

**UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN

UNITED PARCEL SERVICE OF AMERICA, INC.,

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

**CANADA'S REPLY TO
INVESTOR'S SUBMISSION ON THE FILING OF THE
STATEMENT OF DEFENCE**

DRAFT

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***Unless otherwise indicated, all references in the footnotes to “Tabs” will be to the Book of Authorities for Memorandum of Argument Regarding the Submission of the Statement of Defence**

PART I: ARGUMENT IN REPLY

A. Overview

1. In the Investor's Submission on the Filing of the Statement of Defence ("Submission"), UPS asserts that the "critical issue" for the Tribunal is whether the filing of a Statement of Defence will assist in defining the issues and identifying the arguments that will be raised by Canada.¹ Canada disagrees. The critical issue for the Tribunal is whether Canada should be required to defend against a Statement of Claim that prima facie is not within the jurisdiction of the Tribunal and otherwise fails entirely to meet the mandatory requirements of Article 18(2) of the UNCITRAL Rules.

2. As Canada noted in paragraph 18 of its Memorandum of Argument Regarding the Submission of a Statement of Defence ("Memorandum"), its jurisdictional objections strike at the core of the Statement of Claim submitted by UPS. They require that it either be struck in its entirety or substantially amended. These fundamental objections require final adjudication prior to the merits phase of the arbitration. Until the Tribunal determines which, if any, of the allegations in the Statement of Claim are within its jurisdiction, the question of what position Canada will take in its Statement of Defence is hypothetical and premature.

B. Failure to Establish the Jurisdiction of the Tribunal and Meet the Minimum Standard of Pleading

3. The Statement of Claim fails both as a matter of scope and conditions precedent to establish prima facie the jurisdiction of the Tribunal.² Moreover, a plain reading of the Statement of Claim reveals that it is so vague and imprecise that it does not disclose the case to be met.³

4. Pursuant to NAFTA Article 1116, the right to make claims against a Party under NAFTA Chapter Eleven is limited to alleged breaches of an obligation under Section A

¹ Submission, para. 6.

² Notice of Motion in Respect of Jurisdictional Objections to the Investor's Claim ("Notice of Motion"), Parts 1, 2, 2.1, 2.2, and 2.3; and Memorandum of Argument Regarding the Submission of a Statement of Defence ("Memorandum"), paras. 14, 27, 28 and 30.

³ Memorandum, para. 29; and Notice of Motion, Parts 3, 3.1 and 3.2.

of NAFTA Chapter Eleven, and NAFTA Articles 1502(3)(a) (State Enterprises) and 1503(2) (Monopolies and State Enterprises) where the State Enterprise or Monopoly has acted in a manner inconsistent with Party's obligations under Section A. As the Supreme Court of British Columbia recently noted in *The United Mexican States v. Metalclad Corporation* ("Metalclad"):

[57] ... Under most agreements containing arbitration provisions, it is provided that a dispute between the parties to the agreement may be resolved through arbitration. Strangers to the agreement cannot invoke the arbitration procedure because it is only the parties to the agreement who consented to resolve disputes between themselves by arbitration. This normal type of provision is found in Chapter 20 of the NAFTA, which is the general section in the NAFTA dealing with arbitrations of disputes between the NAFTA Parties.⁴

[58] Section B of Chapter 11 establishes a separate arbitration procedure. It allows investors of a NAFTA Party (who are not themselves a party to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other than the obligations imposed by Section A of Chapter 11 and the two Articles of Chapter 15, the investor would have to prevail upon its country to espouse an arbitration on its behalf against the other Party.⁵

5. A substantial portion of UPS' claim, comprising **one hundred and twenty three paragraphs** of the Statement of Claim, are allegations of anti-competitive practices including cross-subsidization and predatory pricing.⁶ These are allegations of breaches of NAFTA Article 1502(3)(d) and are beyond the jurisdiction of the Tribunal. The adjudication of such alleged breaches are expressly and solely reserved to Tribunals constituted under NAFTA Chapter Twenty for the purpose of state-to-state arbitrations.

⁴ NAFTA Article 2004 provides: "Except for matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004".

⁵ *Metalclad*, 2001 BCSC 664, at Prejudice to Canada pp. 21 and 22. [Tab 1, Canada's Supplementary Book of Authorities]

⁶ Notice of Motion, *supra* note at Part 1.

