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

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant / Investor

AND:

GOVERNMENT OF CANADA

Respondent / Party

INVESTOR'S REPLY TO THE POST-HEARING SUBMISSIONS OF THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES (Jurisdiction Phase)

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

Barry W. Appleton, Esq.
Counsel

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

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

Michael P. Carroll, Q.C.
Counsel

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

I. INTRODUCTION

1. The Investor submits this Reply to the August 23, 2002 interpretive Post-Hearing Submissions of the Government of the United States of America ("United States") and the Government of the United Mexican States ("Mexico") in this preliminary Jurisdiction Phase.

2. The Investor maintains its submissions contained in its Counter-Memorial and Rejoinder and will only address those points not previously dealt with by the Investor. The Investor notes that the Tribunal specifically directed that the Article 1128 submissions of the non-disputing NAFTA Parties should be confined to new matters arising from the oral hearing in the jurisdictional phase, and not to matters that had been previously canvassed. It is apparent that much of the submissions now filed by the United States and Mexico simply reargue matters that were or should have been previously addressed, despite the suggestion by those Parties that they are responding to new issues raised by the Investor during the oral hearing.

3. Some comment must also be made about the attempt by both the United States and Mexico to now place before the Tribunal lengthy but selectively chosen submissions made by them in other cases. The Investor submits that the Tribunal should have no regard for those submissions, arising as they do in other proceedings between other parties, and without the full record of those proceedings being before this Tribunal. It is procedurally unfair to attempt to force the Investor to respond to submissions provided out of the context in which they were raised. Moreover, if either the United States or Mexico wanted to rely upon such submissions, there is no reason why they are being provided at this late date. To the extent they have any relevance at all to this proceeding, it is not in respect of new matters arising for the first time at the oral hearing, particularly since all but one of those additional submissions predate it. Fairness and an orderly procedure require that the non-disputing NAFTA Parties comply with the directions of the Tribunal if they wish their submissions to be considered. Accordingly, unless the Tribunal otherwise requires, the Investor does not

propose to provide any further response to these additional documents, but requests that, if the Tribunal is to consider them, the Investor be provided with a proper opportunity to respond.

4. The Investor notes that the Governments of Mexico and the United States failed to point out that the submissions upon which they relied in the *ADF* and the *Pope & Talbot* claims were filed not in the preliminary or jurisdictional phases of those claims, but in the arguments on the merits or damages. Thus, the arguments raised by the non-disputing Parties are not of the type to be considered at a preliminary jurisdictional phase.

5. Despite the fact that both Mexico and the United States are attempting prematurely to address issues which should be dealt with at the merits phase, this Reply will address only the following arguments of the United States and Mexico:

   a. The misstatements by the non-disputing NAFTA Parties of the Investor's position;

   b. The arguments of Mexico and the United States on the relationship between NAFTA Chapters 15 and 11;

   c The argument of the United States regarding "governmental authority";

   d. The argument of the United States on losses or damages of US subsidiaries; and

   e. The arguments of Mexico and the United States regarding the Award on Damages of the *Pope & Talbot* Tribunal.

In response to each of these arguments, the Investor maintains that it has met the jurisdictional requirements under NAFTA Chapter 11.

II. REPLY TO THE NAFTA ARTICLE 1128 POST-HEARING SUBMISSIONS OF THE UNITED STATES AND MEXICO

6. Throughout their submissions both Mexico and the United States place reliance on the fact that the three NAFTA Parties have agreed on a point of interpretation as authority for their conclusion. In essence, it is being suggested that this Tribunal is obligated to apply any submission that is agreed upon by the counsel of the three NAFTA Parties before this Tribunal no matter what its means. The implication is that, even in the absence of jurisprudence or argument, the fact that counsel for NAFTA governments agree on a point makes it authoritative.

7. The Tribunal is not entitled to reach a conclusion in the absence of any analysis or reasoning and without consideration of the parameters imposed by the NAFTA and international law, no matter how vociferously the NAFTA Parties urge it to do so.

