



Steven Shrybman
sshrybman@goldblattpartners.com
Our File No. 15-1913

March 9, 2016

Mr. Peter Denley
National Grievance Officer
Canadian Union of Postal Workers
377 Bank Street
Ottawa ON K2P 1Y3

Dear Mr. Denley:

Re: The Transpacific Partnership: Implications for Postal Services in Canada

You have asked for our opinion about the potential impacts of the Trans-Pacific Partnership (“TPP”) on the activities and mandate of Canada Post.

The TPP has been described as “the most comprehensive trade agreement in the world,” and as you know, Canadian commitments under NAFTA and the GATS already impose broad constraints on the authority of Canadian governments at all levels to exercise their constitutional, legislative and regulatory prerogatives. Nevertheless, the TPP expands the scope of these constraints in several areas of public policy and law. While some of these concern matters of international trade, such as new tariff rules regarding trade in autos, many others predominantly concern matters of domestic policy and law, such as patent protection for pharmaceutical products, local procurement rules, the regulation of financial services, and importantly for present purposes, postal services.

The following analysis examines the extent to which the TPP, if implemented, would establish new rules that impinge upon a) the legislative and regulatory authority of the federal government concerning postal services, and b) the current and future activities of Canada Post. As explained below, the most important consequences of these expansive ‘trade’ rules are the following:

1. TPP rules concerning “Cross-Border Trade in Services” include a detailed annex on “Express Delivery Services” which would impose far more explicit constraints on government authority concerning postal services and the activities of Canada Post than do those in NAFTA or the GATS. These new rules would not only limit the ability of Canada Post to expand current services such as Xpresspost and those

- provided by its subsidiary Purolator, but would threaten its ability to maintain its current business model of integrated express delivery and letter mail services.
2. TPP rules concerning “State Owned Enterprises” (SOEs) and monopolies also expand and make more explicit similar constraints in NAFTA and the GATS on the conduct of Canada Post in meeting its mandate to provide universal postal services to Canadians while maintaining a viable business model that includes express delivery services.
 3. The TPP expands the scope for investor-state dispute settlement (“ISDS”) which has proven to be the most pernicious feature of new ‘trade’ liberalization rules and one that many nations are now attempting to curtail. In so doing, the TPP raises the spectre of another protracted investor-state claim challenging the activities of Canada Post, like the *UPS v. Canada* case, this time buttressed by TPP provisions concerning SOEs and monopolies and the Annex on Express Delivery Services, which disparage the integration of monopoly (letter-mail) and commercial (express delivery) services that is at the heart of the Canada Post business model.
 4. TPP rules concerning postal services closely reflect the objectives of the private courier industry, notably Fedex and UPS, which committed substantial resources to influencing TPP negotiations. The objective of the industry is to curtail or even eliminate competition from public sector service providers, particularly in the market for express delivery services. In aid of that objective, the industry is seeking an enforceable right to take advantage of Canada Post’s national infrastructure (sales, collection and delivery) – without being encumbered by its public service obligations.
 5. In an economic environment in which advantage goes to the enterprise that can innovate and respond to new market demands, such as those being driven by e-commerce, the effect of the TPP rules is not only to lock public sector service providers into the *status quo*, but through new rules on express delivery services, SOEs and monopolies, and the “ratchet mechanism” - to ultimately reduce or even eliminate their capacity to compete in the new marketplace.

In reviewing the TPP, one is struck not only by its complexity, but also by the redundancy of rules that seek to limit the role of public sector postal services. These rules entrench a neo-liberal model that seeks, through deregulation and privatization, to reduce or eliminate the role of public sector service providers.

Given the determined efforts by and demonstrable success of the courier industry in shaping the formulation of TPP rules, it would be prudent to anticipate the aggressive use of the regime to promote the interests of this industry. While this may ultimately result in trade challenges and investor claims, the more pervasive impacts are likely to be felt as a chill on government policy

or regulatory reform concerning postal services as industry lobbyists will be quick to remind any government of the constraints imposed by the TPP.

In short, while TPP rules present no *direct* threat to the letter mail mandate of Canada Post, they impose significant constraints on its ability to maintain a business model that depends upon the integration of express package, courier and letter mail services – i.e. Xpresspost and the courier services of its subsidiary, Purolator.

Furthermore, TPP rules would establish new barriers that would limit Canada’s options for empowering Canada Post to respond to new challenges and emergent opportunities in the marketplace. Given the importance of courier and express delivery services to the Canada Post service model, and the vital role that innovation plays in the success of any business entity, it is not unreasonable to regard the TPP as presenting a material, as well as an existential threat to the future of Canada Post.

To our knowledge there are no putative benefits to be gained by Canada in respect of commitments pertaining to postal or courier services. Nevertheless, and although Canada had the authority to exempt the postal sector from some or all TPP rules as other parties – most notably Japan and Singapore – have done, the Harper government, for reasons it chose not to explain, declined to do so.

Section 1. Canada’s Current International Trade Commitments

A. Canada’s Universal Postal System and International Trade Rules

The Trans-Pacific Partnership (“TPP”) is not the first trade agreement to undermine the policy autonomy of the Parliament of Canada and the role of the Canada Post Corporation (“Canada Post”) in respect of postal and related services.

Canada is already subject to overlapping rules affecting postal services in the General Agreement on Trade in Services (“GATS”) and the North American Free Trade Agreement (“NAFTA”).

In large measure, these ‘trade’ rules reflect the agenda of large transnational courier and express delivery companies (the “courier industry”) that for over twenty years have been engaged in a campaign to limit the role of public postal services. While efforts to persuade governments to deregulate postal services as a matter of domestic policy have generally failed, the same objectives are being pursued through trade negotiations.

Previous assessments have described the multi-pronged strategy of companies like UPS and FedEx, which has included:¹ (1) lobbying for trade rules to curtail or even eliminate the role of public postal services, particularly in respect of express delivery and courier services; (2) engaging in strategic litigation against the U.S. and German postal services;² and (3) initiating a NAFTA investor-state claim against Canada, *UPS v. Canada*.

Fortunately, the courier industry largely failed to achieve its objectives during GATS negotiations, and UPS lost its NAFTA claim against Canada. It has, however, had much more success in respect of bilateral trade agreements, or preferential trade areas (“PTAs”) between the United States and other countries. For example, the 2004 Australia-United States Free Trade Agreement included specific provisions designed to restrict state postal monopolies’ ability to compete with express delivery services in the non-monopoly market.³ The 2003 Chile-United States Free Trade Agreement included a provision that requires Chile – but not the U.S. – to refrain from imposing new restrictions on express delivery services in its territory.⁴

For the reasons described below, the TPP can be seen as representing the high water mark for efforts by the courier industry to establish international trade rules that serve its objectives.

