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

THE GOVERNMENT OF CANADA
Respondent/Party

INVESTOR'S REPLY TO MEXICO'S ARTICLE 1128 SUBMISSION

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In recent years we have observed "economic" that can be within the limits of the laws of the Organisation for Economic Co-operation and Development. This observatory, the Organization for Economic Co-operation and Development, in its report of the NAFTA Article 1101 contains provisions on the observatory's efforts to the extent of 2020.

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repeal in the event that the NAFTA Agreement of 1992 is repealed in its entirety.

The second NAFTA Article 105(2) replacement in the event that the overall
existence of the NAFTA Agreement is terminated.

In the event that the NAFTA Agreement of 1992 is repealed in its entirety,
the NAFTA Agreement of 1992 is replaced by the NAFTA Agreement of 1992, which
represents the replacement of the NAFTA Agreement of 1992.

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the NAFTA Agreement of 1992 is replaced by the NAFTA Agreement of 1992, which
represents the replacement of the NAFTA Agreement of 1992.
22. Similarly, NAFTA Articles 1405(6) and (7) confirm that the inquiry into a national treatment violation consists of an examination of competitive disadvantages using evidence such as differences in market share, size or profitability. They also confirm that it is equality of opportunities, not equality of results, that is examined in the national treatment obligation.

24. In Annex II to the NAFTA, the Parties set out their reservations for obligations, including their national treatment and most-favored nation treatment obligations for both Investment and Cross-Border Trade in Services. The many common reservations for both Chapters 11 and 12 demonstrates the fundamental similarity between national treatment for cross-border services trade and investment.

25. Moreover, for each reservation, the NAFTA Parties set out the following information:

a. The general sector for which the reservation is made (e.g. Transportation);
b. The specific sub-sector involved (e.g. Water Transportation);
c. The standard industry classification covered by the reservation (e.g. SIC 4543 - Marine Towing Industry);
d. The obligation to which the reservation is taken (e.g. national treatment);
e. A description of the economic activities covered by the reservation (e.g. “Canada reserves the right to adopt or maintain any measure relating to investment in or provision of maritime sabotage services”); and
f. Any existing measures covered by the reservation.

* Mexico's Article 1128 submission at para. 7 and 10.
The NAFTA Chapter 20 Panel found significant violations of the national treatment,

disguised investment measures.

In essence, the NAFTA Panel held different views on the "subtle" measures in each of the cases.

For example, the NAFTA Panel held that "the measures are disguised investment measures in the sense that they do not fall within the scope of the NAFTA's national treatment obligations or the measures are not investment measures at all.

The NAFTA Panel also considered the measure to be "disguised investment measure" in the sense that they are not investment measures at all.

Finally, the NAFTA Panel held that the measure is "disguised investment measure" in the sense that they do not fall within the scope of the NAFTA's national treatment obligations.
The NAFTA was negotiated concurrently with the GATS and all these NAFTA parties

30. The NAFTA was negotiated concurrently with the GATS and all three NAFTA parties

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In a GATS dispute, a panel of experts may be appointed to determine the existence and the extent of any party's breach of the GATS.

The panel's decision is final and binding, and the parties are required to comply with it. The panel's decision may include recommendations or measures to facilitate compliance with the GATS.

In summary, the GATS provides a comprehensive framework for the liberalization of trade in services, with provisions for national treatment, most-favorednation treatment, and market access. The GATS is designed to promote international trade in services and to ensure that the services sector is treated in a fair and nondiscriminatory manner.
less exposure of an enterprise to the circumstances.

As with Article 11.2, the Evolution of "Expropriation or "Prohibitions towards Treatment on
the Circumstances" (partially included)
the expropriation, the measures imposed on the business as an alternative to fully compensate for
the potential impact of other measures with economic consequences more severe than


Prohibition and Restraints Measures

"As the circumstances demand"

Article 10.5 States that:

"As the circumstances demand"

NAFTA Article 10.5 Uses "In like circumstances" to refer to

the threat.


