

# NAFTA'S CHAPTER 11: LESSONS LEARNED FROM THE UPS CASE

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## INTRODUCTION

NAFTA'S CHAPTER 11 has become one of the more controversial aspects of free trade in North America.<sup>1</sup> The chapter has been criticized as conferring overly expansive rights to foreign investors. These rights have given rise to concerns that Chapter 11 undermines the autonomy of NAFTA governments.<sup>2</sup> Opponents have also argued that it deters NAFTA governments from passing regulations in the public interest and provides foreign investors with a competitive advantage over domestic investors.<sup>3</sup>

These concerns were once again raised in a Chapter 11 dispute between the United Parcel Service of America Inc. and Canada (the "UPS case").<sup>4</sup> United Parcel Service of America Inc. ("UPS"), an American company that provides courier services in Canada, alleged that Canada has treated and continues to treat domestic investors more favourably, putting them in breach of Chapter 11. UPS alleged that Canada Post, a crown corporation with a monopoly on general mail services, and a Canada Post subsidiary, Purolator, have unfairly benefited from government initiatives such as the Publications Assistance Program

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<sup>1</sup> Donald M. McRae, "Introduction" in Laurie Ritchie Dawson ed., *Whose Rights?: The NAFTA Chapter 11 Debate* (Ottawa: Centre for trade and policy law, 2002) 1.

<sup>2</sup> David R. Haigh, "The Management and Resolution of Cross Border Disputes as Canada/U.S. Enter the 21<sup>st</sup> Century: Chapter 11 Settlement: Frankenstein or Safety Valve?" (2000) 26 Can.-U.S. L.J. 115 [Haigh]. See also Andrew J. Shapren, "Notes & Comments: NAFTA Chapter 11: A Step Forward In International Trade Law or a Step Backward for Democracy?" (2003) 17 Temp. Int'L & Comp. L.J. 323 [Shapren].

<sup>3</sup> See generally Michael M. Hart and William A. Dymond, "NAFTA Chapter 11: Precedents, Principles, and Prospects" in Laurie Ritchie Dawson ed., *Whose Rights?: The NAFTA Chapter 11 Debate* (Ottawa: Centre for trade and policy law, 2002) 129 [Hart].

<sup>4</sup> *United Parcel Services of America Inc. v. Government of Canada*, Award on the Merits of the Arbitral Tribunal (11 June 2007), online: Government of Canada <<http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/MeritsAward24May2007.pdf>> [UPS Case].

<sup>5</sup> Shapren, *supra* note 2.

("PAP")<sup>6</sup> and the Postal Imports Agreement (the "PIA").<sup>7</sup> In addition, UPS has alleged that Purolator, as a direct competitor to UPS's courier services, has access to Canada Post's monopolistic infrastructure in breach of both the state monopoly and the investment provisions of NAFTA.

In summary, UPS used the investor protections imposed by Chapter 11, in particular the ability of a foreign investor to initiate arbitration proceedings against its host nation for government initiatives that breach Chapter 11, as an attack on Canadian domestic policies. This attack targeted policies that arguably limited UPS's expansion in Canada.<sup>8</sup> Therefore, the dispute could be distilled down to a foreign investor seeking to strictly enforce Chapter 11 in order to increase its market share and, on the other hand, Canada seeking a broad interpretation of Chapter 11 in order to limit the extent that domestic policies are subjected to external scrutiny. Thus, this dispute on its face gives rise to many of the above concerns surrounding Chapter 11 and provides relevant context for the discussion of these issues.

However, this paper will demonstrate that the UPS case does not exhibit any of the above criticisms against Chapter 11. In contradiction to the Chapter 11 critics, this paper will assert that the UPS case drastically limits the scope of investor rights and interprets Chapter 11 to provide considerable deference to a host nation's activities.<sup>9</sup> In addition, notwithstanding this debate, this paper will go on to examine the underlying rationale of Chapter 11 and determine whether this rationale can be reconciled with the UPS case. In order to accomplish these tasks the first part of this paper will provide background on Chapter 11, the second part of this paper will examine the UPS case, and the final part will analyze both the criticisms and objectives of Chapter 11 in the context of the UPS case.

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<sup>6</sup> The Publications Assistance Program is a government program that pays subsidies for postal fees to publishers who distribute periodicals qualifying as "cultural products" under this program. See *Publication Assistance Program*, online: Canadian Heritage <[http://www.pch.gc.ca/progs/ac-ca/progs/pap/index\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pap/index_e.cfm)> [PAP].

<sup>7</sup> The PIA is an agreement between the Canada Government and Canada Post that allocates various government tasks to Canada Post. The issue in the UPS Case was whether the PIA was a procurement contract within Article 1108(7)(a). See the UPS Case, *supra* note 4 at para. 123.

<sup>8</sup> Shapren, *supra* note 2.

<sup>9</sup> Please note "activities" is being used in the general sense, as including any government measures such as legislation and procurement contracts.

## CHAPTER 11

The purpose of Chapter 11 is to facilitate the flow of investments among NAFTA governments.<sup>10</sup> Chapter 11 accomplishes this task by imposing limits on the ability of host governments to take actions that may unfairly harm foreign investments or investors.<sup>11</sup> These limitations are an attempt to increase foreign investment opportunities by creating a low-risk jurisdiction with predictable and level playing fields. For example, the following list encompasses issues that foreign investors may address when determining the “risk level” of any given jurisdiction:

- What are the restrictions for making an investment?
- Are there any restrictions on operating the investment?
- Can an investor transfer funds freely?
- Is there a risk of expropriation?
- Are there any available avenues of recourse in case of a dispute?<sup>12</sup>

NAFTA's Chapter 11 includes provisions that address the above issues in an attempt to provide such a “predictable and low-risk” jurisdiction for NAFTA Party investors. These provisions have three objectives: 1) establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; 2) remove barriers to investment by eliminating or liberalizing existing restrictions; and 3) provide an effective means for the resolution of disputes between an investor and the host government.<sup>13</sup> NAFTA's Chapter 11 provisions that are relevant to the UPS case are examined more specifically below.

