (Investor’s Book of Authorities, Tab 100).

expropriated mill owners that it was wrong to treat GAM differently. Mexico determined that nearly half of the mills in the country should be expropriated in the public interest. The reason was not that they were prosperous and the Government was greedy. To the contrary: Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense. The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination. ...⁵⁹⁹

605. The Tribunal must therefore take into consideration other elements such as the activities and operations of the respective investors or investments, as well as the public policy considerations that these activities raise. Which specific circumstances may be relevant in any particular case will depend on the treatment at issue – for example, a facility’s proximity to a sensitive ecosystem may be relevant in a case dealing with effluent controls, but may not be in a case dealing with restrictions on gambling.

606. The context of Article 1102 and the object and purpose of the NAFTA also demonstrate that “like circumstances” cannot mean “like investors”. Such an interpretation could only be derived from WTO cases dealing with the issues of “like products”, “like services” or “like service providers” arising from GATT Articles I and III and GATS Article XVII.⁶⁰⁰

607. These cases can provide only limited contextual assistance in interpreting Article 1102, because the textual differences between them are manifest, and they operate in very different contexts.

608. The Parties did not use the terms “like products”, “like service providers” or

⁵⁹⁹ *Ibid.* para. 114.

⁶⁰⁰ The Claimant relies heavily on GATT and GATS jurisprudence for context, claiming at para. 513 that Article 1102 is “virtually identical” to GATT Article III:4 and GATS Article XVII. At note 552, it cites the *Pope & Talbot* Tribunal as saying the GATS article is “identical” to Article 1102. It is self-evident the provisions are not identical.

even “like investors”. The text of Article 1102 may be easily contrasted with GATT Article III. In paragraph 4, that article reads, “... shall be accorded treatment no less favourable than that accorded to like products of national origin”. Article 1102 reads, “... shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors”.

609. Similarly, GATT Article III, in paragraphs 1 and 4 applies to measures affecting the “internal sale, offering for sale, purchase, transportation, distribution or use of products”. Article 1102 applies to treatment accorded with respect to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”.

610. The Claimant itself cites an excellent statement of the contextual differences that flow from the different scope of the two articles. Citing the United Nations Conference on Trade and Development, the Claimant stressed:

The scope of national treatment in the investment field goes well beyond its use in trade agreements. In particular, the reference to “products” in article III of the GATT is inadequate for investment agreements in that it restricts national treatment to trade in goods. The activities of foreign investors in their host countries encompass a wide array of operations, including international trade in products, trade in components, know-how and technology, local production and distribution, the raising of finance capital and the provision of services, not to mention the range of transactions involved in the creation and administration of a business enterprise. Hence, wider categories of economic transactions may be subjected to national treatment disciplines under investment agreements than under trade agreements.⁶⁰¹

611. In other words, UNCTAD states that the context, object and purpose of Article 1102 are unlike that of GATT Article III, and, by extension, GATS Article XVII. Indeed, UNCTAD said precisely that with respect to GATT Article III only two paragraphs earlier in the same document:

⁶⁰¹ As cited in the Investor’s Memorial, para. 515. Emphasis added by the Claimant.

... because the distinction made in the field of trade in goods between border measures and internal measures has no meaningful equivalent in the field of investment, national treatment clauses in IIAs [international investment agreements] differ in scope and purpose from the national treatment principle of GATT article III.⁶⁰²

612. The distinction between the contexts of GATT Article III and Article 1102 has particular significance for the interpretation of the phrase “in like circumstances”. Article 1102 applies to “a wide array of operations” not covered by WTO provisions. Given this fact, in assessing whether the treatment accorded to investors engaged in those operations was accorded “in like circumstances”, the Tribunal cannot limit itself to a consideration of the products or services they offer.

613. The position would become even more untenable when considering a complaint concerning treatment accorded to investments. “Investments” as defined in Article 1139 includes land, stocks, loans and a variety of other items that do not offer products and may not compete in any marketplace. A “like circumstances” test limited to “business sector” would be simply inapplicable in such cases.

614. Canada accepts that Article 1102, GATT Article III and GATS Article XVII share a broad purpose of preventing nationality-based discrimination.⁶⁰³ However, this purpose itself demonstrates the importance of the “in like circumstances” determination. It serves Article 1102’s purpose by establishing a nexus between the treatment at issue and the investor’s foreign nationality.

615. There may be a number of valid reasons for a government to distinguish

⁶⁰² UNCTAD, *National Treatment* (New York: United Nations, 1999) at 8-9. (Investor’s Book of Authorities, Tab 10).

⁶⁰³ A.H. Roth, writing in 1949, commented that the obligation to accord national treatment

starts from the major postulate that the alien must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of these conditions.

Andreas H. Roth, *The Minimum Standard of International Law Applies to Aliens*, (Leiden: A.W. Sijthoff’s Uitgeversmaatschappij N.V., 1949) at 62. (Respondent’s Book of Authorities, Tab 97).

between investors or investments operating in the same business sector. For example, a government may wish to offer privileges to small businesses, or to businesses operating in economically depressed areas. A proper application of the “in like circumstances” test ensures that there can be no finding of a violation of Article 1102 merely because a small domestic business receives such a privilege and a large foreign-owned business does not.⁶⁰⁴

616. Canada is not arguing that establishing a violation of Article 1102 requires a demonstration of discriminatory intent. Moreover, the Tribunal need not consider the question, because the Claimant cannot establish a discriminatory intent or effect to any of Canada’s measures.

617. Virtually all previous Tribunals have found no violation of Article 1102 unless they were convinced a Party had discriminated on the basis of nationality.

618. The *ADF* Tribunal refused to make a finding of a *de facto* violation of Article 1102 in the absence of evidence of discrimination on the basis of nationality. It set out the sort of evidence it expected to see:

Evidence of discrimination, however, is required. For instance, it appears to the Tribunal that specific evidence concerning the comparative economics of the situation would be relevant, including: whether the cost of fabrication was significantly lower in Canada; whether fabrication capacity was unavailable at that time in the United States and whether transportation costs to Canada were sufficiently low to make up the differential. We note the U.S. did submit evidence of available capacity and Mr. Paschini referred to massive increases in costs due to fabrication in the U.S. This scant evidence is, however, not sufficient to show what the relevant competitive situation of Canadian fabricators and U.S. fabricators was in general, nor was it evidence of the

⁶⁰⁴ While the Tribunal in *Pope & Talbot* looked for a difference in treatment first, and then turned to the question of whether treatment was accorded in like circumstances, it recognised the connection between “like circumstances” and discrimination based on nationality. At para. 79, the Tribunal said:

That is, once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances? It is in answering that question that the issue of discrimination may arise.

comparative costs of steel fabrication in the U.S. and Canadian facilities, in particular.⁶⁰⁵

619. The *Myers* Tribunal considered nationality-based discrimination to be a relevant factor in finding a violation of Article 1102.⁶⁰⁶ In *Pope & Talbot*, the Tribunal found an absence of “like circumstances” based at least in part on the absence of discriminatory intent.⁶⁰⁷ The Tribunal in *Loewen* concluded that Article 1102 is directed only at “nationality-based discrimination” and proscribes only “demonstrable and significant indications of bias and prejudice on the basis of nationality...”⁶⁰⁸ In *GAMI*, the Tribunal based its decision in part on the absence of a discriminatory measure.⁶⁰⁹

620. In sum, the question of whether treatment was accorded “in like circumstances” establishes the basis for comparing the treatment accorded to the foreign and domestic investor (or their investments). There can be no basis for comparing treatment that was not accorded in like circumstances. As the *GAMI* Tribunal put it, the question is whether the circumstances were demonstrably so “like” that it was wrong to treat the foreign investor less favourably.⁶¹⁰

c) The treatment must have been “no less favorable”

621. Article 1102 is explicit in stating that the question at issue is whether the treatment accorded the foreign investor (or its investment) was “no less favorable” than the treatment accorded, in like circumstances, to the domestic investor (or its investment). The test therefore is not whether the treatment was “different”, nor whether it created an

⁶⁰⁵ *ADF* Award, para. 157. (Investor’s Book of Authorities, Tab 95).

⁶⁰⁶ *Myers* Partial Award, para. 252. (Investor’s Book of Authorities, Tab 4).

⁶⁰⁷ *Pope & Talbot* Merits Award, paras. 87-88, 93, 102-103. (Investor’s Book of Authorities, Tab 7).

⁶⁰⁸ *Loewen* Award, para. 139. (Respondent’s Book of Authorities, Tab 61).

⁶⁰⁹ *GAMI* Award, paras. 114-15. (Investor’s Book of Authorities, Tab 100).

⁶¹⁰ *GAMI* Award, para. 114. (Investor’s Book of Authorities, Tab 100).

inequality of “competitive opportunity”, but whether it was any less favourable.⁶¹¹

622. The Claimant, in creating its test of “equality of competitive opportunities” again fails to apply the interpretive principles of the *Vienna Convention*. It makes no attempt to link this test to the ordinary meaning in their context of the terms used in Article 1102, or to the NAFTA’s object and purpose.

623. A demonstration of less favourable treatment requires a demonstration that some disadvantage flows from the treatment in question as compared to the treatment accorded to the domestic investor or investment. The precise nature of that disadvantage will depend on the circumstances of the case.

624. In the circumstances of this case, where the foreign investor is allegedly disadvantaged because of the necessary consequences of a measure that is in the contemplation of the NAFTA, the “no less favorable” concept does not require Canada to take an affirmative step to create “equality of competitive opportunities”.⁶¹²

2. The Claimant bears the burden of proof

625. The applicable rules governing the burden of proof are not in dispute. The UNCITRAL rules provide:

Each party shall have the burden of proving the facts relied on to support his claim or defence.⁶¹³

626. Canada accepts that it bears the evidentiary burden to prove any fact it asserts. Canada also accepts that were it relying upon any facts in support of an affirmative defence, it would bear the burden of proof. Finally, Canada accepts that under general international law rules, once a party discharges its burden, the burden shifts to the other

⁶¹¹ The *Pope & Talbot* Tribunal distinguished between the national treatment obligation in the GATS and Article 1102 by saying that the former “at bottom” prohibits modifications of competitive conditions, unlike the NAFTA. *Pope & Talbot* Merits Award, para. 57. (Investor’s Book of Authorities, Tab 7) Canada has not identified any other Chapter 11 case that considers this question.

⁶¹² Investor’s Memorial, para. 536.

⁶¹³ UNCITRAL Article 24(1).

party to rebut the case. However, Canada has provided ample evidence of the facts it asserts, is not invoking an affirmative defence, and has no case to rebut because the Claimant has not discharged its burden.

627. It is clear from the text that “in like circumstances” is not an exception. It is the basis for the comparison required by Article 1102. It supports the broad purposes of the NAFTA, and the specific purposes of Article 1102 by ensuring that a Tribunal does not engage in irrelevant comparisons. In that sense, it operates as something in the nature of a condition precedent.⁶¹⁴

628. The Claimant’s interpretation would require the drafting of an entirely new provision of the NAFTA. To create its version of Article 1102, it would have to be amended to provide that a Party must accord national treatment, *except in the absence of like circumstances*. This is clearly not how the obligation is drafted, and equally clearly not how it is to be interpreted.

629. The investor also constructs a test for applying its exception to place the heaviest burden possible for Canada.⁶¹⁵ The only authority the investor cites for this test is a single WTO case in which the Appellate Body considered the “chapeau” of GATT Article XX.⁶¹⁶ Unlike Article 1102, GATT Article XX is a set of explicit exceptions; a State invoking it is invoking an affirmative defence, with the shift in burden that this implies. Furthermore, GATT Article XX applies only to treatment accorded to goods. It has no more bearing on the investment context than does GATT Article III.

⁶¹⁴ At least three Tribunals have treated “in like circumstances” as a form of condition precedent. See *Feldman* at para. 170, where the Tribunal held that where there are rational bases for differential treatment, there is no violation of international law. (Investor’s Book of Authorities, Tab 8). The *Loewen* Tribunal at para. 140 refused to undertake any comparison in the absence of evidence that treatment was accorded in like circumstances. (Respondent’s Book of Authorities, Tab 61). In *GAMI* at para. 114, the Tribunal was not convinced that any difference in treatment was “wrong” unless it was first persuaded that the circumstances in which treatment was accorded were sufficiently like. (Investor’s Book of Authorities, Tab 100).

⁶¹⁵ Investor’s Memorial, para. 531.

⁶¹⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998. (Investor’s Book of Authorities, Tab 46).

630. There is nothing in the text of Article 1102 to justify concluding that the question of “in like circumstances” is a defence that Canada must assert. It is plain on the face of the text that the existence of treatment “in like circumstances” is a constituent element of the obligation, not an exception to its application. It must follow that it is the Claimant’s burden to demonstrate it.

631. The Claimant must therefore demonstrate that Canada has accorded it (or its investment) and a domestic investor (or its investment) treatment “in like circumstances”. “In like circumstances” requires a consideration of all the relevant circumstances in which the treatment was accorded. Absent this demonstration, there can be no violation of Article 1102.

632. The Claimant must further demonstrate that the treatment accorded “in like circumstances” is less favourable to it or its investment than to domestic investors or investments, with respect to the matters enumerated in paragraphs (1) and (2). Just as with “in like circumstances”, absent this demonstration there can be no violation of Article 1102.

C. Measures of Canada

633. The Claimant alleges that Canada has breached its obligations under Article 1102 by:

- operating a discriminatory customs system;⁶¹⁷
- requiring publishers to distribute their publications through Canada Post in order to access the Publications assistance program⁶¹⁸; and
- “authorizing” Canada Post’s discriminatory leveraging of its monopoly infrastructure.⁶¹⁹

634. In this section Canada will demonstrate that:

- Canada does not operate a discriminatory Customs system. Customs treatment alleged by the Claimant to be in breach of Article 1102 is either factually incorrect, flows from the existence of two separate customs programs (the International Mail Processing System and the Courier/LVS Program) or results from the Postal Imports Agreement. The different customs programs and the Postal Imports Agreement do not constitute a breach of Article 1102.
- The Publications assistance program is a measure with respect to cultural industries and it is a subsidy. As such it is outside of the scope of Chapter 11 of the NAFTA and exempt from Article 1102.
- As phrased, the Claimant’s allegation that Canada Post leverages its monopoly infrastructure is not a claim against Canada. If the complaint is that Canada failed to take positive steps to neutralise the effect of creating a monopoly that also competes in non-monopolised markets, such an allegation is outside the scope of Article 1102. It does not identify a treatment accorded to the Claimant or its investment other than the direct and natural result of the creation of the monopoly. Even if it did identify a treatment, such treatment would not be accorded in like circumstances, and in any event would be no less favourable.
- The claim actually relates to the conduct of Canada Post, and should therefore have been brought through Chapter 15. Canada will address this point in Section D.

⁶¹⁷ Investor’s Memorial, para. 582 *et seq.*

⁶¹⁸ Investor’s Memorial, para. 590.

⁶¹⁹ Investor’s Memorial, paras. 561-562.

1. The Claimant has failed to establish a breach of Article 1102 in relation to Customs treatment

635. The claim that Canada has violated Article 1102 through what it alleges is Customs' preferential treatment of Canada Post. The Claimant further alleges that Canada "has exempted Canada Post from the Customs requirements that apply to its competitors."⁶²⁰

636. As discussed above, these claims are time-barred and inadmissible because the Claimant has failed to establish fact of damage with respect to it.⁶²¹

637. In its Memorial, the Claimant blurs the distinction between treatment accorded to it and treatment of UPS Canada. It refers to and confuses elements of treatment that Customs accords under the Courier/LVS Program,⁶²² the treatment that Customs accords to goods imported as mail under the Customs International Mail Processing system,⁶²³ and treatment that Customs accords to Canada Post under the Postal Imports Agreement.⁶²⁴

638. Customs treatment alleged by the Claimant to be in breach of Article 1102 is either factually incorrect, flows from the existence of two separate Customs programs (the International Mail Processing System and the Courier/LVS Program) or results from the Postal Imports Agreement.

⁶²⁰ Investor's Memorial, para. 267.

⁶²¹ See Section: "Admissibility, Jurisdiction and Exceptions", paras. 504-522.

⁶²² For a proper description of the courier/LVS program, see *D-Memo D17-4-0*. (Respondent's Book of Documents, Tab 33). See Section: "Customs Process for Goods Imported by Courier", paras. 376 *et seq.*

⁶²³ Customs issued on July 1, 1982 one of the first versions of Memorandum *D-Memo D5-1-1* (Respondent's Book of Documents, Tab 19) which outlined and explained the Customs International Mail Processing System to the trading community, including UPS. In UPS' answer to interrogatory Q. 69 UPS admits that it was aware of the information that is "public knowledge under Departmental Memorandum D5.1.1.". Customs' Memorandum D5-1-1 was up-dated on April 21, 1997 and on September 23, 2002 to keep the trading community apprised on the changes to the Customs International Mail Processing System. See Section: "Customs Process for Goods Imported as Mail", paras. 331 *et seq.* (Investor's Book of Documents, Tabs 94 and 243 respectively).

⁶²⁴ For a proper description, see *Postal Imports Agreement*. (Investor's Schedule of Documents, Tab U66). See Section: "Customs Process for Goods Imported as Mail", paras. 331 *et seq.*

639. First, with respect to certain allegations of Customs treatment accorded to Canada Post, the treatment alleged does not occur or is incorrectly characterized.

640. Second, with respect to the Claimant's comparison of the treatment it or UPS Canada receives under the Courier/LVS Program with the treatment that international mail receives under the Customs International Mail Processing System, the existence of these two different Customs programs does not amount to a violation of national treatment.

641. There is no domestic investor or investment that receives the treatment the Claimant alleges is accorded to Canada Post. Indeed, treatment under the International Mail Processing System is not accorded to Canada Post but to inbound foreign mail. Further, treatment accorded to the inbound foreign mail is not accorded "in like circumstances" to the treatment accorded under the Courier/LVS Program. There are significant differences in the way mail and courier items are imported that are the basis for the differences in treatment. The Claimant completely ignores and avoids the proper comparison that should be made, that is, between the treatment that it receives and the treatment that the other 40, or more, participants in the Courier/LVS Program receive. In any event, the treatment that Canada has accorded to UPS Canada under the Courier/LVS Program is no less favourable than the treatment accorded to the inbound foreign mail.

642. Third, with respect to treatment alleged under the Postal Imports Agreement, as argued above in the section on Admissibility, Jurisdiction and Exceptions, it is exempt from the national treatment obligation set out in Article 1102 because of the procurement exception found in Article 1108(7). However, in the event the Tribunal finds that the Postal Imports Agreement is not a procurement, the Claimant has also not discharged its burden of demonstrating that Canada accorded UPS Canada treatment, in like circumstances, that is less favourable than the treatment Canada accorded to Canada Post through the Postal Imports Agreement.

643. Contrary to what the Claimant suggests,⁶²⁵ not all the differences in Customs

⁶²⁵ Investor's Memorial, para 268.

treatment arise out of the Postal Imports Agreement. The Postal Imports Agreement relates only to the material handling, data entry and collection services that Canada Post provides to Customs.

a) The treatment alleged to be in violation of Article 1102 does not occur

644. The Claimant complains in paragraph 585 and elsewhere in its Memorial⁶²⁶ that UPS Canada receives less favourable Customs treatment than Canada Post. Certain of the allegations are incorrect or based on factual misunderstandings. In particular:

- *Canada has not exempted Canada Post from the cost of a computer linkage system:*⁶²⁷ The Postal Import Control System (PICS) is a Customs computer system designed to facilitate the processing of mail packages, the control of mail packages referred for Customs examination, the consistent application of duties and taxes and the application of financial controls. PICS is not a Canada Post computer system.⁶²⁸ It is different from both the Customs' Electronic Data Interface (EDI) and CADEX which are used for communications between Customs and couriers.⁶²⁹
- *Canada Post does not "perform customs duties:"*⁶³⁰ Sorting of mail items is not a Customs duty. Sorting of mail items by Canada Post employees prior to presentation to Customs is done under the direction of Customs.⁶³¹ This type of sorting before presentation to Customs is contemplated by the Kyoto Convention.⁶³²
- *Customs officers do not perform brokerage services:* The responsibilities of Customs officers within Customs Mail Centres are to determine admissibility of mailed items and to determine origin, tariff classification and value for duty of

⁶²⁶ See e.g. Investor's Memorial, paras. 18 and 278.

⁶²⁷ Investor's Memorial, para 585(b).

⁶²⁸ Martin Affidavit, para. 38. (Respondent's Book of Expert Reports and Affidavits, Tab 26).

⁶²⁹ Martin Affidavit, para 30-37. (Respondent's Book of Expert Reports and Affidavits, Tab 26); see Section: "changes to the processing system for international mail", paras. 352-361.

⁶³⁰ Investor's Memorial, para 585(d).

⁶³¹ *Canada Post Act*, subsection 42(1). (Investor's Schedule of Documents, Tab U218).

⁶³² Recommended Practice 15 of the *Kyoto Convention*. (Respondent's Book of Authorities, Tab 6).

goods imported as mail. These are the responsibilities of Customs officers, not customs brokers.⁶³³

- *Customs does not exempt Canada Post from cost recovery fees:* Customs officers are not performing “special services”⁶³⁴ for Canada Post. Customs officers are simply performing their statutory functions as they relate to goods imported as mail in designated Customs Mail Centres which are co-located with International Mail Exchange Offices.
- *Customs does not exempt Canada Post from the requirement to post bonds:* Canada Post presents international mail to Customs on behalf of the foreign postal administration or the sender. It is not responsible for the goods imported as mail and the duties and taxes that may be owed on those goods. As such, there is no requirement for bonds to be posted. Furthermore, Canada Post does not operate a sufferance warehouse, is not engaged in customs brokerage services or temporary importations and is therefore not subject to these bonding requirements.⁶³⁵

645. As the Customs’ treatments alleged by the Claimant do not occur, they cannot constitute the basis of a claim under Article 1102.

b) Different Customs processing of goods imported as mail and goods imported by courier does not constitute a violation of Article 1102

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

646. The Claimant must identify, as one of the elements of its claim under Article 1102, the treatment of the domestic investor that is the subject of the national treatment comparison. The Claimant argues that its treatment should be compared to that of Canada Post because “Canada Post also imports courier items”.⁶³⁶ In reality, what the

⁶³³ See subsection 58(1) of the *Customs Act*. (Investor’s Schedule of Documents, Tab 383). See also Hahn Affidavit, paras. 11-30. (Respondent’s Book of Expert Reports and Affidavits, Tab 14); Rigdon Affidavit, paras. 34-39. (Respondent’s Book of Expert Reports and Affidavits, Tab 32); Jones Affidavit, paras. 59-70. (Respondent’s Book of Expert Reports and Affidavits, Tab19). Although in the case of goods imported by courier, couriers proceed by self-assessment, ultimately Customs has the responsibility for post-entry verification.

⁶³⁴ *Special Services (Customs) Regulations*, SOR/86-1012. (Respondent’s Book of Authorities, Tab 37).

⁶³⁵ Jones Affidavit, paras. 51-56. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁶³⁶ Investor’s Memorial, para. 584.

Claimant refers to is the treatment Customs accords under the International Mail Processing System: this is not treatment accorded to Canada Post but to inbound foreign mail. Canada Post only presents inbound foreign mail to customs on behalf of the foreign postal administration or the sender.

647. International mail items are posted by senders in the territory of any of the 190 foreign postal administrations.⁶³⁷ In transit, a mail item may be handled by several postal administrations, but it will not be subject to customs formalities until it reaches its country of destination.⁶³⁸ When a mail item is posted abroad for delivery to a destination in Canada, Canada Post has no knowledge of the sender, where the mail item has travelled, who has handled it or what it contains.⁶³⁹

648. Upon arrival in Canada, mail remains under the control of the foreign postal administration until it is “exchanged” at one of three inland International Mail Exchange Offices.⁶⁴⁰ At that point, Canada Post presents the mail containing goods or suspected to contain goods to Customs.⁶⁴¹ Canada Post is not liable for customs declarations when it presents the mail to Customs:⁶⁴² the responsibility to provide information about the

⁶³⁷ See Section: “Characteristics of International Mail”, paras. 332 *et seq.*; See also Harding Affidavit, paras. 13 and 18-23. (Respondent’s Book of Expert Reports and Affidavits, Tab 16).

⁶³⁸ Standard 12 of Annex F.4 of the *Kyoto Convention* (Respondent’s Book of Authorities, Tab 7) and Annex J.2 of the *Revised Kyoto Convention*. (Respondent’s Book of Authorities, Tab 9).

⁶³⁹ Rigdon Affidavit, paras. 19-29. (Respondent’s Book of Expert Reports and Affidavits, Tab 32).

⁶⁴⁰ Jones Affidavit, paras. 62-63. (Respondent’s Book of Expert Reports and Affidavits, Tab 19). See Section: “Description of the Customs International Mail Processing System for Goods Imported “as mail”, more particularly “Arrival of Mail”, paras. 340-351.

⁶⁴¹ Subsection 42(1) of the *Canada Post Corporation Act*. (Investor’s Schedule of Documents, Tab U218).

⁶⁴² The *Universal Postal Convention* as amended in 1999 provides in Article 32(3) that: “Postal administrations shall accept no liability for customs declarations in whatever form these are made or for decisions taken by the Customs on examination of items submitted to customs control.” Annex F.4. of the 1973 *Kyoto Convention* provides that “Although they assume no liability for the Customs declaration, postal administrations are required to do their utmost to inform senders of the correct way to complete the declarations.”

The liability of the postal administration for customs declarations does not arise, *inter alia*, due to the fact that the post is not treated as the consignor or consignee by Customs. Rather, it is the declarant, usually the consignee, which is the party responsible to fulfill the Customs requirements. Conversely, private operators

content of the mail rests with the sender.⁶⁴³

649. In the case of inbound foreign mail, Canada Post is only involved to the extent that Canada Post presents the international mail item on behalf of the foreign postal administration or the sender to Customs. Once the mail item is released by Customs, Canada Post delivers it in accordance to Canada's UPU obligation.

650. The recipient of the Customs treatment is international mail *per se*: As stated by Marcus Harding notes in his affidavit:

651. "When processing international mail, customs authorities in the receiving country are not providing a treatment to the local postal administration but to the international mail received from a foreign postal administration."⁶⁴⁴

652. This treatment of foreign mail cannot be equated with a treatment of Canada Post. To the extent that Customs accords treatment to an entity or person in respect of a mail, it would have to be to the foreign postal administration, the sender, or the recipient of the item. Canada Post is not accorded Customs treatment in respect of goods imported as mail.

653. The fact that Customs does not accord treatment to Canada Post is also reflected in the language of the *Customs Act* itself. The *Customs Act* repeatedly uses the

(such as UPS) are treated by Customs as third parties (i.e. Customs brokers or agents; The General Annex to the *Revised Kyoto Convention* defines "third party" as "any person who deals directly with the Customs, for and on behalf of another person, relating to the importation, exportation, movement or storage of goods."). In this role, private operators act on behalf of the consignor or consignee and are, therefore, liable. World Customs Organization, *Results of the Study on the Differences in Customs Treatment of Postal Items Carried by Postal Operators and by Private Operators*, Permanent Technical Committee (Brussels, 19 April 1999), paras. 5, 6). (Respondent's Book of Documents, Tabs 3, 4 & 52).