These developments are taking place at a time when public postal services are under increasing pressure to fulfil their service mandates in consequence of the ever-decreasing demand for traditional letter mail services. The information technology (IT) revolution and the advent of new communication technologies and social media networks have contributed to a decline of physical mail volumes since the 1990s.⁵ These developments threaten Canada Post’s ability to fulfill its “universal service obligation” under both Canadian and international law.⁶

¹ Scott Sinclair, *The GATS and Canadian Postal Services* (Ottawa: Canadian Centre for Policy Alternatives, March 2001) [Online: <https://www.citizen.org/documents/Sinclair%20POSTAL.pdf>] (“*GATS and Canadian Postal Services*”); and Jim Grieshaber-Otto and Scott Sinclair, *Return to Sender: The Impact of GATS “Pro-Competitive Regulation” on Postal and Other Public Services* (Canadian Centre for Policy Alternatives, 28 January 2004) [Online: <https://www.policyalternatives.ca/publications/reports/return-sender>] (“*Return to Sender*”).

² For example *Federal Express Corporation v. United States Postal Service*, 40 F.Supp.2d 943 (W.D.Tenn. 1999); *UPS Europe SA v. Commission* (Deutsche Post AG intervening) (T-175/99) [2002] All ER (D) 307 (Mar).

³ *Australia-US Free Trade Agreement*, Art. 10.12.3.

⁴ *Chile-US Free Trade Agreement*, Chapter 11, Annex 11.6.

⁵ Siva Somasundram and Iain Sandford, “Regulation of postal services in a changing market environment: lessons from Australia and elsewhere”, in *WTO Domestic Regulation and Services Trade: Putting Principles into Practice*, eds. Aik Hoe Lim, Bart De Meester (Cambridge: Cambridge University Press, 2014) at pp. 182-183.

⁶ Canada’s obligations under international law include those set out in Article 3.1 of the Universal Postal Convention, that obligates it to ensure that all “users/customers enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices.” As set out in section 5 of the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, the purpose of Canada Post includes providing high-quality, affordable postal and related services to all Canadians in all regions of the country by means of a government institution that is accountable. Despite Canada’s vast geography, Parliament required Canada Post to provide a standard of service that is “similar with respect to communities of the same size” and that

In order to remain financially sustainable while still achieving its public service mandate,⁷ including universal service, Canada Post has adopted a strategy of providing services that complement its primary mandate concerning letter mail and that are increasingly in demand. These include parcel and express delivery services (i.e. Xpresspost, as well as those of its subsidiary, Purolator). Thus, while letter mail volumes continue to decline, the opposite is true for express delivery and courier services, which are growth areas in part due to the rise of e-commerce.⁸ It is in respect of these non-letter mail service areas that the TPP poses the greatest threat.

Before turning to the relevant provisions of the TPP which are of greatest concern, the following briefly describes the GATS and NAFTA rules concerning postal services, which provide the baseline against which TPP rules need to be evaluated.

(i) The General Agreement on Trade in Services (“GATS”)

The GATS includes extensive rules that impinge upon policy, law and practices relating to postal and express delivery services.⁹

The application of these rules to Canada Post has been thoroughly analysed in a study published by the Canadian Centre for Policy Alternatives, written by Scott Sinclair.¹⁰ While Canada did not make specific commitments in respect of postal services under the GATS *per se*, it did make extensive commitments in the courier services sector. As noted by Mr. Sinclair,

By listing courier services as one of its GATS specific commitments, Canada triggered the application of the ‘abuse of monopolies’ provisions contained in Article VIII.2. This decision has thus exposed the Canadian government and Canada Post to GATS complaints that it abuses its letter-mail monopoly position to compete unfairly in competitive services such as express delivery.¹¹

“meet[s] the needs of the people in Canada” (s. 5(2)(b)). In addition to broad objectives, Canada Post must also maintain: uniform postal rates throughout the country, standards regarding frequency of collection and speed of delivery, and appropriate proximity of postal boxes and post offices (*Return to Sender, supra* at pp. 110-111).

⁷ Canada Post is required by statute to operate on a financially self-sustaining basis and return an annual dividend in the form of a payment to the general revenues of the federal government. *CPCA, supra*, ss. 5(2)(b), 27.4.

⁸ Zhang, *supra* at p. 389.

⁹ World Trade Organization, “Services: rules for growth and investment” [Online: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm].

¹⁰ *GATS and Canadian Postal Services, supra* at pp. 23-25. See also *Return to Sender, supra*.

¹¹ *GATS and Canadian Postal Services, supra* at p. 26.

The specific commitments regarding courier services trigger the application of “National Treatment” and “Market Access” obligations. Under the former, foreign services or service suppliers are to be given treatment no less favourable than that given to domestic providers, and under the latter, countries are prohibited from placing “limitations” on, among other things, the number of service suppliers.¹²

Canada has faced repeated accusations by the courier industry that it violates GATS rules, notably that Canada Post abuses its monopoly position through “cross-subsidization”.¹³ The allegation, in short, is that Canada Post uses revenues from its exclusive privilege letter operations to subsidize its express courier operations, both its own operations (Xpresspost) and those of its subsidiary (Purolator). Numerous impartial investigations and reviews by, among others, Canada Post’s auditors, have consistently established that there is no evidence of cross-subsidization.¹⁴ This issue has never been litigated before a WTO panel.

Efforts to expand the scope of the GATS, and to extend stringent “pro-competitive” rules from the telecommunications sector to the postal services sector,¹⁵ were generally unsuccessful. Had they succeeded, the result would have surely undermined core features of Canada Post’s public interest mandate and the viability of a public postal system.¹⁶

(ii) The North American Free Trade Agreement (“NAFTA”)

NAFTA contained no provisions explicitly referring to postal services. However, due to NAFTA’s “top-down” approach, the general commitments in the agreement automatically covered all non-exempted sectors, including postal and express delivery services. This also meant that foreign investment in such services was subject to Chapter 11 rules concerning investment, which include investor-state dispute settlement (“ISDS”). Chapter 11 rules require Canada to accord foreign investors a number of broadly defined rights that seriously limit its policy and regulatory options, as well as the activities of its monopolies and state enterprises such as Canada Post when they exercise the “regulatory, administrative or governmental authority that the Party has delegated to it.”