### The Substantive Provisions

In Articles 1102-1105 Chapter 11 sets out the standards of treatment that a host nation must accord to an investor of another NAFTA party. According to Article 1102, NAFTA Parties<sup>14</sup> “shall accord to

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<sup>10</sup> Hart, *supra* note 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> Daniel M. Price, “An overview of the NAFTA Investment Chapter: substantive rules and investor-state Dispute settlement” in Bello et al. ed., *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* (Washington, D.C.: American Bar Association, 1994) at 165 [Price].

<sup>13</sup> *Ibid.*

<sup>14</sup> Please note that “NAFTA Party” refers to either Mexico, the United States of America, or Canada; being the signatories to the NAFTA agreement.

investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors.”<sup>15</sup> In order to establish a breach under this Article, a claimant has the burden of proving three factors:<sup>16</sup>

- 1) the host nation accorded **treatment** to it with respect to establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments;
- 2) the claimant was in **like circumstances** with local investors; and
- 3) the host nation treated the claimant **less favourably** than local investors.

The first factor, “treatment,” has been given an expansive scope by NAFTA tribunals and will be determined on a practical level.<sup>17</sup> The second factor, “like circumstances,” has remained as a wholly undefined term. Tribunals have stated that “like circumstances” is an abstract concept which will depend on the facts and circumstances of any given case.<sup>18</sup> The third factor requires an “effective parity of foreign and domestic investors and investments.”<sup>19</sup> This factor is established when a host nation favours a national champion, and this finding is not mitigated by equal discrimination against other domestic investors.<sup>20</sup> However, even if a claimant can establish these three factors, the host nation can nonetheless raise a defence that the *prima facie* discriminatory treatment was necessary in “order to create a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade.”<sup>21</sup> This defence affords a host nation, in certain circumstances, the ability to justify the less favourable treatment of a foreign investor.

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<sup>15</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA] at Article 1102(1).

<sup>16</sup> UPS Case, *supra* note 4 at para. 83.

<sup>17</sup> *Ibid.* at para. 86.

<sup>18</sup> *S.D. Myers, Inc. v. Government of Canada*, Partial Award, Separate Opinion of Dr. Bryan Schwartz (12 November 2000) (UNCITRAL), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Swartz.pdf>> [*S.D. Myers*] at paras. 124 and 125.

<sup>19</sup> UPS Case, *supra* note 4, dissent at para. 60.

<sup>20</sup> *Ibid.*

<sup>21</sup> *S.D. Myers*, *supra* note 18 at para. 129.

Article 1103 provides similar protections to Article 1102 but includes treatment that is more favourable to other nations (most-favoured-nation principle).<sup>22</sup> Chapter 11 also imposes a minimum standard of treatment in Article 1105.<sup>23</sup> This provision obligates NAFTA Parties to treat investors or investments of another Party “in accordance with international law, including fair and equitable treatment and full protection and security.”<sup>24</sup> Although these provisions were included in the pleadings in the UPS case they were not as contentious of an issue as Article 1102, and therefore they will not be further discussed.

The investment dispute provisions, granting authority to bring arbitration proceedings for breaches under Chapter 11, are set out in Articles 1106 and 1107.<sup>25</sup> In addition, these Articles also include the right to bring a claim for breaches under Articles 1503(2) and 1502(3)(a).

Article 1503 requires any state enterprise not to act inconsistently with Chapter 11.<sup>26</sup> Article 1502(3)(a) applies to federal monopolies (such as Canada Post). These monopolies are permissible under NAFTA, however a NAFTA Party must ensure that the monopoly acts consistently with NAFTA wherever the monopoly exercises any delegated “regulatory, administrative or other governmental authority.”<sup>27</sup> In order for a claimant to establish a breach under this Article it must prove that the activities complained about were delegated governmental authority and not simply the exercise of other powers or rights that do not have a “government character” to them.<sup>28</sup> The rationale behind these protections is to ensure a NAFTA Party does not avoid its NAFTA obligations by delegating government authority to a monopoly.<sup>29</sup>

In addition, NAFTA sets out various exemptions to these Chapter 11 provisions. In particular, cultural property in Chapter 21 and government procurements in Article 1108(7) are exempt, regardless of any “unfair” treatment.

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<sup>22</sup> NAFTA, *supra* note 15, at Article 1103.

<sup>23</sup> *Ibid.* at Article 1105.

<sup>24</sup> *Ibid.*

<sup>25</sup> It is important to note that Article 1116 allows an investor the right to bring a claim on its own behalf, whereas Article 1117 allows an investor to bring a claim on behalf of an enterprise of another Party that the investor owns. These provisions were both examined in the UPS Case and the distinctions were determined to be only one of formality. See UPS Case, *supra* note 4 at para. 35.

<sup>26</sup> NAFTA, *supra* note 15 at Article 1503.

<sup>27</sup> *Ibid.* at 1502(3)(a).

<sup>28</sup> UPS Case, *supra* note 4 at paras. 72-77.

<sup>29</sup> *Ibid.* at para. 70.

## The Scope of Chapter 11

Both the terms “investment”<sup>30</sup> and “investor”<sup>31</sup> have been given expansive definitions in NAFTA. Furthermore, Chapter 11 applies to virtually all “measures adopted or maintained”<sup>32</sup> by a host Party which “relate to”<sup>33</sup> both investors of another Party and their investments.<sup>34</sup> In summary, tribunals have given a liberal interpretation to the scope of

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<sup>30</sup> In particular, investment includes interests in an enterprise - such as ownership, equity, debt securities, or loans - interests that entitle an owner to share in profits from both personal and real property - such as real estate and tangible and intangible property - and interests arising from the commitment of capital. However, investment does not include money claims that arise from contracts created by entities existing in different jurisdictions. See NAFTA, *supra* note 15 at Article 1139(g); Price, *supra* note 12 at 173.

<sup>31</sup> An “Investor of a Party” is a defined term that means any national or *enterprise* of a Party “that seeks to make, is making or has made an investment.” The term “enterprise” includes any enterprises that were “constituted or organized” within the NAFTA territory. Therefore, all forms of business entities are included within this definition of “enterprises.” In addition, the agreement does not outline any control requirements for these entities. For example, Japanese nationalists, who are lawful majority shareholders of a Canadian corporation would also be considered to be an “enterprise of a party.” The ramifications of these defined terms is that all business entities organized within a NAFTA Party, whether controlled by a NAFTA national or not, have standing to sue their host nation.