⁶⁴³ Harding Affidavit, paras. 26 and 44. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

⁶⁴⁴ Harding Affidavit, para. 43; see also paras. 26-28, 31. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

terminology of goods imported “as mail” in contrast to goods imported “by courier.”⁶⁴⁵ This recognizes that there is no Canadian person or entity that can be held liable for Customs formalities for the goods imported as mail.⁶⁴⁶ Therefore, it is a Customs officer that performs the determination function under subsection 58(1) of the *Customs Act*.

654. Moreover, the fact that the Claimant views United States Postal Services (“USPS”), and not Canada Post, [Redacted]⁶⁴⁷ is further indication that what crosses the border into Canada is USPS mail – not Canada Post mail. It is USPS that affects the importation of mail into Canada. This inbound foreign mail from the United States is accorded the Customs treatment, not Canada Post. To get around the fact that Customs does not accord treatment to Canada Post, the Claimant has created the fiction of “jointly produced USPS/Canada Post services” that it alleges [Redacted]⁶⁴⁸ Canada Post does not provide services to U.S. customers through USPS or together with USPS.⁶⁴⁹ Canada Post merely delivers mail within Canada after it is released by Customs⁶⁵⁰ pursuant to Canada’s treaty obligations.⁶⁵¹

655. Since there is no treatment accorded to Canada Post there is no basis for making a national treatment comparison.

⁶⁴⁵ See e.g. sections 12 and 32 of the *Customs Act*. (Investor’s Schedule of Documents, Tab U383). See also sections 2, 7, and 8 of the *Accounting for Imported Goods and Payment of Duties Regulations*, SOR/86-1062 which apply to “goods imported as mail” and sections 7.1 to 7.5 that apply to “goods imported by couriers.” (Respondent’s Book of Authorities, Tab 22).

⁶⁴⁶ Jones Affidavit, para. 90. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁶⁴⁷ [Redacted].

⁶⁴⁸ [Redacted]

⁶⁴⁹ [Redacted] See also Tobias Affidavit, para. 8, which supports Canada’s position that Canada Post does not compete with couriers delivering courier shipments originating in the United States and destined for Canada. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

⁶⁵⁰ *Customs Act*, s. 32. (Investor’s Schedule of Documents, Tab U383).

⁶⁵¹ See Section: “International Commitments Regarding Mail”, paras. 338 *et seq.*

ii) **Customs' Treatment of International Mail Is Not "In Like Circumstances" with the Treatment Accorded to UPS Canada or the Claimant**

The importation of goods as mail and the importation of goods by courier necessitate different Customs treatments because of their different characteristics

656. Customs processes goods imported as mail and by courier in its capacity as the regulator of Canada's borders. Customs makes determinations on the admissibility of goods in the context of national security concerns and economic interests of Canada. In designing processes for the clearance of imported goods, Customs ensures that these interests are protected.⁶⁵²

657. The manner in which mailed goods arrive for importation into Canada is different from the manner in which courier shipments arrive.⁶⁵³ As a result of these differences identified in greater detail below, Customs designed separate processes for the clearance of mailed goods and courier shipments.

658. The risks associated with the importation of goods as mail are greater than those associated with the importation of goods by courier.⁶⁵⁴ Unlike courier companies, the postal system cannot satisfy even the minimal recognized standards for trade chain security. As such, different legal regimes and customs procedures have been developed in Canada and in many other countries.⁶⁵⁵ Customs accords treatment to inbound

⁶⁵² Jones Affidavit, paras. 10-11. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁵³ Several courier/express consignment associations have admitted existence of the difference. The European Express Association (EEA), for instance, has expressly endorsed "the clear distinction between postal and express delivery services." It stated under the slogan "Do Not Confuse the Issues" that "*express services are not postal services... Express delivery companies are not interested in offering national mail services in foreign markets and therefore do not seek further opening of foreign postal markets...*" (European Express Association, EEA Position Paper on GATS: Classification of Postal and Express Delivery Services & Introducing Competitive Safeguards, online: <<http://www.euroexpress.org/CMR/CMR%20position%20paper/GATS>>. (Respondent's Book of Documents, Tab 53).

⁶⁵⁴ Jones Affidavit, paras. 93-94. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁵⁵ See Sections: "Characteristics of international mail"; paras. 332-337, "Description of the Customs International Mail Processing System for Goods Imported 'as mail' ", paras. 340-351; "Characteristics of courier shipments", paras. 377-382, "Description of the Customs process for goods imported 'by courier' (Courier/LVS program)", paras. 384-395.

international mail under the Customs International Mail Processing System. This treatment is not in like circumstances with treatment that Customs accords to couriers under the Courier/LVS Program.⁶⁵⁶

659. *Differences in information about the goods:* Couriers provide detailed and reliable information about their shipments in many cases in advance to Customs.⁶⁵⁷ Receiving detailed advance information on courier shipment permits Customs to carry out risk assessments and other checks.⁶⁵⁸

660. By contrast, Customs receives no advance information about inbound international mail entering Canada. Only when goods are presented to Customs in the Customs Mail Centres does Customs receive the minimal information contained in the CN22 or CN23 form, which are required to be affixed to the mail item.⁶⁵⁹ In order to

See also Parsons Affidavit, para. 23. (Respondent's Book of Expert Reports and Affidavits, Tab 30), who states that Canada's separate Customs programs are in accordance with Canada's international obligations and that the United Kingdom also has similar separate processes.

See also Rigdon Affidavit. (Respondent's Book of Expert Reports and Affidavits, Tab 32) who states that the United States has developed Customs procedures similar to those of Canada and more specifically at para. 63 that:

“both the Canadian and the US customs procedures with respect to international mail and express consignment shipments are fully compliant with both the spirit and the letter of the Revised Kyoto Convention and the WCO Immediate Release Guidelines.”

⁶⁵⁶ Customs processing of international mail is reflected in Customs Memorandum D5-1-1. (Investor's Schedule of Documents, Tab U94). (Respondent's Book of Documents, Tab 19). The process for the Courier/LVS Program is reflected in Memorandum D17-4-0. (Respondent's Book of Documents, Tab 33). See also Sections: “Description of the Customs International Mail Processing System for Goods Imported ‘as mail’ ”, paras. 340-351 and “Description of the Customs process for goods imported “by courier” (Courier/LVS program)”, paras. 384-395.

⁶⁵⁷ Tobias Affidavit , paras. 32, 35, 36 and 46. (Respondent's Book of Expert Reports and Affidavits, Tab 35); Rigdon Affidavit , para. 15. (Respondent's Book of Expert Reports and Affidavits, Tab 32); Harding Affidavit, para. 42. (Respondent's Book of Expert Reports and Affidavits, Tab 16); Parsons Affidavit, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁶⁵⁸ Jones Affidavit, paras. 45, 84, 87-92. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁵⁹ For problems associated with the information in the CN22 or CN23 form, see Jones Affidavit, para. 130, (Respondent's Book of Expert Reports and Affidavits, Tab 19):

ensure that prohibited goods do not enter Canada and to rate and assess duties and taxes on those goods, Customs, therefore, must physically examine every mail item containing or suspected of containing goods.⁶⁶⁰

661. Customs does not compel foreign postal administrations to provide information about the international mail in advance of its arrival in Canada. Even if it did, most foreign postal administrations do not currently have the necessary infrastructure to generate the same reliable information that private courier companies can generate.⁶⁶¹

662. Accordingly, Customs has designed the International Mail Processing System in such a manner that Customs Officers are on site within Customs Mail Centres and to inspect each individual mail item and to enforce other governmental legislation.⁶⁶² The Courier/LVS Program, where shipments are imported with the benefit of detailed information, does not necessitate Customs Officers inspecting each package individually.⁶⁶³

663. *Reliability:* The secure shipping routes and trade chain security of courier

“...in roughly 30 per cent of cases, the CN22 or CN23 is illegible, is not attached to the parcel, or is of no practical use because of other deficiencies. In order for Customs to discharge its mandate, Customs officers must conduct a visual inspection of each mail item presented. When the minimal standard information is missing or of no probative value, opening the mail item or non-intrusive scanning is the only means by which to determine admissibility and whether duties and taxes are owing.”

⁶⁶⁰ Jones Affidavit, para. 90. (Respondent’s Book of Expert Reports and Affidavits, Tab 19), states that :

“...the lack of reliable and accurate information about the exporter, the importer and the contents of mail items moving around the world and the absence of a party accepting legal liability for the import transaction necessitates the intervention of Customs officers to assess duties and taxes in respect of goods imported as mail.”

⁶⁶¹ Harding Affidavit, para. 45. (Respondent’s Book of Expert Reports and Affidavits, Tab 16).

⁶⁶² See Section entitled “Description of the Customs International Mail Processing System for Goods Imported ‘as mail’ ”, paras. 340-351.

⁶⁶³ See Section entitled “Description of the Customs process for goods imported ‘by courier’ ”, paras. 384-395.

companies result in greater reliability for customs purposes.⁶⁶⁴ Couriers have care and control of their shipments from the point of origin to the point of delivery. End-to-end control is significant to Customs for two reasons. First, end-to-end control allows courier companies to know who the sender is and to assess the reliability of the sender as a customer and as a potential security risk. Second, end-to-end control means that the courier companies that use track-and-trace systems can provide Customs with reliable information about the transit of the goods from point of origin to the moment it is presented to Customs for clearance.⁶⁶⁵

664. International mail is distinguished from courier shipments in this respect as mail may be routed through a number of intermediate countries and transferred to a number of postal administrations on its way to Canada.⁶⁶⁶

665. Customs can rely on the multi-layered security network of courier companies created through their end-to-end control of the shipment. Through Customs' Partners in Protection program,⁶⁶⁷ a business or organization such as UPS Canada agrees to develop a joint plan of action, conduct security assessment, participate in awareness sessions, and consult with Customs. In the absence of basic information about mail items, no similar program is feasible in the postal context.

666. Lack of end-to-end control of mail items translates into a labour intensive system which is designed to have Customs Officers examine each individual parcel. The Courier/LVS is designed to eliminate the need to physically examine each courier

⁶⁶⁴ *Customs Guidelines on Integrated Supply Chain Management*, ISCM Guidelines, June 2004. (Respondent's Book of Documents, Tab 54). See also Jones Affidavit para. 94. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁶⁵ Rigdon Affidavit, paras. 16, 21, and 25. (Respondent's Book of Expert Reports and Affidavits, Tab 32); Harding Affidavit, para. 23. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

⁶⁶⁶ Harding Affidavit, para 13. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

⁶⁶⁷ Jones Affidavit, para. 89. (Respondent's Book of Expert Reports and Affidavits, Tab 19). See also Canada Border Services Agency Fact Sheet, January 2004, "Partners in Protection" online: <http://www.cbsa-asfc.gc.ca/general/enforcement/partners/list-e.html>. (Respondent's Book of Documents, Tab 30).

shipment.

667. *Time Sensitive and Time Definite Delivery:* The services offered by postal administrations and those offered by international couriers are distinguished by service standards. International shippers select international courier companies to deliver their shipments because of the guaranteed delivery of their items within an expedited or time-definite delivery cycle. Courier customers pay a premium for these services. Time-definite delivery permits businesses to plan ahead for the arrival of shipments and is of particular importance for companies employing “just in time” inventory practices. Generally speaking, people who choose the post to deliver their shipment do not place as great an emphasis on rapid delivery times and knowing the delivery date and time in advance.⁶⁶⁸

668. The Courier/LVS Program was designed to permit courier companies to meet these time-sensitive and time-definite business standards by separating the admissibility decision from payment of duties and taxes. The courier obtains release of goods prior to payment of amounts owing.⁶⁶⁹ The Customs International Mail Processing System does not have this feature and Canada Post does not complete the delivery of the mail to the addressee/importer until the addressee has paid duties, taxes and fees owing⁶⁷⁰.

669. In addition and at the request of couriers, Customs officers process of courier shipments outside core business hours thereby permitting couriers to meet their early

⁶⁶⁸ Tobias Affidavit, para. 49. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

⁶⁶⁹ Tobias Affidavit, paras. 36 and 47. (Respondent’s Book of Expert Reports and Affidavits, Tab 35) describes the almost instantaneous clearance Customs:

.... the system allows DHL employees to identify quickly the specific shipments selected by Customs for further review. All other shipments on the Cargo Release List are released by Customs for immediate delivery. The selected shipments are set aside in a secure area. Within 1-2 hours, customs officers travel to the DHL sufferance warehouse to process these selected items. Typically, the officers open the shipments and inspect the goods. When the inspection is complete, DHL employees repackage the shipment and, ideally, seal the shipment with tape marked “Opened by Customs” in order to notify our customers and avoid any complaints regarding opened packages.

⁶⁷⁰ Elliott Affidavit, para. 21. (Respondent’s Book of Expert Reports and Affidavits, Tab 10); Jones Affidavit, para. 171-74. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

morning delivery time guarantees.

670. *Differences in relationship with sender:* Couriers have contractual relationships with their clients and, in many cases, repeat customers, resulting in detailed, historical knowledge of their clients.⁶⁷¹ In contrast, no contractual relationship exists between the foreign sender of the goods and Canada Post and, indeed, the sender unknown to both Canada and Customs.⁶⁷²

671. The on-going contractual relationship couriers have with many of their senders establishes a compliance history on which Customs can rely. Reliance on this established history is part of the reason that the self-assessment model can be employed in the courier context.⁶⁷³ Similarly, lack of reliable and accurate information about the exporter necessitates the intervention of Customs officers to assess duties and taxes in respect of goods imported as mail.⁶⁷⁴

672. *Differences in the volumes and flow of goods:*⁶⁷⁵ Each year, approximately 400 million mail items arrive in Canada. Of these, approximately [Redacted] mail items are referred for secondary processing by Customs.⁶⁷⁶ Mail items arrive in essentially a continuous flow six days a week. Accordingly, Customs Mail Centres need to be staffed throughout the day to process the continuous flow of mail.⁶⁷⁷ To meet time of delivery guarantees, courier shipments generally arrive within a concentrated period in the morning. As a result, Customs Officers may only be required for a few hours each day by a courier company.

⁶⁷¹ Parsons Affidavit, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Tobias Affidavit, para. 46. (Respondent's Book of Expert Reports and Affidavits, Tab 35).

⁶⁷² Parsons Affidavit, para 62. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁶⁷³ Jones Affidavit, para. 90-94. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁷⁴ Jones Affidavit, para. 59-64. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁷⁵ Parsons Affidavit, para. 32. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁶⁷⁶ Jones Affidavit, para. 62. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁷⁷ Jones Affidavit, para. 134. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

673. *Sophistication of couriers:* Couriers acting on behalf of or in lieu of⁶⁷⁸ their customers, have knowledge and expertise to assess origin, tariff classification and the value for duty. Regular commercial importers and carriers are familiar with customs laws and they often employ in-house customs expertise and/or use the services of external customs brokers.⁶⁷⁹ Utilizing this expertise and knowledge, Customs can employ the self-assessment model for courier companies.⁶⁸⁰ Customs cannot expect individuals who post mail containing goods for delivery in Canada to have the same degree of sophistication and knowledge of Customs laws and procedures. Accordingly, Customs International Mail Processing System incorporates the intervention of Customs officers to assess duties and taxes.

674. As the facts above demonstrate, the characteristics of goods imported as mail and the characteristics of goods imported by courier are fundamentally different and necessitate different Customs treatments. With respect to goods imported as mail, Customs receives no information in advance of arrival and the information it receives upon arrival is minimal or non-existent. Postal administrations have no end-to-end control of international mail. Clearance of international mail items is not subject to the same time-sensitive and time-definite business requirements as goods imported by courier. In general, couriers have contractual relationships with the sender, no such relationship exists for the mail.⁶⁸¹ Customs must inspect every international item that contains or is suspected to contain goods, which is not the case with goods imported by

⁶⁷⁸ See *Customs Act, para. 32(6)(a)*, (Investor's Schedule of Documents, Tab 383) and the *Persons Authorized to Account for Casual Goods Regulations*, SOR/95-418. (Respondent's Book of Authorities, Tab 34).

⁶⁷⁹ Jones Affidavit, para. 88. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁸⁰ Jones Affidavit, para. 89. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁸¹ *NAFTA Rules of Origin for Casual Goods Regulations* C-54.011 - SOR/93-593, (Respondent's Book of Authorities, Tab 32), defines "'Casual goods' as goods other than goods imported for sale or for an industrial, occupational, commercial or institutional or other like use." (s. 2). The same interpretation of casual goods appears in Customs Memorandum D17-4-1 describing the conditions under which couriers who obtain release of casual goods under section 32(4) of the *Customs Act* may be authorized to account for these goods on behalf of the importer. (Under section 32 of the *Customs Act*, casual goods may be released prior to the goods being accounted for and prior to the payment of duties and taxes.). See also s. 2 of the *Accounting for Imported Goods and Payment of Duties Regulations* SOR/86-1062. (Respondent's Book of Authorities, Tab 22).

courier. In assessing risk, Customs can rely on the multi-layered security network of courier companies, whereas postal administrations have no such networks. Based on all these differences, it was reasonable, rational and necessary for Customs to have created different processes for the treatment of goods imported as mail and for the treatment of goods imported by courier. Consequently, the treatment of goods imported as mail under the Customs International Processing System is not accorded in like circumstances with the treatment accorded to UPS Canada under the Courier/LVS Program.

675. The Claimant itself recognizes and accepts these differences.⁶⁸² This is why the Canadian Courier Association, including UPS Canada, asked for and obtained a separate process for the processing of its shipments.⁶⁸³

Couriers perform different functions from Canada Post

676. The Customs treatment that applies to Canada Post, if any, and the Claimant or UPS Canada is not accorded in like circumstances as they perform different functions. The decision of a service provider, such as the Claimant, to offer multiple services in respect of any given import transaction is entirely market driven and invokes the application of different customs laws depending on the function being performed and on whose behalf those services are being performed.⁶⁸⁴

677. The Claimant is a provider of logistics and distribution services, transportation and freight services, customs brokerage services and other related services.⁶⁸⁵ By contrast, Canada Post does not provide any of these services with respect to goods imported as mail. It does not operate fleets of aircraft, does not provide transportation

⁶⁸² Investor's Memorial, paragraph 30.

⁶⁸³ See Section entitled: "UPS contributed to the design of the Courier/LVS Program", paras. 396-399. See also Tobias Affidavit, paras. 30-40. (Respondent's Book of Expert Reports and Affidavits, Tab 35) and Hahn Affidavit, para. 40. (Respondent's Book of Expert Reports and Affidavits, Tab 14).

⁶⁸⁴ Jones Affidavit, Section entitled "Service providers involved in the international movement of goods." (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁸⁵ Investor's Memorial, para. 35.

and freight services, and does not own, lease or operate aircraft for air transportation purposes.⁶⁸⁶ Canada Post, as the Claimant admits, completes the delivery of mail within Canada's border⁶⁸⁷ on a reciprocal basis pursuant to Canada's international treaty obligations.⁶⁸⁸ Canada Post is mandated to operate within Canada and between Canada and places outside Canada.⁶⁸⁹

678. Given the differences in the functions that Canada Post and UPS Canada perform, the Customs treatment that applies to Canada Post, if any, and to UPS Canada, is not accorded in like circumstances. The relevance of different services offered and functions performed were also found to be relevant in the *Feldman* case.⁶⁹⁰

679. In *Feldman*, the Tribunal held that for the purposes of the export tax at issue in that case:

[...] the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the business of reselling/exporting cigarettes. Other Mexican firms that may also export cigarettes, such as Mexican cigarette producers, are not in like circumstances.⁶⁹¹

680. In this case, the "universe of firms" in like-circumstances are those foreign-owned and domestic-owned firms that are in the business of providing international courier services, which include brokerage services, the operation of sufferance

⁶⁸⁶ Interrogatory Responses of Canada, question 218. See also Jones Affidavit, section entitled "Services provided to international trade by Canada Post". (Investor's Schedule of Documents, Tab U290).

⁶⁸⁷ Investor's Memorial, para. 129.

⁶⁸⁸ See Section entitled "World Customs Organization.", paras. 323-330; Jones Affidavit paras. 7, 92, 94-114. (Respondent's Book of Expert Reports and Affidavits, Tab 19); Rigdon Affidavit 9-18. (Respondent's Book of Expert Reports and Affidavits, Tab 32); Parsons Affidavit generally. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁶⁸⁹ *Canada Post Corporation Act* (Investor's Schedule of Documents, Tab U218).

⁶⁹⁰ *Feldman* Award. (Investor's Book of Authorities, Tab 8).

⁶⁹¹ *Ibid*, para. 171. (Investor's Book of Authorities, Tab 8).

warehouses and freight forwarding services.⁶⁹² These courier companies receive the same treatment as UPS Canada under the Courier/LVS Program. Canada Post is Canada's postal administration and does not perform any of these services, and thus, not in like circumstances with UPS Canada. In this case, Canada's evidence more than meets the threshold established in *Feldman* that "there be at least some rational bases for treating" international courier companies and postal administrations differently.⁶⁹³

681. International mail inbound to Canada is submitted directly to Customs and stored under Customs control in a designated Customs office, there is no need for a sufferance warehouse facility.⁶⁹⁴ In contrast, UPS Canada is subject to the same requirements as any other commercial enterprise engaged in sufferance warehouse operations.⁶⁹⁵

682. [Redacted] bonded carriers, must post acceptable financial security to cover potential duties and taxes on items under carriage.⁶⁹⁶ In contrast, international mail is free from customs formalities during transit, as is expressly provided under international

⁶⁹² Investor's Memorial, paras. 325, 326, and 450.

⁶⁹³ In the *Feldman* Award, paras. 170, 115, 129, the Tribunal considered the multiple business lines to hold the investment not to be in like circumstances. (Investor's Book of Authorities, Tab 8).

⁶⁹⁴ Jones Affidavit, para 54. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁶⁹⁵ See Sections entitled "Description of the Customs process for goods imported 'by courier' (Courier/LVS program)", paras. 376 *et seq.*

⁶⁹⁶ Jones Affidavit, para 55. (Respondent's Book of Expert Reports and Affidavits, Tab 19). As explained in the Rigdon Affidavit, paras. 27 and 39 and, more particularly at 25, (Respondent's Book of Expert Reports and Affidavits, Tab 32), the posting of bonds by carriers and/or broker is also a requirement in the United States:

"..., the carrier has a contractual relationship with the sender; the carrier usually has end to end control over the goods from the point of origin to final destination; and the carrier and/or broker has posted a financial bond sufficient to guarantee the outstanding duties and taxes eventually owing on the shipment. Further, a customs broker, licensed by US Customs, will be processing the commercial or restricted goods shipment on behalf of the importer or addressee."

treaty.⁶⁹⁷

683. UPS Canada, operating as a customs broker, is licensed as other businesses offering customs brokerage services. Canada Post does not operate as a customs broker. Canada Post has neither the knowledge nor the legal relationship to perform customs brokerage services in connection with goods imported as mail.

Differences between mail and courier are recognized internationally

684. The Universal Postal Union and the World Customs Organization recognize the differences between mail and courier and the need for different customs approaches to them.⁶⁹⁸

685. Due to Canada's membership in the UPU, Canada Post is obliged to accept mail from any of the other 189 countries in the single postal territory and complete its delivery in Canada whether or not it is profitable.⁶⁹⁹ Just as the United States relies on USPS, Mexico on El Servicio Postal Mexicano, and France on La Poste, Canada relies on Canada Post to fulfil Canada's obligations pursuant to the Acts of the UPU.⁷⁰⁰ The UPU supports the enactment of domestic rules by Customs for the treatment of international mail.⁷⁰¹

686. Customs accords treatment to the mail based on its special circumstances which

⁶⁹⁷ Parsons Affidavit, para. 19. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Harding Affidavit, para. 21. (Respondent's Book of Expert Reports and Affidavits, Tab 16). See also Standard 12 of Annex F.4 to the *Kyoto Convention*. (Respondent's Book of Authorities, Tab 7).

⁶⁹⁸ See Section entitled: "World Customs Organisation", paras. 323-330, Parsons Affidavit generally. (Respondent's Book of Expert Reports and Affidavits, Tab 30); Rigdon Affidavit, paras. 19-29. (Respondent's Book of Expert Reports and Affidavits, Tab 32); Harding Affidavit, paras. 6-12. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

⁶⁹⁹ Harding Affidavit, generally. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

⁷⁰⁰ Harding Affidavit, paras. 8-9. (Respondent's Book of Expert Reports and Affidavits, Tab 16); Jones Affidavit, paras. 51-56. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁷⁰¹ See Section entitled "International Commitments Regarding Mail", paras. 330-339, particularly, *UPU Acts Parcel Post Manual* Articles 31-33. (Respondent's Book of Authorities, Tab 4).

are recognized by the WCO and the Kyoto Convention⁷⁰² Customs treats goods imported as mail and goods imported by couriers in accordance with Canada's international obligations.

687. The Kyoto Convention, which has been ratified by the United States, Canada and Mexico, contains a separate annex for postal traffic,⁷⁰³ which distinguishes it from all other means of importation. The significant differences between postal traffic and other types of commercial traffic, including express consignment traffic, justified a separate customs treatment for postal imports.

688. The World Customs Organization has recognised the particular needs of the express consignment or courier industry by adopting in 1994, the "Guidelines for the Immediate Release of Consignments by Customs", which were renewed in 2003.⁷⁰⁴ They essentially call for the rapid release of certain categories of goods, provided Customs are given agreed upon and reliable data in advance so that they can enforce the law.⁷⁰⁵ States are encouraged to follow the guidelines in order to assist companies like the Claimant in their need for the rapid release of very large quantities of small consignments.⁷⁰⁶ Far from creating obligations upon States to treat couriers in a similar manner to postal administrations, they clearly differentiate between the two.

689. Other countries, in their domestic practices also recognize the distinction between mail and courier. For example, the United States⁷⁰⁷ and the United Kingdom⁷⁰⁸

⁷⁰² See section entitled: "Characteristics of international mail". See also *Acts of the UPU* and Commentary to Annex F.4 of the *Kyoto Convention* which recognises the "special nature" of the mail. (Respondent's Book of Authorities, Tab 7).

⁷⁰³ See Section entitled: "World Customs Organization", paras. 323-330.

⁷⁰⁴ Parsons Affidavit, paras. 45-60. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁷⁰⁵ Parsons Affidavit, para. 58. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁷⁰⁶ Parsons Affidavit, paras. 45 and 51-52. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

⁷⁰⁷ Rigdon Affidavit, *passim*. (Respondent's Book of Expert Reports and Affidavits, Tab 32).

⁷⁰⁸ Parsons Affidavit, *passim*. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

have separate and distinct customs processes for the clearance of imported mail and courier items.

Even according to the Claimant’s own test, UPS Canada is not in like circumstances with Canada Post

690. The Claimant contends that UPS Canada is in like circumstances with Canada Post by virtue of the fact that they compete in the same economic sector⁷⁰⁹ and that the services and products they offer are substitutable. Assuming that competing in the same sector and substitutability of services are relevant elements to demonstrate like circumstances, which Canada denies, the Claimant still fails according to its own test.

691. The Claimant [Redacted]⁷¹⁰ but does not establish it competes with Canada Post with respect to courier services outside Canada. [Redacted]⁷¹¹ [Redacted]⁷¹² Therefore, the Claimant’s argument that it is in like circumstances [Redacted] with Canada Post must fail.