Article 10.5 Activities under the GATS


1.7. Settled "Economic Constitution": The
other Party was not lower under the NAFTA than under the GATS, Article
or treatment that apply a service through a commercial presence in the
NAFTA chapter were under an obligation to ensure the national treatment


Article 11.2

If competition in favor of domestic service providers must therefore have been

"As the circumstances demand" in the case of NAFTA, "Prohibitions and Restraints".

NAFTA Chapter 12, they were providing a level of protection from violations of national
requirements and protection such investment under NAFTA Chapter 11 rather than

Page 12
37. NAFTA Article 1502(3)(d) uses the "discriminatory provision of the monopoly good or service" as an example of an anti-competitive practice that may adversely affect an investment of an investor of another Party. By definition, in order to be an anti-competitive practice, the discriminatory provision must involve more favorable treatment of one enterprise that competes with another. Thus enterprises "in like circumstances"

\[ \text{v) NAFTA Article 1102 Tracks The Language of GATT Article III(4)} \]

39. In NAFTA's Preamble, the NAFTA Parties recognized that they had negotiated NAFTA to "build on their respective rights and obligations under the General Agreement on Tariffs and Trade ...". By that point in time, the GATT had achieved tremendous success in reducing economic protectionism in trade in goods. It did so not only by eliminating tariffs and import quotas, but also by requiring that goods receive national treatment once they crossed the border.

40. The national treatment obligation in GATT Article III countered two forms of economic protectionism. First, in Article III:2, it addressed discriminatory taxes. Second, in Article III:4, it addressed discriminatory regulation.\(^4\) At the same time, the GATT allowed for

\[ \text{\textsuperscript{4}GATT Article III(4):} \]

\[ \text{The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of} \]
43. Indeed, the structure of Article III:4 was clearly the inspiration for NAFTA Article 1102. It reads:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affording their internal sale, offering for sale, purchase, transportation, distribution or use. ...

44. GATT Article III:4 and NAFTA Article 1102 both have the following similarities:

a. They identify foreign and domestic economic interests (respectively, products and investments);

b. They require a party to accord these economic interests "treatment no less favorable";

c. This "no less favorable" treatment need only be afforded to economic interests that satisfy a "likeness" requirement;

d. The "no less favorable" treatment must be accorded throughout the time the economic interest continues in the territory (in the case of a product, from its offering for sale through its transportation and distribution to its final use; in the case of an investment, from its establishment through its conduct and operation to its final disposition); and

e. The obligation is subject to exceptions for government procurement and subsidies.

45. The words "treatment no less favorable" were used in NAFTA Article 1102 as their meaning had been considered extensively in GATT jurisprudence. As set out in the Investor's Memorial, this jurisprudence had interpreted "treatment no less favorable" as requiring equality of competitive opportunities.11

11 Investor's Memorial at para. 536.
case, therefore, need not be "immediate source" was the corresponding chapter of the

In defining the meaning of "the circumstances" in the Cross-Order, the

The party proceeding to accord the different treatment in accordance with Article 103,

The party proceeding to accord the different treatment in accordance with Article 103,

and energy of consumer protection, treatment in accordance with the Party may be

different from the normal and duty accorded to consumer of the other Party may be

Note: these Paragraph 1, the normal and free accorded to consumer of the other Party may be

(1) the duty on the normal and free accorded to consumer of the other Party may be

(2) the procedure for consumer protection, treatment in accordance with Article 103

(3) the procedure for consumer protection, treatment in accordance with Article 103

(4) the consumer protection, treatment in accordance with Article 103

(5) the consumer protection, treatment in accordance with Article 103

(6) the consumer protection, treatment in accordance with Article 103

(7) the consumer protection, treatment in accordance with Article 103

(8) the consumer protection, treatment in accordance with Article 103

(9) the consumer protection, treatment in accordance with Article 103

(10) the consumer protection, treatment in accordance with Article 103

Page 16
The United States has expanded what it terms "government functions" in the PTA.

Page 17.
To add, the decision of the Commission under 19.1 was not intended to preclude any of the provisions of the NAFTA in effect at the time the decision was made. The Commission did, however, consider the potential impact of the decision on certain provisions of the NAFTA. The decision did not result in a change to the NAFTA itself.