<sup>32</sup> Measure is defined in Article 201(1) and includes, but is not limited to, laws, regulations, practices and procedures. In addition, in *Loewen v. United States*, ICSID Case. No. ARB (AF)/98/3 at 40, the court held measures were to be given a liberal interpretation and included judicial decisions.

<sup>33</sup> It is important to note that the restrictive words “relating to” as set in Article 1101, were found to not limit Chapter 11 to measures primarily directed at investments. See *Pope and Talbot v. Canada*, Preliminary Motion (7 August 2000), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/pubdoc6.pdf>>, such as investments that could also be considered goods under Chapter 3, which finding was adopted in *S.D. Myers, Inc. v. Government of Canada*, Partial Award (13 November 2000) (UNCITRAL), online: Foreign Affairs and International Trade Canada <[http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/myerscanadapartialaward\\_final\\_13-11-00.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/myerscanadapartialaward_final_13-11-00.pdf)> at para. 294.

<sup>34</sup> NAFTA Chapter 11, Article 1101- Scope and coverage, exceptions for economic activities set out in Annex III, which includes a schedule from Mexico of activities reserved to the state.

Chapter 11 and its provisions and it is unlikely that a future tribunal would deny an otherwise valid claim because of a jurisdictional issue.<sup>35</sup>

## THE UPS DISPUTE: FOREIGN INVESTOR V. CANADA

Currently, UPS is the world's largest express carrier and package delivery company and serves more than 200 countries and territories worldwide.<sup>36</sup> UPS's Canada division is focused on providing specialized courier services. In contrast, Canada Post is a crown corporation that has a monopoly in the non-courier, regular mail delivery services. Canada Post also has a legislated Universal Service Obligation.<sup>37</sup> This obligation is evident in Canada Post's mandate; which states that it must provide accessible, affordable, inbound and outbound postal service to all addresses in Canada in a timely fashion.<sup>38</sup> Purolator, a subsidiary of Canada Post, operates as a private corporation and competes in the non-monopolistic "express consignment sector" (otherwise known as courier services). It is important to note that in addition to submissions made by both UPS and Canada, briefs were submitted on behalf of Mexico and the United States. Further, third party submissions were permitted from the Canadian Union of Postal Workers, the Chamber of Commerce of the United States of America, and the Council of Canadians as *amicus curiae*.<sup>39</sup>

### The Claims

UPS's claims against Canada were derived from Canada Post's unique infrastructure as well as its relationship with the Canadian government. These claims can be generalized into three categories:

1. Canada Post is exempt from various custom charges that in "like circumstances" UPS must pay, in contravention of Article 1102 (the "PIA claim");

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<sup>35</sup> J. Anthony VanDuzer, "NAFTA Chapter 11 to Date: The Progress of a Work in Progress" in Laurie Ritchie Dawson ed., *Whose Rights?: The NAFTA Chapter 11 Debate* (Ottawa: Centre for trade and policy law, 2002) 61 [VanDuzer].

<sup>36</sup> *UPS Company Profile*, online: Yahoo! Finance <<http://finance.yahoo.com/q/pr?s=ups>>.

<sup>37</sup> *Canada Post Corporation Act*, R.S.C. 1985, c. C-10.

<sup>38</sup> *Ibid.* at section 5.

<sup>39</sup> Foreign Affairs and International Trade Canada, *Dispute Settlement: Chapter 11, archive of legal documents*, online: Government of Canada <[http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel\\_archive.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel_archive.aspx?lang=en)>.

2. Canada's Publications Assistance Program unfairly favours Canada Post, in contravention of Article 1102 (the "PAP claim"); and
3. Purolator's use of Canada Post's monopoly infrastructure is in violation of Articles 1503(2)(a) and 1102 (the "Purolator claim").

With respect to the first claim, the Canadian government procures a variety of services from Canada Post through the PIA.<sup>40</sup> These services include data entry, material handling and duty collection. Canada Post is paid for these services.<sup>41</sup> This arrangement exempts Canada Post from various Canada Customs charges and levies.<sup>42</sup> UPS argued that in breach of Article 1102 Canada Post is unfairly exempt from Canada Customs charges, whereas under similar conditions UPS is not. With respect to the PAP claim, certain periodicals, which qualify as "Cultural Goods" under the PAP, are eligible for postal subsidies. These subsidies are paid from a government fund to a postal charge account in the name of the publishers.<sup>43</sup> The purpose for this program is twofold: 1) to connect Canadians together through the preservation of accessible Canadian cultural products, and 2) to sustain and develop the Canadian cultural publishing industry.<sup>44</sup> One of the conditions for qualifying for the subsidy is that Canada Post be used to deliver the published materials. UPS alleged that this requirement unfairly favours Canada Post, a domestic investor, contrary to Article 1102. UPS also argued that the publishers qualifying under PAP ought to have the freedom to choose the service provider they want. In part response, Canada submitted that PAP was exempt from Article 1102 through the cultural property exemptions in Chapter 21; which exclude from the Chapter 11 protections "any measures adopted or maintained with respect to cultural industries."<sup>45</sup> Canada submitted that PAP supports the Canadian publishing industry by providing "distribution assistance" to publishers and is therefore a "measure with respect to cultural industries."<sup>46</sup>

UPS admitted that the cultural industries exception applies to measures giving assistance to publishers, but it alleged that Canada Post's role in the PAP is that of a mere "delivery mechanism" and is severable from any valid cultural purpose. Finally, with respect to the

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<sup>40</sup> UPS Case, *supra* note 4 at paras. 121 and 122.

<sup>41</sup> *Ibid.* at paras. 123 and 124.

<sup>42</sup> *Ibid.*

<sup>43</sup> See PAP, *supra* note 6.

<sup>44</sup> UPS Case, *supra* note 4 at para. 146.

<sup>45</sup> See the cultural products exemption in Article 2106.

<sup>46</sup> *Ibid.* at para. 156.

Purolator claim, Canada Post has allowed Purolator to integrate aspects of its express consignment services with Canada Post's general mail monopoly infrastructure. UPS alleged that it was not afforded an equal opportunity to benefit from Canada Post's vast monopoly infrastructure and therefore Purolator was given an unfair advantage in breach of Articles 1102, 1503 and 1502(3)(a).