6. A claim can only be submitted for arbitration under NAFTA Chapter Eleven if the Investor establishes prima facie in its Statement of Claim that it has incurred loss or damage by reason of, or arising out of, alleged breaches, and that it has met the time requirements for bringing its claim.⁷ **Twenty eight paragraphs**, relating to **eleven alleged breaches** of obligations under NAFTA Chapter Eleven, fail to plead that at least six months have elapsed since each of the events giving rise to the claim.⁸ **One hundred and eighty-seven paragraphs**, relating to **forty-one measures**, fail to plead that less than three years have elapsed from the date on which (a.) the Investor first acquired, or should have acquired, knowledge of each of the alleged breaches of obligations under NAFTA Chapter Eleven and, (b.) the Investor acquired, or should have acquired knowledge that the Investor has incurred loss or damage.⁹ **The Statement of Claim as a whole** is deficient for failing properly to plead damages.¹⁰

7. A Statement of Claim must meet the requirements of Article 18(2) of the UNCITRAL Rules, which includes defining with clarity the issues in dispute and giving fair notice of the case which the opposing party has to meet.¹¹ **Twenty Four paragraphs** in the Statement of Claim are impossible to respond to by virtue of being vague, open-ended, frivolous, vexatious or scandalous.¹²

C. Disposing of Preliminary Objections Prior to Filing of Statement of Defence

8. In paragraph 7 of the Submission, UPS notes that Article 21(3) of the UNCITRAL Rules requires jurisdictional objections to be raised no later than in the Statement of Claim. However, as Canada already noted at paragraph 24 of its Memorandum, Article 21(3) only indicates the latest at which a jurisdictional objection should be raised. Doing so before this time is allowed, appropriate and, in the circumstances, necessary.

⁷ Memorandum, paras 38 to 48.

⁸ *Supra*, note at Part 2.2.

⁹ *Ibid.*

¹⁰ *Ibid.*, Part 2.1.

¹¹ Memorandum, paras 33 to 37.

¹² *Supra* note at Parts 3.1 and 3.2.

9. As well, the failure of UPS' Statement of Claim to establish the jurisdiction of the Tribunal, and otherwise meet the minimum standard of pleading, demands that Canada raise its jurisdictional objections at the earliest opportunity prior to the submission of a Statement of Defence. Canada has done this.¹³

10. Furthermore, it is clear from the nature and extent of Canada's jurisdictional objections that they are not dependent upon the underlying facts of the claim and therefore, are capable of being decided without having to address the merits of what UPS alleges in its Statement of Claim. As Canada noted in paragraph 17 of its Memorandum, all of its jurisdictional objections can be efficiently and effectively resolved on the face of the Statement of Claim alone. No further evidence is required.

11. In these circumstances, the established practice and precedent in international arbitration is to suspend proceedings and deal with jurisdictional objections as a preliminary question in accordance with Article 21(4) of the UNCITRAL Rules.¹⁴ UPS agrees that, to the extent possible, jurisdictional issues should be addressed by the Tribunal as a preliminary question.

12. In the *Ethyl* and *Pope & Talbot* cases, Canada raised jurisdictional objections in its Statement of Defence that, because of their nature, could appropriately be raised at that stage. The proceedings were then suspended until the Tribunals had heard and disposed of the jurisdictional objections as preliminary questions.

13. In this case, Canada has raised jurisdictional objections before submitting a Statement of Defence because the Statement of Claim fails entirely to establish the jurisdiction of the Tribunal and to meet the mandatory pleading requirements. In accordance with established practice and precedent, Canada should not be required to

¹³ Memorandum, paras 4 to 11, inclusive.

¹⁴ This practice has been followed by NAFTA Chapter Eleven Tribunals operating under the UNCITRAL Rules, namely: *Ethyl v. The Government of Canada*, Award on Jurisdiction, June 24, 1998 ("*Ethyl*") [Tab 1] and *Pope & Talbot v. Government of Canada*, Preliminary Motion by Government of Canada to Dismiss the Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven, Measures Relating to Investment Motion, January 26, 2000 ("*Pope & Talbot*") [Tab 6]. See also: Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third Edition, Sweet & Maxwell, (London), pp. 269 and 270 [Tab 3]; and Alan Redfern, "The Jurisdiction of an International Commercial Arbitrator", (1986) 3 *Journal of Commercial Arbitration* 19 at p. 34. [Tab 2]

submit its Statement of Defence until its jurisdictional objections are dealt with as a preliminary question.