In January 2000, UPS launched an investor-state claim against Canada alleging numerous violations of NAFTA rules and seeking \$160 million in damages. A key aspect of the allegations was that Canada Post was illegally cross-subsidizing competitive courier services by, among

¹² *GATS and Canadian Postal Services, supra* at pp. 29-35.

¹³ *GATS and Canadian Postal Services, supra* at pp. 6, 26.

¹⁴ See a summary of these reviews and investigations in *GATS and Canadian Postal Services, supra* at p. 26; *Return to Sender, supra* at p. 123.

¹⁵ *Return to Sender, supra*.

¹⁶ *Return to Sender, supra* at p. 111-112.

other things, granting Xpresspost and Purolator privileged access to its infrastructure of post offices and delivery networks.¹⁷ Canada persuaded the majority of the panel that the actions of Canada Post at issue were neither those of the Government of Canada, nor carried out in the exercise of delegated governmental authority, and therefore were not amenable to ISDS. Having found that UPS was not entitled to sue Canada under ISDS procedures, the panel did not comment on whether Canada Post's courier services and/or its relationship with Purolator were in breach of NAFTA requirements. That question could only be resolved if the matter was raised by the U.S. or Mexico under state-to-state dispute procedures.

In addition to NAFTA provisions concerning investment, Chapter 15: "Competition Policy, Monopolies and State Enterprises", imposes obligations on state-owned monopolies to adhere to commercial considerations, rules respecting non-discrimination in the trade of monopoly goods and services, and prohibitions against the abuse of monopoly positions to engage in anti-competitive conduct in non-monopoly markets, and these are discussed further below.

B. The Courier Industry's Influence on International Trade Rules

As noted, the courier industry largely failed to achieve its objectives of broadening the GATS to include "pro-competition" rules on postal services (akin to those in place for telecommunications). In *UPS v. Canada*, it failed to convince the majority of the panel that Canada Post's commercial decisions should be subject to investor-state arbitration. UPS also lost a high-profile claim under European Commission rules alleging cross-subsidization by Deutsche Post in its acquisition of DHL (a large commercial courier business). It has, however, had considerably more success in influencing a series of preferential trade agreements ("PTAs") between the United States and other countries. As described by Ruosi Zhang, a counsellor in the Trade in Services Division of the WTO Secretariat:

Of the twelve PTAs reviewed that involve the United States, all but two (those with Jordan and Singapore) contain additional disciplines for express delivery services, either as part of the chapter on crossborder trade in services or in a dedicated annex to it. Obviously, this reflects the strong interest of the United States and its industry in greater market openings in this sector. These disciplines typically include a definition of express delivery services (along the lines put forward by the United States in its GATS proposal in 2000), a confirmation of the parties' intention to at least maintain the level of market access existing at the moment of signature, and some competition safeguards, – for example preventing the direction of revenues derived from monopoly postal

¹⁷ *UPS v. Canada*, *supra* at para. 11; see also *GATS and Canadian Postal Services*, *supra* at pp. 27-28.

services to confer an advantage to competitive suppliers of express delivery services.¹⁸

Prof. Zhang describes the above rules as a “great victory for the United States” given the fact that few countries had undertaken commitments under GATS with respect to postal and courier services.¹⁹ She notes that “the general level of commitments on postal and courier services in PTAs is significantly higher than GATS commitments.”²⁰

Very similar rules to those in the PTAs concerning express delivery services have been incorporated into the TPP by Annex 10-B to the Cross-Border Trade in Services Chapter. As with the PTAs and described below, the “Express Delivery Services Annex” in the TPP locks in current levels of market access, and explicitly prohibits cross-subsidization of competitive suppliers of express delivery services by postal monopolies.

These TPP rules are clearly testament to the success of courier industry lobbying efforts.²¹ As acknowledged by the U.S. Trade Representative, the Express Delivery Services Annex was included “to address the unique challenges private suppliers face when competing with national postal entities in express delivery” and includes “new commitments that address longstanding issues for U.S. services suppliers.”²²

In addition to the Express Delivery Services Annex, other elements of the TPP can also be seen as directly responsive to industry influence, notably those set out in Chapter 17 concerning “State-Owned Enterprises and Designated Monopolies”, discussed below.

Section 2. Impact on Current Canada Post Services

For the following reasons, the TPP can be expected to adversely impact Canada Post’s current operations by providing new grounds for courier industry attacks (by way of state-to-state or investor-state claims) on Canada Post’s ability to maintain its current business model of

¹⁸ Ruosi Zhang, “The liberalization of postal and courier services: ready for delivery”, *Opening Markets for Trade in Services Countries and Sectors in Bilateral and WTO Negotiations*, eds. Juan A. Marchetti, Martin Roy (Cambridge: Cambridge University Press, February 2009) at pp. 396-397.

¹⁹ Zhang, *supra* at p. 397.

²⁰ Zhang, *supra* at p. 394.

²¹ C. Robert Gibson and Taylor Channing, “Here’s how much corporations paid US senators to fast-track the TPP bill”, *Guardian* (27 May 2015) [Online: <http://www.theguardian.com/business/2015/may/27/corporations-paid-us-senators-fast-track-tpp>]; and Dave Johnson, “Will TPP Kill the Post Office?”, *Huffington Post* (5 June 2015) [Online: http://www.huffingtonpost.com/dave-johnson/will-tpp-kill-the-post-of_b_7523570.html].

²² United States Trade Representative, *TPP: Made in America*, “Chapter 10: Cross-Border Trade in Services” [Online: <https://medium.com/the-trans-pacific-partnership/cross-border-trade-in-services-2e3bdad73583#nkc5phonx>].

integrating the delivery of courier and express delivery services, including those of Xpresspost and Purolator, with those of its letter mail mandate.

C. Express Delivery Services Annex (Annex 10-B)

The Express Delivery Services Annex goes even further than the PTAs because it not only defines express delivery services and locks in market access, but also requires countries to define the scope of their postal monopolies. Thus, the market access provision, in conjunction with definitional requirements, clearly constrains Canada's future policy and regulation options concerning the mandate and role of Canada Post. More immediately problematic, however, are the provisions on cross-subsidization and postal monopolies which provide strong support for the contention that Canada Post is improperly assisting its express delivery services, both those of Xpresspost and Purolator.

(i) Key provisions

The most important elements of Annex 10-B to Chapter 10: Cross-Border Trade in Services,²³ include the following:

1. "Express Delivery Services" are defined as:

[T]he collection, transport and delivery of documents, printed matter, parcels, goods or other items, on an expedited basis, while tracking and maintaining control of these items throughout the supply of the service. Express delivery services do not include air transport services, services supplied in the exercise of governmental authority, or maritime transport services.²⁴

2. Canada Post's monopoly concerning certain letter mail is expressly exempted from this definition.²⁵ However, the activities of Purolator would fall within the definition of express delivery services, as would services such as Xpresspost when the material being transported falls outside the definition of "letters" under s. 15(1) of the *Canada Post Corporation Act* and is therefore excluded from its monopoly.