### **The Tribunal's Findings**

On 11 June 2007, almost seven years after UPS issued its Statement of Claim, a NAFTA tribunal ruled in favour of Canada.<sup>47</sup> The tribunal (the "Tribunal"), in a majority decision, rejected all of UPS's claims. In particular, the Tribunal held that UPS was not in "like circumstances" with Canada Post and therefore there was no breach of Article 1102. In addition, it held that any activities by Canada Post that may have violated Chapter 15 were commercial activities and not within the ambit of the Chapter 15 protections. However, there was a strong dissenting opinion that found Canada *did* violate Chapter 11. Both decisions will be examined below.

With respect to UPS's allegations under both the PAP claim and the PIA claim, the Tribunal applied the three part test referred to above for Article 1102. The Tribunal found that UPS had made out the first factor; that it had been given "treatment" by Canada. Since Canada Customs processes and assigns costs and obligations to items to be delivered in Canada and into Canada by UPS Canada, this constituted treatment.<sup>48</sup> However, the Tribunal rejected the second factor; that UPS was in "like circumstances" to Canada Post. In making this finding, the Tribunal noted that mail services (Canada Post's activities) and courier services (UPS's activities) were both dealt with by Canada Customs as different goods with different characteristics. The Tribunal provided the following list as evidence of the distinct difference of treatment of courier services versus regular mail services:<sup>49</sup>

- Couriers provide detailed advance information on shipments, thus permitting Customs to carry out risk assessments;
- Self-assessment in express mail services, whereas officers make determinations for regular postal;
- Greater security of courier shipments through secured shipping routes and trade chain controls;

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<sup>47</sup> *Ibid.*

<sup>48</sup> UPS Case, *supra* note 4 at para. 85.

<sup>49</sup> *Ibid* at paras. 114 and 115.

- Couriers need expedited clearance to meet time-sensitive delivery standards;
- The existence of contractual relationships between couriers and clients; and
- Couriers do brokerage and warehousing (regular mail services do not).

Furthermore, the Tribunal cited the *World Customs Organization's Kyoto Convention* dealing with postal traffic.<sup>50</sup> The convention referred to the practical reality that regular mail is delivered in an enormous volume and in order to deliver it in a timely fashion, "special administrative arrangements are necessary."<sup>51</sup> The convention further states that these special arrangements could be accomplished by a close relationship between post and customs.<sup>52</sup> The implication of this finding was that Canada was free to treat UPS less favourably than Canada Post, since the two entities were not in "like circumstances."

Further, the Tribunal went on to deal with each specific claim raised under Article 1102. With respect to the PIA claim, the Tribunal held that the PIA fell within the procurement exemption in Article 1108(7) and therefore was exempt from the protections of Article 1102. The Tribunal relied on the *ADF* case<sup>53</sup> for the definition of procurement; "the obtaining by purchase by a governmental agency or entity of title to...possession of, for instance foods, supplies, materials and machinery."<sup>54</sup> In determining whether the facts of this case fit under the *ADF* definition, the Tribunal referred to a Canadian decision, *Dussault*,<sup>55</sup> for evidence that the PIA was a "commercial fee-for-service contract." The Tribunal held this interpretation of the PIA fit within the *ADF* definition and therefore it was a procurement contract under Chapter 11.

The PAP claim was also found to fit under the cultural products exception in Chapter 21. In particular, the Tribunal held that, through the PAP's purpose of assisting publishers who print cultural goods, it ought to fit under the cultural industries exception. The Tribunal read the cultural industries exception broadly and found that it included any nature, scope, objective, or operation of an excepted measure that is in

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at para. 115.

<sup>52</sup> *Ibid.*

<sup>53</sup> *ADF Group Inc. v. United States of America* (9 January 2003) (International Centre for Settlement of Investment Disputes), online: U.S. Department of State <<http://www.state.gov/s/1/c3754.htm>>.

<sup>54</sup> UPS Case, *supra* note 4 at para. 131.

<sup>55</sup> *Dussault v. Canada (Customs and Revenue Agency)*, 2003 FC 973 [*Dussault*].

connection with the cultural industry.<sup>56</sup> Canada Post's involvement in the PAP was held to be one of those "connected measures."

In addition, the Tribunal rejected UPS's argument that the program's objectives should be considered independently from those of its delivery mechanism, Canada Post. More specifically, the purpose of the PAP was to deliver cultural materials nationwide. The Tribunal cited evidence that Canada traditionally has a high volume of subscription sales and a low volume of newsstand sales.<sup>57</sup> The implications being that since many deliveries exist in jurisdictions with little or no infrastructure, the program's objectives are not necessarily commercially viable without subsidization. The Tribunal therefore held that the delivery of the PAP materials through Canada Post was the best and most effective way to meet the program's objectives. Therefore the requirement that publishers use Canada Post was found to be both "rationally and intrinsically connected to assisting the Canadian Publishing industry."<sup>58</sup>

Furthermore, with respect to Article 1102, since UPS was held to be incapable of fulfilling the objectives of the program (delivering to jurisdictions with little infrastructure) it followed that Canada Post was not in competition for the PAP contracts. Since UPS could not compete, Canada did not act unfairly by not offering the program to UPS on equal terms. In addition, the Tribunal noted that other domestic express consignment service providers in Canada – like Purolator – were also not offered the contract. Therefore Canada did not prefer one express consignment provider over another, but rather it was simply a practical reality that the express consignment providers could not satisfy the objectives of the program.

With respect to claims under Chapter 15, the Tribunal held that, in order to violate the alleged Articles under Chapter 15, Canada Post's decisions or activities must have been "government" in nature. Canada argued that the decision to share its monopoly infrastructure with Purolator was a commercial activity. Canada, in its submissions, distinguished these activities, which it submitted were akin to management, expansion, and overall business decisions, from activities such as collecting custom duties, which were "government" in nature. The Tribunal agreed.<sup>59</sup>

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<sup>56</sup> UPS Case, *supra* note 4 at para. 162.

<sup>57</sup> *Ibid.* at para. 147.

<sup>58</sup> *Ibid.* at para. 168.

<sup>59</sup> UPS Case, *supra* note 4 at para. 78.