692. [Redacted]⁷¹³

693. The difference between services provided by the national postal administration and those provided by courier services is recognized internationally. In addition to the UPU and the World Customs Organization discussed above, the United Nation’s classification of services system and the General Agreement on Trade in Services (GATS) also recognizes the distinction between these two services.

694. The United Nations’ Provisional Central Product Classification system, (“CPC Code”) has a separate category in Communication Services for postal services and for

⁷⁰⁹ Investor’s Memorial, para. 583.

⁷¹⁰ [Redacted].

⁷¹¹ Investor’s Memorial, para. 129.

⁷¹² [Redacted]

⁷¹³ [Redacted]

courier services.⁷¹⁴ The CPC code distinguishes between postal services rendered by the national postal administration and courier services rendered by service providers other than the national postal administration.⁷¹⁵

695. In the context of the General Agreement on Trade in Services (GATS), Canada, the United States and Mexico have all scheduled GATS commitments on Communication Services. They have committed to liberalise the trade in courier services, but have in no way committed to liberalise their postal services.⁷¹⁶

696. Even applying the Claimant's own incorrect formulation of the test for like circumstances, it has not demonstrated that UPS Canada is in like circumstances with Canada Post.

iii) There is no nationality based discrimination – UPS Canada is being treated like Canadian courier companies

697. As demonstrated, the treatment Customs accords to UPS Canada under the Courier/LVS Program is due to the different circumstances in the importation of mail and courier, and UPS Canada's participation in the Courier/LVS Program. It is not based on the Claimant's nationality. The over 40 courier companies participating in the

⁷¹⁴Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991). (Respondent's Book of Authorities, Tab 102). The CPC Code has been revised on several occasions. The latest version is the Central Product Classification, Version 1.1, Statistical Papers, Series M No. 77, United Nations (2004). The CPC code is a detailed, multi-level classification of goods and services. It provides a framework for the collection and international comparison of the various kinds of statistics dealing with goods and services. The CPC Code is exhaustive and its categories are mutually exclusive. In other words, it covers all goods and services, and a given good or service may only be classified in one CPC category.

⁷¹⁵ The CPC Code provides the following Classes and Subclasses:

7511 - Postal services

- 75111 - Postal services related to letters
- 75112 - Postal services related to parcels
- 75113 - Post office counter services
- 75119 - Other postal services

7512 - Courier services

- 75121 - Multi-modal courier services
- 75129 - Other courier services

⁷¹⁶ See Section 2 of the Canadian, US and Mexican Schedules of Specific Commitments to *The General Agreement on Trade in Services*, The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations, World Trade Organization, 15 April 1994. (Respondent's Book of Authorities, Tab 10).

Courier/LVS Program are both foreign and domestically owned. They receive the same treatment under the Courier/LVS Program, which is fully and completely described in D-Memo D17-4-0, irrespective of their nationality.⁷¹⁷

iv) Treatment Canada accords the Claimant and UPS Canada is “no less favorable” than any treatment it accords Canada Post

698. The treatment accorded to UPS Canada under the Courier/LVS Program is no less favourable than the treatment accorded to international mail under the Customs International Mail Processing System.

699. UPS, on its own and through its industry lobby, the Canadian Courier Association, was a key participant in the development and design of the Courier/LVS Program. Broadly speaking, UPS Canada was successful in obtaining the Customs treatment for which it had lobbied.⁷¹⁸ The Courier/LVS Program was shaped to accommodate the business demands of the courier industry, including the Claimant and UPS Canada.

700. Chris Mahoney, President of UPS Canada stated in a letter to Canada’s Minister of Revenue following the introduction of the Courier/LVS Program that:

“We believe the new system will substantially impact on our industry and wanted you to know of our support for this initiative.”⁷¹⁹

701. The Claimant further acknowledges [Redacted]⁷²⁰ UPS Canada has also referred

⁷¹⁷ See Section entitled: “Description of the Customs process for goods imported ‘by courier’ (Courier/LVS program)”, paras. 384-395. Jones Affidavit, para. 82. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁷¹⁸ See Section entitled: “Customs Process for Goods imported ‘by courier’ ”, paras. 376 *et seq.* and more specifically the section entitled: “UPS contributed to the design of the Courier/LVS program”, paras. 396-399.

⁷¹⁹ Letter from Chris Mahoney, President UPS Canada to The Honourable Otto Jelinek, Minister Revenue Canada, dated April 19, 1993. (Respondent’s Book of Documents, Tab 39).

⁷²⁰ [Redacted]

to the Courier/LVS Program as the “most business facilitative system in the world.”⁷²¹

702. Indeed, the Claimant although well aware of the Customs postal process in effect at the time⁷²² did not want to lobby Customs to process its imports in the same manner as mail, presumably because the uncertainty and unreliability of the postal stream would not have allowed it to guarantee time-sensitive and time-definite deliveries. The Customs process for clearance of mail can take several days or more, depending on seasonal volumes, if the mail item is required to go through secondary processing.⁷²³ The time required for clearance of mail is much too long for the rigorous demands of the customers of courier companies.

703. The treatment the Claimant complains of is a result of the different needs and customs services required and demanded by the courier industry. It does not amount to less favourable treatment.⁷²⁴

c) The Postal Imports Agreement does not constitute a breach of Article 1102

704. In the event the Tribunal finds the procurement exception does not apply to the Postal Imports Agreement, the Agreement nevertheless does not constitute a breach of national treatment. Treatment accorded to Canada Post under the Postal Imports Agreement is not in like circumstances to the treatment the Claimant or UPS Canada receives from Customs.

705. Canada has authorized Customs to outsource to Canada Post the collection of duties on goods imported as mail to improve collection rates and allow Customs to focus

⁷²¹ Canadian Courier Association, *Canadian Courier Association Position on Carrier Re-Engineering*, (March 1, 1999). (Respondent’s Book of Documents, Tab 55).

⁷²² The Claimant, UPS Canada or both knew about Customs International Mail Processing System in 1992. See Tobias Affidavit, para. 29. (Respondent’s Book of Expert Reports and Affidavits, Tab 35).

⁷²³ See Section entitled: “Customs Process for Goods Imported as Mail”, paras. 376 *et seq.*

⁷²⁴ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Report of the Appellate Body, WT/DS302/AB/R, para. 96, adopted 19 May 2005. (Respondent’s Book of Authorities, Tab 51).

on its core functions.⁷²⁵ Since Customs no longer spends as much of its time on material handling, data entry and the collection of duties and taxes, it can devote more resources to preventing dangerous and illegal goods from entering Canada; protecting Canadians and the environment from prohibited, hazardous, and toxic products; facilitating the movement of low-risk goods while focusing on those deemed to be high-risk; detecting contraband and health and safety threats; and ensuring the accuracy of trade data for the benefit of the Canadian economy; determining admissibility of goods and, where applicable, rendering determinations of origin, tariff classification, and value for duty in respect of international mail and the resulting rating and assessing the duties and taxes owing. The outsourcing of collection functions to Canada Post has resulted in improved collection rates.

706. The Claimant is not in like circumstances with Canada Post with respect of the Custom's choice of Canada Post to perform these administrative services as an agent for Customs. It is also not in like circumstances with Canada Post with respect to the remuneration received pursuant to the Agreement and the taxation of the fee collected.

707. *Choice of Canada Post to perform materials handling and data entry and to collect duties and taxes as an agent for Customs:* Canada Post was particularly well-situated to provide data entry and material handling services to Customs with respect to inbound foreign mail as Customs and Canadian postal facilities are situated in the same premises.⁷²⁶ Canada Post already maintained a domestic collection-on-delivery system. Further, Canada Post has an obligation to delivery mail to every address in Canada and therefore already had an extensive delivery network that could be used for the collection of customs duties and taxes in relation to these mail items. In fact, at various times in the past the collection of duties and taxes has been performed by Canada Post or its

⁷²⁵ Under the *Customs Act*, Section 58(1) sets out the core functions, namely, the determination of the origin, tariff classification and value for duty of imported goods; Jones Affidavit, paras. 13, 173-178; (Respondent's Book of Expert Reports and Affidavits, Tab 19); for a discussion of policy considerations leading to the Agreement see Elliott Affidavit, paras. 19-21. (Respondent's Book of Expert Reports and Affidavits, Tab 10); Cardinal Affidavit, para. 7. (Respondent's Book of Expert Reports and Affidavits, Tab 4).

⁷²⁶ Cardinal Affidavit, para. 8. (Respondent's Book of Expert Reports and Affidavits, Tab 4).

predecessor.⁷²⁷ The practice of contracting out the collection function to postal authorities is in line with the practice of many other countries and is in conformity with Recommended Practice 25 of the Kyoto Convention and Article 33 of the *UPU Convention*.⁷²⁸ Also of relevance is the fact that Canada Post does not provide any brokerage services in relation to the mail item sent by the foreign sender. By contrast, UPS Canada, [Redacted] could not be an agent of both Customs and the importer/owner because to do so would put UPS Canada in a conflict of interest.⁷²⁹ These elements illustrate that Canada Post is not in like circumstances with any entity with respect to performing data entry and materials handling, or the collection of duties and taxes on mail items as an agent for Customs.

708. *Remuneration of Canada Post under the Postal Imports Agreement:* Canada Post provides services to Customs for a fee under the Postal Imports Agreement.⁷³⁰ As neither the Claimant nor UPS Canada provides these same services for Customs, neither is in like circumstances to Canada Post with respect of the remuneration Canada Post receives under the Agreement.

709. *Taxation of handling fee and remittance of duties and taxes collected:* Canada Post is authorized under the Postal Imports Agreement to perform, on behalf of Customs, a governmental function (i.e. collect duties and taxes) that would otherwise be performed by Customs. For these services, Canada Post receives [Redacted] for each dutiable/taxable mail item. The addressee pays \$5 for the services performed by Canada

⁷²⁷ For example Memorandum 955B, dated December 4, 1897, indicates that certain postmasters at locations not served by a customs office were authorized to collect customs duties on all packages sent to them under Customs manifest. Memorandum 1259B, dated January 22, 1904, provides for the payment of a commission by Customs to Canada Post of 10% of duties collected to a maximum of \$75 per calendar month. (Respondent's Book of Documents, Tabs 16 and 17).

⁷²⁸ Section entitled: "Changes to the Processing System for International Mail", paras. 352-361.

⁷²⁹ [Redacted]

⁷³⁰ In *Dussault v. Canada*, the Federal Court of Canada found that the Postal Imports Agreement "is a commercial fee-for-service contract entered into in 1992 between CPC and the CCRA." (Respondent's Book of Authorities, Tab 77).

Post on behalf of Customs⁷³¹ [Redacted]⁷³² [Redacted]⁷³³ As the Claimant or UPS Canada does not perform these services on behalf of Customs, and does not receive a handling fee as a result, it is not in like circumstances to Canada Post with respect to taxation of the handling fee. As Canada Post collects taxes and duties on behalf of Customs it is not in like circumstances with UPS Canada which remits taxes and duties to Customs on behalf of its customers.

⁷³¹ The *Fees in Respect of Mail Regulations* sets the fee at \$5. As explained in the Elliott Affidavit, para. 31 (Respondent's Book of Expert Reports and Affidavits, Tab 10), this fee was introduced as a government user fee, it was therefore, like other user fees, zero-rated meaning that no GST would be collected in respect of this fee. See also Rigdon Affidavit, para. 46 who explains that USPS performs collection functions for U.S. Customs and charges U.S. \$4.50 for that service. (Respondent's Book of Expert Reports and Affidavits, Tab 32).

⁷³² Elliott Affidavit, para. 31. (Respondent's Book of Expert Reports and Affidavits, Tab 10); Jones Affidavit, para. 69. (Respondent's Book of Expert Reports and Affidavits, Tab 19); [Redacted]

⁷³³ [Redacted]

2. The Claimant has failed to establish a breach of Article 1102 in relation to the Publications Assistance Program

710. The Claimant's allegations with respect to the *Publications Assistance Program* must fail. Pursuant to the exemption for measures with respect to cultural industries found in Article 2106 and Annex 2106, the program is entirely outside the scope of Chapter 11. In any event, as discussed earlier the claim under Chapter 11 in relation to the PAP is time barred.⁷³⁴ In addition, the program is a subsidy, and is therefore exempt from Article 1102 by the exception in Article 1108(7). Finally, Canada has not accorded UPS Canada treatment "less favourable" than the treatment it has accorded to Canada Post, "in like circumstances"; therefore there is no breach of Article 1102.

a) The Tribunal has no jurisdiction and Article 1102 is not applicable to the PAP

i) The Publications Assistance Program is covered by the Cultural Exemption

711. Canada's *Publications Assistance Program* provides distribution assistance to Canadian magazines. As such, it is a measure with respect to cultural industries that falls within the scope of the NAFTA's cultural exemption. This much is recognized by the Claimant. Referring to Publications Assistance Program, the Claimant states: "[w]ith respect to assistance to publishers, *the terms of the exemption clearly apply.*"⁷³⁵

712. Having made this concession, the Claimant attempts to circumscribe the scope of the exemption so as to exclude the distribution of assistance through Canada Post. The Claimant argues that the cultural industries exemption applies only to cultural industries themselves, but not to their delivery mechanisms, and that there is no connection between the program's objectives and Canada Post's involvement.

713. These arguments have no basis in the text of the NAFTA, and are wrong in fact. The cultural exemption is an intentionally broadly worded provision, safeguarding the

⁷³⁴ See Section III, "Admissibility, Jurisdiction and Exceptions", para. 522.

⁷³⁵ Investor's Memorial, para. 601. (emphasis added).

rights of the other NAFTA Parties by allowing for unilateral retaliation. Canada Post's involvement in the PAP achieves the program's goals of providing accessible Canadian cultural products by ensuring the widest possible distribution of Canadian periodicals, in the most efficient and fiscally responsible manner.

714. Canada set out in the jurisdictional phase the proper interpretation of Article 2106 and Annex 2106 of NAFTA, giving effect to the ordinary meaning of the words read in their context and in the light of the object and purpose.⁷³⁶ Three main elements bear repeating:

- The purpose of Article and Annex 2106 is to protect Canada's ability to pursue cultural objectives.⁷³⁷
- The effect of Article and Annex 2106 is that, as between Canada and the other NAFTA Parties, "measures adopted or maintained with respect to cultural industries" are governed solely by the provisions of the *Canada-United States Free Trade Agreement* (the "FTA"). This includes Article 2005 of the FTA, which contains the cultural exemption. This also means that NAFTA Chapter 11 and the investor-state dispute settlement provisions are not applicable to such measures.⁷³⁸
- The terms of Annex 2106 of NAFTA make clear that it is the "*measure adopted or maintained with respect to cultural industries*"⁷³⁹ as a whole that falls outside the scope of the NAFTA and is governed by the provisions of the FTA.

⁷³⁶ See Canada's Memorial on Jurisdiction at paras. 107-114. Canada maintains all of the arguments raised in at the Jurisdiction phase.

⁷³⁷ *North American Free Trade Agreement*, Canadian Statement on Implementation, Canada Gazette, Part I, January 1, 1994, 68 at 218. ("this ensures that NAFTA leaves unimpaired Canada's ability to pursue cultural objectives"). (Investor's Book of Authorities, Tab 9). See also *The Canada-U.S. Free Trade Agreement*, *TRADE: Securing Canada's Future*, (Ottawa: Department of External Affairs 1988), at 291-93, comments of Article 2005 "nothing in this agreement affects the ability of either Party to pursue cultural policies". (Respondent's Book of Authorities, Tab 103).

⁷³⁸ See Canada's Memorial on Jurisdiction at paras. 107-114 for a description of the operation between NAFTA Article 2106, Annex 2106 and Canada-US FTA Article 2105.

⁷³⁹ NAFTA Annex 2106 – Cultural Industries provides: "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)

715. Like its predecessor, the postal subsidy, the *Publications Assistance Program* is an integral part of Canada's cultural policy. The mail subsidy it provides makes accessible Canadian publications by encouraging the wide and affordable dissemination of eligible publications to Canadians, strengthens Canada's cultural identity and sustains the Canadian periodical publishing industry.⁷⁴⁰

716. The *Publications Assistance Program* falls squarely within the ordinary meaning of Article and Annex 2106. As a measure "with respect to cultural industries", the program is therefore covered by the cultural exemption, and among other things, is not subject to NAFTA Chapter 11.

717. The language of Annex 2106 is intentionally broad. It removes from the scope of the NAFTA "any measure adopted or maintained with respect to cultural industries". This is consistent with the objective of the provision, to protect Canada's ability to pursue its cultural policies, and with the corresponding unilateral right of retaliation granted to other NAFTA Parties. The Claimant's suggestion that only certain aspects of the measure are covered by the exemption has no basis in the text or in the purpose of the provision.

718. Without ruling on the point, the Tribunal accepted in its Award on Jurisdiction that the actual delivery of magazines may be included in the cultural exemption:⁷⁴¹

It does not necessarily follow, however, that the activity of delivering cultural products to consumers is inconsistent with the protection of Canadian "cultural industries" as the concept is understood in the context of NAFTA, or that the persons engaged in delivering such products are excluded from the article 2107(a) definition of cultural industries.

⁷⁴⁰ Fizet Affidavit, paras. 7-8. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

⁷⁴¹ *UPS Jurisdiction Award*, para. 111. (Investor's Book of Authorities, Tab 48). In this respect, the Tribunal also noted in its Award on Jurisdiction at para. 109: "setting aside the issue whether or not the word distribution includes delivery [...] it is, at first blush arguable that the intent of the article 2107(a) definition is to capture all aspects of what might be called the business of print-making and selling; and indeed it is not necessarily obvious why, if the object and purpose of the cultural industries provisions of NAFTA are to benefit those industries, the delivery to consumers of cultural products should be excluded."

719. Furthermore, the program's provision of distribution assistance through Canada Post is in line with the objectives of the program. Although alternatives were considered by the Heritage Department, ultimately they were rejected. Because of Canada Post's universal service obligation, using Canada Post is the best way to meet the program's objective, ensuring the widest possible distribution of Canadian publications at affordable prices.⁷⁴²

720. The Claimant's objection "to the manner in which Canada implements the PAP" must fail.⁷⁴³ There is no question that the program *as a whole* is a measure "with respect to cultural industries". Moreover, there is nothing in the text of NAFTA Article 2106, or in Article 2005 of the FTA that prescribes or limits the design or implementation of these measures. How Canada chooses to design or implement its measures with respect to cultural industries in order to realize its cultural objectives is exactly what was meant to be protected from review by the cultural exemption.

721. Pursuant to Article and Annex 2106, NAFTA Chapter 11 obligations are not applicable to measures with respect to cultural industries, and the Tribunal has no jurisdiction to hear this claim.

ii) Article 1102 does not apply to Subsidies

722. If the Tribunal finds that the cultural exemption does not apply to the *Publications Assistance Program*, Canada submits in the alternative that it is a subsidy. As such, it is exempt from the national treatment obligation by virtue of the exception in Article 1108(7)(b) which provides that Article 1102 does not apply to subsidies provided by a Party or state enterprise.

723. The Claimant does not contest that the program is a subsidy. It argues that it should not be covered by the subsidy exception because it does not provide a subsidy to Canada Post but to publishers. The relevance of this argument is unclear, given that

⁷⁴² Fizet Affidavit, paras. 6, 20-24. (Respondent's Book of Expert Reports and Affidavits, Tab 12).

⁷⁴³ Investor's Memorial, para. 348.

Article 1108(7) does not contain a limitation on beneficiaries or types of subsidies exempted.

724. The Claimant's attempt to rely on GATT jurisprudence to interpret the Chapter 11 subsidy exception must be rejected.⁷⁴⁴ Not only is the scope of GATT Article III:8 different – it concerns subsidies for the production of goods – it is much more narrowly drafted than Article 1108(7).⁷⁴⁵ The Parties were aware of the GATT provision, and could have drafted Article 1108(7) using similar language if they had desired.

725. In order to maximize the effectiveness of the subsidy, the government has chosen to deliver the program in partnership with Canada Post. The subsidy is only granted when the publishers use of Canada Post services. The condition that publishers use Canada Post's publication mail services is therefore an integral part of the provision of the subsidy.⁷⁴⁶

726. [Redacted]⁷⁴⁷ [Redacted]

727. The *Publications Assistance Program* would therefore be exempt from Article 1102 by virtue of Article 1108(7), were it not already excluded from the NAFTA as a measure relating to cultural industries.

b) In any event, there is no breach of national treatment

728. Even assuming the Tribunal had jurisdiction to hear the Claimant's complaints with respect to the *Publications Assistance Program*, the measure is fully consistent with

⁷⁴⁴ UPS' attempt to rely on the *Foreign Sales Corporation* is also misplaced for that reason. In addition, the exception in GATT Article III:8 was not even at issue in that case. The United States did not invoke it, because it was clearly inapplicable. In addition, the taxation measure at issue was expressly and explicitly origin-based, unlike the *Publications Assistance Program*.

⁷⁴⁵ *The General Agreement on Trade in Services*, The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations, World Trade Organization (Cambridge: Cambridge University Press, 1999), Article III:8. (Respondent's Book of Authorities, Tab 10).

⁷⁴⁶ Similarly in *ADF* the Tribunal applied the procurement exception in Article 1108(7)(a) to exempt from the national treatment obligation in Article 1102 the procurement by the State of Virginia and the associated discriminatory "Buy America" requirements.

⁷⁴⁷ [Redacted]

Article 1102.

i) Canada does not accord treatment “in like circumstances”

729. The Claimant has not established that Canada accorded UPS Canada and Canada Post treatment “in like circumstances”. Absent this demonstration, there can be no violation of Article 1102.

730. The treatment at issue is the Heritage Department’s choice of Canada Post as the delivery mechanism for publications receiving the subsidy.

731. The Claimant asserts that “UPS and UPS Canada are in like circumstances with Canada Post because they have sought and continue to seek to compete with Canada Post in the provision of courier services to publishers that qualify for the *Publications Assistance Program*”.⁷⁴⁸ In light of the program’s objective, it is clear they are not.

732. The program seeks to ensure the widest-possible distribution of publications to individual consumers, at the lowest possible cost. Only Canada Post is in a position to provide affordable distribution of publications throughout the country. The Claimant has not even asserted that UPS Canada can do this. [Redacted]⁷⁴⁹ Shipping to retailers would not meet Canada’s objectives under the program. Many Canadian publications rely heavily on home-delivered subscription sales, rather than on traditionally low newsstand sales.

733. Not only does this explain why Canada Post and UPS Canada are not in like circumstances with respect to the program, but the rationale for delivering the distribution assistance through Canada Post also highlights that there is no discrimination based on nationality. Treatment accorded to UPS Canada and to Canadian courier companies is accorded “in like circumstances” for the purposes of the *Publications Assistance Program*. Publishers do not receive assistance under the program if they use a delivery

⁷⁴⁸ Investor’s Memorial, para. 592.

⁷⁴⁹ [Redacted]

method other than Canada Post, whether it is UPS Canada or any Canadian courier company.

ii) Canada's treatment is "no less favorable"

734. The Claimant has not established that it could or would be willing to deliver all eligible publications on a national basis, under the same conditions as Canada Post under the Memorandum of Agreement. The Claimant is not asking for the same treatment. Instead, the Claimant requests that Canada leave the choice to publishers. [Redacted]⁷⁵⁰ It is not interested in providing the same service as Canada Post or the same contribution Canada Post makes under the PAP. The Claimant has therefore not established that the PAP provides UPS Canada less favourable treatment than it provides Canada Post.

⁷⁵⁰ [Redacted]

3. The Claimant has failed to establish a breach of Article 1102 in relation to Canada Post’s “leveraging” its infrastructure

735. The Claimant’s allegation that Canada Post has “leveraged” its infrastructure is not within the scope of Article 1102 and cannot give rise to a breach of that Article.⁷⁵¹

736. The allegation describes the conduct of Canada Post, not Canada. Chapter 11 claims against the conduct of Canada Post may only be brought through Articles 1502(3)(a) and 1503(2). To bring such a claim, the Claimant must establish that the impugned conduct is an exercise of “delegated governmental authority”. It has not done so.

737. Even if the Claimant were to re-phrase its argument to make a clear allegation against Canada, its argument must fail. The only allegation the Claimant could make is that when Canada created Canada Post, it did not prevent Canada Post from “leveraging” its infrastructure. Chapter 15 allows a NAFTA Party to designate a monopoly that competes in non-monopolised markets, and requires only that it not engage in anti-competitive conduct. Article 1102 does not change this.

738. If Canada’s actions were within the scope of Article 1102, any “treatment” would not be accorded “in like circumstances”. Canada Post’s universal service obligation requires it to maintain a costly postal infrastructure. That obligation includes the provision of services over which Canada Post has no exclusive privilege. Canada Post’s services, both within and without the exclusive privilege, assist in funding the infrastructure required to meet the universal service obligation. UPS Canada is a private courier company with no social or policy obligations.

739. Nor is UPS Canada treated less favourably than Canada Post. Canada is not under a positive obligation to nullify the necessary consequences of allowing a monopoly to compete in a non-monopolised market. In providing its competitive services, Canada

⁷⁵¹ Throughout the Counter-Memorial, Canada’s arguments with respect to “leveraging” the infrastructure, whether pleaded against Canada or Canada Post, apply to all the alleged measures set out in Part Two, Chapter III of the Investor’s Memorial.

Post is entitled to take advantage of economies of scale and scope arising from its infrastructure. The claim to the contrary rests on an untried theory that is not supported by accepted economic principles, and provides no basis for the Tribunal to find a breach of Article 1102.

a) The allegation that Canada Post “leverages” its infrastructure is not a claim against Canada directly

740. In the section of the Memorial in which it purports to identify the treatment of which it complains,⁷⁵² the Claimant alleges that in 1981 Canada gave Canada Post an exclusive right to develop and maintain a “monopoly postal infrastructure”.⁷⁵³ Quite apart from the fact that this creates the erroneous impression that Canada Post was allowed to create a “Monopoly Infrastructure” – and that such an infrastructure even exists – this cannot be the treatment at issue.

741. The Claimant concedes that the NAFTA allows Canada to designate a monopoly. Furthermore, it concedes that a monopoly so designated may operate in a non-monopolized market.⁷⁵⁴ The Claimant therefore cannot complain of Canada’s designation of Canada Post as a monopoly postal services provider.

742. The Claimant also alleges that Canada or Canada Post has denied UPS Canada access to this infrastructure.⁷⁵⁵ However, this too appears to be gratuitous, since the Claimant specifically denies seeking access “on any terms”.⁷⁵⁶ In any event the allegation is false. [Redacted]⁷⁵⁷

⁷⁵² Investor’s Memorial, paras. 568 to 571 come under the heading “Treatment less favorable”.

⁷⁵³ Investor’s Memorial, para. 569.

⁷⁵⁴ Investor’s Memorial, paras. 578-79.

⁷⁵⁵ Investor’s Memorial, para. 571.

⁷⁵⁶ Investor’s Memorial, para. 579.

⁷⁵⁷ UPS Canada, like any other courier company, has access to Canada Post’s entire network, on commercial terms. [Redacted].

743. The only remaining treatment identified relates to how Canada Post used its “discretion to control the access, and terms of access, to that infrastructure”⁷⁵⁸ – that is, what the Claimant refers to as Canada Post’s “leveraging” of the infrastructure.⁷⁵⁹ This allegation relates explicitly to the conduct of Canada Post, not Canada.