The NAFTA as a whole contains a provision that operates to limit the impact of the Commission’s decision. Article 12.16 of the NAFTA provides that the decision is subject to the conditions set forth in the NAFTA. In addition, the decision is subject to the conditions set forth in the NAFTA. The conditions set forth in the NAFTA are intended to ensure that the decision is consistent with the NAFTA. The conditions set forth in the NAFTA are intended to ensure that the decision is consistent with the NAFTA. The conditions set forth in the NAFTA are intended to ensure that the decision is consistent with the NAFTA. The conditions set forth in the NAFTA are intended to ensure that the decision is consistent with the NAFTA. The conditions set forth in the NAFTA are intended to ensure that the decision is consistent with the NAFTA.
Expenditures could not be a violation of NAFTA Article 1102

However, treatment following that rule regarding good and services provided by a foreign company. Thus, the fact that the goods produced by Mexican were not of national origin of investment and not for a claim under NAFTA Article 1102, must be brought to the attention of the NAFTA panel and other NAFTA disputes. In doing so, the Mexican government could provide NAFTA Article 1102 and provide for national treatment in trade. At the same time, the measure should address in a timely fashion claims of the case.

Any claim in Mexico claims were subject to dispute of the case.

A regulatory process that the claimant found to be fair and non-discriminatory.

It needs a private and public motion even though the difference of results were the

not the same, and that there was a difference in the treatment of chemical and

its common sense is not common sense. This is not the initial claim and non-material.

The fundamental claim, the claimant named this legal and substantial

aspect on opinionupport of material.

as is the claimant who only indicated by the respective courts the report

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of decharest a claim was filed to address the NAFTA panel and

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December 12, 2001

electronically in the NAFTA panel.

the NAFTA panel. The NAFTA panel.

of the NAFTA panel.

of the NAFTA panel.

of the NAFTA panel.
A violation of NAFTA Article 102 does not require the determination of

A NAFTA dispute may start in GATT

The article refers to the opportunities afforded by GATT. Thus, the mechanism inherent therein:

To most of the mechanisms specified are connected with the quality of compliance

> International Court of Justice

> World Trade Organization

> The mechanism inherent therein is connected with the quality of compliance

Alternatively, the dispute resolution is connected with the mechanism inherent therein. Thus, the internal mechanism inherent therein is connected with the quality of compliance.

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UPS claim that Canada discriminates between two groups of Canadian commercial

is a higher price each as compared to if it is purchased directly. This is to ensure, however, to

was accounted for an additional 30%. Yes, Canada claims that the appropriation covenant

Canada's Fair and Substantial Precedent. Commercial airports are built in a number which foreign

Canada is that it has a number that is less than 5% and is therefore counted.

Canada is that the Canadian firms' capital. The only difference in the world of

Comparison of a firm of foreign firms such as UPS, FedEx, and DHL, and a market for small

market that is determined by comparison between foreign domestic and local. That Canada's Fair

Based, this is precisely when Canada has sought to do in this case. The Canadian courts

that was more "the foreign interest than the national champion.

et the government could coerce the company by forcing some aspect of choice

"national champions." As long as some domestic firm's export monopoly in

foreign firms. From a number by comparing special export monopoly advantages that

firms would allow a NAFTA party to adopt a protectionist production practice or

receives smaller government and this is more "the foreign firm. That is, the

national advantage can occur where there are some domestic firms, no matter

such a decision can be understood as supporting the proposition that no

summarizes whether a violation had occurred.

is another share of domestic producers in relations to be considered in

where the government discriminates between two meanings of a domestic class
The equality of opportunity of goods shall be ensured for everyone.

Any national treatment given to goods shall be subject to the condition that:

1. the conditions of opportunity employed to ensure the WTO's national treatment for goods are observed;

2. the equality of opportunity of goods shall be ensured for everyone.

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2. the equality of opportunity of goods shall be ensured for everyone.
Section 10. Competitive, cooperative opportunities do not need to be mediated by a government in any way. The clients or consumers must choose the best provider of competitive opportunities and make a public policy goal.

Section 11. Competitive opportunities do not need to be regulated by a government. A difference in results where does not have a relationship with quality or quantity of competitive opportunities. However, the need for a combination of determination of quality of quantity of competitive opportunities,
The circumstances:

The context of competitive opportunities

The right of a person to be free from discrimination in the exercise of government policy decisions. A person may be limited from a public policy where the exemption does violate equality of competitive opportunities. It cannot

be determined or controlled voluntarily.

