

IN THE 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.*

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**THIRD SUBMISSION  
OF THE UNITED STATES OF AMERICA**

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), the United States of America makes this submission on certain questions of interpretation of the NAFTA. Those questions arose in connection with the July 29-30, 2002 hearing on the jurisdictional objections of the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed here. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

Relationship Between Chapters Fifteen and Eleven

2. The three NAFTA Parties agree that Article 1116(1)(b) allows an investor to submit a claim to arbitration for an alleged breach of Article 1502(3)(a) only where the claim is that the respondent NAFTA Party failed to ensure that the subject monopoly acts in a manner that is not inconsistent *with an obligation embodied in a provision of Section A of Chapter Eleven*.<sup>1</sup>

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<sup>1</sup> See, e.g., July 29, 2002 Hearing Transcript (“7/29/02 Tr.”) at 25, 28-29; Mexico’s Submission Under NAFTA Article 1128 (“Mexico Sub.”), dated May 14, 2002, ¶ 15(8) at 6; Second Submission of the United States of America (“U.S. Second Sub.”), dated May 13, 2002, ¶ 6 at 3.

3. Contrary to certain arguments advanced at the hearing, the three NAFTA Parties' common interpretation of Article 1116(1)(b) is in no way inconsistent with the plain language of Article 1502(3)(a).<sup>2</sup> Article 1502(3)(a) makes clear that a NAFTA Party cannot circumvent any of its obligations under the NAFTA simply by delegating governmental authority to a privately-owned or government monopoly.<sup>3</sup> A violation of Article 1502(3)(a) with respect to any provision in the NAFTA could be subject to State-to-State dispute resolution under Chapter Twenty.<sup>4</sup> By contrast, and as Article 1116(1)(b) explicitly states, a violation of Article 1502(3)(a) is also subject to investor-State dispute resolution under Chapter Eleven, but only with respect to "obligations under Section A" of Chapter Eleven.

4. The contrary interpretation advanced at the hearing would lead to absurd results. Under that interpretation, an investor could submit a claim to investor-State arbitration for acts of a privately-owned or government monopoly alleged to be inconsistent with *any* provision of the NAFTA. By contrast, an investor could submit a claim to investor-State arbitration based on an act by a NAFTA Party or state enterprise only when the NAFTA Party itself or the state enterprise acted inconsistently with an obligation embodied in Section A of Chapter Eleven. There simply is no rational basis for deciding the applicability of Chapter Eleven's dispute resolution mechanism on the basis of whether the subject actor is a monopoly (referenced in Article 1502(3)(a)), rather than the respondent NAFTA Party itself or a state enterprise.<sup>5</sup> The NAFTA Parties did not intend such a distinction. And, indeed, they agree that the text of the NAFTA imposes a uniform and consistent requirement: whether the alleged breach is by a NAFTA Party itself, a referenced monopoly or a state enterprise, acts that are inconsistent with an obligation of the respondent NAFTA Party under Section A must be shown.

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<sup>2</sup> See July 30, 2002 Hearing Transcript ("7/30/02 Tr.") at 287-89.

<sup>3</sup> See Mexico Sub. ¶ 15(1) at 5 (Article 1502(3)(a) "is designed to ensure that a State does not use a monopoly that exercises delegated powers to take action that would be inconsistent with the Agreement if such action were taken directly by the State itself.").

<sup>4</sup> Certain provisions of the NAFTA, however, are excepted even from the State-to-State dispute resolution mechanism in Chapter Twenty. See, e.g., NAFTA art. 1501(3).

<sup>5</sup> Also, the United States notes that, contrary to Claimant's assertion at the hearing, Article 1503(2) does not provide a basis for a claim under Section B of Chapter 11 for alleged violations of Sections B and C of Chapter 11. See 7/30/02 Tr. at 277. The Article 1503(2) reference to Chapter Eleven is to Section A only: as Sir Kenneth noted, *id.* at 280, a state enterprise cannot act in a manner inconsistent with a provision of Section B, which established the process by which NAFTA Parties—not state enterprises—engage in investor-State arbitration under the NAFTA; Section C, which merely includes definitions, prescribes no obligations of any kind.

