
UNDER CHAPTER 11 OF THE NAFTA AND UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

- and –

GOVERNMENT OF CANADA

Respondent/Party

REPLY OF THE GOVERNMENT OF CANADA TO THE UNITED STATES' AND MEXICO'S POST HEARING SUBMISSIONS UNDER ARTICLE 1128 ON CANADA'S PRELIMINARY JURISDICTIONAL OBJECTIONS

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1. The Article 1128 submissions of the United States and Mexico confirm that the three NAFTA Parties are *ad idem* as to the proper interpretation of the NAFTA provisions at issue in this claim. The three Parties agree on each of the following points:

   - the relationship between Chapters 11 and 15 is clear, and Article 1116 does not provide investors a remedy for allegations of anti-competitive conduct;
   - anti-competitive conduct, even if proven, would not violate either Article 1102 or Article 1105;
   - the mere existence of a monopoly does not suffice to trigger the obligations in Article 1502(3)(a); there must be an actual exercise of "governmental authority" by that monopoly in respect of third parties.

2. In short, the NAFTA Parties agree that the arguments advanced by UPS are not consistent with the text of the NAFTA, and by extension, that the UPS claim is not arbitrable under the investor-state provisions of Chapter 11. In light of the customary international law rules of treaty interpretation, the Tribunal should accord very considerable weight to this agreement between the three signatories to the NAFTA.

3. Finally, Canada agrees with the United States and Mexico that this Tribunal should exercise caution in relying on the *Pope & Talbot Award In Relation To Damages* in respect of its reasoning on the minimum standard of treatment obligation and the effect of the FTC Note of Interpretation.

> *Third Submission of the United Mexican States, at par. 11-19; Third Submission of the United States of America at par.10.*

4. Accordingly, Canada reiterates its request that the claims of anti-competitive conduct against it be dismissed as non-arbitrable, and that an order be issued as set out in Section IV of Canada's Memorial on Preliminary Jurisdictional Objections.

Chapters 11 and 15 do not provide investors a remedy for anti-competitive conduct

5. Contrary to UPS' claims, Article 1116(1)(b) does not limit the substantive scope of Article 1502(3)(a) or deprive it of its full effect. It merely limits the circumstances in which an investor has a remedy for a breach of Article 1502(3)(a). Under the express terms of Article 1116(1)(b), in order to submit to arbitration a claim under Article 1502(3)(a), the Investor must establish that the monopoly has breached an obligation under Section A of Chapter 11. Absent such a breach, Article 1502(3)(a) is subject only to state-to-state dispute settlement under Chapter 20 of the NAFTA. The wording of the Articles 1116(1)(b) and 1502(3)(a) is clear, and creates no inconsistency or "conflict" between Chapter 11 and Chapter 15.

Third Submission of the United Mexican States, at par. 2-6; Third Submission of the United States of America at par. 2-4.

6. The NAFTA Parties therefore concur that Article 1502(3)(a) does not provide investors a remedy for alleged breaches of Article 1502(3)(d).

Third Submission of the United Mexican States, at par.10; Third Submission of the United States of America at par. 2 -4.

Anti-competitive conduct does not establish a breach of Articles 1102 or 1105

7. The three NAFTA Parties also agree that allegations of anti-competitive practices and cross-subsidization, even if proven, do not establish that Canada has not accorded "treatment no less favourable" in violation of Article 1102. Nor do they establish that Canada has failed to accord treatment in accordance with the

minimum standard of treatment at customary international law in breach of Article 1105.

Third Submission of the United States of America at par. 7; Mexico's submission under NAFTA Article 1128, May 14,2002, at par. 18-32 and 33.

Article 1502(3)(a) requires an actual exercise of "governmental authority"

8. Furthermore, the three NAFTA Parties agree as to the scope of Articles 1502(3)(a) and 1503(2). Specifically, they are *ad idem* as to the meaning of the phrase "... wherever such a monopoly exercises regulatory, administrative or other governmental authority that the Party has delegated to it". The term "governmental authority" refers to an exercise of authority over third parties in the nature of that exercised by a government in its sovereign capacity. It is illustrated by the examples of such authority given in articles 1502(3)(a) and 1503(2) – *i.e.*, the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges. UPS has not identified any such exercise of governmental authority by Canada Post.

9. There can thus be no breach of either Article 1502(3)(a) or Article 1503(2) merely because the monopoly performs its monopolistic activity; it must also exercise governmental authority. Otherwise, the express references to "governmental authority" would be rendered meaningless.

Third Submission of the United States of America at par.5- 6 and footnote 9; Third Submission of the United Mexican States, at par. 7; Mexico's submission under NAFTA Article 1128, May 14,2002, at par. 15(7).

Conclusion

10. It is evident from the submissions of the three NAFTA Parties that allegations of anticompetitive conduct are not within the purview of investor-state arbitration. Thus, the Tribunal should strike all such allegations now, without subjecting Canada to a long and costly arbitration over competition matters. Canada reiterates its request that these allegations be dismissed as non-arbitrable, and that an order be issued as set out in Section IV of Canada's Memorial on Preliminary Jurisdictional Objections.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED at the City of Ottawa, the Province of Ontario, this 3rd day of September 2002.

Sylvie Tabet

Of Counsel for the Government of Canada

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