14. It is trite law that the concept of “proceeding” includes all possible steps in arbitration under NAFTA Chapter Eleven, from its commencement through the submission of a Notice of Arbitration and Statement of Claim, to the issuance of a final award.¹⁵ UPS therefore wrongly asserts in paragraph 5 of its Submission, that the principles governing the conduct of preliminary questions, where a Statement of Defence has not been submitted, are different from those governing such questions where a Statement of Defence has been submitted. If a disputing party raises a fundamental objection to jurisdiction, then the appropriate next step is to suspend the proceedings at whatever stage they may be, and deal with the objection as a preliminary question.

15. In paragraphs 8 and 9 of the Submission, UPS contends that Canada’s proposed procedure for dealing with its jurisdictional objections leaves open the possibility that Canada will raise further such objections in its Statement of Defence if is unsatisfied with the initial decision of the Tribunal. The contention is without merit as it misconstrues the nature of Canada’s jurisdictional objections and is contradicted by established practice and precedent.

16. As Alan Redfern and Martin Hunter have noted:

Any award on jurisdiction made by an arbitral tribunal, whether as an interim or final award, is binding on the parties to the arbitration.¹⁶

Once adjudicated Canada will be precluded from revisiting the jurisdictional objections raised in its Notice of Motion.¹⁷

D. Prejudice to Canada

17. In paragraph 11 of the Submission, UPS states that:

¹⁵ *Black’s Law Dictionary*, 6th Edition, West Publishing Co. (St. Paul, Minn.), p. 1204. [Tab 2, Canada’s Supplementary Book of Authorities]

¹⁶ *Supra*, note 14 at p. 271.

¹⁷ The only other available recourse is an application to a competent court to have the interim or final award on jurisdiction set aside or to refuse its recognition or enforcement: *Ibid*.

... [I]f this Tribunal were to order Canada to file its Statement of Defence, Canada would not suffer any prejudice to its ability to make jurisdictional arguments to this Tribunal.

18. UPS has brought a claim that is beyond the jurisdiction of the Tribunal.

Regardless of prejudice to Canada, there is no legal principle requiring a defence on matters beyond the Tribunal's authority. That said, requiring the submission of a Statement of Defence in these circumstances is in fact prejudicial to Canada.

19. As Canada noted in paragraphs 12 and 19 of its Memorandum, to require it to submit a Statement of Defence notwithstanding its objections would render them moot. Canada would be compelled to proceed on the assumption that all allegations in the Statement of Claim are relevant and within the jurisdiction of the Tribunal.

20. It would require Canada not only to waste significant time and effort responding to lengthy and complex allegations that prima facie are not properly before the Tribunal but also, according to UPS, to begin the document discovery process.

21. At paragraph 10 of the Submission, UPS argues that:

... [A] delay in obtaining the Statement of Defence will frustrate the ability of the disputing parties to create or commence an effective documentary production process to further the hearing of this claim.

Identifying the elements of the Statement of Claim, if any, that are properly before the Tribunal is critical to ensuring an appropriate and fair document discovery process.

22. In NAFTA Chapter Eleven arbitrations, Canada is not required to set forth its position on matters that it has agreed to arbitrate only with other NAFTA Parties. To allow this to occur not only prejudices Canada, but also undermines the state-to-state dispute resolution regime under NAFTA Chapter Twenty and prejudices the other NAFTA Parties.

23. In paragraph 4 of its Submission, UPS states that:

...The Investor submits that it is time for Canada to provide its defence to the Investor's claim. Canada has now had just more than a year to prepare its Statement of Defence in order to close the pleadings in this arbitration.

24. The mere passage of time cannot cure fundamental defects in the Statement of Claim. As Canada noted in paragraphs 32, 33 and 49 of its Memorandum, the onus is on UPS to ensure that the essential requirements of pleading jurisdiction, and complying with the requirements of Article 18(2) of the UNCITRAL Rules, are met. A failure to meet these requirements per se defines the issues for resolution as a preliminary question and negates the requirement to submit a Statement of Defence.

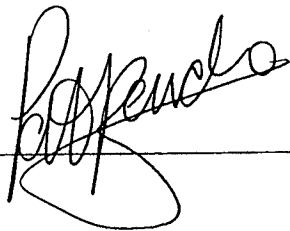
PART II: RELIEF SOUGHT

25. For the foregoing reasons, Canada asks the Tribunal determine that:

- a. UPS' request that Canada submit a Statement of Defence prior to resolution of the Notice of Motion be dismissed, and
- b. the Tribunal direct the disputing parties to make representations by May 30, 2001 as to the schedule for filing of submissions and the hearing of argument on the issues raised in the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED in the City of Ottawa, in the Province of Ontario, this 7th day of May, 2001.



Of Council

Donald J. Rennie

Patrick Bendin