²³ Despite the appellation "cross-border," and as is true for the GATS, these putative 'trade' disciplines apply primarily to services delivered domestically by local companies (usually subsidiaries of U.S. or EU based transnational corporations).

²⁴ *TPP*, Chapter 10, Annex 10-B, s. 1.

²⁵ *TPP*, Chapter 10, footnote 11(c).

3. The Annex locks in current levels of market openness in the express delivery services market as of February 4, 2016, the date the TPP was signed.²⁶ This provision is framed in terms of the “desire” of the parties, and is backed by a consultation mechanism which arguably would not include recourse to dispute resolution under Chapter 28. Even so, the Annex would stand in the way of any future expansion of Canada Post’s monopoly into this market.
4. The Annex specifically prohibits the use of revenues derived from a postal monopoly to “cross-subsidize” its own or any other competitive supplier of Express Delivery Services, regardless of ownership.²⁷
5. The Annex requires governments to ensure that a postal monopoly does not “abuse its monopoly position to act in the Party’s territory in a manner inconsistent with the Party’s commitments under Article 9.4 (National Treatment), Article 10.3 (National Treatment) or Article 10.5 (Market Access) with respect to the supply of express delivery services.”²⁸ This is a broader and more explicit requirement than exists under NAFTA’s general rules related to Monopolies and State Enterprises.²⁹
6. The Annex prohibits Parties from requiring a foreign express delivery service supplier of another country to provide basic universal postal service, or assess fees or other charges for the purpose of funding the supply of another delivery service.³⁰

(ii) Locking in deregulation and precluding future reform

While some of the above commitments are similar to those made under the GATS and NAFTA, the Express Delivery Services Annex goes further by expanding upon and delineating these obligations. Moreover, as Canada made no specific commitments under the GATS in respect of postal services *per se* (although it made commitments in respect of courier services), the Annex also creates new commitments concerning these services. Furthermore, the service classification system adopted by the GATS to delineate the scope GATS commitments defines postal services – for which Canada has made no commitments – broadly to include express delivery services rendered by a national postal administration.³¹ In other words, the Annex effectively erases the distinction between public and private services in this sector that the GATS preserved.

²⁶ *TPP*, Chapter 10, Annex 10-B, s. 4. The *Canada Post Corporation Act* grants Canada Post the “sole and exclusive privilege of collecting, transmitting and delivering letters to the addressee thereof within Canada” (s. 14(1)).

²⁷ *TPP*, Chapter 10, Annex 10-B, s. 5.

²⁸ *TPP*, Chapter 10, Annex 10-B, s. 6.

²⁹ *NAFTA*, Art. 1502(3)(a), (c). This topic is further addressed below in the section discussing Chapter 17 of the *TPP*.

³⁰ *TPP*, Chapter 10, Annex 10-B, s. 7.

³¹ *GATS and Canadian Postal Services*, *supra* at p. 31

Since express delivery services are defined, in part, as excluding Canada's postal monopoly as defined in statute and regulation, any expansion of Canada Post's monopoly would arguably impinge upon market openness. For example, in 2010 the Harper government deregulated the market for outbound letter mail,³² a 'reform' that was brought about through omnibus legislation. Nevertheless, because this reduction in Canada Post's mandate expanded market access for express delivery service suppliers, it would be irreversible under TPP rules.

Similarly, the prohibition on requiring a foreign express delivery service supplier to provide universal service, or paying them to do so, means that if another element of Canada's postal monopoly is abandoned, and subsequently "locked in" by the market access rule, Parliament may be unable to achieve universal service objectives through other means.

(iii) Can Canada Post maintain express delivery services post-TPP?

Arguably, the most problematic elements of the Annex are those concerning cross-subsidization³³ and "abuse of monopoly position".³⁴ These rules directly reflect industry efforts to curtail the ability of Canada Post (as well as the postal service monopolies of other countries, including the U.S.) to integrate monopoly services (certain addressed letter mail) with express delivery services such as those of Xpresspost and Purolator. This is of particular concern in light of the importance of this integrated service model to the financial sustainability of Canada Post.

We are aware of no evidence to support the contention that Canada Post directly subsidizes its internal courier service operations, or Purolator's operations, with its letter mail monopoly revenues. However, the Annex is not necessarily limited to "direct" subsidies. The language is of subsidies *simpliciter*, which may include indirect subsidies. Actors whose interests include capturing a greater market-share of express delivery services in Canada can easily argue that by granting Purolator (and Xpresspost) access to Canada Post's infrastructure, which is itself funded by its monopoly revenues, Canada Post is indirectly subsidizing select service providers to the exclusion of others.

There is considerable debate about the precise meaning of cross-subsidization both generally and in the postal services context. Any allegation of non-compliance with TPP rules would raise complex issues about the elements of cross-subsidization and the evidence required to prove it.³⁵

³² *Canada Post Corporation Act*, RSC 1985, c C-10, s. 15; 2010, c. 12, s. 1885. Letters "intended for delivery to an addressee outside Canada" are now excluded from the exclusive privilege of CPC. There is little doubt that this change was influenced at least in part by the courier industry. See, for example, reports on lobbying by FedEx of both Canada Post and federal cabinet ministers: Barrie McKenna, "Ottawa's invite to courier business party must be in the mail", *Globe and Mail* (November 7, 2010) [online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/ottawas-invite-to-courier-business-party-must-be-in-the-mail/article4349159/>].

³³ *TPP*, Chapter 10, Annex 10-B, s. 5.

³⁴ *TPP*, Chapter 10, Annex 10-B, s. 6.

³⁵ See e.g. Somasundram, *supra*, at pp. 189-190.