744. Allegations dealing with the conduct of monopolies or state enterprises can only be brought through Article 1502(3)(a) or Article 1503(2). Under those Articles, the Claimant must allege that Canada has failed to ensure that Canada Post, in exercising a delegated governmental authority, has acted in a manner that is not inconsistent with the provisions of Chapter 11, in this case Article 1102. The Claimant has not even attempted to meet the requirements of those Articles. Its claim is not within their scope.⁷⁶⁰

b) If the allegation were pleaded against Canada, it would be outside the scope of Article 1102 because it does not identify a treatment of the Claimant or UPS Canada

745. Article 1102 requires a comparison of the treatment a Party accords to domestic investors or investments, and other NAFTA investors or investments. Where a claim is brought through either Article 1502(3)(a) or Article 1503(2), the comparison is of the treatments accorded by a monopoly or state enterprise, provided it acted in the exercise of delegated governmental authority. Either way, a Party or its delegate must accord treatment to one that is less favourable than the treatment it accords to another.

746. The Claimant’s argument does not fit within this model. It makes no attempt to compare the treatment either Canada or Canada Post accorded to a Canadian investor or investment against the treatment accorded to the Claimant or UPS Canada. It is a transparent attempt to reformulate a claim that the Tribunal has already rejected as being outside its jurisdiction when brought under Article 1105. It is equally outside the scope of Article 1102 because it does not identify a treatment accorded to the Claimant or to

⁷⁵⁸ Investor’s Memorial, para. 570.

⁷⁵⁹ For example, see para. 572.

⁷⁶⁰ See Section D, *infra*.

UPS Canada.⁷⁶¹

747. The only allegation that the Claimant makes that could in any way be pleaded as a measure of Canada deals with the creation of Canada Post in 1981. The complaint would appear to be this: Canada, having created Canada Post, and having continued a portion of the post office's already limited exclusive privilege, failed to ensure that no advantages would accrue to Canada Post as a result of its being a monopoly that also competes in non-monopolised markets.

748. The claim appears to be that in failing to prevent Canada Post from making use of these advantages – such as economies of scope and scale that arise between the exclusive privilege and competitive products – Canada gives Canada Post a competitive advantage. Since UPS Canada and other courier companies cannot partake of this alleged advantage, the Claimant argues that Article 1102 creates a positive obligation for Canada to extinguish it by means of the costing scheme the Claimant has created for this arbitration.

749. This cannot be “treatment” of the Claimant or UPS Canada for the purposes of Article 1102 because it involves only the direct and natural consequences of designating a monopoly and allowing it to compete in non-monopolised markets, both of which are explicitly permitted in the NAFTA. Had the Parties intended to impose upon themselves a positive obligation to extinguish such consequences, they would have done so explicitly, not through a general obligation like Article 1102.

750. The NAFTA recognises at Article 1502(1) that Canada can designate a monopoly. Furthermore, Article 1502(3)(d) provides for a limited obligation governing their monopoly's behaviour in a “non-monopolized market”. The necessary implication is that monopolies are not prohibited from competing in non-monopolized markets, providing they comply with Article 1502(3)(d) in respect of certain anti-competitive

⁷⁶¹ See Canada's Memorial on Compliance with the Award on Jurisdiction at paras. 32-42. The arguments Canada made there with respect to cross-subsidisation apply equally to UPS' “leveraging” claim. In the *UPS Jurisdiction Award*, 22 November 2002, the Tribunal found that it lacks jurisdiction where the facts alleged are incapable of constituting a violation of the obligation they state. *UPS Jurisdiction Award*, paras. 33-37. (Investor's Book of Authorities, Tab 48).

conduct, including cross-subsidisation.⁷⁶²

751. While Article 1502(3) does require Parties to ensure that the monopolies they designate abide by certain obligations, those obligations are carefully circumscribed. Item (a) applies only when the monopoly exercises delegated governmental authority. Items (b) and (c) apply only to the monopoly's purchase or sale of the monopoly good or service. Only item (d) governs the monopoly's conduct in the market, and it applies only to certain anti-competitive practices.⁷⁶³

752. Article 1502(3) demonstrates that the Parties clearly turned their minds to the issues arising as a result of allowing the designation of monopolies. It also demonstrates they turned their minds to the specific issues arising in the specific circumstances of allowing such a monopoly to compete in non-monopolised markets. Had they intended to create a positive obligation to extinguish any advantages that flow necessarily from allowing a monopoly to so compete, this is where they would have done so.

753. Nowhere does Article 1502(3) suggest that the monopoly should not take advantage of economies of scale and scope, or that the Party must take positive steps to prevent its monopolies from doing so.

754. The absence of any such obligation is in line with economic principles. The report of Professor Kleindorfer demonstrates that corporations – including those with a monopoly in respect of some of their products or services – must be expected to take advantage economies of scope and scale. This is the efficient economic result, provided they do not engage in anti-competitive behaviour such as cross-subsidisation.⁷⁶⁴

⁷⁶² The Tribunal has already determined that Article 1502(3)(d) is outside its jurisdiction. *UPS Jurisdiction Award*, 22 November 2002, at para. 98. Nevertheless, *ex abundante cautela* Canada has amply demonstrated that Canada Post's monopoly products do not cross-subsidise its competitive products. See Section entitled: "Canada Post Exclusive Privilege Products Do Not Cross-Subsidize Competitive Products".

⁷⁶³ Note 46 to the NAFTA illustrates the detailed attention the Parties paid to the conduct of monopolies. It provides that cross-subsidization and certain other actions are only prohibited by Article 1502(3)(b) "when they are used as instruments of anticompetitive behavior by the monopoly firm."

⁷⁶⁴ Kleindorfer Report, paras. 46-47. (Respondent's Book of Expert Reports and Affidavits, Tab 20).

755. Nothing in Article 1102 suggests it was intended to change this result. Indeed, the opposite is true. Article 1102 is a national treatment obligation, whose basic purpose is to prevent discrimination on the basis of nationality. Specifically, it requires a Party to accord foreign investors and their investments treatment that is no less favourable than the treatment it accords, in like circumstances, to its own investors and investments.

756. The Claimant's allegation does not involve a comparison of the relative treatment accorded to foreign and domestic investors, or their investments, in any circumstances, other than the initial designation of one and not the other as a monopoly. This has nothing to do with national treatment.

757. This is not to say that when Canada accords treatment to Canada Post it is exempt from Article 1102 because Canada Post is a monopoly. It simply acknowledges that Article 1102 cannot be used to subvert the obligations set out in Article 1502.

758. Under the applicable law set out in the *Vienna Convention*, Article 1102 must be read in the context of Article 1502, and *vice versa*.⁷⁶⁵ Faced with the clearly limited regime governing the Parties' specific obligations for monopolies that compete in non-monopolised markets in Chapter 15, the Tribunal would require an equally clear provision to conclude that the Parties intended to create some form of additional obligation in Article 1102.

759. The Tribunal applied similar reasoning in rejecting the Claimant's argument that Chapter 11 creates jurisdiction for complaints of anti-competitive conduct by monopolies:

No obvious reason appears why Parties, having twice confined investor-State dispute resolution to a narrow set of claims, would expand the ambit of disputes dramatically if a state monopoly, instead of the State itself, acts inconsistently with the State's obligations under Chapter 11A.⁷⁶⁶

⁷⁶⁵ Article 31(2) provides that the text of the treaty is itself context for interpretive purposes.

⁷⁶⁶ *UPS Jurisdiction Award*, para. 68. (Investor's Book of Authorities, Tab 48).

760. Similarly, no obvious reason appears why the Parties, having established an extremely limited regime in Chapter 15, would expand it dramatically in Chapter 11. Article 1102 provides no support for such a conclusion. It is a simple national treatment obligation, simply stated and simply defined. It cannot be enough in itself to overturn the clear intent in Chapter 15, particularly since doing so would reduce a detailed Article to inutility. Canada submits “UPS’s argument strains both the text and the structure of the Agreement”.⁷⁶⁷

761. Thus, the Claimant’s allegation that Canada failed to ensure that no advantage would accrue to Canada Post by reason of its being a monopoly fails to state a “treatment” accorded by Canada to the Claimant or UPS Canada, and should be dismissed for that reason alone.

c) In the alternative, the Claimant cannot establish that treatment was accorded “in like circumstances”

762. Assuming that Canada’s not preventing Canada Post from taking advantage of being a monopoly is “treatment” within the meaning of Article 1102, any such treatment was not accorded “in like circumstances”.

763. The factors relating to likeness of circumstances will be discussed more fully below, in relation to Canada Post. However, because the alleged treatment differs slightly if it is attributed to Canada or Canada Post,⁷⁶⁸ Canada will address here some elements of the “in like circumstances” test.

764. While Canada Post and UPS Canada may provide some services that compete for market share, that in itself cannot establish that any treatment Canada accords them was accorded “in like circumstances”. Any treatment Canada accorded Canada Post would have to take into account the following circumstances:

⁷⁶⁷ *Ibid.*

⁷⁶⁸ If attributed to Canada, the alleged treatment is that Canada designated a monopoly that competes in non-monopolised markets without extinguishing the advantages, such as economies of scope and scale, that necessarily flow from this. If attributed to Canada Post, the alleged treatment is that it did take advantage of these economies.

- o Canada’s universal service obligation, implemented by Canada Post as described in **Section III(B) of Part II, *supra* [version of 3 June, 17:00]**. Canada Post must provide affordable postal services throughout Canada, whether or not it is profitable to do so. Canada has chosen to fund this obligation through the reserved area, and through allowing Canada Post to provide services in non-monopolised markets, both of which are specifically permitted in the NAFTA. UPS Canada has no universal service obligation, and provides only those services that it finds commercially advantageous.
- o Canada Post’s social policy function, as set out in **Section III(C) of Part II, *supra* [version of 3 June, 17:00]**. In particular, Canada Post is often the only federal presence in remote areas of Canada. UPS Canada has no social policy functions.

i) The universal service obligation

765. Canada is part of a single international postal territory. As such it has an obligation to provide ubiquitous affordable mail service to and from Canada. Given Canada’s enormous size and geographic challenges, this in itself is a substantial burden.

766. The mail service includes letter mail and all other mail within the definition of the Universal Postal Union, including expedited mail and parcels.⁷⁶⁹ The term “universal service obligation” captures the essence of the obligation, but its full extent is set out in Part II, Section III(B). Well before Confederation in 1867, a postal infrastructure was developed to ensure that mail could be delivered everywhere in Canada, and to link Canadians to the outside world.

767. The responsibility for the universal service obligation comes with a cost. Neither the mail subject to the exclusive privilege nor the mail subject to ordinary commercial pressures can finance it alone. Canada Post’s predecessor, a government department, ran into severe financial difficulties even with a larger exclusive privilege and similar competitive products.⁷⁷⁰

⁷⁶⁹ The exclusive privilege extends to letter mail costing up to \$2.50 Canadian that is not of an urgent nature.

⁷⁷⁰ Part II, Section III(D), paras. 104-138, describes the services that Canada Post provides in order to fund the USO and its other social obligations, while meeting the government-imposed requirement of financial self-sufficiency.

768. Canada intended to address this through the *Canada Post Corporation Act*. Canada made it an express requirement that the new corporation be financially self-sufficient. Canada allowed the new corporation to continue to operate both in the exclusive privilege and in the competitive sector. While it reduced the scope of the exclusive privilege, Canada also allowed the Canada Post to pursue new business opportunities.⁷⁷¹

769. The costs associated with the universal service obligation are easily demonstrated with the example of street letter boxes, Canada Post's use of which the Claimant describes as an unfair advantage.⁷⁷² As Doug Meacham describes in his affidavit,

Specifically, whereas a private sector competitor will typically place induction points in higher volume, and thus generally more profitable, locations, Canada Post must also place induction points in locations that support its social obligations but would not otherwise be conducive to earning a profit. Many of these are in small communities or in urban residential neighborhoods.⁷⁷³

770. Any treatment Canada accords Canada Post must take into account the financial burdens associated with operating a postal infrastructure, including the universal service obligation.

ii) Other social obligations

771. Canada Post has a number of other social and policy functions that come with a financial cost.⁷⁷⁴

⁷⁷¹ For a discussion of the transformation of the Post Office department of Canada into a Crown corporation, see Campbell Report, paras. 86-103. (Respondent's Book of Expert Reports and Affidavits, Tab 5).

⁷⁷² Investor's Memorial, paras. 149 *et seq.*

⁷⁷³ Meacham Affidavit, para. 27 (Respondent's Book of Expert Reports and Affidavits, Tab 27). Similarly, at para. 8, Mr Meacham states that Canada Post's social mandate requires the placement of street letter boxes at other locations, such as outside homes for the elderly, that are not necessarily commercially justified.

⁷⁷⁴ Unless otherwise noted, the facts in this section are described at Part II, Section III(C).

772. Canada Post is required to deliver a number of services at a price negotiated between the government and Canada Post. For example, Canada Post delivers Parliamentary free mail, literature for the blind, and nutritious food to remote northern communities. Clearly, commercial considerations alone will not determine that price – in providing delivery for the Publications Assistance Program, Canada Post itself contributes a subsidy to Canadian publishers.⁷⁷⁵

773. Canada Post has an obligation to maintain services that would be eliminated if commercial considerations alone dictate whether the service should be continued. For example, because Canada Post is sometimes the only federal presence in remote and northern communities, it has been required to keep open post offices that are not commercially justified.

774. Canada Post is subject to obligations as an institution of the government of Canada, including those imposed by Canada's bilingual policy.

775. Some of Canada Post's products are subject to Government regulation that may take into account considerations other than the purely commercial. The price of exclusive-privilege letter mail is a case in point, which is capped at two-thirds of the rate of inflation.⁷⁷⁶

776. In all of this Canada recognized that exclusive-privilege services alone would not meet the cost of funding the postal service. Nor would a fully-commercial postal service meet the needs of Canada.⁷⁷⁷ A balance had to be struck between these needs. That balance was the *Canada Post Corporation Act* of 1981.

777. The circumstances surrounding any treatment accorded to Canada Post and UPS Canada in respect of Canada Post's infrastructure are therefore unlike. Canada Post

⁷⁷⁵ Part II, Section V, paras. 292 *et seq.* describes Canada Post's role in the Publications Assistance Program.

⁷⁷⁶ Canada's letter mail pricing regulation is described in Part II, Section III(D).

⁷⁷⁷ Crew Report, paras. 71-73. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

offers services as part of its social and policy obligations, including the universal service obligation. It operates on the basis of financial self-sufficiency. UPS Canada is a commercial operation whose overwhelming motivation is profit.

d) Any treatment Canada accords is “no less favorable”

778. Canada submits that same arguments it used to demonstrate that it does not accord treatment to the Claimant or UPS Canada also support the conclusion that any treatment it does accord would be “no less favorable”. This follows from the Claimant’s argument that the “no less favorable” obligation places a positive obligation on Canada to “provide equality of competitive opportunities”.⁷⁷⁸

779. The Claimant’s version of “no less favorable” treatment is one that requires Canada to extinguish any advantages that accrue to a monopoly simply because it is a monopoly that competes in non-monopolised markets. Canada has already demonstrated that this cannot have been the intention of the Parties.

780. In addition to being wrong in law, the Claimant’s approach has no place in economics. In economic theory, economies of scope and scale come with valuable social benefits. A firm that enjoys such economies can use them to offer products or services more efficiently than other firms, thereby lowering costs for consumers. While this may result in lower profits for competitors who have to price down to match the more efficient firm, this is precisely how competition is supposed to work.⁷⁷⁹ The cost to individual competitors is more than made up by the benefit to consumers. The mere fact that some of the economies derive from products produced under a partial monopoly does not change the fact that society as a whole benefits.⁷⁸⁰

⁷⁷⁸ Investor’s Memorial, para. 536.

⁷⁷⁹ Annan Affidavit, para. 22. (Respondent’s Book of Expert Reports and Affidavits, Tab 1).

⁷⁸⁰ Crew Report, paras. 57-61. (Respondent’s Book of Expert Reports and Affidavits, Tab 9). Professor Crew, a leading postal economist, demonstrates that allowing a postal administration to take advantage of its economies of scale and scope assists in enhancing the viability of the postal infrastructure it must maintain, regardless of whether it offers competitive products. Furthermore, by taking advantage of these economies, the postal administration can spread its costs more effectively, and lower prices for consumers, making “everyone better off”.

781. There is no basis in law or in economics for the Claimant's interpretation of Article 1102. Its argument demands that society as a whole give up the benefits of economies of scope and scale to the benefit of UPS Canada's profits, in the name of national treatment. A provision whose broad purpose is the prevention of nationality-based discrimination cannot be transformed into a positive obligation to remove every obstacle to the profitability of a foreign investor or its investment, particularly when those obstacles have no connection to its nationality.

782. The Claimant's case against Canada in respect of Canada Post's "leveraging" its infrastructure therefore fails on every count. As demonstrated in the following section, the Claimant could not succeed even if it were to plead its case properly, through Article 1502(3)(a) or Article 1503(2).

D. Measures of Canada Post

783. Canada's responsibility for the actions of Canada Post is set out specifically in Chapter 15 of the NAFTA.

784. Articles 1502(3)(a) and 1503(2) of the NAFTA establish that Chapter 11 obligations only apply to Canada Post when it is exercising "delegated governmental authority".

785. In taking advantage of economies of scope and scale in the operation of its business, Canada Post is not exercising "delegated governmental authority" within the meaning of Articles 1502(3)(a) and 1503(2). The Claimant's arguments must therefore fail.

786. Even if the Tribunal were to accept that Canada Post is exercising delegated governmental authority, the claim must fail because it does not raise issues within the scope of NAFTA.

787. Finally, the Claimant has failed to demonstrate that either Canada or Canada Post accorded it or UPS Canada treatment "in like circumstances".

788. Each of these reasons is sufficient to dismiss the claim.

1. Chapter 11 claims against monopolies and state enterprises must be brought through Chapter 15

789. The Claimant alleges that Canada Post breached Article 1102 on the basis that Canada Post's conduct is attributable to Canada, making the Article *directly* applicable to Canada Post. These claims include conduct related to Canada Post's leveraging of its infrastructure and its allocation of costs.

790. The Claimant also argues that by virtue of the fact that Canada Post is an organ of the Government of Canada and pursues public policy objectives, everything it does is in the exercise of delegated governmental authority and, as a result, the actions of Canada Post are *also* in breach of Articles 1502(3)(a) and 1503(2).⁷⁸¹ Furthermore, according to the Claimant's theory, Article 1502(3)(a) and 1503(2) impose an additional obligation on NAFTA Parties to prevent their monopolies and state enterprises from breaching NAFTA. The Claimant argues that Canada has failed to properly regulate Canada Post.⁷⁸²

791. This fundamentally misconstrues the relationship between Articles 1502(3)(a), 1502(3) and Chapter 11 obligations. The Claimant is seeking to broaden the circumstances in which Chapter 11 obligations are applicable to monopolies and state enterprises, that is, when they exercise delegated governmental authority. The Claimant fails to establish that the actions of Canada Post at issue relate to the exercise of delegated governmental authority. Therefore, its claims of violation of Article 1102 by Canada Post cannot succeed

792. Canada Post is not part of the formal structure of the government of Canada as are, for example, the government of a province or territory, parliament, and courts of a Party. Canada Post is a Crown corporation, in other words a separate legal entity owned by the government of Canada, that has been granted a monopoly on Lettermail. As such, it is not subject directly to the obligations in Chapter 11, although these obligations may be applicable to it to the extent set out in Chapter 15.

⁷⁸¹ Investor's Memorial, para. 729.

⁷⁸² Investor's Memorial, para. 722.

793. As its title indicates (“Competition Policy, Monopolies and State Enterprises”), Chapter 15 of NAFTA contains the obligations applicable to actions of monopolies and state enterprises. Because the NAFTA Parties recognized the potential for monopolies and state enterprises to distort trade, they provided certain obligations governing their conduct.⁷⁸³

794. In addition, the NAFTA Parties identified in Articles 1502 and 1503 the circumstances under which all or certain of their obligations, including Chapter 11, would apply to the conduct of government monopolies and state enterprises. They also provided for the Parties’ responsibility in this regard.

795. As Canada Post falls squarely within the definition of government monopoly and state enterprise,⁷⁸⁴ the provisions in Chapter 15 are therefore the law applicable to Canada’s responsibility for Canada Post. The general principles of state responsibility cannot supersede what was specifically agreed by the NAFTA Parties.

a) Articles 1502(3)(a) and 1503(2) define the extent to which Chapter 11 obligations are applicable to government monopolies and state enterprises

796. In its Award on Jurisdiction, the Tribunal noted that an investor may challenge violations of Chapter 11 in two circumstances:⁷⁸⁵

A challenge can be brought by an investor when the violations of chapter 11 obligations flow from the direct action of one of the Parties to NAFTA or when they flow from conduct of state enterprises in effect acting in the place of a Party.

797. Indeed, Articles 1502(3)(a) and 1503(2) extend to monopolies and state enterprises the Parties’ Chapter 11 obligations, including national treatment, only when they are exercising regulatory, administrative or other governmental authority and are

⁷⁸³ For example, the Parties provided that the sale or purchase of monopoly goods or services must be in accordance with commercial considerations. See NAFTA Article 1502(3)(b).

⁷⁸⁴ NAFTA Article 1505.

⁷⁸⁵ *UPS* Jurisdiction Award. (Investor’s Book of Authorities, Tab 48).

therefore effectively acting in the place of a Party.

798. Article 1502(3)(a) requires that each Party shall ensure, “through regulatory control, administrative supervision or other measures”, that its monopoly does not act in a manner inconsistent with the Parties’ obligations under the NAFTA wherever it exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges.

799. Article 1503(2) requires that each Party shall ensure, “through regulatory control, administrative supervision or other measures”, that its state enterprise act in a manner not inconsistent with the Party’s obligations under Chapters 11 and 14 wherever it 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.

800. This means that the Claimant has to establish first, that the monopoly or state enterprise has exercised delegated regulatory, administrative or other governmental authority as required by Articles 1502(3)(a) and 1503(2); and second, that the monopoly or state enterprise has breached Chapter Eleven of the NAFTA in the exercise of this authority. The Claimant does not do this. Instead, it confuses the matter by invoking the Articles on State Responsibility and by making vague references to authority delegated to Canada Post.

b) The Articles on State Responsibility cannot be used to circumvent the NAFTA provisions

801. The Claimant seeks to avoid the limitations imposed by Articles 1502(3)(a) and 1503(2) by invoking the principles of attribution in the Articles on State Responsibility prepared by the International Law Commission.⁷⁸⁶ The Tribunal should reject the

⁷⁸⁶ James Crawford, *The International Law Commission’s Articles on State Responsibility*, (Cambridge: Cambridge University Press) at 94-99; 100-02; 110-13. [Articles on State Responsibility] (Investor’s Book of Authorities, Tab 3).

Claimant's attempt to broaden the scope of obligations applicable to Canada Post for two reasons. First, the question of attribution is separate from the question of breach of an applicable obligation resulting in state responsibility. Second, the general rules of attribution cannot be used to circumvent the clear rules established by Parties regarding their responsibility for actions of monopolies and state enterprises.

802. The Articles on State Responsibility provide that there is an internationally wrongful act of a State when conduct is (a) attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.⁷⁸⁷

803. The Articles on State Responsibility, particularly Articles 4 (conduct of organs of State), 5 (conduct of persons or entities exercising elements of governmental authority), and 8 (control directed or controlled by a State), contain rules regarding attribution to a State of certain actions. However, in order to determine whether there is a breach of an international obligation, one must look to the treaty which contains the State's obligations.⁷⁸⁸

804. In this case, the relevant provisions are those of Chapter 15 of NAFTA,⁷⁸⁹ which specify the Parties' obligations with respect to conduct of their monopolies or state enterprises. The Claimant confuses the two elements of state responsibility, attribution and breach of an applicable obligation.

805. The Articles on State Responsibility do not apply where states have specified in

⁷⁸⁷ Article 2 of the Articles on State Responsibility, at 81-85. (Investor's Book of Authorities, Tab 3).

⁷⁸⁸ The ILC commentaries which were prepared in connection the Articles on State Responsibility distinguish between the "primary rules" that contain the substantive obligations (the violation of which may result in responsibility) found in the relevant treaty and the "secondary rules" found in the Articles that determine whether the obligation has been breached and the consequences of that breach. Articles on State Responsibility, at 74. (Investor's Book of Authorities, Tab 3).

⁷⁸⁹ Where a state enterprise is subject to NAFTA obligations other than those that may apply by virtue of Chapter 15, it is expressly specified in the text of the provision. The NAFTA contains also specific obligations under Chapter 10 with respect to procurement by certain state enterprises. See Annex 1001.1a-2 by which Canada Post and other listed state enterprises were made subject to procurement obligations. Chapter 13 also contains provisions with respect to provincial monopolies (Article 1305).

a treaty particular rules governing their responsibility.⁷⁹⁰ Article 55 (*Lex specialis*) provides:

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

806. Contrary to what the Claimant suggests,⁷⁹¹ the Articles themselves provide that if there is a conflict, the special rules provided in the treaty will take precedence. In other words, where, as in the NAFTA, the parties specified what obligations are applicable to state enterprises and government monopolies, and when the actions of monopolies or state enterprises are subject to the same obligations as the State, it is to these provisions that one must turn.

807. This does not mean the Articles on State Responsibility have no application in the NAFTA context.⁷⁹² However, the principles of attribution cannot be used to extend the scope of applicable obligations or the state responsibility for acts of monopolies or state enterprises beyond what is specified in Chapter 15 of the NAFTA.

808. In any event, if the Articles on State Responsibility were relevant, in light of the fact that CANADA POST is a distinct legal entity, the applicable rule would not be

⁷⁹⁰ This is consistent with the principle in international law that the special rules prevails over the general rule. Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press) 2003 at 116. (Respondent's Book of Authorities, Tab 100). This is also consistent with the principle that rules of customary international law, such as those reflected in the Articles on State Responsibility, cannot override the provisions of a treaty. See *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 24, on the relationship between customary international law and WTO Agreements. (Respondent's Book of Authorities, Tab 52).

⁷⁹¹ Investor's Memorial, para. 753.

⁷⁹² For example, the Tribunal in *Loewen* referred to the rules of attribution of the Articles on State Responsibility to find the US government would be responsible for acts of Mississippi courts. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Case No. ARB(AF)/98/3, (January 5, 2001), (Decision on Hearing of Respondent's Objection to Competence and Jurisdiction), para. 70. [*Loewen* Decision]. (Investor's Book of Authorities, Tab 51).