## The Dissent

In contrast to the majority, the dissenting arbitrator, Dean Ronald A. Cass (“Cass”), held that Canada had violated Articles 1102, 1502(3)(a) and 1503(2). In particular, with respect to the PIA claim, Cass held that UPS was in “like circumstances” to Canada Post. Cass acknowledged that ordinary mail was not in like circumstances with courier services (as the majority did), but held ordinary mail was not the comparable good upon which UPS was claiming unfavourable treatment; rather a comparison of UPS’s courier services, and Canada Post’s express mail services<sup>60</sup> was required. On this comparison Cass made findings that customers used these services provided from both companies interchangeably. Therefore, it was held that Canada Post was in like circumstances to UPS. Cass went on to examine the third, “less favourable treatment” factor of Article 1102. He found that Canada Customs pays handling fees to Canada Post and not to UPS, which has to perform similar tasks, and that Canada Customs does not levy the same fines and penalties against Canada Post for failure to comply with Customs regulations as it does against UPS. Therefore Cass held that Canada treated UPS less favourably than a domestic investor in violation of Article 1102.

Cass moved on to examine whether the procurement exception was a valid defence to the *prima facie* breach of Article 1102.<sup>61</sup> The defence was rejected as the PIA was held not to constitute a valid procurement. Specifically, it was stated that procurement contracts have many formal requirements that were absent in the PIA.<sup>62</sup> Cass referred to both the *ADF* and *Dussault* cases relied on by the majority, but distinguished both on the grounds that they did not deal with the definition of a procurement contract under Chapter 11. Specifically, he noted that in the *ADF* case the procurement contract in question complied with the formal requirements listed above and the issue instead was whether a state, by entering into a procurement contract, could be considered to be a party.

Cass, instead, cited the *ADF* case as an example of a procurement contract and not as a ruling that canvassed the issue of what a procurement contract is. On a further examination of the PIA, he held

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<sup>60</sup> For example, Xpresspost, Priority Courier and Expedited Parcel. See paragraph 21 of the dissent. Please note these services are distinguished from Purolator’s express consignment services.

<sup>61</sup> NAFTA, *supra* note 15 at Article 1108(7)(a).

<sup>62</sup> Cass referred to the following examples of formal requirements for a valid procurement: a tender process, formal announcement of services, and an evaluation process.

that the contract afforded Canada Post additional payments for fewer services and fewer payments for additional services. This interpretation of the PIA was found in substance to indicate a transfer of money between government departments and was less like an agreement to secure services, which it purported in form to be.

With respect to the PAP claim, Cass held that the program, through preferring Canada Post over UPS, treated UPS less favourably. In addition, Cass held that UPS could have fulfilled some, if not all, of the objectives of the PAP.<sup>63</sup> Therefore, UPS was in like circumstances with Canada Post and was receiving less favourable treatment. Cass then examined whether Canada had any justification for the structure of the PAP that *prima facie* gave rise to a breach of Article 1102.<sup>64</sup> This inquiry raised issues of the level of deference a NAFTA tribunal should afford a NAFTA Party when examining the legitimacy of that Party's public policy objectives.<sup>65</sup>

However, Cass refused to directly question Canada's motivations for the PAP and instead reframed the issue. He held that the issue was not one of whether Canada was reasonable in its decision under the PAP, but whether the procedural posture in which the justification arose was legitimate. For instance, when Canada instituted the PAP it did not offer the program to other service providers under conditions that the service providers meet certain criteria, nor was any evidence adduced whether the government canvassed this option.<sup>66</sup> In contrast, it appeared that one of the PAP's objectives was to provide Canada Post with its financial benefits, as opposed to rationalizing this decision within broader public policy goals.<sup>67</sup> In particular, the dissent held that Canada's submissions on the structure of the PAP were tailored to fit the legal issues at hand. The ability to rationalize a *prima facie* breach of Article 1102 after a dispute arose was held to frustrate the protections that Article 1102 afforded. Therefore, Cass held that Canada could not rebut the *prima facie* breach of Article 1102.

Cass also went on to reject the cultural industry exception by narrowing the definition to exclude, in certain cases, the delivery of cultural services. Specifically he held that when the delivery of cultural goods is "less centrally related to the creative acts associated with cultural industries," tribunals will be more apt to distinguish them from

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<sup>63</sup> UPS Case, *supra* note 4, dissent at paras. 108 and 109.

<sup>64</sup> S.D. Myers, *supra* note 18 at para. 129.

<sup>65</sup> UPS Case, *supra* note 4, dissent at paras. 117 and 118.

<sup>66</sup> *Ibid.* at para. 130.

<sup>67</sup> *Ibid.* at para. 130.

cultural products.<sup>68</sup> Further, Cass held that a party asserting an exception had the burden of proving that the activity in question was “reasonably connected” to that exception.

In considering this question, the dissent held that, in contrast to the “like circumstances” analysis, less deference would be afforded to a host nation’s domestic decision making policies when relying on an exception. For example, the cultural industry exception could apply to the sale of books. However, it would be overstating the exception if Canada could also subsidize Canadian-owned book stores in order to promote the sale of Canadian books. This subsidization would have no reasonable connection to the sale of books as foreign-owned book stores could equally sell the Canadian books (i.e. the better approach is to subsidize the cost of Canadian books, not the infrastructure used to sell them). Similarly, Cass stated that, if Canadian periodicals can be subsidized, this does not necessarily mean that all Canadian owned delivery mechanisms should also be subsidized. In this case the PAP payments benefited Canada Post as a general mail and package delivery entity rather than a firm engaged in a cultural industry.<sup>69</sup> Therefore, Cass held that Canada Post’s role in the PAP had no reasonable connection to the cultural industries exception.

With respect to the Purolator claim, Cass held that Canada Post’s decision to allow Purolator access to its monopoly infrastructure *was* an activity with “government” character that fit within the ambit of Article 1502(3)(a). He distinguished between decisions to purchase or sell a product or change prices, which would not be within Chapter 15, and a decision to approve a complex commercial transaction, which would. Cass found that Canada Post’s sharing of its infrastructure fell into the latter category.