When UPS made allegations of cross-subsidization against Deutsche Post before the European Commission, they were rejected as unproven, following lengthy litigation.³⁶

It is noteworthy that the TPP prohibition on cross-subsidization gives international expression to U.S. law as set out in the *Postal Accountability and Enhancement Act*, which prohibits the “subsidization of competitive products by market-dominant products.”³⁷ UPS and FedEx have continued to invoke these provisions to allege cross-subsidization by the United States Postal Service. One recent U.S. study commissioned by UPS makes the case in a manner that would clearly apply to Canada Post. It contends that:

Cross subsidization of the type practiced by the USPS can occur only if the USPS enjoys certain advantages over private companies. The Postal Service’s advantages are ultimately based on its monopoly over letter-mail delivery, which vitally supports the USPS’s vast delivery infrastructure, including some 35,600 retail offices, 211,300 vehicles, 244,365 routes, and 154 million delivery points. This network infrastructure enables the USPS to draw on the sizable economies of scale and scope created largely by its institutional investments, in order to reduce the delivery costs for its competitive products, which depend on the same offices, vehicles, routes and delivery points as letter mail. While private companies such as FedEx and UPS must cover all of their delivery costs from the revenues from their package and shipping services and products, USPS can finance some of its package-delivery costs when it competes directly with FedEx, UPS and others through revenues from its letter mail monopoly.³⁸

In addition to the prohibition of cross-subsidization, the requirement that governments ensure that a postal monopoly does not “abuse its monopoly position” in a manner inconsistent with National Treatment and Market Access in its supply of express delivery services, also clearly threatens the preferred access to Canada Post infrastructure that Purolator enjoys. Indeed, even the use of Canada Post infrastructure for Xpresspost services, which are supplied directly by Canada Post, could be challenged for violating these provisions.

³⁶ In *UPS Europe SA v. Commission* (Deutsche Post AG intervening) (T-175/99) [2002] All ER (D) 307 (Mar), UPS alleged that Deutsche Post was able to acquire a controlling interest in its competitor in the express market, DHL, only as a result of the revenue it obtained on its reserves services.

³⁷ Pub. L. 109-435, 120 Stat. 3198, 39 U.S.C. §3633(a)(1).

³⁸ Robert J. Shapiro, “How the U.S. Postal Service Uses Its Monopoly Revenues and Special Privileges to Subsidize Its Competitive Operations” (October 2015) [Online: http://www.sonecon.com/docs/studies/Study_of_USPS_Subsidies_for_Its_Competitive_Operations-Robert_Shapiro-Sonecon-October_21_2015.pdf].

Of course nothing in the TPP would preclude a private courier company from leveraging any of its infrastructure to compete in related or unrelated businesses. Furthermore, and as noted, numerous independent investigations, including a 1993 investigation by the Competition Bureau and related independent study by an accounting firm,³⁹ have established that Canada Post does not “cross-subsidize” its courier services with its letter mail revenues.⁴⁰ However, if a broader definition of cross-subsidization is adopted by a panel interpreting the TPP, the result, unless Canada Post abandons express delivery services, would allow private courier companies like UPS to take advantage of Canada Post’s letter mail infrastructure without any correlating obligation to provide universal service to Canadians, and no such universal service obligation could be required of them. This is, as noted, clearly the objective of courier industry in pushing for the Annex’s rules.

(iv) Enforcement limited to state-to-state

Had the panel in the *UPS v. Canada* arbitration been applying the rules in Annex 10-B, it would very likely have reached a different result on the question of exclusive access to Canada Post infrastructure.

Importantly, Chapter 10, including the Express Delivery Services Annex, is expressly exempted from the application of investor-state (as opposed to state-to-state) enforcement under the TPP, as set out in a footnote as a clarification to Article 10.2.2(a) of the Chapter.⁴¹ This is important because Annex 10-B, s. 6 expressly stipulates that entities such as Canada Post must be made to comply with National Treatment, an obligation that could otherwise provide a foundation for the contention that investor-state dispute resolution is available to enforce the Annex.

However, there is no reason to be sanguine about the risk of a state-to-state dispute under TPP rules to enforce the Annex. Furthermore in any investor-state dispute concerning postal services there is little doubt that Annex 10-B would be invoked as an aid to ‘interpret’ the rights of private investors under TPP investment rules. While the U.S. would be unlikely to challenge an integrated service model that its own postal service relies upon, other TPP Parties with no similar domestic programs⁴² might be prompted by the express service delivery industry to do so.

³⁹ *GATS and Canadian Postal Services*, *supra* at p. 26.

⁴⁰ United States Government Accountability Office, GAO/GGD-97-45BR *Postal Reform in Canada* (1997) at 63.

⁴¹ *TPP*, Chapter 10, footnote 1. “For greater certainty, nothing in this Chapter, including Annexes 10-A (Professional Services), 10-B (Express Delivery Services), and 10-C (Non-Conforming Measures Ratchet Mechanism), is subject to investor-State dispute settlement pursuant to Section B of Chapter 9 (Investment).”

⁴² For example, New Zealand, Malaysia and Singapore have all privatized the delivery of postal services. See Zhang, *supra* at p. 382, 386-7.

D. State-Owned Enterprises and Designated Monopolies Chapter (Chapter 17)

Chapter 17 of the TPP imposes obligations on parties to regulate how state-owned enterprises (“SOEs”) and designated monopolies operate. Canada Post meets the definitions of “state owned enterprise,” as well as those of a “government monopoly” and “designated monopoly” in respect to its activities in the monopoly letter market. Purolator also appears to be a SOE in consequence of Canada’s indirect ownership through Canada Post.⁴³ Chapter 17 does not itself prohibit the use of SOEs or the establishment of monopolies controlled by the government.⁴⁴ Rather, it seeks to limit their scope and to regulate their conduct.

The applicable rules for SOEs and monopolies vary depending on their nature and functions. SOEs are subject to stricter constraints with respect to their commercial activities. Monopolies are subject to a parallel set of requirements, but which only apply to their purchase or sale of monopoly goods.

Commercial activities are defined as “activities which an enterprise undertakes with an orientation toward profit-making and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise.” A footnote to this definition clarifies that activities undertaken on a cost-recovery basis do not constitute commercial activities.⁴⁵

The *Canada Post Corporation Act* provides that Canada Post is to “conduct its operations on a self-sustaining financial basis”.⁴⁶ Alone, this provision is ambiguous and can be interpreted as imposing either a commercial or a cost recovery mandate on Canada Post. However, the requirement for Canada Post to pay dividends to its shareholders⁴⁷ is strong evidence that Canada Post is a commercial enterprise. The fact that Canada Post also made a \$198 million after-tax profit in 2014⁴⁸ would also be viewed as further evidence that it was a profit-seeking entity, and thus engaged in commercial activities.

Based on the foregoing, Canada Post would be subject to the following obligations with respect to its activities:

⁴³ While the definition does not explicitly deal with indirect ownership, it does refer to situations where a Party “controls, though ownership interests, the exercise of more than 50 percent of the voting rights” of the enterprise in question. The language is arguably broad enough to encompass Canada’s indirect ownership of Purolator.

