

**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

**MEMORANDUM OF ARGUMENT REGARDING THE
SUBMISSION OF A STATEMENT OF DEFENCE**

April 30, 2001

Department of Foreign Affairs
And International Trade
Trade Law Division (JLT)
125 Sussex Drive
Ottawa, Ontario
K1A 0G2

Tel: (613) 944-0014
Fax: (613) 944-3213

Table of Contents

PART I:	I: INTRODUCTION	1
PART II:	STATEMENT OF FACTS.....	1
PART III:	OVERVIEW.....	2
PART IV:	ARGUMENT	3
	A. Summary of Canada's Position.....	3
	B. Preliminary Questions are Disposed of Prior to Filing a Statement of Defence.....	4
	C. Applicable Law does not Require the Submission of a Statement of Defence.....	7
	D. Failing to Meet Conditions Precedent under NAFTA Chapter Eleven	8
	E. Practice of NAFTA Chapter Eleven Tribunals Support Canada's Position.....	10
PART V:	RELIEF SOUGHT	12

PART I: INTRODUCTION

1. Pursuant to the Tribunal's Procedural Decision No. 1 dated April 17, 2001, the Government of Canada ("Canada") submits this Memorandum of Argument Regarding the Submission of a Statement of Defence.
2. Canada should not be required to file its Statement of Defence until the Tribunal rules on whether the claim submitted by United Parcel Services of America, Inc. ("UPS") is within the terms of the North American Free Trade Agreement ("NAFTA").
3. Concurrent with these submissions, and as indicated in prior communication on this issue, Canada files its Notice of Motion objecting to the jurisdiction of the Tribunal to address the Statement of Claim.

PART II: STATEMENT OF FACTS

4. On January 19, 2000 UPS delivered a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven for alleged breaches of Canada's NAFTA obligations.
5. On April 19, 2000, UPS submitted its Notice of Arbitration and Statement of Claim, in which it claimed recourse to arbitration under the UNCITRAL Arbitration Rules ("UNCITRAL Rules").
6. On September 5, 2000, the Deputy Secretary-General of ICSID advised the disputing parties of the appointment of the Rt. Hon. Justice Sir Kenneth Keith as the presiding arbitrator, and thereby confirmed the constitution of the Tribunal.
7. On September 11, 2000 Canada advised the Tribunal that it objected to the jurisdiction of the Tribunal to adjudicate numerous breaches in the Statement of Claim and requested that this objection be dealt with as a preliminary question in accordance with Article 21(4) of the UNCITRAL Arbitration Rules ("UNCITRAL Rules").
8. Canada attached to its letter of September 11, 2000 a draft schedule for the expeditious resolution of the preliminary questions. The first step in that schedule was the submission of a Notice of Motion.

9. On September 22, 2000 Canada advised the Tribunal that, given the extensive nature of the jurisdictional objections, filing its Statement of Defence at this time would be inconsistent with the UNCITRAL Rules and established practice in both NAFTA and international arbitrations. Nor would it assist the Tribunal in defining the matters in issue.

10. On October 18, 2000 Canada reiterated the proposal made in its letter of September 11, 2000 and noted that it was prepared to file a Notice of Motion in respect of its jurisdictional objections forthwith upon confirmation of the procedure.

11. On March 16, 2001 Canada noted that, since substantial portions of the claim are outside the terms of NAFTA Chapter Eleven and that the Statement of Claim as a whole is deficient and impossible to respond to, the submission of a Statement of Defence was premature. It was further submitted that, in the circumstances, the only appropriate response is an objection to the jurisdiction of the Tribunal by a Notice of Motion.

PART III: OVERVIEW

12. The weight of international arbitration precedent and practice, together with the UNCITRAL Rules, supports the resolution of jurisdictional objections to a Statement of Claim prior to filing a Statement of Defence. Sound policy reasons underlie this result, for to require otherwise is to negate a disputing party's right not to plead to matters that it says cannot be adjudicated. It requires a disputing party to defend on the merits in the face of a live question as to whether it is required to do so.

13. Given the defects in the Statement of Claim, a response does little to bring precision or certainty to the matters in issue. Canada is not required by law to defend a pleading of this nature, and cannot properly so defend. The purpose of pleadings is to narrow and define what truly is in issue, and thereby sustain the capacity of arbitral panels to be efficacious in their deliberations and save the disputing parties time and resources. A heavy onus lies on a disputing party seeking an order from an arbitral tribunal to depart from these principles.

PART IV: ARGUMENT

A. Summary of Canada's Position

14. The sole basis of jurisdiction under NAFTA Chapter Eleven in arbitrations under the UNCITRAL Rules is the consent of the Parties. Jurisdictional objections therefore translate into a crucial threshold question of whether a Party has consented to arbitration. There are, in turn, two aspects to the inquiry. First: Is a claim within the type of claims that Canada has consented to arbitrate as evidenced by the express terms of the NAFTA? Second: To what extent is Canada's consent to arbitrate conditioned solely on the fulfilment of specified requirements in NAFTA Chapter Eleven?¹

15. The weight of international arbitration precedent and practice is to defer proceedings on the merits when jurisdictional issues are raised and provide disputing parties with an opportunity to make submissions.² As Alan Redfern notes:

It is ... an obvious waste of time and money for an arbitral tribunal to have conducted an arbitration from beginning to end, if its award then proves to be invalid for lack of jurisdiction. For this reason, the best course of action for an arbitral tribunal to take usually is the second; where possible, it should hear arguments on the point. This enables the parties to know where they stand at a relatively early stage."