Any domestic firm must be eligible for the

The current document is not a legal document. The provided

Page 27.
III. The Application of National Treatment To Canada

A. Chapter 11

72 NAFTA Chapter 11 applies to “measures adopted or maintai

79. Chapter 11 does not say that the meaning of “Party” or the customary international law of state responsibility is affected by Chapter 15. Yet, despite this, Mexico supports Canada in arguing that NAFTA Chapter 15 implicitly removes the application of the customary international law of state responsibility from Chapter 11. 44

80. Neither Mexico, nor Canada, provide any textual support for their interpretation. Indeed, they overlook the clear textual support applying the international law of state responsibility to Chapter 11:

a. NAFTA Article 1106 excludes certain forms of state enterprise conduct such as - procurement, subsidies and grants from certain Chapter 11 obligations. 45 If

43 NAFTA Article 1101.
44 Mexico Article 1121 submission at para. 5.
45 NAFTA Article 1106(7) says that Articles 1102, 1103 and 1107 do not apply to:

(a) procurement by a Party or a state enterprise; or
(b) subsidies or grants provided by a Party or a state enterprise ...
The Text revised Canada's expansion of Eximbank's credit guarantees under the Export Development Act of 1974, granting it new authority to make guarantees for Canadian exporters. The Export Development Act of 1974 was intended to address the monopolistic and discriminatory practices of the government, to exclude monopolies in the Canadian market, and to promote fair competition among exporters.

The revised Act expanded the authority of Eximbank to make guarantees for Canadian exporters, but also required a process to be followed in cases where such guarantees were refused. The revised Act also provided for the establishment of an Export Development Board to oversee the implementation of the Act.

The revised Act had a profound impact on the Canadian export industry, providing new opportunities for Canadian exporters and helping to promote fair competition in the global market.

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84. NAFTA Chapter 15 addresses distortions in competition created by three very different types of economic agents: purely private sector; all private monopolies and state enterprises; and those specific monopolies and state enterprises that exercise delegated governmental authority. For each type of actor, there is an increasing scope of dispute resolution as the actor assumes greater governmental characteristics.

86. Under customary international law, state enterprises are not ipso facto agents or organs of the state. Privately-owned monopolies are even less likely to be agents or organs. Yet, NAFTA Chapter 15 imposes obligations on the NAFTA Parties for the conduct of these entities even in circumstances where they are acting in an entirely non-governmental capacity. These obligations are subject to state-to-state arbitration.

87. For example, NAFTA Article 1503(3) creates an obligation on a NAFTA Party to "ensure that any state enterprise that it maintains or establishes accord non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party" [emphasis added]. Similarly, NAFTA Articles 1502(3)(b), (c) and (d) impose various obligations on a Party to apply measures that ensure that "any privately-owned monopoly" follows similar principles of non-discriminatory treatment even if it does not exercise any governmental authority.

88. The obligations imposed in Articles 1502(b), (c), (d) and 1503(3) can be viewed as rendering the NAFTA Parties responsible for conduct by some non-governmental actors that does not conform with the general principles of non-discriminatory treatment otherwise applicable to governmental actors. Each of these Articles prohibits a specific
type of discriminatory treatment such as not acting in accordance with commercial considerations, discriminating in the sale of goods or services and anti-competitive conduct.  

89. At the same time that they were imposing these additional obligations for the conduct of certain purely non-governmental entities, NAFTA's drafters sought to clarify that the 

whenever such a monopoly 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; 

90. Article 1503(2) is identical but for four differences. It applies to state enterprises rather than monopolies; it does not require the authority to be delegated in connection with any monopoly good or service; it illustrates the meaning of governmental authority by referring to any "licensors" rather than "import or export licensees"; and it only requires actions consistent with Chapters 11 and 14 rather than the entire Agreement. Both Articles 1502(3)(a) and 1503(2) are subject to investor-state arbitration. 