⁴⁴ *TPP*, Art. 17.2.9.

⁴⁵ *TPP*, Chapter 17, footnote 1.

⁴⁶ *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, s. 5(2)(b) [“*CPCA*”].

⁴⁷ *CPCA*, s. 27.4.

⁴⁸ Canada Post Corporation, *2014 Annual Report (Financial Performance)* at 41 [Online: https://www.canadapost.ca/cpo/mc/assets/pdf/aboutus/annualreport/2014_ar_financial_en.pdf].

- refraining from using its monopoly position in the letter-delivery market to engage directly or indirectly – including through its subsidiaries – in anticompetitive practices in a non-monopolised market (e.g. parcel delivery) that negatively affects trade or investment between TPP Parties;⁴⁹
- when engaging in commercial activities, acting in accordance with commercial considerations, except to fulfill any terms of its public service mandate (i.e. letter mail delivery);⁵⁰
- when engaging in commercial activities, according to enterprises or investments of other parties treatment that is no less favorable than is given to domestic or any other foreign enterprise or investment with respect to purchases of any good or service;⁵¹
- when engaging in commercial activities or the sale of monopoly services (letter mail delivery), according to enterprises or investments of other parties treatment that is no less favourable than is given to domestic or any other foreign enterprise or investment with respect to the sale of any good or service, including its monopoly service.⁵²

For the purposes of this Chapter, the “commercial considerations” requirement is defined to mean:

price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale; or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry;⁵³

The rules set out in Chapter 17 largely mirror the NAFTA’s chapter on “Competition Policy, Monopolies and State Enterprises” but are more expansive and impose new constraints on the way in which Canada Post may carry out its mandate. These differences are:

- The NAFTA rules impose commercial consideration obligations on monopolies, but not on SOEs. Thus TPP rules go further by imposing constraints on the operations of both Purolator and Canada Post in providing non-monopoly services.⁵⁴

⁴⁹ *TPP*, Art. 17.4(2)(d).

⁵⁰ *TPP*, Art. 17.4.1(a).

⁵¹ *TPP*, Art. 17.4.1(b).

⁵² *TPP*, Arts. 17.4.1(c), 17.4.2(c).

⁵³ *TPP*, Art. 17.1, s.v. “commercial considerations”.

⁵⁴ Compare *NAFTA*, Art. 1502(3)(b) with *TPP*, Arts. 17.4.1(a), 17.4.2(a).

- The non-discrimination rules applicable to SOEs are broader under the TPP than under NAFTA. NAFTA only prohibits discriminatory treatment with respect to the *sale* of goods and services, and applies only with respect to the investments of investors of foreign parties.⁵⁵ The TPP covers both the purchase and sale of goods and services, and also applies to the treatment of foreign enterprises, even if they are not investments in Canada.⁵⁶ While NAFTA would not regulate how SOEs purchase goods or services from foreign enterprises, the TPP does.
- The prohibition against abuse of monopoly positions is broader under the TPP than under NAFTA. NAFTA prohibits abuse of monopoly positions in non-monopolised markets that have the effect of adversely affecting the investment of an investor of a foreign Party.⁵⁷ The TPP rules cover negative impacts on trade or investment between parties generally.⁵⁸ The breadth of the phrase “negatively affect trade or investment between the Parties” opens the door to a much broader array of complaints and challenges than would be permitted under NAFTA rules.

In addition, Article 17.6 sets out a novel and expansive prohibition on “non-commercial assistance” (“NCA”) that adversely affects the interests of another Party, which has no parallel in NAFTA or the GATS. Generally speaking, Canada Post’s activities as an SOE would not engage these provisions because “[a] service supplied by a state-owned enterprise of a Party within that Party’s territory shall be deemed to not cause adverse effects”.⁵⁹ Absent adverse effects, the NCA rules do not apply. However, a footnote to the Chapter states that the above-quoted test “shall not be construed to apply to a service that is itself a form of non-commercial assistance.” As discussed below, some aspects of Canada Post’s relationship with Purolator could well meet the definition of non-commercial assistance, and thus engage the NCA provisions.

NCA has two components.⁶⁰ First, it must be “assistance to a state-owned enterprise”. Second the assistance must be given “by virtue of that state-owned enterprise’s government ownership and control”.

For the purposes of this definition, “assistance” includes “services other than general infrastructure on terms more favourable than those commercially available to that enterprise”. Access to Canada Post’s sales, collection and distribution facilities is certainly access to *its*

⁵⁵ NAFTA, Art. 1503(3).

⁵⁶ TPP, Art. 17.4.1(b), (c).

⁵⁷ NAFTA, Art. 1502(3)(d).

⁵⁸ TPP, Art. 17.4.2(d).

⁵⁹ TPP, Art. 17.6.4.

⁶⁰ TPP, Art. 17.1, s.v. “non-commercial assistance”.

infrastructure. The question is whether those facilities could also be considered *general* infrastructure. The term is not defined in the TPP, but it is most likely to mean infrastructure for general societal use such as highway or municipal water systems, and not specialized infrastructure such as that used exclusively by Canada Post to deliver letters and packages.⁶¹ Therefore, there is a real risk that granting Purolator access to Canada Post’s facilities would be considered a prohibited form of “assistance” for the purpose of the NCA rules.

With respect to the second component of non-commercial assistance, the phrase “by virtue of that state-owned enterprise’s government ownership and control”, is defined to mean:

(i) the Party or any of the Party’s state enterprises or state-owned enterprises **explicitly limits access to the assistance to any of its state-owned enterprises;**

(ii) the Party or any of the Party’s state enterprises or state-owned enterprises provides assistance which is predominately used by the Party’s state-owned enterprises;

(iii) the Party or any of the Party’s state enterprises or state-owned enterprises provides a disproportionately large amount of the assistance to the Party’s state-owned enterprises; or

(iv) the Party or any of the Party’s state enterprises or state-owned enterprises otherwise favours the Party’s state-owned enterprises through the use of its discretion in the provision of assistance;

[emphasis added]

Because Canada Post does not grant access to its infrastructure to entities other than other SOEs, e.g. Purolator (and arguably Xpresspost), this second component of the NCA test would also be satisfied.

Chapter 17 also requires Parties to ensure that their SOEs do not provide NCA to other SOEs in a manner that has “adverse effects on the interests of another Party” with respect to, *inter alia* “the supply of a service by the state-owned enterprise from the territory of the Party into the territory of another Party”.⁶² This provision could easily be read to cover assistance granted by Canada Post to Purolator with respect to Purolator’s international delivery activities. If another party could establish that the effect of granting Purolator access to Canada Post infrastructure for the purpose of international shipping had the effect of displacing or impeding like service suppliers

⁶¹ It would, however, include Canadian customs services that the private couriers frequently complain gives special treatment to Canada Post.