Article 4, which deals with organs of the state.⁷⁹³ Rather, it would be Article 5, which deals with para-statal entities. It may be noted that the rules of attribution contained in Article 5 are not significantly different from those set out in Articles 1502(3)(a) and 1503(2).⁷⁹⁴

809. Articles 1502(3)(a) and 1503(2) specify that the monopoly or state enterprise will be subject to certain of the State's obligations when it exercises delegated governmental authority. These are self-contained provisions governing the applicability of the Parties' obligations to the conduct of State enterprises and Monopolies. Given that the rules of responsibility for breach of a Chapter 11 obligation by a monopoly or state enterprise are specified in NAFTA, it is those provisions that the Tribunal must apply; there is no need to have recourse to the Articles on State Responsibility. The WTO Appellate Body has followed a similar approach by focussing on the terms of the obligation at issue and not the general rules of attribution.⁷⁹⁵

c) Meaning of delegated “regulatory, administrative or other governmental authority” in Articles 1502(3)(a) and 1503(2)

810. Articles 1502 and 1503 indicate that, in order for Chapter 11 obligations to be applicable to conduct of Canada Post, the Tribunal must determine that the conduct is in the exercise of Canada Post's delegated regulatory, administrative or other governmental authority. To make this determination, the Tribunal must first consider the meaning of

⁷⁹³ If UPS is correct in asserting that conduct of state enterprises and government monopoly are attributable to the state because they are organs of government, not only are article 1502(3)(a) and 1503(2) superfluous but they are also inconsistent given that they extend a more narrow set of obligations.

⁷⁹⁴ Attribution for acts of para-statal entity depends on whether they are exercising governmental authority and not simply engaged in commercial activity. One significant difference between Article 5 of the Articles on State Responsibility and Article 1503(2) is that even when exercising delegated governmental authority, a state enterprise is only subject to the NAFTA Parties' obligations under Chapters 11 and 14.

⁷⁹⁵ The findings of the WTO panels regarding the application of certain obligations to acts by entities of the government or by para-statal entities have been based on the wording of the particular provisions at issue. They cannot simply be transposed in the context of NAFTA which contains a separate Chapter dealing specifically with the obligations applicable to state enterprises and government monopolies. Indeed, there is no equivalent to Chapter 15 or to Articles 1502(3)(a) and 1503(2) in the WTO context.

this phrase. Canada discussed this in some detail during the jurisdiction phase.⁷⁹⁶ The Claimant however, continues to advance an interpretation of Articles 1502 and 1503 that disregards what was specifically agreed to by NAFTA Parties. 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.⁷⁹⁷

i) Ordinary Meaning of the phrase exercise of delegated “regulatory, administrative or other governmental authority”

811. As a starting point, examining the meaning of the terms used in Article 1502(3)(a) and 1503(3)(2) is necessary to the proper interpretation of these provisions. They indicate that:

- o “Wherever such a - monopoly - state enterprise - exercises” establishes that the authority in question must be something that is capable of being exercised. It cannot just be a status such as the fact of being an institution of the Government of Canada or a Crown corporation. There needs to be an exercise of authority of a particular kind.
- o “Authority” refers to power given over someone or something in a manner that affects their rights. This can be contrasted with being “authorized” to do something which refers to having the right or being permitted to do something.⁷⁹⁸
- o The phrase “that the party has delegated to it” together with Note 45 of the NAFTA⁷⁹⁹ confirms that the authority in question must be given through an active formal assignment or transfer of authority.⁸⁰⁰ It cannot therefore

⁷⁹⁶ Memorial of the Government of Canada on Preliminary Jurisdictional Objections (February 14, 2002), paras. 80-86; Transcript of the Jurisdiction Hearing, vol. 1, (July 29, 2002), at 44-99.

⁷⁹⁷ *Vienna Convention*, Article 31. (Investor’s Book of Authorities, Tab 89).

⁷⁹⁸ *The New Shorter Oxford English Dictionary*, vol. 1, (Oxford: Clarendon Press, 1993) at 151. (Respondent’s Book of Authorities, Tab 84).

⁷⁹⁹ Note 45 provides that in Article 1502(3)(a): “A delegation includes a legislative grant and a government order, directive or other act transferring to the monopoly or authorizing the exercise by the monopoly of governmental authority.”

⁸⁰⁰ This ordinary meaning is supported by the United States in its 1128 submission at paragraph 9 “to fall within Article 1502(3)(a) or 1503(2), the sovereign authority being exercised must have been transferred to the monopoly or state enterprise by some affirmative act of the NAFTA party.”

be authority that is simply inherent in the creation or operation of any entity; it must be a specific power.⁸⁰¹

- o 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. An exercise of regulatory authority is normally formal in nature, generally involves a formal instrument for the exercise of that authority, such as a statutory instrument, delegated legislation and regulation.⁸⁰²
- o The term “administrative” is a form of the word “administration” whose ordinary meaning is “the management of public affairs; government.” Administrative authority includes administrative orders, rules, directives, including the exercise of the powers and privileges of the executive.⁸⁰³
- o “Governmental” is a term whose ordinary meaning is “of or pertaining to government, especially of a State.” Governmental authority is the authority vested in the state to govern the conduct of others.⁸⁰⁴

812. While the NAFTA does not define the phrase “regulatory, administrative or other governmental authority”, the meaning of the term governmental authority has been considered and defined in other contexts. In all cases it refers to something very distinct from commercial activity.

813. For example, under Article 5 of the Articles on State Responsibility, attribution of conduct of para-statal entities to the state depends on whether it concerns the exercise of governmental authority. While Article 5 itself does not define the term governmental

⁸⁰¹ US Second 1128 Submission, May 13, 2002, para. 9. (Respondent’s Book of Authorities, Tab); Mexico’s Third 1128 Submission, August 23, 2002, para. 7. (Respondent’s Book of Authorities, Tab). The extract from the commentary to the ILC Articles cited at para. 731 of the UPS as relevant to the interpretation of the term delegated authority do not assist in the interpretation of the term as they deal with an entirely different concept.

⁸⁰² *The New Shorter Oxford English Dictionary*, vol. 2, (Oxford: Clarendon Press, 1993) at 2530. (Respondent’s Book of Authorities, Tab 85).

⁸⁰³ *The New Shorter Oxford English Dictionary*, vol. 2, (Oxford: Clarendon Press, 1993) at 28. (Respondent’s Book of Authorities, Tab 85).

⁸⁰⁴ According to Black’s Law Dictionary, “government” means, inter alia, the [regulation, restraint, supervision, or control which is exercised upon the individual members of an organized jural society by those invested with authority” [...] “The essence of government is therefore that it enjoys the effective power to regulate, control or supervise individuals or otherwise restrain their conduct through the exercise of lawful authority”. *Black’s Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 695. (Respondent’s Book of Authorities, Tab 82).

authority, the Commentary sheds some light on its meaning. It indicates that it refers, to “functions of a public character normally exercised by State organs”.⁸⁰⁵ It also notes that conduct must:

[...] concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of state under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).⁸⁰⁶

814. The Claimant ignores these explanations.⁸⁰⁷

815. Another example of the use of the term is in Article I:3 of the GATS, which refers to “service supplied in the exercise of governmental authority”. This is defined as “any service, which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”.⁸⁰⁸

816. Finally, in the context of the *Canada-Dairy* case, the Appellate Body considered what is meant by the word government in Article 9(1)(a) of the *Agreement on Agriculture* which refers to the provision of subsidies by governments and their agencies:

We start our interpretative task with the text of Article 9.1(a) and the ordinary meaning of the word “government” itself. According to Black’s Law Dictionary, “government” means, inter alia, the [regulation, restraint, supervision, or control which is exercised upon the individual members of an organized jural society by those invested with authority” [...] “The essence of government is therefore that it enjoys the effective power to regulate, control or

⁸⁰⁵ Articles on State Responsibility, at 100, para. (2). (Investor’s Book of Authorities, Tab 3).

⁸⁰⁶ Articles on State Responsibility, at 101, para. (5). (Investor’s Book of Authorities, Tab 3).

⁸⁰⁷ See Investor’s Memorial, paras. 738-744, where UPS refers to the use of the term in Article 5 and to the Commentary, but avoids the relevant portions of the Commentary.

⁸⁰⁸ *The General Agreement on Trade in Services*, The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations, World Trade Organization (Cambridge: Cambridge University Press, 1999), Article I:3(c). (Respondent’s Book of Authorities, Tab 11).

supervise individuals or otherwise restrain their conduct through the exercise of lawful authority." The meaning is derived in part from the functions performed by government and part from the government having the powers and authority to perform those functions. "A government agency is in our view an entity which exercises powers vested in it by a government for the purposes of performing functions of a governmental character, that is, to regulate, restrain, supervise or control the conduct of private citizens."⁸⁰⁹

817. These definitions cannot simply be brought into the NAFTA, as the exact meaning of the term governmental authority will vary depending on the context. However, they indicate at the very least that governmental authority is generally understood as something other than commercial or business activity.

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

ii) Context

819. The ordinary meaning of words is informed by the context in which they are found. It follows that the terms "regulatory", "administrative" and "other governmental authority" must be read together. Also providing context for these terms are the rest of Articles 1502(3)(a) and 1503(2), including the examples illustrating the type of authority contemplated ("such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges"); the rest of Chapter 15, including the obligations that are imposed on the state enterprise and monopoly when providing its commercial goods or services; and the NAFTA as a whole.

820. The Claimant's interpretation of the term governmental authority ignores the relevant context of the words. Because it ignores context, the Claimant's interpretation is

⁸⁰⁹ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999. para. 97. (Respondent's Book of Authorities, Tab 41).

contrary to the interpretative principles *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 *eiusdem generis*, that general words are limited by the meaning indicated by accompanying specific words.⁸¹⁰ These principles demonstrate that, read in context, “other governmental authority” should be understood as referring to authority that is akin to “regulatory” or “administrative” authority.

821. The examples that follow the terms “regulatory, administrative or other governmental authority” also explain the type of authority contemplated. 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.

822. The powers specified in these articles therefore 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. Again, the Claimant’s interpretation is not consistent with the examples given by the NAFTA Parties of the authority contemplated.

823. Examples of entities that exercise such powers that the NAFTA Parties may have had in mind include, Petroleos Mexicanos (PEMEX) the Mexican state-owned oil company, which has powers to issue licenses to sell gasoline and extract gas from the underground; CFE, the Federal Electricity Commission and LFC, the Light and Power Company for the Centre, which have powers to issue licenses to produce electricity and impose tariffs.⁸¹¹

824. Furthermore, the presumption of effectiveness in treaty interpretation means that an interpreter cannot adopt a reading that would reduce whole clauses or paragraphs

⁸¹⁰ Ian Brownlie, *Principles of Public International Law*, 6th ed., (Oxford: University Press, 2003) at 604. (Respondent’s Book of Authorities, Tab 88).

⁸¹¹ Other examples include power authorities and pilotage or port authorities in Canada and the United States, which usually impose fees and sometimes issue licenses.

of the treaty to redundancy or inutility.⁸¹² 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. The phrase clearly contemplates a narrower scope of monopoly conduct than everything it does in carrying on business.

825. Moreover, the subparagraphs in Articles 1502 and 1503 provide relevant context and inform each other’s meaning.⁸¹³ They must be read as a whole. Each subparagraph covers a different situation and imposes a different obligation.

826. As the Tribunal noted in its Award on jurisdiction,⁸¹⁴ there is a distinction between the activities covered by Articles 1502(3)(a) and 1503(2) on the one hand, and the activities covered by Articles 1502(3) and 1503 on the other. The former deal with “exercises by monopolies or enterprises of authorities delegated to them by a Party which breach NAFTA obligations”. The latter cover “actions of monopolies and state enterprises in their commercial activities”.

827. To read the concept of delegated governmental authority as encompassing commercial activities would result in redundancy between the obligations imposed in the different subparagraphs. The Claimant’s reading of delegated governmental authority as covering everything Canada Post does would mean that Canada Post would always be subject to the national treatment obligation in Article 1102. If that were the case, the non-discrimination obligation in Articles 1502(3)(c) and 1503(3) with respect to Canada

⁸¹² *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R; WT/DS810/AB/R; WT/DS11/AB/R, adopted 1 November 1996, at 12. (Respondent’s Book of Authorities, Tab 56).

⁸¹³ As the Appellate Body noted in *Korea-Dairy*:

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 Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, adopted 12 January 2000, para. 81. (Respondent’s Book of Authorities, Tab 58)

⁸¹⁴ *UPS Jurisdiction Award*, para. 18. (Investor’s Book of Authorities, Tab 48).

Post's purchase and sale of its goods and services would be inutile. The Claimant's interpretation must therefore be rejected.

828. The Claimant ignores the context of the phrase "exercise of delegated governmental authority" and particularly the accompanying terms "regulatory" and "administrative", as well as the examples of this authority provided by the NAFTA Parties. Its interpretation is therefore incorrect.

iii) Object and Purpose

829. Article 31 of the Vienna Convention mandates interpretation of a treaty in accordance with the object and purpose of the treaty. The ordinary meaning of the words "delegated regulatory, administrative or other governmental authority" must therefore be examined in light of the general objectives of the NAFTA, but more particularly in light of the objectives of Articles 1502 and 1503.⁸¹⁵

830. The object of these articles is to set out when and what obligations are applicable to the conduct of state enterprises and monopolies. More specifically, the obligations in Article 1502(3)(a) and Article 1503(2) recognize that governments sometimes delegate regulatory or administrative functions to their monopolies and state enterprises. They require that such monopolies and state enterprises act in a manner consistent with some or all of the Party's NAFTA obligations, but only when delegated and exercising such authority. As the Tribunal recognized in its Award on Jurisdiction, these articles are, in a sense, anti-avoidance mechanisms to ensure that certain obligations are not eroded by governments' delegating their authority to monopolies or state enterprises.⁸¹⁶

831. This confirms that the phrase "delegated governmental authority" refers to the type of authority that would usually be exercised by governments and thereby subject to the NAFTA obligations.

⁸¹⁵ *ADF* Award, para. 147. (Investor's Book of Authorities, Tab 95).

⁸¹⁶ *UPS* Jurisdiction Award, para. 17, where the Tribunal states that "a Party cannot avoid its obligations by delegating its authority to bodies outside the core government." (Investor's Book of Authorities, Tab 48).

d) The Claim with respect to Canada Post’s leveraging of its infrastructure does not Relate to the Exercise of “Delegated Regulatory, Administrative or Other Governmental Authority”

832. The Claimant’s allegations regarding Canada Post’s leveraging of its infrastructure and its allocation of costs amount do not relate to conduct by Canada Post in the exercise of a delegated regulatory, administrative or other governmental authority. The conduct at issue is clearly of a commercial nature and is therefore not subject to the obligation in Article 1102.

833. In order to get around this obvious conclusion, the Claimant makes various attempts to characterize Canada Post’s actions as the exercise of governmental authority formally delegated to Canada Post through Canadian law.

834. First, the Claimant alleges that everything Canada Post does is in the exercise of delegated governmental authority because it is an organ of the Canadian government.⁸¹⁷ The Claimant confuses the issue by referring to the customary international law rules of attribution to get around the limitation set out in Articles 1502(3)(a) and 1503(2) that the monopolies and state enterprise are only subject to Chapter 11 obligations when exercising delegated governmental authority.

835. Second, the Claimant makes references to the fact that Canada Post is a crown agency pursuant to section 5(2)(e) and section 23 of the *CPC Act* and that it acts “under statutory authority” and therefore “within government authority”.⁸¹⁸ It is not clear how this is relevant. The fact that Canada Post acts under or within its statutory authority does not establish that it *exercises* delegated governmental authority – otherwise everything a state enterprise does would meet the requirement of Articles 1502(3)(a) and 1503(2).

836. Next, the Claimant argues that the fact that Canada Post is owned and controlled

⁸¹⁷ Investor’s Memorial, para. 744.

⁸¹⁸ Investor’s Memorial, para. 745.

by the Government of Canada, subject to its direction under section 22 of the *CPC Act*⁸¹⁹ and accountable to it amounts to a delegation of governmental authority to Canada Post.⁸²⁰ The definitions of government monopoly and state enterprises inherently imply government control over state enterprises and monopolies. The Claimant itself argues that it this control is required. This does not however establish the additional element required by Articles 1502(3)(a) and 1503(2), that there be exercise of delegated governmental authority.

837. The Claimant also relies on the fact that Canada Post implements governmental policy. While it is true that Canada Post pursues public policy objectives, it also follows commercial objectives and imperatives as is set out in Section 5 of the *CPC Act*. This does not resolve the question of whether the action at issue, whether related to a public policy goal or not, is an exercise of delegated governmental authority.

838. As set out above, the proper interpretation of the phrase the exercise of delegated “regulatory, administrative or other governmental authority” makes clear that:

- o It does not refer to the simple fact that Canada Post is established by legislation, that it is a Crown corporation “owned” by the Government of Canada or one of its “institutions”;
- o It does not refer to the operation of the postal monopoly and related businesses just because the CPC act allows Canada Post to engage in these activities; in other words, it does not refer to everything Canada Post does;
- o It does not refer to the commercial activities of Canada Post such as the sale and purchase of Canada Post goods and services.
- o It refers powers that Canada Post may have that would normally only be powers exercised by a state such as powers to make regulation and make decisions that affect the rights of third parties

839. In addition to the arguments that everything Canada Post does is an exercise of delegated governmental authority, the Claimant identifies specific provisions of the *CPC*

⁸¹⁹ UPS’ reliance on the *Periodicals* case is misplaced. The issue in that case was not whether Canada Post exercised governmental authority but whether its discriminatory rate regulation for publications was a governmental measure.

⁸²⁰ Investor’s Memorial, paras. 746, 748, 749.

Act and regulations in relation to its claim that Canada Post's leveraging of its infrastructure is an exercise of delegated governmental authority.⁸²¹ The Memorial mischaracterizes these provisions and makes factually inaccurate statements regarding the powers delegated to Canada Post and the content of the regulations. On their face, the provisions have nothing to do with Canada Post's regulation or authority over UPS Canada; they relate to Canada Post's monopoly, and to the organization of its business.⁸²²

840. Moreover, none of the provisions on which the Claimant relies explain the claim that Canada Post's leveraging of its infrastructure is an exercise of delegated governmental authority. The fact that Canada Post is able to pursue business activities other than the delivery of mail and is able therefore to take advantage of economies of scale and scope is not contested. Canada Post's provision of services in non-monopolized markets, its delivery of mail, and its internal allocation of costs are commercial conduct, are not an exercise of governmental authority.

841. As a result, the Claimant has failed to establish that the breach it is complaining of, Canada Post's leveraging of its infrastructure, is an exercise of delegated governmental authority. The Tribunal need not pursue further the inquiry regarding whether there is a breach of NAFTA Chapter 11.

e) There is no independent obligation to adequately supervise Monopolies and State Enterprises under Articles 1502(3) and 1503(2)

842. There is no basis in the text, structure or object and purpose of Articles 1502(3)

⁸²¹ Investor's Memorial, paras. 733-734. The provisions on which UPS relies are: Section 14(1) of the CPC Act which grants Canada Post the letter mail monopoly; Section 19 of the CPC Act which gives Canada Post regulation making authority "for the efficient operation of the business of the Corporation and for carrying the purposes and provisions of this Act"; Section 57 of the CPC Act which prohibits the sale of postage stamps without Canada Post's consent; Section 3 and 10(h) of the Mail Receptacles Regulations which allow Canada Post to place mail collection/delivery receptacles in public places and provide that Canada Post will deliver to apartment boxes if certain conditions are met; Canada Post provision of private post office boxes; The Postage Meter Regulations which regulate the use of postage meters for the purposes of payment of postage to Canada Post; A vague allegation that the CPC Act grants Canada Post "the privilege to develop an infrastructure to collect, transmit and deliver letters" and "to control the right and terms of access to the infrastructure".

⁸²² Ferguson Affidavit, paras. 42-46. (Respondent's Book of Expert Reports and Affidavit, Tab 11). Meacham Affidavit, paras. 33-36. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

and 1503(2) to read them as imposing a separate obligation providing how NAFTA Parties must govern its state enterprise or monopoly.

843. The phrase “[e]ach Party shall ensure, through regulatory control, administrative supervision or the application of other measures” deals with the question of the NAFTA Parties’ responsibility at international law for the conduct of their monopolies and state enterprises. Articles 1502 and 1503 do not impose a regulatory standard; rather, they establish that the NAFTA Parties shall ensure the respect of the obligations set out in these articles, regardless of how the NAFTA Parties choose to regulate their monopolies and state enterprise.

844. The ordinary meaning of the word “ensure” is to “guarantee”, “make certain”.⁸²³ The words that follow “through regulatory control, administrative supervision or the application of *other measures*” indicate certain ways by which NAFTA Parties shall make certain that the state enterprise and monopoly respect the obligations that are imposed upon them. It is up to the NAFTA Parties to decide how they will achieve this result. If the monopolies or state enterprises respect the obligations set out in Articles 1502 and 1503, then the State has fulfilled its obligation under these Articles. This is consistent with the purpose of these provisions

845. Moreover, the Claimant’s assertions regarding the lack of supervision of Canada Post are simply incorrect. Canada has a complete regulatory system in place for the governance of its Crown corporations set out in the *Financial Administration Act*. Other mechanisms including certain provisions of the Canada Post Act also contribute to an effective regulation of Canada Post.⁸²⁴ Finally, in so far as anti-competitive conduct is concerned, Canada Post is subject to Canada’s *Competition Act*. It is also obliged to have its audited financial statements confirm that it does not cross-subsidize.⁸²⁵

⁸²³ *The New Shorter Oxford English Dictionary*, vol. 1, (Oxford: Clarendon Press, 1993) at 827. (Respondent’s Book of Authorities, Tab 84).

⁸²⁴ Ferguson Affidavit. (Respondent’s Book of Expert Reports and Affidavits, Tab 11). Also see Section 11 “Governance and Accountability of Canada Post”.

⁸²⁵ Annan Affidavit. (Respondent’s Book of Expert Reports and Affidavits, Tab 1).

846. The Claimant's allegations regarding the governance of Canada Post are part of its efforts over the years to make Canada's regulation of Canada Post more akin to the U.S. regulatory system. The Claimant made a similar claim in its Amended Statement of Claim. It argued that Canada's supervision and regulation of Canada Post was ineffective and non-transparent and constituted a breach of Article 1105. The Tribunal in its Award on Jurisdiction ordered this claim be struck.⁸²⁶ The Claimant now argues that Canada's supervision of Canada Post is insufficient and constitutes a violation of Articles 1502 and 1503. This claim should also fail.

⁸²⁶ Para. 134 (a) of the *UPS Jurisdiction Award* struck paras. 33(b) and 34 of the Amended Statement of Claim.

2. The Claimant has not established that Canada Post’s conduct amounts to a violation of Article 1102

847. If the Tribunal finds that Canada Post exercised a delegated governmental authority, Canada submits that the Claimant has not established that Canada Post violated Article 1102 in “leveraging” its infrastructure. The Claimant’s allegations of “leveraging” are an attempt to create some sort of “super” competition law that has no basis in the NAFTA. These allegations do not fit within the scope of Article 1102, and therefore could not lead to a violation of that Article even if true.

848. The Claimant has also failed to establish that Canada Post accorded UPS Canada treatment, in like circumstances, that was less favourable than the treatment it accorded itself – or any other Canadian investment. Neither has it established the presence of any nationality-based discrimination.

a) The Claimant has failed to identify a “treatment”

849. The claim – as directed against the conduct of Canada Post – is that Canada Post has engaged in unfair competition by “leveraging” its infrastructure. The Claimant stresses that its claim is that Canada Post failed to charge the products it offers in non-monopolized market a “market rate” for access to its infrastructure.⁸²⁷ And it summarises its own case by stating that it complains about Canada’s allowing Canada Post to engage in “unfair competition”.⁸²⁸

850. Canada Post’s internal costing decisions cannot be “treatment” of the Claimant

⁸²⁷ Investor’s Memorial, para. 579. On the basis of this new test, the Claimant asserts that Canada Post’s meeting a cross-subsidy test using long-run incremental cost is not enough to meet NAFTA obligations. In spite of this late admission that cross-subsidisation is irrelevant to Article 1102, both the Memorial and a Claimant’s expert imply that Canada Post is not meeting the long-run incremental cost test. See Investor’s Memorial, paras. 190-97 and para. 762; Neels Report *passim*. (Investor’s Brief of Witness Statements and Expert Reports, Tab 5).

⁸²⁸ Investor’s Memorial, para. 1.

or UPS Canada.⁸²⁹ The allegation faces the same hurdle when directed against Canada Post as it does when directed against Canada: it does not fit within Article 1102's structure of comparing the treatment accorded the foreign investor or its investment to that accorded to a domestic investor or investment.⁸³⁰

851. This fact reveals itself in the Claimant's ambiguity as to whether its complaint is directed at less favourable treatment accorded to itself, or to UPS Canada, or both. The Memorial never states plainly whether the Claimant is asserting a violation of paragraph 1102(1) or 1102(2), or both. Under the former, the Claimant must allege that Canada treated it less favourably than it treated a Canadian investor, in like circumstances. Under the latter, the Claimant must allege that Canada treated its investment less favourably than it treated a Canadian investment, in like circumstances. Article 1102 makes no provision for asserting that a NAFTA Party treated an investor less favourably than an investment.

852. The Memorial states that Canada Post's leveraging its monopoly "treats UPS and UPS Canada less favorably than Canada Post".⁸³¹ However, the remainder of the sections alleging less favourable treatment refer exclusively to UPS Canada.⁸³² The simple fact is, Canada Post's costing treats neither the Claimant nor UPS Canada.

853. The legal obligations governing the conduct of monopolies and state enterprises are found in Chapter 15. As discussed above, they do not prohibit either from taking advantage of economies of scale and scope.

854. Article 1501 is an unambiguous statement that the NAFTA Parties intended

⁸²⁹ While the Claimant has made a number of factual allegations, its pleading rests entirely on Canada Post's failure to pay "market rates" for its allegedly exclusive access to what the Claimant calls the "Monopoly Infrastructure".

⁸³⁰ Canada dealt with this argument in more detail in its Memorial on Compliance with the Award on Jurisdiction, paras. 36-42.

⁸³¹ At para. 568. Note that the allegation, if any, is that Canada treated the Claimant less favourably than Canada Post.

⁸³² See paras. 569-77.

issues of competition law to be outside the scope of any NAFTA dispute settlement regime. The remainder of Chapter 15 is also clear in setting out obligations that it imposes on Parties for the regulation of competition. The very limited obligations governing competition are set out in Article 1502(3)(d).⁸³³

855. The Claimant argues that the same set of facts can constitute a violation of more than one NAFTA provision.⁸³⁴ Canada has never contested this. However, it is for the Claimant to demonstrate that the alleged facts it formerly claimed violate Article 1502(3)(d) can also violate Article 1102. It has failed to do so. Nor can it, because the Claimant's interpretation of Article 1102 cannot be squared with any effective interpretation of Article 1502(3)(d).

856. The Claimant's real intent is therefore to raise issues under Article 1102 that might be dealt with in domestic competition law, or under Article 1502(3)(d), if anywhere at all. It is therefore seeking to create a form of "super" competition law that has absolutely no basis in the NAFTA. The Claimant has invented a competition regime that has nothing to do with national treatment, nothing to do with Article 1502(3)(d) and no precedent in international law.⁸³⁵

b) The Claimant has failed to demonstrate that Canada Post accorded itself and either the Claimant or UPS Canada treatment "in like circumstances"

857. As Canada demonstrated at the outset of its Article 1102 argument, the "in like circumstances" test calls for an examination of the overall context in which the treatment was accorded, including relevant public policy considerations. The Claimant has not looked beyond the issue of same "business sector", has not considered the circumstances in which the treatment was accorded, and has not established that the treatment was

⁸³³ Article 1502(3)(b) also an element of regulation of competition, through note 46.

⁸³⁴ Investor's Memorial, paras. 392-94.