In summary of both decisions, the Tribunal appeared to have afforded broad deference to a host nation’s domestic policies by reading the protective provisions in Chapter 11 narrowly and the exceptions broadly. The dissent, on the other hand, interpreted Chapter 11 more strictly and would have found Canada’s domestic policies treated UPS unfairly.

These contrasting opinions make the UPS case’s value as a precedent unclear. It has been argued that the Tribunal’s narrow reading of Chapter 11 will detract future investors from pursuing Chapter 11

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<sup>68</sup> *Ibid.* at para. 138.

<sup>69</sup> UPS Case, *supra* note 4, dissent at para. 147.

claims.<sup>70</sup> However, both the majority and the dissent not only differed with respect to their reasoning, but also with respect to their finding of facts. It could be inferred that in light of these competing opinions, the Chapter 11 provisions are wholly undefined and afford a high level of discretion. This may also indicate that there will be little predictability as to how future cases will be handled.

It could be argued that the conflicting decisions in the UPS case are attributable to the *ad hoc* nature of Chapter 11 tribunals. Commentators have suggested that *ad hoc* tribunals decrease the precedential value of earlier decisions by creating uncertainty and unpredictability in the decision making process of future cases.<sup>71</sup> This observation could be extended to each individual case due to the Chapter 11 process of utilizing party-appointed arbitrators;<sup>72</sup> as each arbitrator may have either arbitrated or acted on different conflicting cases in the past. In addition, it has been suggested that the Chapter 11 arbitration appointment process creates a risk that party-appointed arbitrators act as agents for the party that appointed them.<sup>73</sup>

The UPS case did not provide evidence to the contrary. Yves Fortier C.C., Q.C.,<sup>74</sup> was appointed to the panel by Canada and ruled in favour of Canada, and Dean Ronald A. Cass,<sup>75</sup> was appointed by UPS and ruled in favour of UPS. Both of these arbitrators, as well as the third arbitrator appointed on consent (New Zealand native Judge Kenneth Keith),<sup>76</sup> have extensive experience and backgrounds in international

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<sup>70</sup> Mr. Herman was quoted as saying winning future cases will be an “uphill battle for the investor.” See Inside U.S. Trade, “NAFTA Ruling Against UPS May Curb Investor Suits vs. State-Run Firms” (22 June 2007), online: The Council of Canadians

<[http://www.canadians.org/media/documents/NAFTA\\_Ruling\\_IUST\\_06-07.pdf](http://www.canadians.org/media/documents/NAFTA_Ruling_IUST_06-07.pdf)> [U.S. Trade].

<sup>71</sup> J.C.Thomas “Commentary: A Practitioner’s Perspective” in Laurie Ritchie Dawson ed., *Whose Rights?: The NAFTA Chapter 11 Debate* (Ottawa: Centre for trade and policy law, 2002) 100 [Thomas].

<sup>72</sup> See NAFTA, *supra* note 15 at Article 1123.

<sup>73</sup> Hart, *supra* note 3 at 159-160.

<sup>74</sup> For the profile of Yves Fortier, C.C., Q.C., see online: Ogilvy Renault <[http://www.ogilvyrenault.com/en/people\\_LYvesFortier.htm](http://www.ogilvyrenault.com/en/people_LYvesFortier.htm)>.

<sup>75</sup> For the profile of Dean Ronald A. Cass, see online: Cass & Associates <<http://cassassociates.net/ronaldcass.html>>.

<sup>76</sup> Please note the parties consented to arbitration under the UNICTRAL rules using the ICSID as the body to provide administrative services, see *United Parcel Service of America Inc. v. Government of Canada*, Decision of the Tribunal on the Place of Arbitration (17 October 2001), online: Foreign Affairs and International Trade Canada <[http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/PA\\_oct.pdf](http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/PA_oct.pdf)>.

arbitration as both counsel and arbitrators.<sup>77</sup> However, it is interesting to point out that Fortier, with prior experience as counsel for Canadian governments both federally and provincially, ruled in favour of deference for Canada's domestic decision making policies. On the other hand, Cass, a former Dean of Harvard Law and Vice-Chairman of the US International Trade Commission, took a stricter approach to enforcing Chapter 11. Therefore, with the ability of disputing parties to pick their own arbitrators with varying backgrounds and philosophies, it is further unclear what future guidance the UPS case will provide on Chapter 11 disputes.

## LESSONS LEARNED FROM THE UPS CASE

In the introduction of this paper, several issues were raised that generally criticized both the policy objectives and the substantive text of Chapter 11. The first of these criticisms alleged that NAFTA governments had abandoned their sovereignty by affording foreign investors the right to seek damages that they incur as a result of domestic policy making.<sup>78</sup> In a brief answer to this criticism, Hart and Dymond ("Hart"), writing about the future outlooks of Chapter 11, simply state that the acceptance of mutually-agreed reciprocal constraints on national sovereignty is not a shortcoming, but a goal of Chapter 11.<sup>79</sup> Hart goes on to argue that all international agreements limit national autonomy; the rationale being that states are better off as a whole when other states act in more predictable manner. While it is difficult to argue with Hart on this point, a more focused rebuttal to the first criticism requires an examination not of whether sovereignty was restricted, but more importantly whether these restrictions act to infringe otherwise valid domestic policy objectives of the host government.

With respect to the UPS case, Chapter 11 was used by UPS to attack the structure of the PAP, the PIA, and Canada Post's decision to share its monopolistic infrastructure with Purolator. On its face, one could argue that Chapter 11 was being used to frustrate valid domestic policy objectives. In particular, the PAP arguably has a valid cultural purpose: to deliver periodicals nationwide that qualify as "cultural materials."<sup>80</sup> Furthermore, Canada Post's role in this cultural purpose may be justifiably necessary as nationwide delivery may not be

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<sup>77</sup> For the profile of Judge Kenneth Keith, see online: International Court of Justice <<http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=157>>.

<sup>78</sup> Haigh, *supra* note 2. See also Shapren, *supra* note 2.

<sup>79</sup> Hart, *supra* note 3 at 152.

<sup>80</sup> PAP, *supra* note 6.

commercially feasible.<sup>81</sup> The majority in UPS cited evidence that a courier, like UPS, could not satisfy the program's requirements.