8. Under the NAFTA and international law, there are accepted ways in which treaty Parties can amend treaty provisions. For example, under NAFTA Article 2202, the NAFTA Parties are entitled to amend the NAFTA in accordance with the applicable legal procedures of each Party such as obtaining the advice and consent of a two-thirds majority of the US Senate. Nowhere does the NAFTA contemplate a process whereby lawyers representing NAFTA Parties can amend the explicit text of the NAFTA merely by asserting a common position before a NAFTA Tribunal. The espousal of similar governmental positions on any particular issue at any particular time also does not constitute an amendment of the NAFTA.

9. Similar arguments were made by Mexico and the United States before the *Methanex* Tribunal through a series of Post-Hearing Submissions. In those submissions, these NAFTA governments made the novel observation that the simple fact of an agreement amongst the counsel of the three NAFTA Parties resulted in the "agreement" necessary to make that position to be considered as relevant under Article 31(3) of the *Vienna Convention*.[1] It is the Investor's position that mere agreement amongst counsel in their submissions to an arbitration does not result in a formal "agreement" or "practice" as contemplated under the *Vienna Convention.* In any event, such a determination should properly be deferred to the merits phase of this arbitration.[2]

A. Reply to the United States' and Mexico's Submissions on Interpretive and Factual inaccuracies

10. The Post-Hearing Submission of the Governments of the United States and Mexico contain a number of interpretive and factual inaccuracies. While this Reply Post-Hearing Submission cannot address them all, it will address the most important of these inaccuracies:

a) The United States argues that an investor-state arbitration with regard to NAFTA Article 1502(3)(a) deals only with breaches of Section A of Chapter 11.[3] This is an incomplete statement. NAFTA Article 1502(3)(a) deals with actions where government monopolies act in a manner inconsistent with a Party's obligations

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[1] See: *Methanex and United States*, Investor Post-Hearing Submission, July 20, 2001; US Post-Hearing Submission, July 20, 2001; Investor Reply Post-Hearing Submission, July 27, 2001; and US Reply Post-Hearing Submission. All NAFTA Article 1128 submissions of the United States may be found at the US State Department Website at: www.state.gov/s/l/c5823.htm.

[2] The *Methanex* Tribunal deferred a similar issue to the merits phase of that arbitration. See: *Methanex and United States*, Award on Jurisdiction and Admissibility, August 7, 2002 at paras. 101-102.

[3] Post-Hearing Submission of the United States at para. 3.

under the NAFTA Agreement as a whole, which would include acts inconsistent with the Party's obligations under Section A of NAFTA Chapter 11 **as well as other** provisions of the NAFTA.

b) The United States interprets the Investor's argument as being that a monopoly exercises delegated governmental authority under NAFTA Article 1502(3) simply because it is a monopoly.[4] This is not the position that was taken by the Investor during the oral hearing in the jurisdictional phase. The Investor's position is that the question of whether there is delegated governmental authority should be considered at the merits phase since it cannot be assessed unless the Tribunal hears evidence.[5] However, in any event, the Investor produced more than sufficient evidence at this phase to demonstrate that Canada Post carries out delegated governmental authority in the operation of its letter mail monopoly, and it has used the infrastructure of such monopoly unfairly (e.g. by cross-subsidization) to harm the Investor in non-monopoly service operations.

c) The United States suggests that the effect of the NAFTA Article 1502(4) public procurement exemption for government agencies[6] is that the procurement activities of a privately-owned prison would not be covered by the obligations of NAFTA Article 1502(3). This statement is incorrect. NAFTA Article 1502(4) provides that the procurement policy of a government-run prison would be exempt from the application of NAFTA Article 1502(3). This exemption is similar to the Article 1108(7) exemption for government procurement with

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[4] Post-Hearing Submission of the United States at para. 6.

[5] See: *UPS and Government of Canada*, Jurisdiction Hearing Transcripts, July 30, 2002, Vol. II at 294:17-19.