⁸³⁵ The Tribunal concluded in its Award on Jurisdiction at para. 92 that there is no rule of customary international law prohibiting or regulating anticompetitive behaviour. In any event, the Claimant has cited no legal authority for its test. *UPS Jurisdiction Award* (Investor's Book of Authorities, Tab 48).

accorded in like circumstances.

858. Since the burden of proof to demonstrate that treatment was accorded “in like circumstances” rests with the Claimant, and the Claimant has not discharged it, Canada submits that this alone is sufficient grounds to dismiss the “leveraging” claims. Nevertheless, Canada will demonstrate that any treatment Canada Post may have accorded itself and UPS Canada was not accorded in like circumstances.⁸³⁶

859. The relevant circumstances in a particular case can only be determined on the basis of the treatment at issue.⁸³⁷ Here, the Claimant alleges that Canada Post violated Article 1102 by “failing to require its commercial products to pay market rates for access to its infrastructure.” Relevant circumstances therefore relate to Canada Post’s infrastructure, including its creation, nature and use.

i) Canada Post’s social obligations, not the exclusive privilege, determine the extent and density of the network

860. Foremost among the relevant circumstances is the universal service obligation. This obligation, along with Canada Post’s domestic mandate to meet social and policy imperatives, requires Canada Post to be able to serve every address in Canada with letters, parcels and other services, even where “strict commercial logic” would have dictated otherwise.⁸³⁸ Canada Post’s other social and policy imperatives also require it to make decisions on other than commercial grounds. Doug Meacham states:

For instance, while the profit mandate of Canada Post may favour a more efficient placement of a mailbox in order to service the maximum number of possible users in a designated area, the social mandate of Canada Post may require that an additional mailbox be

⁸³⁶ With respect to the allegation that the Claimant and Canada are accorded treatment “in like circumstances”, the Claimant advances no evidence at all. It relies entirely on the similarity of business sectors test it applies to Canada Post and UPS Canada. Even if this were sufficient to establish likeness of circumstances as between Canada Post and UPS Canada, it would say nothing about Canada and the Claimant.

⁸³⁷ Canada demonstrated the correct legal test for Article 1102 in Part III, Section IV(B), paras. 584 *et seq.*

⁸³⁸ Commentary of the Universal Postal Union, discussed at Part III, Section II(A), para. 449.

located at or within a home for the elderly, notwithstanding the additional cost that may result.⁸³⁹

861. It is this requirement to meet policy obligations, including the universal service obligation, that has forced Canada Post and its predecessors to develop such an extensive infrastructure, not the presence of the exclusive privilege. Professor Crew states:

It is because of its USO that CPC and other POs have many more outlets than they would in the absence of a USO. A privately-owned company that did not have a USO would have many fewer retail outlets than CPC. One measure of CPC's burden is the extra outlets it is obligated to operate.⁸⁴⁰

862. Later in his report, Professor Crew states that the universal service obligation would require the same infrastructure whether or not the postal authority provides competitive services.⁸⁴¹

863. The European Court of Justice recognized that the universal service obligation creates a need for an intensive infrastructure in dealing with a complaint brought by the *Union française de l'express* against *La Poste*, the French equivalent of Canada Post.⁸⁴²

864. The Court had to decide whether *Chronopost*, a courier company 67%-owned by *La Poste*, benefited from subsidies. The Court found that such a decision required consideration of the "very different" situation created by *La Poste*'s providing "a service of general economic interest".⁸⁴³

865. The Court went to say:

⁸³⁹ Meacham Affidavit, para. 8. (Respondent's Book of Expert Reports and Affidavits, Tab 27). See also Ferguson Affidavit, para. 23. (Respondent's Book of Expert Reports and Affidavits, Tab 11).

⁸⁴⁰ Crew Report, para. 17. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

⁸⁴¹ *Ibid.* para. 57. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

⁸⁴² *Chronopost et al. v. Union française de l'express et al.* [2003] ECR I-6993, EU:Case C-83/01. (Respondent's Book of Authorities, Tab 50).

⁸⁴³ *Ibid.* para. 33. (Respondent's Book of Authorities, Tab 50).

Such a service essentially consists in the obligation to collect, carry and deliver mail for the benefit of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar conditions as to quality.

To that end, La Poste had to acquire, or was afforded, substantial infrastructures and resources (the ‘postal network’), enabling it to provide the basic postal service to all users, even in sparsely populated areas where the tariffs did not cover the cost of providing the service in question.

Because of the characteristics of the service which the La Poste network must be able to ensure, the creation and maintenance of that network are not in line with a purely commercial approach. As was recalled in paragraph 22 above, Ufex and Others have indeed accepted that a network such as that available to SFMI-Chronopost is clearly not a market network. Therefore that network would never have been created by a private undertaking.⁸⁴⁴

866. While the European Court of Justice was applying European Community law on state aid, its analysis of the difference between post and courier is just as relevant here. Indeed, the differences between European law and the NAFTA only underscore the absence of treatment “in like circumstances” here. The European Court’s jurisdiction extends to a comprehensive regime of competition law, while the NAFTA contains very little, and Chapter 11 none.

867. Like La Poste, Canada Post has a mandate to provide uniform postal services that are of general economic interest, and to that end is charged with a universal service obligation. Like La Poste, to meet that obligation it has a network that is not in line with a purely commercial operation.

868. Canada Post therefore operates a postal infrastructure because it is required to do so, not because there is an inherent advantage in it. It would not operate the same infrastructure if it did not have the universal service obligation. Instead, it would operate an infrastructure designed to serve purely commercial needs.

869. UPS Canada does not have a universal service obligation. It is not required to

⁸⁴⁴ *Ibid.* paras. 34-36. (Respondent’s Book of Authorities, Tab 50).

provide services throughout Canada at uniform low prices. It is a commercial enterprise with no social policy mandate. It provides services if and when it is in its business interests to do so, at a price that serves its business interests. UPS Canada thus has a different infrastructure because that is what is profitable, not because it is legislatively prohibited from copying Canada Post's.⁸⁴⁵

870. The fact that Canada Post has a universal service obligation is therefore an important distinguishing feature between it and a courier business. Given the substantial effect it has on the nature and extent of the infrastructure, it must be an important relevant circumstance in determining whether any treatment accorded in respect of it was accorded "in like circumstances".

ii) Canada Post's social obligations impose a financial burden on it

871. Canada Post's so-called "leveraging" of its infrastructure is also a direct result of having to operate the type of network required to meet its universal service obligation. The operation and maintenance of Canada Post's infrastructure places an enormous financial burden on the corporation.

872. Professor Crew explains that the universal service obligation raises costs for postal authorities because it imposes costly activities on them to which couriers are not subject.⁸⁴⁶ As an example he cites the extra outlets a postal authority must operate, which he describes as one of the "burdens" of the universal service obligation.⁸⁴⁷

873. Canada Post is subject to a number of social and policy imperatives beyond the universal service obligation. These include providing the only federal presence in remote

⁸⁴⁵ For example, at para. 170 of the Memorial the Claimant quotes a Canada Post executive for evidence that it is disadvantaged by reason of the exclusive privilege. The executive was comparing Canada Post's 7400 post offices in Montreal to UPS Canada's single location. Assuming the executive had the correct facts, if UPS Canada has only one location in Montreal, it must be because of its own choice, not because of the density of Canada Post's network. It seems inconceivable that UPS Canada cannot expand to two locations in Canada's second-largest city simply because of Canada Post's presence.

⁸⁴⁶ Crew Report, para. 41. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

⁸⁴⁷ *Ibid.* para. 18. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

areas and supporting Government policies such as those enshrined in the *Official Languages Act*. These too add to Canada Post's burden.⁸⁴⁸

874. The affidavit of Doug Meacham confirms that Canada Post must operate in the manner described by Professor Crew. Mr Meacham describes the various roles Canada Post and its single postal infrastructure must play. As a result of the balance between commercial and social roles that Canada Post must strike, he states:

... rural operations contribute low revenues but account for significant labour and transactional costs. However, Canada Post must nevertheless maintain a rural presence in order to facilitate access to products and delivery in these areas.⁸⁴⁹

875. The circumstances surrounding a private carriers network are not "like" those just described. Commercial carriers would generally close outlets that are not economically viable – or refrain from opening them in the first place.⁸⁵⁰ Any treatment accorded in respect of financing the extra costs of the postal infrastructure cannot be accorded "in like circumstances" to treatment accorded to private carriers.

iii) The exclusive privilege and the competitive products are required to fund Canada Post's social obligations

876. The burdens created by maintaining a postal infrastructure require governments to take measures to ensure its viability. This also true of the uniform pricing policy within the universal service obligation.

877. In order to finance the infrastructure, Canada has provided Canada Post a limited exclusive privilege, allowing it to set an average price that will exceed the cost of delivery in high-density areas, but be lower than the cost of delivery in low-density areas. This pricing system is only viable if Canada Post, like postal administrations in most other countries, is given a monopoly. If not, competitors with purely commercial

⁸⁴⁸ Ferguson Affidavit, paras. 23-24. (Respondent's Book of Expert Reports and Affidavits, Tab 11).

⁸⁴⁹ Meacham Affidavit, para. 8. (Respondent's Book of Expert Reports and Affidavits, Tab 27).

⁸⁵⁰ Crew Report, para. 52. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

interests would provide service in low cost areas and undercut the postal administration's prices.⁸⁵¹

878. Professor Crew describes this issue as a "graveyard spiral":

Without a reserved area, a PO faced with a USO would be at serious risk of a graveyard spiral. Competitors would enter low cost routes undercutting the PO's blended uniform price. In addition, competitors would take the business of the PO's largest customers, which on a per-piece basis are typically the cheapest to serve. Inevitably, the competitors would be cream skimming and the PO would be left with economically unviable routes and customers. To counter the loss of profits, the PO may try to raise the uniform stamp price but this would lead to some of the routes that competitors had previously found uneconomical becoming more attractive. If this process continued, with every price increase resulting in the loss of more profitable routes and customers, the PO would be in a vicious cycle, a graveyard spiral, losing more and more money, with the result that the USO would be jeopardized.⁸⁵²

879. The reserved area is therefore a critical element in the funding of the infrastructure. However, it is not enough in itself, requiring governments to provide additional funding mechanisms.⁸⁵³

880. As a second means of financing the infrastructure, Canada has chosen to give Canada Post a commercial mandate, allowing it to take advantage of any economies of scope and scale that may arise from its operations. Thus, while Canada Post competes in

⁸⁵¹ The European Court of Justice recognized this issue in Case C-320/91 Corbeau [1993] ECR I-2533 at paragraph 15. It stated with respect to price averaging:

That equalization in turn presupposes the establishment of a statutory monopoly. If in fact the postal service were liberalized, competition would concentrate on the most profitable services, exerting a progressive pressure on tariffs and a consequent "creaming-off" of the profits of the postal administration. On the other hand the task of providing the most onerous services and hence those structurally least profitable would fall to the administration.

(Respondent's Book of Authorities, Tab 47).

⁸⁵² Crew Report, para. 43. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

⁸⁵³ *Ibid.* paras. 46-49, and paras. 62-63. (Respondent's Book of Expert Reports and Affidavits, Tab 9).

non-monopolized markets, and seeks to make a profit, it does so to meet Canada’s direction that it operates on a self-sustaining basis.

881. [Redacted]⁸⁵⁴ Canada Post must provide basic parcel service as well as basic letter service, meaning its use of its infrastructure in non-monopolized markets is also a direct result of its universal service obligation. In other words, Canada Post operates a postal infrastructure, not a “monopoly infrastructure”.⁸⁵⁵

882. The steps Canada has taken to finance the postal infrastructure all arise in the unique circumstances created by the burdens of Canada Post’s social and policy obligations, including the universal service obligation. Thus, when Canada Post uses the postal infrastructure, including for commercial purposes, it is not according treatment to itself and to UPS Canada “in like circumstance”, even assuming that it is treating UPS Canada at all.

iv) Even applying the Claimant’s test, Canada Post and UPS Canada are not accorded treatment in like circumstances

883. As noted above, Canada recognises that one of the considerations in a like circumstances analysis is a consideration of the business sector in which the investors or investments operate.

884. [Redacted]⁸⁵⁶ [Redacted].

885. [Redacted]:

[Redacted]⁸⁵⁷

886. [Redacted].⁸⁵⁸

⁸⁵⁴ [Redacted]

⁸⁵⁵ See Part II, Section II(F), paras. 149-185. Canada Post and its predecessors have been delivering parcels for over a century, and express parcels since 1939. Conn Affidavit, paras. 20 and 24. (Respondent’s Book of Expert Reports and Affidavits, Tab 6).

⁸⁵⁶ [Redacted]

⁸⁵⁷ [Redacted].

887. Even if Canada Post offers certain products that have some of the same characteristics as certain UPS Canada products, there remain significant differences in the offerings of Canada Post and UPS Canada and other couriers. Canada Post generally carries different items, with a focus on letters and small parcels. It has much less knowledge of the contents of what it carries. It offers more limited track and trace capabilities, and it tends to be slower.⁸⁵⁹

888. Moreover, the business of Canada Post is fundamentally different from the business of UPS Canada. On the one hand Canada Post offers universal basic customary postal service and some competitive express services in the person to person, person to business and business to business markets in Canada, while on the other hand UPS Canada offers a full range of global services and integrated logistics services in the business to business market. As Professor Kleindorfer says:

[Redacted].⁸⁶⁰

889. In light of these facts, even by the Claimant's own test that relies on a business sector analysis, Canada Post and UPS Canada are not accorded treatment in like circumstances.

c) There is no discrimination based on nationality

890. Whatever competitive advantages Canada Post has obtained through economies of scale and scope apply equally to domestic and foreign couriers. Canadian courier companies such as Canpar – or for that matter, Purolator – operate under the same conditions as UPS Canada. There is no question of discrimination based on nationality.

891. To the extent Canada Post receives treatment that is different from the treatment accorded to UPS Canada, that difference is based on Canada Post's status as Canada's postal provider. Nationality is not the operative basis for any distinctions. A Canadian

⁸⁵⁸ [Redacted]

⁸⁵⁹ See Part II, Section II(E), paras. 139 *et seq.*

⁸⁶⁰ [Redacted].

investor seeking to make an investment, operating an investment, or disposing of an investment in the Canadian courier industry faces the same challenges as the Claimant.

892. In the absence of any treatment in like circumstances that is more favourable to Canadian investments or investors, *de facto* or *de jure*, there can be no violation of Article 1102.

V. THE CLAIMS UNDER ARTICLE 1105 ARE WITHOUT MERIT

893. The Claimant alleges that four categories of claims violate Article 1105:

- 1) Customs treatment;
- 2) collection of duties and taxes by Canada Post;
- 3) matters relating to the collective bargaining rights of Canada Post employees; and
- 4) acts by Canada Post in relation to Fritz Starber.

894. These claims, to the exception of the last one, were not made with any degree of specificity in the RASC. Canada therefore repeats its jurisdictional objection that the RASC lacked specificity.⁸⁶¹ The only reference that the RASC made to the first three categories of allegations above is a vague statement that “the facts pleaded with respect to Canada’s breach of NAFTA Article 1102 constitutes [sic] a breach of [...] Article 1105.”⁸⁶² The Claimant’s general incorporation of arguments raised in another part of the case must be dismissed as lacking sufficient specificity because they do not adequately identify the facts relied on in connection with the Article 1105 claims. This level of deficiency in pleading did not allow Canada to know the case it had to meet prior to its receipt of the Memorial.

895. As discussed in the Jurisdiction and Admissibility section of this Memorial, the claim with respect to Fritz Starber is not admissible because it is new and unconnected to the Claimant’s original case.⁸⁶³

896. Moreover, the Claimant has previously abandoned the argument that it now

⁸⁶¹ Statement of Defence, paras. 121-25.

⁸⁶² RASC, para. 43.

⁸⁶³ See Part III, Section F “Fritz Starber claim is inadmissible”, paras. 571-573.

seeks to make on the exemption of the Goods and Services Tax on the \$5 handling fee.⁸⁶⁴

897. In the event that the Tribunal accepts jurisdiction on any or all of the Claimant's Article 1105 case, it must find that the claims are entirely without merit. The Claimant has not proved the existence, or breach, of a single rule of customary international law governing the treatment of aliens. If Canada has not breached any such obligation, it cannot have breached its obligation to accord fair and equitable treatment and full protection and security.

A. Legal Test

1. A breach of Article 1105 requires a breach of a customary legal obligation

898. The scope of Article 1105 is given content by the rules of customary international law that form part of a definable set of subject areas governing the treatment of aliens, such as the denial of justice. Further, as set out in Section C below, Chapter 11 tribunals have consistently recognised that Article 1105 applies to serious, rather than minor, misconduct on the part of States. The minimum standard of treatment, therefore, has both a high threshold and a limited and recognised subject matter scope.

899. NAFTA Article 1105(1) provides as follows:

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.

900. To justify its claims that Canada has breached Article 1105, the Claimant asserts a grossly expansive interpretation of this Article and, in particular, of the meaning of the term "international law".

901. The proper interpretation of Article 1105 has been confirmed by the Free Trade

⁸⁶⁴ Investor's Memorial, para. 643(i); see *UPS Jurisdiction Award*, paras. 116-17. (Investor's Book of Authorities, Tab 48).

Commission (FTC):⁸⁶⁵

1. Article 1105(1) prescribes the customary internal 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 a separate international agreement, does not establish that there has been a breach of Article 1105(1).

902. The Tribunal has accepted the conclusion drawn by the FTC interpretation that “the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard.”⁸⁶⁶

903. Nonetheless, the Claimant argues against the FTC Note of Interpretation, ignores the Tribunal’s finding that it is the correct interpretation, and argues that “international law” encompasses sources other than custom.⁸⁶⁷ Its contention must be rejected.

904. For there to be a breach of Article 1105, there must be a breach of customary international law that is a recognized part of the international minimum standard for the treatment of aliens. A breach of a treaty obligation or an obligation found in a declaration cannot amount to a breach of Article 1105 unless the Claimant shows that the obligation exists in customary international law and forms part of the law applicable to foreign investors.

⁸⁶⁵ *UPS Jurisdiction Award*, para. 97. (Investor’s Book of Authorities, Tab 48); see also *Mondev Award*. (Investor’s Book of Authorities, Tab 37); *ADF Award*, paras. 177-179. (Investor’s Book of Authorities, Tab 95).

⁸⁶⁶ *UPS Jurisdiction Award*, para. 97. (Investor’s Book of Authorities, Tab 48).

⁸⁶⁷ Investor’s Memorial, paras. 683-700, and, in particular, paras. 687, 696 and 700.

905. Therefore, unless the Claimant can show that an obligation amounts to custom relevant to the treatment of aliens, the Tribunal must disregard any allegation that Canada has breached an obligation contained in the ILO Convention no. 87, the International Conventions, the Fundamental Declaration and the Universal Declaration of Human Rights.

906. The NAFTA Parties did not agree to incorporate by reference every provision of every treaty and declaration into Article 1105. Articles 1116 and 1117 contemplate a limited jurisdiction. If Section A of Chapter 11 incorporated the entire NAFTA through the reference to “international law” in 1105, this scheme of limited jurisdiction would be defeated. And if it brought in other treaties the obligations imported and made arbitrable by 1105 would be little short of infinite. That is not the purpose of the minimum standard of treatment obligation in Article 1105.

907. Until the Claimant identifies a customary legal standard that forms part of the international minimum standard on the treatment of foreign investors, it has not raised a case against Canada.

2. The Claimant has not identified any customary legal standard with respect to treatment of aliens as required by the scope of Article 1105

908. The burden rests with the Claimant to show the existence of a customary rule, that it forms part of the international minimum standard of treatment of aliens, and that Canada has breached it.

909. To establish a rule of customary international law, two requirements must be met: consistent state practice and an understanding that the practice is required by law (“*opinio juris*”).⁸⁶⁸ As the Tribunal has already pointed out, “relevant practice and the related understandings must still be assembled in support of a claimed rule of customary

⁸⁶⁸ *UPS Jurisdiction Award*, para. 84, (Investor’s Book of Authorities, Tab 48) citing *Case Concerning the Continental Shelf (Libyan Arab Jamhuriya/MALTA)*, 1985 I.C.J. 13, at 29. (Respondent’s Book of Authorities, Tab 43).

international law”.⁸⁶⁹

910. Moreover, the customary rule must relate to a subject area applicable to aliens, such as the denial of justice.

911. As the Tribunal noted in its Award on Jurisdiction, these subject areas can be found for example in the International Law Commission’s (ILC) 1961 draft articles on state responsibility and in the draft convention on the international responsibility of states for injuries to aliens prepared for the ILC by Professors Sohn and Baxter of Harvard Law School.⁸⁷⁰ The Claimant refers to neither of these sources, which the Tribunal described as the “high water mark in the statement of the law for the protection of aliens”.⁸⁷¹ Instead, the Claimant cites general principles without identifying how they form part of the limited number of recognized customary obligations applicable to aliens.

912. In no instance has the Claimant proven the existence of a customary obligation. In fact, only in one instance, the *Universal Declaration of Human Rights*, does the Claimant even assert that a customary obligation exists, and it does so without demonstrating that labour standards form part of the subject matter scope of the minimum standard of treatment of aliens.⁸⁷² The Claimant’s case on Article 1105 must fail for this reason alone.

913. In the Award on Jurisdiction, the Tribunal rejected the Claimant’s similar attempt to have Article 1105 cover anticompetitive behaviour without establishing that it was part of customary international law:

UPS has not attempted to establish that that state practice reflects an understanding of the existence of a generally owed international legal obligation which, moreover, has to

⁸⁶⁹ *UPS Jurisdiction Award*, para. 84. (Investor’s Book of Authorities, Tab 48).

⁸⁷⁰ *UPS Jurisdiction Award*, paras. 88-90. (Investor’s Book of Authorities, Tab 48).

⁸⁷¹ *UPS Jurisdiction Award*, para. 90. (Investor’s Book of Authorities, Tab 48).

⁸⁷² Investor’s Memorial, para. 669.

relate to the specific matter of requiring controls over anticompetitive behaviour.⁸⁷³

914. Likewise, the Tribunal in *ADF v. United States* recognised that the principles of equity and fairness have to be disciplined by an objective legal framework of “customary or general international law”.⁸⁷⁴ Otherwise, they simply provide an unfettered and subjective discretion, which in itself would be inconsistent with the rule of law that the ICJ identified in *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)* as central to the protection of foreign investments.⁸⁷⁵

915. The Claimant relies on broad and general principles, such as “good faith”, but fails to demonstrate that these amount in themselves to independent rules of customary international law. The objective appears to be to give the Tribunal an open-ended power to act as ombudsman to remedy any “inequitable” treatment even though such treatment does not violate any specific legal rule, it is not for the Tribunal to “apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1)”.⁸⁷⁶

916. The Claimant’s approach, which implies that “fair and equitable treatment” applies whether or not a customary rule addresses the behaviour at issue, is inconsistent with the proper interpretation of Article 1105. The Claimant is advocating an entirely subjective and extra-legal conception of Article 1105 instead of a substantive and knowable legal rule. This stands in direct contradiction to the principles expounded by this tribunal in the Award on Jurisdiction.⁸⁷⁷

917. The fault line dividing the Claimant’s approach from that of this Tribunal is

⁸⁷³ *UPS Jurisdiction Award*, para. 86. (Investor’s Book of Authorities, Tab 48).

⁸⁷⁴ *ADF Award*, para. 184. (Investor’s Book of Authorities, Tab 95).

⁸⁷⁵ *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J 15, at 76, para. 128. (Respondent’s Book of Authorities, Tab 45).

⁸⁷⁶ *Mondev Award*, para. 119. (Investor’s Book of Authorities, Tab 37); Also, the authoritative materials, such as the Sohn and Baxter’s Harvard Draft of 1961 and the ILC draft articles prepared by Amador in 1961, do not lend support to any such extension of the scope of the standard.

⁸⁷⁷ *UPS Jurisdiction Award*, paras. 83-98. (Investor’s Book of Authorities, Tab 48).

whether Article 1105 is to operate on the basis of purely subjective notions of fairness captured in the expression “the length of the chancellor’s foot”, or whether it operates by reference to ascertainable legal norms that are objective, while allowing for a measure of arbitral appreciation. The choice between these two approaches is no longer open, having regard to the findings of the Tribunal in its Award on Jurisdiction as well as the FTC Interpretation. The task of the Tribunal is to apply an *objective* and ascertainable rule to the facts before them.

918. Therefore, the first step in the analysis must be to determine whether or not the claim or allegation can be related to an existing customary rule of international law that forms part of the minimum standard for the treatment of aliens. If it does, but only if it does, the notions of fairness, equity, and full protection and security come into play in a second stage of the analysis, as part of the interpretation and application of that rule.

919. There are a finite number of specific topics where international law contains customary rules dealing with the protection of aliens. For instance, an illegal expropriation or a denial of justice may amount to a breach of customary international law. These rules, and only these rules, are incorporated by Article 1105 into NAFTA. Admittedly the scope of the minimum standard, and the content of the rules that it incorporates, may evolve over time, but it is for the Claimant – and not the Respondent or this tribunal – to prove the existence of any such change in the law.

920. If the Tribunal is inclined to proceed with an analysis of whether Canada has breached Article 1105 despite the Claimant’s failure to demonstrate a breach of custom forming part of the minimum standard of treatment, Canada asks it to consider the following arguments.

a) Good faith is not itself a source of obligation where none would otherwise exist

921. The principle of good faith, as set out by the Claimant, is at best a paraphrase of the concept of “fair and equitable treatment” that adds nothing of substance.

922. “Good faith” is indeed a fundamental principle, but it is an auxiliary principle

that controls the application of other, more substantive rules. Thus it controls the implementation of treaties under the *Vienna Convention*, but it does not define the specific content of treaty obligations. The International Court stated in the *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* that the

principle of good faith is, as the Court has observed, “one of the basic principles governing the creation and performance of legal obligations” (Nuclear Tests, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.⁸⁷⁸

923. The ICJ re-iterated its opinion in the *Case Concerning the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v. Nigeria)*, in which Nigeria contended that Cameroon violated the principle of good faith by secretly planning to invoke the Court’s compulsory jurisdiction even while it maintained bilateral contact with Nigeria on border issues.⁸⁷⁹ The Court rejected Nigeria’s position, repeating the quotation above. It further noted that

In the absence of any such obligations and of any infringement of Nigeria’s corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions.⁸⁸⁰

924. Some of the subsidiary principles identified in the Claimant’s Memorial under the general heading of good faith are indeed fundamental, such as *pacta sunt servanda*, abuse of rights and arbitrary treatment. But these again are overarching principles to be applied to the interpretation and application of a specific legal rule. If invoked in connection with a subject matter that forms part of the customary international minimum standard, they could indeed be relevant. Otherwise they are not.

925. Moreover, the Claimant refers to the principle of good faith without establishing

⁸⁷⁸ *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 1988 I.C.J. 69, at 105-106, para. 94. (emphasis added) (Respondent’s Book of Authorities, Tab 42).

⁸⁷⁹ *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, 1998 I.C.J. 275, at 297. (Respondent’s Book of Authorities, Tab 46).