It is submitted, however, that the UPS case did not provide a threat to the above initiatives. Notwithstanding UPS's pleadings or the positions it took during the arbitration, neither the majority nor the dissenting opinion ever proceeded to question the motive or the rationale for the PAP. Instead, the majority narrowed the issue and questioned whether UPS could have carried out the objectives of the PAP. Having made a finding that UPS could not, the Tribunal rejected any allegations that the PAP infringed Article 1102. In addition, the Tribunal would also have found the PAP to fit within the cultural property exception to Article 1102. This finding, while largely based on the technical grounds referred to above, illustrates a reluctance of the Tribunal to question a host-nation's policy objectives.<sup>82</sup>

For example, the Tribunal compared regular mail services to UPS's courier services, which were found to be in "unlike" circumstances. The Tribunal did not compare Canada Post's additional express mail services (through Purolator), or whether these services were functionally equivalent to UPS's courier services, which arguably would have been a reasonable inquiry. Furthermore, the Tribunal relied on the Kyoto Convention as evidence that Canada's differential treatment of courier products versus other mail products was permissible. The Tribunal again never questioned whether this differential treatment was reasonable. This narrow definition of "like circumstances" afforded the Tribunal the ability to avoid questioning the validity of Canada's domestic policies.

In addition, even the dissent, which would have found that Canada violated Article 1102, made the following statements with respect to a Tribunal questioning a host-nation's motivation for domestic policies:

That construction [UPS urged the Tribunal to read Article 1102 to provide a narrowly limited scope for governments to only follow policy objectives that would not disadvantage foreign investors or investments] would severely constrain NAFTA Parties in pursuit of their own objectives and would greatly expand the power of NAFTA tribunals to evaluate the legitimacy of government

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<sup>81</sup> UPS Case, *supra* note 4 at para. 155.

<sup>82</sup> "While the broadly worded substantive obligations of NAFTA states in Chapter 11 may be capable of being applied in a manner that would impose significant constraints on sovereignty, they have not been applied to do so. So far only egregious state actions which were either arbitrary, clearly unfair or overtly protectionist have been found to be contrary to obligations under chapter 11" see Hart, *supra* note 3 at 157.

objectives and efficacy of governmentally chosen means...I do not believe that is the correct construction of Article 1102.<sup>83</sup>

Instead, the dissent examined whether the particular domestic policy was designed or implemented in a fair manner, and did not question the validity of the domestic policy itself. Therefore it is submitted that the UPS case provides evidence that Chapter 11, specifically Article 1102, does not unreasonably impinge on national sovereignty.

Another criticism suggested that Chapter 11 provides foreign investors with a competitive advantage over domestic investors. This argument is rooted in the basis that Chapter 11 provided an additional remedy to foreign investors that is unavailable to domestic investors. Although it is submitted that there does not appear to be any logical basis for distinguishing domestic investors from foreign investors;<sup>84</sup> simply because a foreign investor is provided with an additional remedy does not necessarily imply an advantage over domestic investors. For example, in the UPS case, domestic investors, aside from Purolator, could have benefited from UPS's litigation. If UPS had been successful, Canada may have had to open up the PAP as well as Canada Post's facilities to private companies. This would have created a benefit to competing domestic courier services and would have created an equal playing field between UPS and other domestic courier services.

Furthermore, the fact that domestic investors cannot sue for damages is an argument with little value. Historically, tribunals have awarded meager sums<sup>85</sup> that would not compensate the time and resources spent on the dispute.<sup>86</sup> Therefore, if foreign investors are willing to enforce the protections of Chapter 11 in order to create an "equal" playing field, interested domestic investors may benefit from the fruits of their labour.

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<sup>83</sup> UPS Case, *supra* note 4, dissent at paras. 117 and 118.

<sup>84</sup> Hart, *supra* note 3.

<sup>85</sup> A total of \$21 million has been paid out by Canada since 1994, in contrast to the \$900 million in total amounts claimed. The \$21 million includes the \$15 million settlement paid to Ethyl Corporation in 1998. See Cassels Brock & Blackwell LLP, Trade Law Memo 4:4, "NAFTA Investment Disputes Grind Along" (31 March 2005), online: Cassels Brock <<http://casselsbrock.com/publicationdetail.asp?aid=762>>.

<sup>86</sup> For example, the costs of the arbitration proceedings in UPS alone amounted to \$950,000 US. See UPS Case, *supra* note 4 at para. 188.

The final criticism alleged that NAFTA's Chapter 11 imposes a regulatory chill on governments.<sup>87</sup> This contention is related to the sovereignty issue mentioned above, and stems from the fact that in light of the threat of arbitration, governments will be reluctant to pass regulations. As mentioned above, it is the purpose of Chapter 11 to deter governments from taking measures that create an inequitable or unfair playing field for foreign investors or investments.

The more direct issue, however, is whether Chapter 11 deters governments from passing regulations for the public good. Although much of this debate revolves around environmental issues,<sup>88</sup> the UPS case may also provide some guidance.<sup>89</sup> In particular, the Tribunal gave expansive readings to both the procurement and the cultural industries exceptions of Chapter 11. These expansive definitions will not only provide leeway for governments to pass regulations for the public good, but will provide actual guidance as to how a government can pass regulations that are exempted from the protections imposed by Chapter 11.<sup>90</sup> Therefore, the UPS case does not indicate that Chapter 11 creates a "regulatory chill" on NAFTA Parties.

In summary, the UPS outcome illustrates a deferential attitude toward host-government decisions. The Tribunal read Articles 1102 and 1116 narrowly, while reading the procurement and cultural exceptions expansively. This ruling is also evidence that a host government's legislation will not be subject to technical challenges under Chapter 11. Therefore, the UPS case provides a contradictory example to the many criticisms against Chapter 11.

### **Does the Decision Strengthen the Objectives of Chapter 11?**

Both the Honourable David Emerson, Minister of International Trade, and the Honourable Lawrence Cannon, Minister of Transport,

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<sup>87</sup>Hart, *supra* note 3 at 152.

<sup>88</sup> For example, see generally: *United Mexican States v. Metalclad Corp.*, 2001 BCSC 1529, online: Courts of British Columbia <<http://www.courts.gov.bc.ca/jdb-txt/sc/01/15/2001bcsc1529.htm>>; and *S.D. Myers*, *supra* note 18.