[6] Post-Hearing Submission of the United States at para. 6, footnote 9.

respect to the operation of a government operations or state enterprises with respect to NAFTA Articles 1102, 1103, and 1107. If the prison were privately-owned and operated, then NAFTA Article 1502(3) would apply and the NAFTA Article 1502(4) exemption would not.[7]

d) Mexico identifies its "special concern" with the position advanced by the Investor with respect to the effect of NAFTA Article 1112.[8] This NAFTA provision states that if there is an inconsistency between a provision in NAFTA Chapter 11 and another NAFTA Chapter, the other NAFTA Chapter provision will prevail to the extent of such an inconsistency. Mexico states that the Investor did not advise the Tribunal whether there was any inconsistency between NAFTA Chapter 11 and Chapter 15.[9]

It is the position of the Investor that there is no inconsistency between NAFTA Articles 1116(1)(b) and 1502(3)(a) in the course of an investor-state arbitration. At the oral hearing, the Investor submitted that if the Tribunal adopted Canada's interpretation, then there would be a necessary finding of inconsistency. Canada submitted that, notwithstanding the unambiguous reference to the term "under this Agreement" in NAFTA Article 1502(3)(a), that word under NAFTA Article 1116(1)(b) should mean only breaches of Section A of Chapter 11.[10] If the Tribunal accepts Canada's position, then it must resort to NAFTA Article 1112

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[7] See: *UPS and Government of Canada*, Jurisdiction Hearing Transcripts, July 30, 2002, Vol. II at 274:11-21and 275:1-5.

[8] Post-Hearing Submission of Mexico at para. 2.

[9] Post-Hearing Submission of Mexico at para. 3.

[10] See: *UPS and Government of Canada*, Jurisdiction Hearing Transcripts, July 30, 2002, Vol. II at 287:19:-21, 288:1-21 and 289:1-2.

which requires this Tribunal to prefer the text of NAFTA Article 1502(3)(a) over that of NAFTA Article 1116(1)(b).

B. Reply to the United States' and Mexico's Submissions on the relationship between Chapters 15 and 11

11. The United States continues to advocate, at paragraph 4 of its Submission, a "slippery slope" argument with respect to the relationship between Chapters 11 and 15. In response, the Investor submits that, on a plain meaning construction of the NAFTA, the requirements for bringing a NAFTA Chapter 11 claim with respect to NAFTA Chapter 15 obligations are quite restrictive, and that there is no possibility that a claim concerning a monopoly may be made with respect to "any" provision of the NAFTA. Moreover, the only provision that this Tribunal has been asked to address is that of NAFTA Article 1502(3)(d), which explicitly deals with "anticompetitive practices ... that adversely affect an investment of an investor of another party..."

12. The Investor agrees with the submissions of the Governments of Mexico and the United States that the purpose of NAFTA Articles 1502(3)(a) and 1503(2) is to ensure that a NAFTA Party does not use or allow its monopoly or state enterprise to act in a manner that is inconsistent with the NAFTA if the action in question was taken directly by the state itself.[11]

13. What the United States has failed to acknowledge is that NAFTA Article 1502(3)(a) requires not only that government monopolies act consistently with the relevant Party's Chapter 11 obligations, but also that each NAFTA Party ensures that such monopolies act consistently with the Party's obligations under the NAFTA Agreement. Rather, NAFTA

[11] Post-Hearing Submission of Mexico at para. 7; Post-Hearing Submission of the United States at paras. 3-4, and footnote 3 citing Mexico for the same proposition.

Article 1502(3)(a) obligates the NAFTA Parties to ensure that the monopoly acts consistently with the obligations of a Party under the NAFTA "Agreement". Thus, the NAFTA Parties clearly intended that there be a different and more extensive supervisory obligation imposed on Parties with respect to their monopolies.

14. The Investor disputes Mexico's submission at paragraph 9 that NAFTA Article 1502(3)(d) is not incorporated into NAFTA Article 1502(3)(a) because a designated or maintained monopoly "would have had failed to regulate properly another monopoly that it had designated or maintained."

15. Under NAFTA Article 1502(3)(a), Canada is required to supervise its government monopolies to ensure that a monopoly does not act "in a manner that is inconsistent with the Party's obligations under this Agreement." One of Canada's obligations under NAFTA is Article 1502(3)(d) which provides that Canada is required to supervise its designated or maintained government monopoly to ensure that the monopoly does not engage in certain anticompetitive practices. With respect to Article 1502(3)(a), a government monopoly (with delegated government authority) could act in a manner inconsistent with Canada's obligation under NAFTA Article 1503(2)(d) by engaging in any of these prohibited anticompetitive practices. Thus, a monopoly could act in a manner inconsistent with a NAFTA Party's obligations under Article 1502(3)(d) without having to fail to supervise another monopoly which the first monopoly has designated or maintained.