⁸⁸⁰ *Ibid.* Preliminary Objections, 1998 ICJ 275, at 297. (Respondent’s Book of Authorities, Tab 46).

how Canada has breached it. In particular:

- The Claimant argues that good faith requires States to perform their undertakings, whether contractual or treaty based,⁸⁸¹ yet it does not allege that Canada has breached a contractual obligation owed to UPS Canada.
- The Claimant argues that the same principle requires States to negotiate in good faith, yet it has not alleged that Canada has negotiated in bad faith.
- The Claimant alleges that expelling an alien without just reason⁸⁸² and maliciously misapplying the law⁸⁸³ amount to an abuse of right. However, Canada has not expelled UPS Canada or its personnel. Nor has the Claimant pointed to an incident in which Canada has maliciously misapplied its law.
- The Claimant also alleges that Canada discriminates to give Canada Post's courier services a competitive advantage against the Claimant and/or UPS Canada and its actions are therefore inconsistent with Canada's obligation to act in good faith. But the Tribunal has already held that unfair competition is a matter that lies outside the subject matter scope of the minimum standard.⁸⁸⁴ Moreover, non-discrimination is not in itself an obligation owed in customary international law, so it cannot give rise to a breach of Article 1105.

926. The Claimant has had ample opportunity to make out any such claims, yet in every instance, it has failed to adduce the necessary evidence to satisfy its burden.

927. In any event, Canada performs its UPU, *Kyoto Convention*, WTO and NAFTA obligations in good faith. Canada treats both domestic and foreign courier services in the same manner,⁸⁸⁵ which understandably and necessarily differs from the treatment it accords to the mail.⁸⁸⁶

⁸⁸¹ Investor's Memorial, paras. 613-614.

⁸⁸² Investor's Memorial para. 621, citing Hersch Lauterpacht. (Investor's Book of Authorities, Tab 39).

⁸⁸³ Investor's Memorial, para. 622, citing *Azinian v. The United Mexican States*. (Investor's Book of Authorities, Tab 40).

⁸⁸⁴ *UPS Jurisdiction Award*, para. 99. (Investor's Book of Authorities, Tab 48).

⁸⁸⁵ Jones Affidavit, para. 82. (Respondent's Book of Expert Reports and Affidavits, Tab 19). *D-Memo D17-4-0*. (Respondent's Book of Documents, Tab 33).

⁸⁸⁶ Parsons Affidavit, paras. 62 and 77. (Respondent's Book of Expert Reports and Affidavits, Tab 30).

b) The Claimant wrongly construes Article 1105 as a general prohibition against arbitrary and discriminatory conduct

928. The Claimant relies upon a standard of “arbitrary and discriminatory conduct” without, once again, tying it to a subject that forms part of the minimum international standard for the treatment of aliens. The observations set out above with respect to good faith are largely applicable here as well. If resorted to in connection with the interpretation or application of a rule of customary international law – such as “denial of justice” – that forms part of the minimum standard, the concept of arbitrary and discriminatory conduct could indeed be relevant. But, like good faith, it is not a rule in itself. It is not an independent source of legal obligation.

929. To the extent that “arbitrary and discriminatory conduct” may be relevant, it is essentially a paraphrase – like “good faith” – of fair and equitable treatment. It begs the essential question: is the claim based upon a substantive rule of customary international law that forms part of the minimum standard of treatment?

930. It would be for the Claimant to demonstrate that a general prohibition on “arbitrary and discriminatory” conduct exists, as opposed to an auxiliary principle guiding the application of such recognised rules as “the denial of justice”. No such demonstration has been made.

931. The practice of NAFTA States in fact demonstrates that the Parties have set out in writing their guarantee to “accord to foreign investors no less favourable treatment in like circumstances”. The prohibition against discriminatory treatment is dealt with specifically in Article 1102. To interpret Article 1105 to cover discriminatory conduct based on nationality would render Article 1102 useless and would obviate the need to consider whether the treatment is accorded in like circumstances. This interpretation cannot be correct.

932. Discrimination *per se* is not synonymous with arbitrariness and its prohibition is not an obligation owed in customary international law. As stated in *Oppenheim’s*,

There is in customary international law no clearly established general obligation on a state not to differentiate between other states in the treatment it accords to them.⁸⁸⁷

933. For this reason, it continues to be custom that “a state may restrict the rights of aliens to hold property; and far-reaching interference with private property, including that of aliens, is common in connection with such matters as taxation, measures of police, public health, the administration of public utilities and the planning of urban and rural development.”⁸⁸⁸

934. The Claimant relies on a number of cases to support its proposed standard prohibiting “arbitrary and discriminatory” treatment. While case law may be helpful in ascertaining the existence of customary international law, the incorrect citation of case law is not.

935. For example, the Claimant relies on *Metalclad v. Mexico* to argue that Canada is prohibited from “acting on the basis of irrelevant considerations”,⁸⁸⁹ yet the decision never once employs the term “irrelevant considerations” nor does it explain how it amounts to custom. Likewise, the Claimant maintains that the *Pope & Talbot v. Canada* Tribunal found a breach of Article 1105 when Canada acted “on prejudice rather than on reason or fact”,⁸⁹⁰ but that decision makes no mention of these terms or how they amount to custom.

936. Unlike the decision in *Pope & Talbot*, the *Lauder v. Czech Republic* Tribunal actually does contend with a standard of arbitrariness. However, it does so in relation to a claim that the Czech Media Council violated the Czech Republic’s express obligation to

⁸⁸⁷ Sir Robert Jennings & Sir Arthur Watts, *Oppenheim’s International Law*, 9th ed., vol. I, Introduction and Part 1 (Great Britain: The Bath Press, 1992) at 376-77, references omitted. (Respondent’s Book of Authorities, Tab 94).

⁸⁸⁸ Whether they are prohibited by a treaty’s guarantee of national treatment is another matter altogether; Sir Robert Jennings & Sir Arthur Watts, *Oppenheim’s International Law*, 9th ed., vol. I, Parts 2 and 4 (Great Britain: The Bath Press, 1992), at 911-12. (Respondent’s Book of Authorities, Tab 94).

⁸⁸⁹ Investor’s Memorial, para. 616.

⁸⁹⁰ Investor’s Memorial, para. 618.

prohibit “arbitrary and discriminatory measures” by withdrawing its prior approval of the investor’s investment in a small Czech company that had been granted a television broadcasting licence. In the words of the Tribunal, the Media Council’s actions breached the standard of “arbitrary and discriminatory” conduct because the measure was “founded on the basis of prejudice or preference rather than on reason or fact”.⁸⁹¹

937. The *Lauder* Tribunal undertook an interpretation of “an arbitrary measure” because the obligation to avoid “arbitrary and discriminatory measures” was specifically set out in Article II(2)(b) of the Bilateral Investment Treaty (BIT) being interpreted.⁸⁹² What the Tribunal was *not* interpreting, however, was the provision that guarantees fair and equitable treatment and full protection and security in accordance with international law.⁸⁹³ In the end, the *Lauder* Tribunal did find a breach of the bilateral treaty provision prohibiting “arbitrary and discriminatory” treatment.

938. However, the Tribunal also found that “none of the actions and inactions [...] which have already been examined with respect to the prohibition against arbitrary and discriminatory measures [...] constitutes a violation of the duty to provide fair and

⁸⁹¹ *Lauder v. The Czech Republic*, (3 September 2001), (Final Award), para. 232 (Investor’s Book of Authorities, Tab 43).

⁸⁹² Article II of the US-Czech BIT provides as follows:

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable [...]

2.(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

⁸⁹³ This discussion may be found in paragraphs 289-314 of the decision.

equitable treatment” or “to provide full protection and security”.⁸⁹⁴ According to the Award, a breach of arbitrary and discriminatory treatment did *not* amount to a breach of the minimum standard of treatment.

939. NAFTA does not contain a provision that obliges Canada to protect investors from “arbitrary and discriminatory” treatment, similar to that found in the US-Czech BIT. The NAFTA provides only for national treatment in Article 1102 and a minimum standard of treatment in Article 1105. Like the US-Czech BIT, NAFTA states that the minimum standard of treatment includes fair and equitable and full protection and security. Unlike the US-Czech BIT, NAFTA does not include an obligation to accord protection from “arbitrary and discriminatory measures”. In fact, the *Lauder* Award reflects an interpretation that is inconsistent with that proposed by the Claimant.

940. Canada admits that in certain respects its treatment of the mail is different from the treatment it accords to courier services, both foreign and domestic. These differences are based on the services’ different circumstances, which exist in domestic law⁸⁹⁵ and international obligations.⁸⁹⁶ It is anything but arbitrary and it is unpainted by any element of discrimination.

c) The Claimant improperly attempts to create an obligation upon Canada to respect the investor’s legitimate expectations

941. The Claimant argues that fair and equitable treatment includes the obligation to protect legitimate expectations. More specifically, the Claimant alleges that Canada Post has an obligation to “conduct itself with transparency and fairness” as Fritz Starber had a “reasonable and legitimate expectation” it would do so.⁸⁹⁷ The factual basis of the

⁸⁹⁴ *Lauder v. The Czech Republic*, (3 September 2001), (Final Award), paras. 293 and 309. (Investor’s Book of Authorities, Tab 43).

⁸⁹⁵ Jones Affidavit, para. 115 *et. seq.* (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁸⁹⁶ Harding Affidavit, paras. 24-27 and 41; Jones Affidavit, paras. 94-114; Parsons Affidavit generally; Rigdon Affidavit, paras. 19-29. (Respondent’s Book of Expert Reports and Affidavits, Tabs 16, 19, 30 and 32 respectively).

⁸⁹⁷ Investor’s Memorial, para. 641.

allegations is denied. The legal propositions relied upon also have no basis in Article 1105.

942. The Claimant cites no *opinio juris* or state practice for the assertion that legitimate expectations, transparency or general fairness constitute customary rules of international law.

943. In any event, the Claimant would be unable to prove that a customary obligation to protect legitimate expectations exists. The concept of legitimate expectations can only be relevant where a legal obligation exists.⁸⁹⁸ For the purposes of Article 1105, the obligation must exist in customary international law and neither transparency⁸⁹⁹ nor the protection of legitimate expectations is a customary legal rule.

944. The Claimant also alleges that a State's failure to implement its laws breaches a duty to protect legitimate expectations.⁹⁰⁰ Although Canada concedes that there may be instances in which a failure to implement domestic law can amount to a breach of the minimum standard of treatment in international law as noted by the *GAMI* Tribunal, the basic assumption in international law and the starting point of any analysis is that a breach of domestic law does not in itself constitute a breach of an international obligation.⁹⁰¹ This is consistent with the finding made by the *ADF* Tribunal that

⁸⁹⁸ And even then, it does not alter the interpretation of the existing rule. See for example, *European Communities – Customs Classification of Certain Computer Equipment*, Report of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, paras. 83-84, (Respondent's Book of Authorities, Tab 49), which it found as follows:

"[W]e do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the 'legitimate expectations' of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the *Vienna Convention*. Recently, in *India - Patents*, the panel stated that good faith interpretation under Article 31 required 'the protection of legitimate expectations'. We found that the panel had misapplied Article 31 of the *Vienna Convention*.... The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties.

⁸⁹⁹ *United Mexican States v. Metalclad Corporation*, BCSC, Tysoe J, [2001] 89 BCLR (3d) 359, para. 68. (Respondent's Book of Authorities, Tab 63).

⁹⁰⁰ Investor's Memorial, para. 626.

⁹⁰¹ *Treatment of Polish Nationals and Other Persons of National Origin or Speech in the Danzig Territory* 1932, PCIJ Series A/B, No. 44, 4 at 24 (Respondent's Book of Authorities, Tab 66).

“something more than simple illegality or lack of authority under the domestic law of the State is necessary to render an act or measure inconsistent with Article 1105(1)”.⁹⁰² The Tribunal has no authority to review the legal validity and standing of the domestic measure under internal administrative law.⁹⁰³

945. “Legitimate expectations” is a meaningless concept without reference to an existing legal standard. This is recognized by the *GAMI* Tribunal.⁹⁰⁴ Canada further submits that for the purposes of Article 1105, the relevant legal standard must be proven to exist in customary international law.

d) The Claimant improperly invokes human rights and core labour standards

946. Even if the rights cited by the Claimant could be proven to constitute customary rules, Canada submits that they do not provide a cause of action by the Claimant.

947. Had the Claimant included these claims in its Statement of Claim, Amended Statement of Claim or Revised Amended Statement of Claim, Canada would have objected to them on jurisdictional grounds then. Canada objects now, on two bases. First, these allegations come as a total surprise and are in no way related to the RASC. Second, the Claimant does not have standing to bring a claim for an alleged violation committed against Canada Post employees.

948. The Claimant’s complaint is as follows: “Canada’s failure to respect core labour standards for Canada Post’s workers violates Canada’s Article 1105 obligation” and Canada “failed to observe its international law obligations respecting the observance of core labour standards, such as the right of collective bargaining for Canada Post’s workers.”

⁹⁰² *ADF* Award, para. 190. (Investor’s Book of Authorities, Tab 95).

⁹⁰³ *ADF* Award, para. 190. (Investor’s Book of Authorities, Tab 95).

⁹⁰⁴ *GAMI* Award, para. 91. (Investor’s Book of Authorities, Tab 100); UPS relies on the award of the *Tecmed* Tribunal for the opposite view, but it is doubtful that its reasoning is applicable in the NAFTA context. Although the *Tecmed* award predates the *GAMI* and *Waste Management II* decisions, neither of these Tribunals chose to rely upon that Tribunal’s characterization of the international minimum standard.

949. A breach of a customary rule cannot give rise to an 1105 claim unless it is directed at the investor. This flows naturally from the language of Article 1105, which requires Parties to accord fair and equitable treatment and full protection and security to investments of investors of another Party.

950. It also flows from the fact that NAFTA Chapter 11 applies only to measures relating to, and causing damage to, the investors or investments of another Party.⁹⁰⁵ In other words, the claim must be “owned” by the foreign investor. Therefore, when a group of Irani nationals tried to bring a claim for “billions of dollars” against the US on behalf of all Irani citizens, the Iran-US Tribunal dismissed it on the basis that

ownership of a claim is a *sine qua non* of a party’s standing in a private claim, and because the claimants have not pleaded such injury or ownership, the Tribunal finds that they have no standing to bring this Claim.”⁹⁰⁶

951. Investor protections are international guarantees between States. This explains why a claim brought against one State must be owned by the national of another State. The NAFTA Parties never intended Chapter 11 to be invoked by foreign investors to remedy breaches of customary law owed to their own nationals.

952. The Claimant has no standing to complain under Article 1105 about labour policies of Canada Post and the labour legislation to which it is. The treaties relied upon are *res inter alios acta*. By the Claimant’s admission, the only part of the claim that it owns is the alleged reduction of Canada Post’s labour costs, making competition more difficult.⁹⁰⁷ As the Tribunal has already determined, there is no rule of customary international law prohibiting or regulating anticompetitive behaviour.⁹⁰⁸

⁹⁰⁵ NAFTA, Article 1101.

⁹⁰⁶ Chamber One Decision No. DEC 131-946-1, 11 June 2003 in Case. No. 946, para. 14. (Respondent’s Book of Authorities, Tab 48).

⁹⁰⁷ Investor’s Memorial, paras. 647 and 671.

⁹⁰⁸ UPS Jurisdiction Award, para. 92. (Investor’s Book of Authorities, Tab 48).

B. All Four Categories of Claims Amount to an Attempt to Impermissibly Broaden the Scope of Article 1105

953. Based on a correct interpretation of Article 1105, none of the four claims brought by the Claimant properly enter into the subject matter scope of the minimum standard of treatment.

1. Customs treatment does not breach Article 1105

954. In order to establish a breach by Canada of Article 1105, the Claimant invokes the same differences in Customs treatment that allegedly cause a violation of Article 1102.⁹⁰⁹ As pleaded by the Claimant, every one of these claims calls on the Tribunal to consider the treatment that Canada gives to Canada Post. None of the treatments at issue are directed at the Claimant. It is therefore outside the purview of Article 1105, which deals with the treatment of investors. This indicates that the Claimant is really complaining about anti-competitive behaviour, something that the Tribunal has declared to be outside its jurisdiction.⁹¹⁰

955. The treatment that Customs accords to the mail is different than the treatment it accords to courier shipments because the manner in which they arrive in Canada is different. Correspondingly, the functions of Canada Post and the functions of the Claimant and UPS Canada are different. Canada Post is a postal administration. It is therefore subject to laws and procedures that are appropriate to a postal administration, having regard to the nature of the service.

956. Customs has developed a specialized treatment for courier services to respond to the needs and requirements of that industry. The factual and practical distinctions between the mail and courier services have resulted in different programs for courier and mail and in the application of different domestic legal requirements depending on the

⁹⁰⁹ In repeating its Article 1102 allegations word-for-word, UPS overlooked the fact that it had already abandoned its argument relating to the non-application of Goods and Services Tax on the \$5 handling fee. The Tribunal must reject this allegation; Investor's Memorial, para. 643(i).

⁹¹⁰ *UPS Jurisdiction Award*, para. 99. (Investor's Book of Authorities, Tab 48).

functions performed.⁹¹¹ This does not in any way amount to unfair or inequitable treatment. Enforcing those laws in a manner that differentiates between Canada Post and UPS Canada cannot constitute unfair or inequitable treatment either.

957. To the extent that the Claimant can show that Canada has not properly enforced its laws with respect to Canada Post or has given favourable treatment to Canada Post, it is complaining about treatment that is not directed at a foreign investment. Insofar as the Claimant argues the Customs treatment of Canada Post allows it to lower its costs, it amounts to a request for the Tribunal to apply a standard prohibiting anticompetitive behaviour.⁹¹² The Tribunal has already ruled that competition is not governed by Article 1105.⁹¹³

2. Collection of duties and taxes by Canada Post

958. The Claimant accuses Canada Post employees of breaching Canadian laws when it alleges that they “deliberately or unwittingly separate out and release packages from Customs, for immediate delivery by Canada Post - without a Customs officer ever having the chance to assess the propriety of the separation process”⁹¹⁴ These serious accusations are made without any evidence to support them.⁹¹⁵

959. Instead, the Claimant relies on a study by James Nelems, but the study itself contradicts the Claimant’s allegation that Canada Post is releasing packages prior to Customs inspection. Given that every item that the Nelems study sent through the mail arrived at its destination with an E14 Customs invoice attached to it, this means that each

⁹¹¹ Jones Affidavit, paras. 57. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁹¹² Investor’s Memorial, paras. 332, 337, 634, 644.

⁹¹³ *UPS Jurisdiction Award*, para. 99. (Investor’s Book of Authorities, Tab 48).

⁹¹⁴ Investor’s Memorial, paras. 304 and 305.

⁹¹⁵ *Waste Management Inc. v. United Mexican States*, Case No. ARB(AF)/00/3, (April 30, 2004), (Award), 43 I.L.M. 967 (2004), para. 98 [Waste Management II Award]. The *Waste Management II* Tribunal confirms that conspiracy is a serious allegation that must be proved; *Waste Management II Award*, paras. 138-139. (Respondent’s Book of Authorities, Tab 71).

one of them was inspected by Customs.⁹¹⁶

960. The Claimant is mistaken when it states that Canada enables “Canada Post to perform its own customs duties”.⁹¹⁷ Canada does not delegate to Canada Post the discretion to self-inspect postal imports, nor to assess the amount of duties and taxes owing on them.⁹¹⁸ In this regard, Canada Post’s activities are totally unlike those of UPS Canada or the Claimant.

961. Therefore, to the extent that the Claimant can complain about a failure to properly assess duties and taxes, it must be complaining about the conduct of Customs. The determination of origin, tariff classification and value for duty, is a responsibility undertaken by, and reserved for, customs officers.⁹¹⁹

962. With respect to courier shipments, this determination is deemed to occur at the time of accounting. Customs officers merely review a description of the goods as contained in the Cargo Release List; they typically do not physically inspect the parcel.⁹²⁰ The system is predicated on self-assessment by Couriers and, other than periodic verification by Customs, relies on the accuracy and diligence of the courier.⁹²¹

963. In the case of goods imported as mail, determinations are made by customs officers by looking at each and every mail item. Each determination relies on a customs officer’s physical inspection of the goods and retrieval of the information, if there is any, from the CN 22 or CN 23 declaration attached. There is no assessment of duties and taxes owing by the sending postal administration. Instead, information is retrieved

⁹¹⁶ Satherstrom Affidavit, para. 9. (Respondent’s Book of Expert Reports and Affidavits, Tab 33).

⁹¹⁷ Investor’s Memorial, para. 644.

⁹¹⁸ Satherstrom Affidavit, para. 6; Jones Affidavit, para. 152. (Respondent’s Book of Expert Reports and Affidavits, Tabs 33 and 19).

⁹¹⁹ *Customs Act*, s. 58. (Investor’s Schedule of Documents, Tab U383); Jones Affidavit, para. 143. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁹²⁰ Jones Affidavit, paras. 141 and 149. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

⁹²¹ Jones Affidavit, para. 149. (Respondent’s Book of Expert Reports and Affidavits, Tab 19).

manually from the mail item itself, prior to its release to Canada Post for delivery.⁹²² Canada Post's role is to collect the duties and taxes upon delivery, based on the determination made by the customs officer.⁹²³

964. Therefore, Customs processing of postal imports does not rely in any way on Canada Post's or the foreign postal administration's diligence in assessment, since they have no role in this regard. Instead, it is predicated on the sender's ability to fill out a form accurately, in English or French, truthfully recording the value of the goods and affixing the form to the package in a manner that it is not lost in transit.

965. As a result of the differences in the way Customs makes its determinations for courier shipments as opposed to mail items, the Nelems study cannot accurately measure Customs compliance.⁹²⁴ The Satherstrom and Mills affidavits describe this and other important flaws with the Nelems study.⁹²⁵

966. However, even if it were accurate, the study would merely demonstrate that the different means of assessment may produce different results. Yet, the majority of postal administrations are unable to provide advanced information and the system does not permit self-assessment.⁹²⁶

967. Canada exerts due diligence when assessing and collecting duties and taxes on

⁹²² Jones Affidavit, para. 148; Satherstrom Affidavit, para. 12. (Respondent's Book of Expert Reports and Affidavits, Tabs 19 and 33).

⁹²³ [Redacted]. This is not an "improper delegation" of authority as suggested by the Claimant (Investor's Memorial, para. 305). It is the result of a policy decision to improve amounts of duties and taxes actually collected and to allow Customs to better focus on its functions, including proper determination of duties and taxes and the enforcement of other laws. It is common practice among UPU and WCO members. Moreover, Customs strives to ensure that duties and taxes are properly collected by Canada Post on behalf of Canada, and conducts periodic sampling of mail items that have been released by Customs to Canada Post for delivery; Jones Affidavit, paras. 168-178; [Redacted]; Elliot Affidavit, paras. 24-27. (Respondent's Book of Expert Reports and Affidavits, Tabs 19, 4 and 10).

⁹²⁴ Satherstrom Affidavit, paras. 8-13. (Respondent's Book of Expert Reports and Affidavits, Tab 33).

⁹²⁵ For these reasons, see the Satherstrom Affidavit and the Mills Report. (Respondent's Book of Expert Reports and Affidavits, Tabs 33 and 28).

⁹²⁶ Harding Affidavit, para. 41. (Respondent's Book of Expert Reports and Affidavits, Tab 16).

mail items,⁹²⁷ but even if Customs did not achieve the same rate of success as in the case of courier imports, this cannot arise to a breach of the Claimant's right to fair and equitable treatment.

968. Customs has no incentive to improperly determine the amount of duties and taxes owing on imported goods. Nor does Canada Post have an incentive to fail to collect duties and taxes that Customs have determined are owed. After all, Canada Post is compensated per E14 invoice, or in other words, based on the volumes of dutiable goods processed by Customs officers.

969. The Claimant has failed to demonstrate that the subject of customs administration falls within the minimum standard of treatment as recognised by international law. There is nothing in its allegations, even if accepted, analogous to a maladministration amounting to an "outright and unjustified repudiation" of the relevant laws and regulations.⁹²⁸

3. Human rights, core labour standards and Article 1105

970. The Claimant's allegation that Canada has breached Article 1105 by failing to enforce international labour law is misplaced. Moreover, the Claimant does not have standing to bring it, since it relates to a right owed to Canada Post's rural route workers or pension holders, not to UPS Canada.

971. In Canada, whether a worker has a right to bargain collectively with an employer depends on whether that person is an "employee" for the purposes of the relevant labour relations statute.⁹²⁹ Some statutes contain expanded definitions of the

⁹²⁷ Jones Affidavit, paras. 170-172. (Respondent's Book of Expert Reports and Affidavits, Tab 19).

⁹²⁸ GAMI Award, para. 103. (Investor's Book of Authorities, Tab 100); *Waste Management II* Award, para. 115. (Respondent's Book of Authorities, Tab 71).

⁹²⁹ The *Canadian Charter of Rights and Freedoms*, Part I. of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c.11. guarantees the fundamental right of freedom of association in s. 2(b), but the Supreme Court has been clear that this right does not protect the right to collective bargaining activity; see *Professional Institute of the Public Service of Canada v. Commissioner of Northwest Territories et al(Commissioner)*, [1990] 72 DLR (4th) 1. (Respondent's Book of Authorities, Tab 78).

term “employee”. Part 1 of the *Canada Labour Code*, which applies to the federal private sector, is such a statute. It defines an “employee” as persons who are found to be dependent contractors, namely those persons who have the attributes of an independent contractor such as providing their own vehicle to perform services, but are economically dependent upon one employer for their livelihood. On the other hand, the *Public Service Staff Relations Act*, which establishes a collective bargaining regime for the federal public service, grants collective bargaining rights to those persons who are actual employees or public servants. There is no concept of a deemed “employee”.

972. The determination under the *Canada Labour Code* of whether or not the person is an employee, dependent contractor or independent contractor, who is not entitled to bargain collectively, is a question of fact that must be determined on an individual basis.

973. Section 13(5) of the *Canada Post Act* provides *inter alia* that “a mail contractor is deemed not to be a dependent contractor or an employee with the meaning of those terms in [the *Canada Labour Code*]”. This provision was enacted in 1981 to ensure that the position of rural route workers as contractors would remain unchanged after the passing of the *Canada Corporation Act*, which transferred labour relations authority over Canada Post from the *Public Service Staff Relations Act (PSSRA)* to the *Canada Labour Code*. Until 2004 rural route workers have been considered to be independent contractors.⁹³⁰

974. The status of rural route workers was challenged in 1987 before a domestic labour tribunal, and appealed to the Federal Court of Appeal, which found that they were properly considered to be ‘mail contractors’ and not postal employees.⁹³¹ The Supreme

⁹³⁰ Contrary to UPS’ assertion, the policy was not changed by Canada. Rather, Canada Post hired the rural route workers as employees pursuant to negotiations between Canada Post and the Canadian Union of Postal Workers.

⁹³¹ *Canada Post Corp. v. Assn. of Rural Route Mail Couriers (sub nom. Canada Post Corp. v. C.U.P.W.)*, [1989] 1 F.C. 176, 46 D.L.R. (4th) 716 (C.A.). (Respondent’s Book of Authorities, Tab 73); *Canada Post Corporation v. CUPW* (1987) 69 di 173 (Canada Labour Relations Board). (Respondent’s Book of Authorities, Tab 80).