<sup>89</sup> It is important to point out that the issues dealt with in the UPS Case do not provide a complete picture of the Chapter 11 debate. NAFTA Articles 1105, 1106 and 1110 have also been sources of both concern and legal disputes. For example, see generally: "*Canfor Corporation v. United States of America*," online: U.S. Department of State <<http://www.state.gov/s/1/c7424.htm>>, and "*ADF Group Inc. v. United States of America*," online: U.S. Department of State <<http://www.state.gov/s/1/c3754.htm>>.

<sup>90</sup> U.S. Trade, *supra* note 70.

Infrastructure and Communities, went on record to voice their satisfaction of the UPS case's "favourable outcome."<sup>91</sup> However, did Canadians as a whole truly benefit from the NAFTA Tribunal's decision? In other words, is it in Canadian's best interests to have a decision providing deference to domestic policies or is it more important to strengthen the rules that create an attractive jurisdiction for foreign investment? It is important to note that it is not the purpose of this section to question the UPS Tribunal's findings of facts; rather it is proposed that if the majority adopted the dissent's views, or read Chapter 11 more broadly, the outcome may have actually been more favourable to Canadians as a whole. In order to address this issue, it is necessary to review the objectives behind the formation of Chapter 11.

As referred to above, Chapter 11 was introduced to increase foreign investment opportunities by providing foreign investors with protections from government measures that could unfairly harm the investment.<sup>92</sup> It has been argued that Chapter 11 protects investors from governments prone to defending short term politics and special interest groups with narrow issues.<sup>93</sup> In theory, the Chapter ensures that longer-term interests trump short-term political calculations.<sup>94</sup>

It has also been stated by Dr. Bryan Schwartz, on the issue of multi-lateral investment treaties generally, that investor-state arbitrations are required for reasonable security for the foreign investor or investment.<sup>95</sup> Dr. Schwartz suggests that without this security, disputes may be distinguished or ignored at the discretion of the host nation for the sake of overall state-to-state diplomacy.<sup>96</sup> These objectives have a valid place within Canada's international trade agreements.

A reading of Chapter 11 that frustrates these objectives is not necessarily in the best interests of Canadians, and arguably the UPS case took such a soft line towards their enforcement. For example, the dissent questioned whether Canada Post could provide Canadian taxpayers with the most cost-effective services to carry out the obligations of the PAP. He suggested that there did not appear to be a valid reason why the benefits of the subsidy had to go to one service

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<sup>91</sup> Trade Media Relations Office, "Canada Welcomes Favourable Decision on UPS Legal Challenge" (13 June 2007), online: Government of Canada <<http://news.gc.ca/web/view/en/index.jsp?articleid=317579>>.

<sup>92</sup> Shapren, *supra* note 2.

<sup>93</sup> Hart, *supra* note 3 at 147.

<sup>94</sup> *Ibid.*

<sup>95</sup> Bryan Schwartz, "The Doha Round and Investment: Lessons From Chapter 11 of NAFTA" (2003) 3 *Asper Rev. of Int'l Bus. and Trade Law*, 1-21, at 9 [Schwartz].

<sup>96</sup> *Ibid.*

provider.<sup>97</sup> In addition, he cited evidence that publishers had expressed frustration with Canada Post and may have preferred an alternate service provider.<sup>98</sup>

These were valid inquiries which ought to have been explored, especially in a case where a host nation seeks to justify an activity that is *prima facie* discriminatory. For example, the majority afforded Canada deference on its structuring of initiatives such as the PAP and the PIA, which may not have been structured with any real rational policy objective.<sup>99</sup> In addition, with respect to procurements, the dissent argued that governments should provide transparency to the process by offering a request for proposals. This requirement is arguably a valid one; as it is in the best interests of the tax payer that the most cost effective and qualified service provider receive the contract.

Similarly, if Canada Post had to offer access to its monopoly infrastructure, with equal terms as it offers to Purolator, courier prices may have dropped. Such a price reduction may also have occurred if Purolator had to stop using Canada Post's infrastructure. If the dissent's opinions were adopted, Chapter 11 protections could have acted to create a level playing field and, arguably, provide the most competitive services for the Canadian consumer in the long run. Furthermore, finding in favour of UPS would not necessarily frustrate the objectives of the PAP, nor would it undermine the Universal Service Obligations of Canada Post. Finding for UPS may have only had the effect of creating additional choices of delivery services for some Canadians.<sup>100</sup>

## CONCLUSION

The UPS case, examined practically, demonstrates the reluctance of a NAFTA tribunal to second guess a NAFTA Party's domestic objectives. This was illustrated through a narrow reading of the

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<sup>97</sup> UPS Case, *supra* note 4, dissent at para. 114.

<sup>98</sup> *Ibid.* at para. 116.

<sup>99</sup> For example, the European Commission, in a similar dispute involving UPS and Deutsche Post (Germany's Crown mail service), fined Deutsche Post 24 million Euros under article 82 EC for granting fidelity rebates and by engaging in predatory pricing. See *UPS Europe SA v. Deutsche Post AG, et al.*, [2002] ECR II-1915.

<sup>100</sup> For example, according to Greg Kane, a UPS spokesperson, "Our primary motivation in this whole case was to develop and promote a level playing field here in Canada along the lines of the courier market. We're still striving to do that." See Tara Broughtigam, "Canada Post wins NAFTA challenge launched by UPS" *Toronto Star* (13 June 2007), online: The Toronto Star <<http://www.thestar.com/Business/article/224634>>.

Chapter 11 investor protection sections, in particular Article 1102, and an expansive reading of two exceptions (cultural products and procurements). The case did not provide evidence that Chapter 11 unreasonably restricts national autonomy, nor that it deters governments from passing regulations for the public good. However, there was a strong dissenting opinion which differed greatly from the majority. As a result, similar cases in the future may not be interpreted the same way.

On a theoretical level, a favourable UPS outcome would have given more credence to the Chapter 11 investment protections. Since the purpose of Chapter 11 is to increase foreign investment opportunities by liberalizing host government initiatives, a decision in favour of UPS would have given effect to this objective. In addition, the case would have acted as a deterrent against host governments from distorting markets. As a result of the UPS case, Canadians may be paying tax dollars to programs and state run services that could be run more cost-effectively in a liberalized market setting.