Department of Foreign Affairs
and International Trade
Department of Justice

Ministère des Affaires étrangères
et du Commerce international
Ministère de la Justice

125 Sussex Drive
Ottawa, Ontario K1A 0G2

March 21, 2003

BY FACSIMILE

Rt. Hon. Justice Sir Kenneth Keith, KBE
New Zealand Court of Appeal
Judges' Chambers
Cnr Molesworth & Aitken Streets
Wellington, New Zealand

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Dean Ronald Cass
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Dear Sirs:

Re: United Parcel Service of America, Inc. v. Government of Canada

Document production

In response to Mr.Appleton's letter of February 26, 2003, Canada makes the following observations:

- Requests for Documents should follow the resolution of jurisdictional objections;

- Requests for Documents should be done in accordance with the procedure set out in the IBA Rules on Taking of Evidence;

- The Documentary record should be fixed prior to the parties' submissions on the merits, subject to leave from the Tribunal to request or produce additional documents;

- Expert reports should be submitted concurrently with the parties' submissions;

- There should be no interrogatories. The disputing parties will have an opportunity to cross-examine the other party's witnesses at the hearing.

Confidentiality

Contrary to UPS' submission in its letter of January 24, 2003, paragraph 10 of the proposed Confidentiality Agreement is not inconsistent with Article 15 of the UNCITRAL Arbitration Rules or with Article 1115 of the NAFTA. Paragraph 10 is consistent with the Free Trade Commission Note of Interpretation which provides: "Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: confidential business information; information which is privileged or otherwise protected from disclosure under the Party's domestic law [...]". UPS's argument that "Canada would have Canadian domestic law trumping the NAFTA and the laws of its NAFTA partners" or that this would create some inconsistency has no merit, given that all three NAFTA Parties recognize redaction for information, which is privileged or otherwise protected from disclosure under the Party's domestic law.

With respect to the bracketed text in paragraph 1(b), Canada observes that the purpose of the term "could" is to enable Canada to protect and redact any information that could usually be protected under its domestic legislation. With respect to paragraph 9(2)(b), the bracketed text was proposed by Canada, therefore, if UPS now agrees with its adoption, there is no outstanding dispute with respect to this paragraph.

With respect to the application of section 39 of the *Canada Evidence Act*, and refusals to produce documents in the context of the arbitration, that is a matter that can be addressed by the Tribunal when such issues arise in the context of requests to produce. It would be premature for the Tribunal to determine this issue now, as there is yet no request for documents or refusal to produce. Canada wishes to make clear, however, that the Confidentiality Agreement should not be construed as abrogating any such claim or entitlement to refuse to produce or disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada, including any claim based on section 39 of the *Canada Evidence Act*. This is reflected in paragraph 10.

With respect to UPS' submissions regarding Canada's *Access to Information Act* (the ATIA), Canada notes that the ATIA imposes binding obligations upon the Government of Canada. As to the scope of the exemptions under the ATIA on which UPS comments, it is a matter for Canada and Canadian Court, not Chapter 11 Tribunals, to determine the scope of the

ATIA provisions and of its various exceptions. However, it should be noted that under the proposed Confidentiality Agreement, only documents containing confidential business information would be protected from disclosure. Therefore, any potential issue regarding the application of the ATIA would only arise with respect to such documents.

As noted in Canada's letter of January 24, 2003, the ATIA protects confidential business information. Therefore, any risk of conflict between the ATIA is minimized, in any event, by the fact that the definition in the proposed confidentiality agreement mirrors that of the ATIA.

While it is correct that UPS would not have any input into Canada's determination of the application of the "international affairs" exemption under its ATIA, UPS would have an input into the determination and application of any exemption relating to UPS confidential business information. Therefore, it is unclear why UPS raises this issue in its letter of January 24, 2003 and more importantly, how this is inconsistent with (or even relevant to) paragraph 10 which deals with refusal to disclose.

Various legislative disclosure requirements apply to both UPS (for example, under securities legislation) and Canada (for example, under the ATIA). The Confidentiality Agreement should not be construed in such a way as to conflict with those requirements, as neither party may contract out of such legislative requirements. While certain problems and conflicts arose in the context of the *Pope & Talbot* case, the *Mondev* and *Metalclad* Tribunals adopted different positions and recognized the existence of legislative disclosure requirements. This case does not raise the same issues as the *Pope & Talbot* case. The proposed Confidentiality Agreement minimizes risks of conflicts by providing for disclosure of documents listed in paragraph 15, subject to redaction for confidential business information and for information protected by legislation, and by providing that any request received under the ATIA should be governed by the provision of that Act.

UPS' request that the confidentiality order provide for prompt notice of any information request under the ATIA is not necessary. Any request made pursuant to the ATIA should be governed by the procedures set out therein. The ATIA provides for adequate protection of business confidential information and for a process for objections to the release of any such business confidential information. There is no reason why, as a result of NAFTA, different procedures should apply to UPS than would normally apply to any third party whose confidential business information is contained in a document subject to an access to information request. The proposed bracketed text in paragraph 11 should be removed to avoid any confusion.

The text in brackets in paragraph 18 was proposed by Canada. We are, therefore, pleased that UPS now agrees with the adoption of this text. However, Canada wishes to note that paragraph 18 is not meant to deal with an access to information request but, rather, as a general process that would apply to any disclosure by either party of material referred to in paragraph 15.

Yours sincerely,

Sylvie Tabet
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Trade Law Bureau

cc. Barry Appleton
cc. Ucheora Onwuamaegbu