Delegated “Governmental Authority”<sup>6</sup>

5. The United States agrees with Canada’s position at the hearing, with which Mexico also agrees, that a breach of Article 1502(3)(a) may only occur wherever a referenced monopoly “exercises” delegated “governmental authority.”<sup>7</sup>

6. Moreover, 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 referenced in Article 1502(3)(a) is a monopoly—that is, that the monopoly functions as, possesses the status of, or is authorized to be a sole provider of a good or service.<sup>8</sup> Indeed, otherwise, the requirement that a referenced monopoly exercise delegated “governmental authority” would be entirely superfluous. As noted above (*see* ¶ 2), for a claim to be submitted under Chapter Eleven, the monopoly, in exercising its delegated “governmental authority,” must allegedly have acted in a manner that is inconsistent with the respondent NAFTA Party’s obligations under Section A of Chapter Eleven.<sup>9</sup>

Relationship Between “Anticompetitive Practices” and NAFTA Articles 1102 and 1105

7. The United States notes that the NAFTA does not define the term “anticompetitive practices,” which is a complex term based on concepts of competition and regulation.<sup>10</sup> Accordingly, contrary to a suggestion at the hearing, a showing of “anticompetitive practices” does not, in and of itself, establish that a NAFTA Party has not accorded “treatment no less favorable” in the sense of Article 1102; nor does it establish a violation of the Article 1105 requirement to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment.”<sup>11</sup>

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<sup>6</sup> The concept of delegated “government authority” is the same in Articles 1502(3)(a) and 1503(2). Therefore, although the discussion that follows refers only to Article 1502(3)(a), the points made apply equally with respect to Article 1503(2).

<sup>7</sup> *See* 7/29/02 Tr. at 42; Mexico Sub. ¶ 15(6) at 5; U.S. Second Sub. ¶ 8 at 3-4.

<sup>8</sup> *See, e.g.*, 7/29/02 Tr. at 49, 53, 91, 92, 96-97.

<sup>9</sup> At the hearing, questions regarding delegated “governmental authority” were asked based on the example of an operator of a prison. An example of the exercise of “governmental authority” delegated by a NAFTA Party (within the meaning of Article 1502(3)(a)) that also involves procurement by a government agency of a service for governmental purposes could be the contract operation of prisons for law enforcement authorities. Such procurement would be exempted from the application of Article 1502(3) by reason of Article 1502(4).

<sup>10</sup> *See, e.g.*, WTO Working Group on the Interaction Between Trade and Competition Policy, “Overview of Members’ National Competition Legislation,” Note by the Secretariat (Revisions, July 4, 2001), WT/WGTCP/W/128/Rev.2 (available at [www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm)).

<sup>11</sup> *See* 7/30/02 Tr. at 261-63.

Losses or Damages of U.S. Subsidiaries of U.S. Investors

8. At the hearing, the Claimant asserted that losses or damages of its U.S. subsidiaries that “flow to” the Claimant are recoverable under Article 1116(1).<sup>12</sup>

9. The United States incorporates here its positions and arguments in paragraphs 2 through 10 of the attached submission made in the case of *Pope & Talbot Inc. v. Canada*: Seventh Submission of the United States of America, dated November 6, 2001. Furthermore, the United States notes that any complaints about export opportunities to Canada denied the Claimant’s U.S. subsidiaries are, absent identification of a Canadian investment of those U.S. subsidiaries (which would bring those U.S. subsidiaries into the definition of “investors of a Party”), covered by NAFTA Chapter Twelve, which governs cross-border trade in services, and, therefore, subject to the State-State dispute resolution mechanism embodied in NAFTA Chapter Twenty.

*Pope & Talbot Damages Award*

10. In response to the Claimant’s reliance at the hearing on the May 31, 2002 Award in Respect of Damages issued in the case of *Pope & Talbot Inc. v. Canada*, the United States incorporates here its positions and arguments in the attached submissions made in the case of *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1: (1) Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, dated June 27, 2002, at 7-22; and (2) Final Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, dated August 1, 2002, at 1-6.

*Respectfully submitted,*

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<sup>12</sup> See 7/30/02 Tr. at 222-23.