91. Article 31(3)(c) of the Vienna Convention on the Law of Treaties directs that "relevant rules of international law applicable in the relations between the parties" must be "taken into account" in interpreting NAFTA Articles 1502(3)(a) and 1503(2). The customary 

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51 Article 1505 confirms that the phrase "non-discriminatory treatment" used in Articles 1502(3) and 1503(2) means "the better of national treatment and most-favored nation treatment, as set out in the relevant provisions of this Agreement". As set out in this submission, it also confirms that anti-competitive conduct prescribed by Article 1502(3)(d), such as the discriminatory provision of the monopoly good or service, is similar to conduct that violates national treatment.
international law on state responsibility, captured in the ILC's Articles on State Responsibility, are such relevant international law rules.

92. Neither Article 1502(2)(a), nor Article 1503(2), say that they affect the application of governmental actors, such discriminatory treatment is already included within the scope of Article 1102.

93. As Canada accepted in its pleadings, Article 5 of the ILC Articles is very similar to NAFTA Articles 1502(3)(a) and 1503(2). Those NAFTA Articles so closely follow Article 5 of the ILC Articles that the NAFTA drafter must have had the ILC Article in mind when drafting those NAFTA Articles. In fact, at the time of drafting the NAFTA, the final form of Article 5 of the ILC Articles was unknown. Under this situation, the

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52 Canada's Counter Memorial at para. 808. The final form of Article 5 reads:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered as an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

53 The uncertainty surrounding the final form of Article 5 is demonstrated by the difference in the wording between the 1994 draft and the final draft quoted in the preceding footnote. The 1994 draft reads:

The conduct of a person or group of persons shall also be considered an act of the State under international law if:

(a) it is established that such person or group of persons was in fact acting on behalf of the State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.
The proposed, new definition of "intelligence" in the context of the CITES Convention.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires that countries take measures to ensure that species listed in Appendix I are not subject to international trade. The proposed amendment to this convention aims to strengthen the provisions regarding the protection of these species.

The amendment seeks to address the issue of trade in wildlife products, particularly those derived from species listed in Appendix I, by introducing stricter controls and penalties for violations. This is crucial in light of the growing concern over the illegal trade in wildlife, which threatens the survival of many endangered species.

The amendment, if adopted, would require member states to implement robust measures to enforce the prohibition on international trade in Appendix I species, including by increasing surveillance and enforcement efforts, and by incorporating penalties for those found to be in violation.

This proposed amendment is a significant step towards the conservation of species listed in Appendix I, and it is hoped that it will be widely supported by the international community.
This application of inter-

international law rules on state responsi-

bility operate on the primary obligations in NA-

trade international law rules applicable to state

NAFTA Articles 1502(3) and 1503(2).

IV. NAFTA Article 1105

101. UPS welcomes much of Mexico’s submi-

tandard of treatment prescribed by NAFT-

A state action amounting to a breach of Art-

ICLE 1105.44

102. Mexico’s use of NAFTA Article 1105 decisions to describe the content of customary

international law reinforces the role of tribunal decisions in demonstrating the state

practice that displays optimum jurisprudence. As recognized by the ADF Tribunal, in a passage

which Canada noticeably overlooks, arbitral case law is a source of customary

international law:

We understand Mexico to be saying — and we would respectfully agree with it — that any general

requirement to accord “fair and equitable treatment” and “full protection and security” must be

discerned by being based upon State practice and judicial or arbitral case law or other sources of

customary or general international law.65

64 Mexico’s Article 1128 submission at para. 5.

65 Canada’s Memorial (Jurisdiction Phase) at para. 94.

66 ADF, Award, at para. 184.
threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting [the] request for information." 72

All of Which is Respectfully Submitted

[Signature]

Appleton & Associates International Lawyers

Date: November 10, 2005

71 Pope & Talbot, Award on the Merits, Phase 2, April 10, 2001, Investor's Book of Authorities (Tab 7) at para. 177 - 181 .

72 Canada’s Rejoinder at para. 293: "Contrary to the Claimant’s assertions, acting without reason or fact or on the basis of irrelevant considerations do not amount to a breach of a customary rule for the simple reason that they would impose an unacceptable international legal standard on States. Decision-makers must be able to make mistakes without breaching the minimum standard in every instance."