16. As applied to this case, the Investor alleges that Canada is obligated to ensure that Canada Post does not engage in certain anticompetitive practices and Canada Post by engaging in any of these anticompetitive practices would be acting in a manner inconsistent with Canada's obligation under Article 1502(3)(d).

C. Reply to the United States' Submission on Governmental Authority

17. At paragraph 6 of its Submission, the United States incorrectly characterizes the Investor's arguments. The United States argues that:

> ... contrary to certain arguments at the hearing, jurisdiction does not attach over a claim where the averred inconsistency with an obligation embodied in Section A of Chapter Eleven is alleged to result solely from the fact that a monopoly functions as, possesses the status of, or is unauthorized to be the sole provider of a good or service.

18. In order to succeed on the portion of the argument relating to Articles 1502(3)(a) and 1503(2), the Investor will be required to establish the existence of a delegated government authority will have to be established through evidence during the merits phase of the arbitration. The Investor agrees with the United States to that extent. Whether particular activities being engaged in by a government monopoly are the exercise of a governmental authority will depend, not only upon who it is that performs or performed those functions (although that would be one relevant consideration), but also upon the nature of those functions, including the extent to which they are in their essence commercial, public, or private. The degree to which a postal monopoly, given its significance as a central tool of governmental policy, ought to be considered as carrying out governmental authority is something that can only be determined at the merits phase.

19. At this stage, the Investor has alleged in its Claim that such delegated governmental authority exists, and the Respondent has admitted it. For the purposes of this jurisdictional phase, that is sufficient.

D. Reply to the United States' Submission on Losses or Damages of US Subsidiaries

20. The question of damages addressed by the United States is clearly a question that need not be determined during the jurisdiction phase. The submission of the United States to the *Pope & Talbot* Tribunal was made in the context of the damages phase of that arbitration. Moreover, the *Pope & Talbot* Tribunal rejected these same arguments.[12] The Investor submits that this question of interpretation is not relevant to a determination of jurisdiction in this arbitration and should be deferred until the damages phase.

E. Reply to the United States' and Mexico's Submissions on the Pope & Talbot Award of Damages

21. The submissions of the NAFTA Parties with respect to the *Free Trade Commission (FTC) Note of Interpretation* begs the simple question - is this Tribunal required at this time to make a decision on the disputed interpretation, and application, of NAFTA Article 1105? The Investor submits that it does not.

22. The most recent decision of a NAFTA Tribunal on the issue of jurisdiction was released subsequent to the oral hearing of the jurisdictional phase before this Tribunal on August 7, 2002 by the *Methanex* NAFTA Chapter 11 Tribunal. In its Award on Jurisdiction and Admissibility, the *Methanex* Tribunal supports the arguments of the Investor that the question of interpretation of substantive obligations of the NAFTA should only be dealt with during the merits phase of the arbitration. With respect to the United States' challenge of jurisdiction and admissibility in relation to the NAFTA Article 1105 interpretation and the FTC Note of Interpretation, the *Methanex* Tribunal held as follows:

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[12] *Pope & Talbot and Canada*, Award in Respect of Damages, May 31, 2002 at paras. 74-80.

We decide that this particular challenge cannot succeed for several reasons. As with Challenge I, we cannot address it as a challenge based on 'admissibility'; it does not qualify as a jurisdictional challenge; and even if it did qualify as a jurisdictional challenge (which in our view it does not), it is so intertwined with factual issues in Methanex's case that we would have been minded to join that challenge to the merits.[13]

All of which is respectfully submitted this 3rd day of September, 2002

Michael P. Carroll, Q.C.
Counsel

Barry W. Appleton, Esq.
Counsel

[13] *Methanex and United States*, Award on Jurisdiction and Admissibility, August 7, 2002 at paras. 102, 87-88.