⁶² *TPP*, Art. 17.6.2(b).

in the foreign market, or significant price undercutting, suppression, depression or loss of sales,⁶³ then a violation of the NCA rules would be established.

The TPP contains a grandfathering provision, which deems NCA that was provided prior to the signing of the agreement or for three years thereafter not to cause adverse effects.⁶⁴ This would delay any complaints about a violation of the NCA rules, but ultimately Canada may have to confront a challenge under this heading if it continues to carry on its current business practice.

Finally, it is worth noting that Chapter 17 also imposes several transparency obligations on Canada, including the requirement to furnish certain forms of information respecting SOEs and designated monopolies either proactively or on request.⁶⁵

(i) Chapter 17 would create a powerful tool for *states* to attack Canada Post

While Chapter 15 of NAFTA contains some comparable obligations, Chapter 17 of the TPP imposes a much more robust and categorical requirement of “non-discriminatory treatment and commercial considerations”. Any exceptions to these requirements, either for state-owned enterprises or for designated monopolies, are narrow and limited.

In light of the universal service mandate of Canada Post, which includes numerous goals ranging from affordability to universal geographic coverage, it is clear that Canada Post does not limit itself to “commercial considerations” in all its decisions, whether within the scope of its letter monopoly or without. However, to the extent that Canada Post’s decisions privilege certain companies over others, or advance non-commercial policy objectives with respect to any of its non-monopoly activities, they are vulnerable to attack under Chapter 17.

As compared to the GATS regime where Canada has made no commitments for postal services, which are broadly defined under that Agreement, Chapter 17 would, subject to some exceptions, apply National Treatment and ‘abuse of monopoly’ rules to core letter mail delivery services.

None of the provisions in Chapter 17 of the TPP are directly subject to ISDS procedures. While the actions of state enterprises and monopolies may be subject to ISDS procedures under the Investment Chapter wherever they are exercising delegated governmental authority (discussed in the following section), the commercial decisions of such entities may only be challenged by states under Chapter 17.

⁶³ TPP, Art. 17.7(1)(d),(e).

⁶⁴ TPP, Art. 17.7.5.

E. Investment Chapter (Chapter 9)

Like NAFTA's Chapter 11, the TPP's Investment Chapter includes both substantive obligations in respect of the treatment of foreign investments and investors (including national treatment, most favoured nation treatment, minimum standard of treatment and compensation for expropriation), as well as its own enforcement mechanism authorizing private investors to bring claims against states (i.e. investor-state dispute resolution or ISDS).

As noted and described more fully below, UPS previously invoked similar rules under NAFTA in an attempt to dismantle Canada Post's integration of letter mail and express delivery services. Canada was able to overcome this challenge not on the merits, but rather by persuading the majority of the arbitration panel that the dispute was not amenable to ISDS procedures because the measures at issue were commercial decisions made by Canada Post that could only be challenged under Chapter 11 by another Party (the U.S. or Mexico) not by a private investor like UPS. While this reasoning may be persuasive, it would not bind future arbitration panels interpreting the TPP, which could well adopt the reasons of the dissenting arbitrator in *UPS* and find that the investment rules apply to decisions of Canada Post, notably to grant Purolator privileged access to its infrastructure.

Moreover, the very possibility of another investor-state claim could have a chilling effect on future decisions of the Canadian government and/or Canada Post in respect of postal services. In addition, ISDS procedures can be invoked to challenge decisions of the Canadian government affecting investments or investors, such as any attempt to expand Canada Post's mandate, which would provide a powerful disincentive to consider any such reform.

(i) Key provisions

TPP investment rules impose a series of obligations on Canada with respect to the treatment of foreign investments and investors in Canada. These rules, which are common to modern investment treaties, include national treatment,⁶⁶ most favoured nation treatment,⁶⁷ minimum standard of treatment,⁶⁸ and compensation for expropriation.⁶⁹

Similar to NAFTA's Chapter 11, the TPP's Investment Chapter also includes its own enforcement mechanism, namely investor-state dispute settlement ("ISDS"), which gives private investors the right to bring claims directly against Canada.⁷⁰ Decisions by arbitrators appointed under ISDS rules are binding and enforceable against Canada.

⁶⁶ *TPP*, Art. 9.4.

⁶⁷ *TPP*, Art. 9.5.

⁶⁸ *TPP*, Art. 9.6.

⁶⁹ *TPP*, Art. 9.7.

⁷⁰ *TPP*, Ch. 9, Section B: Investor-State Dispute Settlement (Arts. 9.18-9.30).

The obligations under the Investment Chapter apply to measures adopted and maintained by Canada as a Party to the TPP, *as well as* to measures adopted and maintained by “any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it.”⁷¹ In other words, Chapter 9 applies to the actions of Canada Post but only when it is exercising “delegated” “governmental authority”. The rationale is to prevent states from evading their obligations under investment rules by delegating authority to entities that can act in the place of the state.

(ii) The reasoning of the majority in *UPS v. Canada* would protect Canada Post against investor-state claims, but it is not binding

NAFTA’s Chapter 11 operates in a similar fashion. The investment rules in NAFTA (as in the TPP) generally apply only to “measures adopted or maintained by a Party”.⁷² However, under NAFTA, “state enterprises” and “monopolies” are also subject to the investment rules in Chapter 11 whenever they exercise “any regulatory, administrative or other governmental authority that the Party has delegated to it.”⁷³ This is broadly analogous to the application rules in the TPP’s Investment Chapter (which apply to “any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it”).

As a preliminary matter, the panel in *UPS v. Canada* rejected UPS’s argument that actions of Canada Post amounted to actions of the Government of Canada, finding that while Canada Post “may be seen as part of the government system, broadly conceived,”⁷⁴ its actions “are not in general actions of Canada which can be attributed to Canada as a ‘Party’.”⁷⁵

The more serious issue was whether Canada Post’s actions could be construed as an exercise of delegated governmental authority and therefore subject to a claim for damages by UPS under NAFTA’s ISDS procedures. On this question, the majority and dissent disagreed. The majority of the three-member panel found that the actions of Canada Post being challenged by UPS – and in particular its decision to grant Purolator privileged access to its infrastructure – were not exercises of delegated governmental authority, but rather, were exercises of rights and powers

⁷¹ TPP, Art. 9.2.2(b).