Court dismissed the application for leave to appeal.⁹³² In 1989, the Association of Rural Route Mail Couriers brought a separate challenge to the Federal Court, under the *Charter*. This too was dismissed.⁹³³

975. Whether the designation of rural route carriers as independent contractors amounts to a breach of international law is a question that has also been considered. A large number of US and Canadian unions submitted a complaint under the *North American Agreement on Labour Cooperation (NAACL)*, a supplemental accord on labour matters signed by NAFTA Parties on 14 September 1993.⁹³⁴ After receiving written submissions from the US and Canadian unions and from Canada Post, the US National Administrative Office (NAO) of the *NAACL* evaluated and declined to accept the complaint for further review.⁹³⁵

976. The Claimant also states that all Canada Post employees were prohibited from negotiating over pension benefits until February 2003.⁹³⁶ When Canada Post became a Crown corporation, it brought with it a generous government mandated pension plan, as Canada Post employees were deemed to continue to be public servants for the purposes of the *Public Service Superannuation Act (PSSA)*.⁹³⁷ Canada Post, as a public service corporation, was expressly named in the *PSSA*, and the Corporation and its employees were required to contribute to the plan. Under the collective bargaining regime for the federal public service under the *PSSRA*, pensions are legislatively beyond the permitted scope of collective bargaining. Canada Post employees were deemed to be public

⁹³² *Canada Post Corporation v. Canadian Union of Postal Workers et al.*, (1988), 88 N.R. 159. (Respondent's Book of Authorities, Tab 75).

⁹³³ *Rural Route Mail Carriers of Canada, Local 1801. et al. v. Canada (Attorney General)*, 1990 CarswellNat 1135 (Fed. T.D. May 29, 1990), Reed J. (Respondent's Book of Authorities, Tab 80).

⁹³⁴ *North American Agreement on Labor Cooperation (NAALC)*, (1993) 32 I.L.M. 1499, at 1502. (Respondent's Book of Authorities, Tab 13).

⁹³⁵ Letter from Irasema Garza, U.S. NAO of the NAACL, to Larry Fedechko, Organization of Rural Route Mail Couriers, 1 February 1999. (Respondent's Book of Documents, Tab 56).

⁹³⁶ Investor's Memorial, para. 646.

⁹³⁷ Bass Report, para. 1. (Respondent's Book of Expert Reports and Affidavits, Tab 2).

servants for this purpose. In 2000, Canada Post became responsible for the liabilities of the pension plan, but was legislatively required to maintain the key elements of the expensive plan.⁹³⁸ Contrary to the insinuations in the Claimant's argument, the plan is generous to employees and very costly to Canada Post, as it reflects the fact that the Post, once a government department, must appear fair and equitable as an employer.⁹³⁹

977. What is clear from the discussion above on bargaining rights is that a NAFTA Chapter 11 Tribunal is not the proper forum for a dispute over the proper application of labour law to Canada Post. Complaints mechanisms exist to the UN Human Rights Committee,⁹⁴⁰ the International Labour Organization (ILO) Committee on Freedom of Association,⁹⁴¹ the ILO Governing Body⁹⁴² and to the NAO established under the *NAALC*.⁹⁴³ Labour issues such as these were specifically left out of the NAFTA, and a more appropriate forum was established for them to be considered, the *NAALC*.

978. NAFTA members made clear their intention to address labour issues in a forum separate from NAFTA through their conclusion of the *NAALC*. The *NAALC* is specifically tasked with addressing labour issues and it "provides a mechanism for member countries to ensure the effective enforcement of existing and future domestic labour standards and laws without interfering in the sovereign functioning of the different

⁹³⁸ Bass Report, para. 4. (Respondent's Book of Expert Reports and Affidavits, Tab 2).

⁹³⁹ Bass Report, para. 1. (Respondent's Book of Expert Reports and Affidavits, Tab 2).

⁹⁴⁰ The Human Rights Committee was established pursuant to Article 28 of the *International Covenant on Civil and Political Rights*. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.Y.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368.

⁹⁴¹ Complaints to the *Committee on Freedom of Association* may be brought against an ILO member state by employers' and workers' organizations. "ILO Committee on Freedom of Association", online: <<http://www.ilo.org/public/english/standards/norm/applying/freedom.htm>>.

⁹⁴² Under articles 24 and 25 of the ILO Constitution, industrial associations of employers or workers may make representations to the ILO Governing Body regarding an ILO member's non-observance of a treaty to which it is a party to. "Representations" online: <<http://www.ilo.org/public/english/standards/norm/applying/representation.htm>>.

⁹⁴³ Article 16.3 of the *North American Treaty on Labour Cooperation* (*NAALC*) provides that National Administrative Offices of the *NAALC* shall review public communications "on labour law matters arising in the territory of another Party." (Respondent's Book of Authorities, Tab 13).

national labour systems”⁹⁴⁴ Article 1 of the agreement reveals a clear labour mandate, that of promoting “to the maximum extent possible” labour principles such as freedom of association and protection of the right to organise.⁹⁴⁵

979. The Claimant makes its claims related to labour standards without standing and in the wrong forum. The only relevance that Canada Post’s labour practices may have in relation to UPS Canada is limited to undercutting labour costs unfairly. The Claimant admits as much.⁹⁴⁶ However, as the Tribunal has already determined, there is no rule of customary international law prohibiting or regulating anticompetitive behaviour.⁹⁴⁷

4. The Fritz Starber facts cannot be the basis of an Article 1105 claim

980. The Claimant tries to construe a commercial decision by Canada Post not to tender certain transportation services and an e-mail to Fritz Starber as the basis of a breach of Article 1105, 1502(3)(a) and 1503(2).

981. Just as Article 1102 only applies to actions of Canada Post where it exercises delegated governmental authority, Article 1105 also only applies in these circumstances. Contracting for the supply of services is quintessentially a commercial activity that does not relate to the exercise of delegated governmental authority. Given the Claimant’s failure to demonstrate that the facts at issue relate to the exercise of governmental authority, its Article 1105 claim against the actions of Canada Post in relation to Fritz Starber must be rejected.

982. In any event, Canada Post’s actions were not in breach of any customary international law standard. Not every commercial disappointment gives rise to a breach

⁹⁴⁴ NAALC, *Ibid.* (Respondent’s Book of Authorities, Tab 13)

⁹⁴⁵ NAALC, Article 1 and Annex 1. (Respondent’s Book of Authorities, Tab 13).

⁹⁴⁶ Investor’s Memorial, paras. 647, 671.

⁹⁴⁷ UPS Jurisdiction Award, para. 92. (Investor’s Book of Authorities, Tab 48).

of the minimum standard of treatment.⁹⁴⁸

983. Indeed, the Claimant has not established any relevant rule of customary international law that has been breached by Canada Post's treatment of Fritz Starber. The Claimant argues that there is a breach of Article 1105 because the treatment of Fritz Starber was, in its view, not fair and equitable, arbitrary, constituted an abuse of right and was contrary to its legitimate expectations of transparency and fairness. The Claimant makes these assertions, without explaining how these elements are part of the customary international law minimum standard of treatment of aliens.⁹⁴⁹ In addition, the facts do not support the Claimant's position.

984. The facts establish that, although Canada Post did explore the possibility of alternatives to its current transportation service supplier for mail destined for the Caribbean, Central and South America, its decision not to pursue this further was commercially justified. Simply put, USPS prices for land and marine transportation of mail were cheaper than what freight forwarders, including Fritz Starber, could offer for air transportation. It is Canada Post's policy to pursue the business opportunities that are the most advantageous to it.⁹⁵⁰ No tender call was therefore issued. Canada Post's informal enquiries regarding prices and services offered by Fritz Starber cannot be construed as creating an entitlement or a right for UPS Canada or the Claimant.

985. The e-mail from Lavictoire, a representative of Canada Post, to Ross, a sales representative at Fritz Starber, was simply a routine business enquiry rather than "an invitation to bid" as the Claimant suggests.⁹⁵¹ This was confirmed by the Canadian

⁹⁴⁸ *Azinian v. The United Mexican States*, para. 83. (Investor's Book of Authorities, Tab 40); see also *Waste Management II Award*, paras. 114-115. (Respondent's Book of Authorities, Tab 71).

⁹⁴⁹ The Claimant relies heavily on the *Pope & Talbot* Award for its claims relating to Fritz Starber. The *Pope & Talbot* Tribunal was proceeding on the assumption that "fair and equitable treatment" is "additive" and does not have to be linked to any substantive and independent rules of international law. That assumption, as shown above, is incorrect. It has also been rejected by the Tribunal in the Award on Jurisdiction.

⁹⁵⁰ Craven Affidavit, para. 8. (Respondent's Book of Expert Reports and Affidavits, Tab 8).

⁹⁵¹ Investor's Memorial, para. 358.

International Trade Tribunal (CITT) in the context of a complaint brought by Fritz Starber. The CITT dismissed the claim after having reviewed the e-mail from Lavictoire to Ross. The Tribunal was “unable to conclude from the evidence submitted that a designated contract exist[ed] at this time.” It also stated that “there is no evidence that CANADA POST has issued solicitation documents pertaining to a current or future procurement”.⁹⁵² The absence of any tender call or procurement highlights the absence of basis for the Claimant’s argument that it had legitimate expectations.

986. Nor can the Claimant complain under Article 1105 that Canada Post did not proceed to tender the contract. Customary international law does not provide any obligations relating to procurement. Chapter 10 exists for this very reason. Alleged breaches of Chapter 10 obligations may not be brought before a Chapter 11 tribunal, they are left in the first instance to domestic tribunals to address, and if necessary to a NAFTA Chapter 20 Tribunal. In this case, there was no breach of procurement rules.⁹⁵³

C. Even If the Claimant Could Demonstrate Canada’s Breach of an Existing Rule of Customary Law, It Has Not Proven that Canada’s Actions Rise to the Requisite Threshold

987. The threshold for an Article 1105 breach is high. It is important to take account of the role of the minimum international standard in the scheme of Chapter 11, as only one of a number of rules protecting foreign investment. The most important of these protections, clearly, is national treatment. In advanced economies subject to the rule of law and democratic pressures, it is extremely unusual that a government should treat its own enterprises so badly that a fundamental international standard is breached. In the vast majority of cases, therefore, national treatment provides a reasonable degree of protection to foreign investors. Article 1105 therefore serves, not as the first line of defence, but as a last resort. It is the ultimate safety net when all else fails.

988. It is therefore not surprising that the Chapter 11 case law has consistently

⁹⁵² Decision of the Canadian International Trade Tribunal, December 27, 2001 [*CITT Decision*]. (Respondent’s Book of Authorities, Tab 72).

⁹⁵³ *CITT Decision*. (Respondent’s Book of Authorities, Tab 72).

adopted language demonstrating a very high standard. The words used by the Tribunals to capture the concept of the minimum standard include, treatment that is “grossly unfair”,⁹⁵⁴ “wholly arbitrary”⁹⁵⁵, “idiosyncratic or aberrant”,⁹⁵⁶ a “clear and malicious application of the law” or a “pretence of form”,⁹⁵⁷ “clearly improper and discreditable”⁹⁵⁸ or “outright and unjustified repudiation”.⁹⁵⁹

989. So, in setting out the standard as it relates to a denial of justice, no tribunal has strayed from the idea that the minimum standard is meant to capture illegal acts that are so grave as to shock a sense of judicial propriety. Even the *Pope & Talbot* Tribunal recognised this standard.⁹⁶⁰ Other tribunals have since stated clearly that the idea of shock or surprise is not presented in isolation, and it is the “record as a whole – not dramatic incidents in isolation – which determines whether a breach of international law has occurred”.⁹⁶¹

990. None of the Claimant’s allegations, even if they could be substantiated on the basis of a breach of a customary law, rise to such a standard.

991. Contrary to the Claimant’s assertion, the NAFTA Parties did not agree to allow foreign investors to bring claims against ‘every internationally wrongful act of a State’.⁹⁶²

⁹⁵⁴ *ADF* Award, para. 189 (Investor’s Book of Authorities, Tab. 95); *Waste Management II* Award, para. 98 (Respondent’s Book of Authorities, Tab 71).

⁹⁵⁵ *Waste Management II* Award, para. 115. (Respondent’s Book of Authorities, Tab 71).

⁹⁵⁶ *ADF* Award, para. 188. (Investor’s Book of Authorities, Tab 95).

⁹⁵⁷ *Mondev* Award, para. 126, (Investor’s Book of Authorities, Tab 37), endorsing the language adopted by the Tribunal in *Azinian* Award (Investor’s Book of Authorities, Tab 40).

⁹⁵⁸ *Mondev* Award, para. 127. (Investor’s Book of Authorities, Tab 40).

⁹⁵⁹ *GAMI* Award, para. 104. (Investor’s Book of Authorities, Tab 100).

⁹⁶⁰ *Pope & Talbot* Damages Award, para. 62 (Investor’s Book of Authorities, Tab 38).

⁹⁶¹ *GAMI* Award, para. 103. (Investor’s Book of Authorities, Tab 100); see also *Mondev* Award, para. 127 (Investor’s Book of Authorities, Tab 40).

⁹⁶² The Claimant relies on Article 1 of the *ILC Articles on State Responsibility* in paras. 631-33 of its Memorial.

Rather, they adopted Article 1105 with the intention that the Parties would guarantee protection against breaches of customary law forming part of the minimum standard applicable to aliens. The actions of a Party will breach Article 1105 only when they result in an outright and unjustified repudiation of an investor's right in a manner that is grossly unfair.

VI. THE CLAIMANT HAS FAILED TO ESTABLISH A BREACH OF ARTICLES 1103 AND 1104

992. The Claimant alleges that Canada has violated Article 1103 on the basis that “the level of international law treatment offered by Canada” under other investment protection treaties ratified by Canada since the NAFTA came into force “exceeds that provided by Canada to the Investor and its Investments under NAFTA Article 1105.”⁹⁶³ Notwithstanding several opportunities to amend its statement of claim, and a memorial of several hundred pages, the Claimant’s claim in respect of NAFTA Article 1103 remains unclear. The Claimant has not explained what more favourable treatment is contained in the other investment treaties to which it refers. It has not shown that the treatment was accorded in like circumstances. And it has not established that the alleged more favourable treatment has resulted in damage to the Claimant or UPS Canada.

993. Canada objected to the Claimant’s claims under Articles 1103 and 1104 on the basis that they are outside the jurisdiction of the Tribunal.⁹⁶⁴ The Claimant failed to meet the requirement in Article 1119 that the Notice of Intent identify the issues and factual basis for the claim and the provisions of the NAFTA alleged to have been breached. Canada maintains that objection and the Claimant’s allegations under Articles 1103 and 1104 should be dismissed.

A. The Claimant Has Failed to Establish a Breach By Canada Of Any Obligation Under Article 1103**1. Legal test for breach of Article 1103**

994. Canada’s obligation to afford most-favoured-nation treatment (“MFN”) to NAFTA Party investors and investments is contained in Article 1103. Article 1103 requires each Party to accord to investors of another Party, and their investments, treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or non-Party, and their investments, with respect to the establishment,

⁹⁶³ Investor’s Memorial, para. 369.

⁹⁶⁴ Canada’s Statement of Defence, para 109.

acquisition, expansion, management, conduct, operation and sale or other disposition of investments. Article 1103 reads as follows:

Article 1103: Most-Favoured-Nation Treatment

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

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

995. The general rule of interpretation outlined in Article 31 of the *Vienna Convention on the Law of Treaties*⁹⁶⁵ applies to Article 1103 – that is, it must be interpreted according to the ordinary meaning of the terms in their context and in light of the treaty’s object and purpose. The article is to be interpreted as a whole, but for the sake of practicality can be broken into distinct constituent elements. Each constituent element must be established to show a breach of Article 1103. The Claimant has “the burden of proving the facts relied on to support”⁹⁶⁶ its claim, and thus bears the burden to establish each requisite element of 1103.

996. The Claimant must establish that the Party accorded it, or its investment, “treatment” relating to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” that was “less favorable” than the treatment accorded “in like circumstances” to investors or investments of another Party, or of a non-Party. These elements mirror those under Article 1102. Canada submits that

⁹⁶⁵ *Vienna Convention*. (Investor’s Book of Authorities, Tab 89).

⁹⁶⁶ Article 24(1) of the UNCITRAL Rules provides, “Each party shall have the burden of proving the facts relied on to support his claim or defence.”

they should be interpreted in the same manner.⁹⁶⁷

997. As Canada has demonstrated above with regard to the interpretation of Article 1102,⁹⁶⁸ “like circumstances” means all the relevant circumstances surrounding the treatment, including public policy considerations, and not merely whether the investments operate in the same business sector. In addition, “less favorable” means more than a difference in treatment. The treatment need not be identical; rather, the Claimant must demonstrate that what it received is “less favorable”.

998. The Claimant has failed to discharge its burden to establish the requisite elements of a breach of Article 1103. As a result, its claim in this respect should be dismissed.

2. The Claimant has failed to identify specifically the alleged treatment/measures at issue

999. The Claimant sets out what it perceives as the breach of Article 1103 in paragraph 369 of the Memorial:

Canada has failed to provide international law standards of treatment as favorable to UPS and its Investments as it is obligated to provide to investments and investors of non-NAFTA Parties under other investment protection treaties ratified by Canada since the NAFTA came into force on January 1, 1994. There is a violation of MFN treatment by Canada to the extent that the level of international law treatment offered by Canada under those treaties exceeds that provided by Canada to the Investor and its Investments under NAFTA Article 1105.⁹⁶⁹

⁹⁶⁷ The Arbitral Panel, *In the Matter of Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel, February 6, 2001, para 276, (Investor’s Book of Authorities, Tab 106), made a similar finding with respect to NAFTA Chapter 12 services provisions and stated “With regard to most-favoured-nation treatment under Article 1203, essentially the same considerations are relevant as with national treatment under Article 1202.”

⁹⁶⁸ See Part IV, Section B , paras. 584 et seq., “The Correct Legal Test under Article 1102” above for Canada’s submissions regarding the correct interpretation to be applied to these terms.

⁹⁶⁹ Investor’s Memorial, para. 369.

1000. In Canada's Statement of Defence,⁹⁷⁰ Canada made a jurisdictional objection to the allegations with respect to a breach of Article 1103 (and 1104) on the basis that the Claimant had failed to identify the measure or treatment that was the subject of the allegation. Canada maintains this objection. In its Memorial, the Claimant continues to fail to identify which measure or treatment is the subject of its Article 1103 allegations.

1001. The Claimant's effort to identify the measures which form the subject of their allegation of breach of Article 1103 is insufficient for Canada to be able to present a full and complete defence. At page 158 of its Memorial, the Claimant states:

456. UPS relies on the MFN obligation as another basis to establish Canada's violation of its NAFTA obligations. In so doing, UPS relies on the same measures: namely, Canada's practices, laws, and regulations. UPS also relies on the same activities arising from such measures, detailed above. ...

1002. It remains unclear whether the "same measures" the Claimant cites at page 158 of its Memorial as being "detailed above" are the measures it pleaded as forming the basis of an alleged violation of Article 1102, the separate measures it pleaded as forming the basis of an alleged violation of Article 1105 or, indeed, the measures the Claimant pleaded under both articles.

1003. By the Claimant's failure to identify the measures that are the subject of the alleged breach of Article 1103, Canada has been prejudiced in the preparation of its defence. It is only once a measure has been identified by the Claimant that Canada is able to formulate a substantive defence, or to rely on the reservations and exceptions contained in Article 1108.⁹⁷¹ As it stands, without the measures being clearly identified, Canada is unable to respond fully.

1004. Even if this claim is permitted to proceed, the Claimant still would not have met

⁹⁷⁰ Canada's Statement of Defence, para. 105(c).

⁹⁷¹ If the measures that are the subject of the Claimant's 1103 allegations are those it has pleaded under Article 1102 then Canada may rely, for example, on a defence that the treatment in question is a procurement under Article 1108. If the measures that are the subject of the Claimant's 1103 allegations are those it has pleaded under Article 1105 then Canada may rely, for example, on the defence that the treatment is a taxation measure under Article 2103.

its evidentiary burden for a successful claim.

3. The Claimant has failed to show that the treatment is “less favorable”

1005. The Claimant has the onus of establishing that the treatment it has been accorded is “less favorable” than that accorded to the other Party or non-Party investor in the case of Article 1103(1). It also has the onus of establishing that the treatment accorded to its investment is “less favorable” than that accorded to the investment of another Party or a non-Party investor in the case of Article 1103(2). The Claimant has failed to establish any “less favorable” treatment. Nor has the Claimant identified whether it is Article 1103(1), Article 1103(2) or both on which it bases its claim.

1006. The Claimant makes reference to sixteen of Canada’s Foreign Investment Protection and Promotion Agreements (FIPAs), all of which were signed or came into force after the NAFTA. The Claimant has the burden of establishing that: 1) these 16 FIPAs provide a more favourable standard than that available under the NAFTA, and 2) that the “same measures” which are the subject of the Claimant’s 1103 allegations breach the more favourable standard provided by the FIPAs but do not breach the allegedly lesser level of protection afforded by NAFTA’s Article 1105.

1007. The *ADF* tribunal placed this two-fold burden on the investor in analyzing that investor’s 1103 claim.⁹⁷² The investor in *ADF* had referred to bilateral investment treaties the United States had entered with Albania and with Estonia subsequent to the NAFTA as part of a claim of breach of Article 1103. In rejecting the claim, the *ADF* Tribunal noted:

“The Investor’s theory assumes the validity of its own reading of the relevant clauses of the treaties with Albania and Estonia. That reading, as observed in some detail earlier, is that the ‘fair and equitable treatment’ and ‘full protection and security’ clauses of the two treaties establish broad, normative standards of treatment distinct and separate from the specific requirements of the customary international law minimum standard of treatment. We have, however, already concluded that the Investor has not been able persuasively to document the existence of such autonomous

⁹⁷² *ADF* Award, paras 75-80. (Investor’s Book of Authorities, Tab 95).

standards, and that even if the Tribunal assumes hypothetically the existence thereof, the Investor has not shown that the U.S. measures are reasonably characterized as in breach of such standards.”⁹⁷³

1008. Thus, the Claimant must establish that the 16 FIPAs have a more favourable standard than the minimum standard of treatment at customary international law encapsulated in Article 1105 of the NAFTA.

1009. There is no difference in the standards of treatment afforded under NAFTA Article 1105 and the 16 FIPAs – both accord the customary international law minimum standard of treatment.

1010. As the Claimant acknowledges, the 16 FIPAs that have come into force post-NAFTA “are based on the NAFTA model, and contain similar language”.⁹⁷⁴

1011. Canada has been consistent in its statements that these FIPAs are based on the NAFTA. They are referred to as Agreements Based on new Model (NAFTA based) on the website of International Trade Canada.⁹⁷⁵

1012. Article 1105, as set out above,⁹⁷⁶ is a statement of the customary international law minimum standard of treatment. This has been made clear through the by the FTC interpretation.

1013. Canada’s view has always been that Article 1105 refers to the customary international law minimum standard of treatment, as can be seen from the *Canadian*

⁹⁷³ *Ibid*, para 194. (Investor’s Book of Authorities, Tab 95).

⁹⁷⁴ Investor’s Memorial, para. 701.

⁹⁷⁵ See reference to the FIPAs on International Trade Canada’s website (last visited June 14, 2005.). Online: < http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-en.asp>. (Respondent’s Book of Documents, Tab 57)

⁹⁷⁶ See Part V, Section A, “Legal Test”, paras. 898-907.

Statement on Implementation on the entry into force of the NAFTA,⁹⁷⁷ a document that predates the FTC Interpretation:

Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. 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.⁹⁷⁸

1014. Article 1105 prescribes the customary international law minimum standard of treatment. The 16 FIPAs Canada has entered subsequent to 1 January 1994 are based on the NAFTA and, as such, also prescribe the customary international law minimum standard of treatment. There is no difference in the treatment accorded to UPS Canada and to a non-Party investor.

1015. In addition and as set out by the *ADF* Tribunal, The Claimant must establish that the supposed different standard of treatment in the FIPAs arrives at a different result when applied to the measure in question than does an application of Article 1105. To successfully claim a breach of Article 1103, the Claimant must establish a “less favorable” treatment under the NAFTA. This is only possible where a measure breaches the minimum standard of treatment clause in a FIPA, but would not breach Article 1105.

1016. The Claimant has made no effort to apply the sixteen FIPAs to the “same measures” that are the basis of its Article 1103 claim. Although the Claimant cites standard of treatment clauses from some of the sixteen FIPAs, they have provided no analysis of how those provisions apply to the “same measures” that are the basis of its Article 1103 claim. As such, the Claimant has failed to meet its burden of establishing “less favorable” treatment.

⁹⁷⁷ The Claimant itself argues that Canada’s NAFTA *Statement on Implementation* should be used to interpret the NAFTA pursuant to Article 31(2)(b) of the *Vienna Convention* as “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”. Investor’s Memorial, para. 690.

⁹⁷⁸ *North American Free Trade Agreement*, Canadian Statement on Implementation, Canada Gazette, Part I, 1 January 1994, 68 at 149. (Investor’s Book of Authorities, Tab 9).

1017. The Claimant is required to meet its burden, and, not having done so, its claim of a breach of Article 1103 must be dismissed.

4. The Claimant has failed to show loss or damage

1018. An investor of a Party is only permitted to submit to arbitration a claim that another Party has breached an obligation if “the investor has incurred loss or damage by reason of, or arising out of, that breach” pursuant to Article 1116.

1019. The Claimant has failed to adduce any evidence that it or UPS Canada has “incurred loss or damage by reason of, or arising out of” a breach of Article 1103. As the Claimant has failed to meet the minimum requirements of Article 1116 and 1117, its claim must be denied.

B. The Claimant Has Failed to Establish a Breach by Canada of Any Obligation under Article 1104

1. If no breach of Article 1102 or 1103 there is no breach of Article 1104.

1020. Article 1104 provides:

“Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103”.

1021. As Canada has demonstrated that there has been no breach of either Article 1102 or Article 1103, there can be no breach of Article 1104.

2. The Claimant has not addressed its claim under Article 1104 in its Memorial

1022. The Claimant has not addressed its claim under Article 1104 in its Memorial; therefore, the claim should be dismissed. Indeed, Article 1104 is not included among the list of the “relevant obligations for the purposes of this proceeding”,⁹⁷⁹ nor does a breach of Article 1104 appear in the Claimant’s “Relief Requested”.⁹⁸⁰ In this respect, the

⁹⁷⁹ Investor’s Memorial, para. 379.

⁹⁸⁰ Investor’s Memorial, para. 764.

reference to a breach of Article 1104 in the section on the “Measures Adopted or Maintained by Canada”⁹⁸¹ is insufficient for the Claimant to establish its claim.

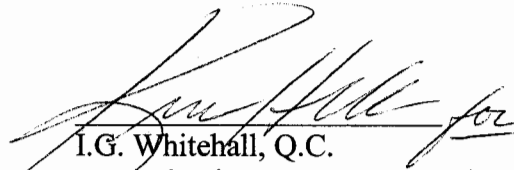
⁹⁸¹ Investor’s Memorial, paras. 453-56.

RELIEF SOUGHT

1023. For the foregoing reasons Canada respectfully requests that this Tribunal render an award:

- a) in favour of Canada and against the Claimant, United Parcel Service of America, Inc., dismissing its claims in their entirety; and
- b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that the Claimant, United Parcel Service of America, Inc., bear the costs of this arbitration, including Canada's costs for legal representation and assistance.

Respectfully submitted,



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