⁷² Chapter 11 of NAFTA applies to “measures adopted or maintained by a Party” (NAFTA, Art. 1101(1)).

⁷³ See NAFTA, Art. 1116(1), which authorizes investors to submit investor-state claims in respect of conduct by monopolies or state enterprises, pursuant to Arts. 1502(3) or 1503(2) in the Competition Policy, Monopolies and State Enterprises Chapter. Unlike NAFTA’s Chapter 11, the TPP’s Investment Chapter would directly apply to Canada Post (see Art. 9.2.2(b)). However, the effect on monopolies and state enterprises (including Canada Post) is similar, because, as under the TPP, Arts. 1502(3) and 1503(2) under NAFTA require Parties to ensure that monopolies and state enterprises comply with the investment rules when exercising delegated governmental authority.

⁷⁴ *UPS v. Canada*, para. 57.

⁷⁵ *UPS v. Canada*, para. 62.

Canada Post enjoyed as a corporation,⁷⁶ In other words, they were commercial decisions not regulatory ones. Accordingly, the investment rules simply did not apply.

However, the dissenting opinion, authored by Dean Ronald Cass of the Boston University School of Law – a prominent international arbitrator and former Vice Chairman and Commissioner of the U.S. International Trade Commission – read the language of delegated governmental authority more broadly, and found that Canada indeed violated certain investment rules.⁷⁷ Among other things, he concluded,

The decision by Canada Post to grant preferences to Purolator is not in the nature of a decision to purchase or sell a product. It is not a decision respecting the price of Canada Post's own delivery products or of Canada Post's purchase of materials to create stamps or packaging. [...] Instead, it is a decision to approve a relatively complex commercial transaction – one undertaken between Canada Post and Purolator respecting the access Purolator will have to Canada Post facilities – and the simultaneous decision not to approve a similar transaction affecting similar arrangements between Canada Post and UPS Canada. The latter decision was taken despite efforts by UPS to obtain access to Canada Post's infrastructure on terms comparable to those granted to Purolator and despite an announced preference by the government that Canada Post explore additional access agreements similar to that granted to Purolator. [...] These decisions are not the everyday sort of decision on matters such as product pricing that was removed from the ambit of delegated governmental authority. They were approvals – or refusals to approve – commercial transactions of a very different kind than those subject to the other parts of Chapter 15 that Canada says should govern here.⁷⁸

Following the majority of the NAFTA panel, the Investment Chapter of the TPP would not apply to the *commercial* decisions of Canada Post, including its dealings with Purolator. However, that decision is not binding, and a panel interpreting the TPP could adopt the reasoning of the dissenting Professor Cass. As noted however, while the UPS claim was considered beyond the reach of ISDS because the Canada Post decisions at issue were commercial in nature, those same decisions could readily have been challenged by another NAFTA State Party for offending NAFTA rules concerning state enterprises and monopolies, and/or cross-border services.

⁷⁶ *UPS v. Canada*, paras. 64-79. Specifically, the decisions of CPC relating to the use of its infrastructure by Purolator and by its own courier services are not made in the exercise of “governmental authority”: para. 78.

⁷⁷ *UPS v. NAFTA*, paras. 170-190.

⁷⁸ *UPS v. NAFTA*, para. 188.

The unprecedented and irreversible expansion of ISDS rules under the TPP⁷⁹ – which expands the scope of investor-state rules beyond NAFTA’s Chapter 11 and similar free trade deals with Chile and Peru - would make Canada vulnerable to such claims by investors in additional countries at a time when countries are increasingly rejecting the conventional ISDS model that would be entrenched in the TPP.⁸⁰

F. Canada’s Failure to Include Adequate Reservations

The TPP permits parties to enter reservations that exempt specific existing non-conforming measures (Annex I reservations) or entire specified sectors (Annex II reservations) from the operation of many of the Agreement’s substantive provisions. Canada also had an opportunity to negotiate reservations from Chapter 17 to be listed in Annex V.

As noted above, Canada maintains an Annex II reservation with respect to cultural industries that would protect Canada Post’s Publication Assistance Program. No other reservation entered by Canada appears to protect Canada Post’s operations.

This stands in stark contrast with broad reservations maintained by other parties that are designed to protect their own postal services.

For example, in its Annex II, “Japan reserves the right to adopt or maintain any measure relating to investments in or the supply of... postal services in Japan.”⁸¹ In its Annex II, “Singapore reserves the right to adopt or maintain any measure relating to Public Postal Licensee(s).”⁸² In both cases, the substantive national treatment rules in Chapters 9 and 10 – amongst others – are expressly ousted from applying to their postal services.

Canada’s approach to the TPP also contrasts with that it took in CETA, where it made this Annex I reservation against Market Access.

Sector: Postal Services

Sub-Sector: Postal services, mail transportation by any mode of transport.

Industry Classification: CPC 7511, 7321, 71124, 71235

Type of Reservation: Market Access

⁷⁹ To include disputes concerning “investment agreements” under Article 9.18.1(a)(i)(C) and those concerning “Minimum Standard of Treatment” requirements in respect of financial services under Article 11.2.2(a).

⁸⁰ Janyce McGregor, *EU quietly asks Canada to rework trade deal’s thorny investment clause*, CBC News [Online: <http://www.cbc.ca/news/politics/canada-europe-trade-isds-ceta-1.3412943>].

⁸¹ *TPP*, Annex II (Japan), No. 2.

⁸² *TPP*, Annex II (Singapore), No. 21.

Measures: Canada Post Corporation Act, R.S.C., 1985, c. C-10 Letter Definition Regulations, SOR/83-481

Description: Cross-Border Trade in Services and Investment

The sole and exclusive privilege of collecting, transmitting and delivering letters (as defined in the Letter Definition Regulations, SOR/83-481) within Canada is reserved for the postal monopoly.

For greater certainty, activities relating to the exclusive privilege may also be restricted, including the issuance of postage stamps and the installation, erection or relocation in any public place of any mail receptacle or device to be used for the collection, delivery or storage of mail.

Including additional protections for domestic postal systems was viewed by some states as necessary for their national interests, and such reservations were apparently acceptable to other negotiating parties. Canada offered no explanation for why it declined to avail itself of the opportunity to list similar reservations. The failure to do so exposes Canada Post to the restrictive rules described above, which may give rise to state-to-state disputes under Chapter 28 or, in certain cases, to Investor-State disputes under Chapter 9.

Having summarized the key conclusions of this analysis at the beginning of this document, we will not repeat the exercise here.

Sincerely,



Steven Shrybman
Louis Century
Daniel Sheppard

F:\15-1913\00853018.DOCX