UPS agrees that, to the extent possible, jurisdictional issues should be addressed by the Tribunal as a preliminary question.

16. Canada's Notice of Motion raises a number of substantive jurisdictional objections. It contends that the Statement of Claim fails, both as a matter of scope and conditions precedent, to establish prima facie the jurisdiction of the Tribunal. It also alleges that the Statement of Claim is so vague and imprecise that it does not disclose the case to be met and impedes the Tribunal's ability to regulate the proceeding.

¹ *Ethyl Corporation v. The Government of Canada (Ethyl) Award on Jurisdiction*, June 24, 1998, p. 31., para. 60. [Tab 1]

² "The Jurisdiction of an International Commercial Arbitrator", (1986) 3 *Journal of International Arbitration*, 19 at p.34. [Tab 2]

17. All of these issues can be resolved on the face of the Statement of Claim alone. No evidence is required in order to address the issues raised in Canada's Notice of Motion.

18. In other words, even if one accepts the truth of the allegations of fact in the Statement of Claim, the claim nonetheless fails to establish prima facie that the Tribunal has jurisdiction to deal with a central aspect of its claim - that Canada Post engaged in anti-competitive practices and that Canada failed to prevent this from occurring. Moreover, many allegations in the Statement of Claim do not disclose the case to be met besides being entirely prejudicial to Canada, it impedes the ability of the Tribunal to regulate the proceedings. Canada's Notice of Motion therefore strikes at the core of the Statement of Claim submitted by UPS and requires that it either be struck in its entirety or substantially amended.

19. To require Canada to submit a Statement of Defence at this stage, notwithstanding its objections, would render these objections moot. It also compounds the mischief that the established practice is designed to prevent by requiring Canada to respond to the merits of what is alleged and to proceed on the assumption that all the allegations in the Statement of Claim are relevant and within the jurisdiction of the Tribunal.

20. UPS's Statement of Claim does not prima facie establish that it is within the terms of NAFTA Chapter Eleven and otherwise fails to plead sufficient facts to support the claim. It also fails to meet the requirements of Article 18(2) of the UNCITRAL Rules. There is therefore no duty upon Canada under Article 19(2) of the UNCITRAL Rules to submit a Statement of Defence before resolution of these issues

21. Finally, Canada's Notice of Motion provides the Tribunal with the appropriate procedural vehicle for moving the arbitration forward in a timely matter.

B. Preliminary Questions are Disposed of Prior to Filing a Statement of Defence

22. NAFTA Article 1120 governs the submission of a claim to arbitration. NAFTA Article 1120(2) provides:

The applicable arbitration rules shall govern the arbitration except to the extent modified by this section.

23. Articles 21(1) and (4) of the UNCITRAL Arbitration Rules (“UNCITRAL Rules”) empowers this Tribunal to deal with objections to its jurisdiction as preliminary questions. Article 21(3) of the UNCITRAL Rules requires a jurisdictional objection to be raised no later than in the Statement of Defence. Articles 21(1), (3) and (4) provide:

- (1) The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in reply to the counter-claim.
- (3) **In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.** However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award. (emphasis added)

24. Article 21(3) of the UNCITRAL Rules stipulates the latest at which a jurisdictional objection can be made. Raising a jurisdictional objection before that time is allowed and appropriate.

25. Article 15(1) of the UNCITRAL Rules provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

26. An arbitral tribunal can therefore deal with preliminary questions prior to the filing of a Statement of Defence pursuant to its general jurisdiction under Article 15(1) of the UNCITRAL Rules. It should do so when a statement of claim fails prima facie to establish a claim under NAFTA Chapter Eleven.

27. In its Notice of Motion, Canada objects to the jurisdiction of the Tribunal to arbitrate breaches alleged in the Notice of Intent of NAFTA Article 1202 (obligations

relating to cross-border trade in services) and in the Statement of Claim of NAFTA Articles 1501 and 1502(3)(d) (obligations relating to anti-competitive business practices) on the grounds that they are prima facie beyond the scope of NAFTA Chapter Eleven.

28. Canada also objects to the jurisdiction of the Tribunal to adjudicate UPS's claim on account of its failure to meet the conditions precedent to bringing a claim under NAFTA Chapter Eleven by failing to establish that,

- i. it incurred loss or damage by reason of, or arising out of, the alleged breaches;
- ii. its claim meets the time limitations under NAFTA Chapter Eleven; and
- iii. non-Canadian subsidiaries or related foreign companies are investments of the investor in the territory of Canada.

29. The Statement of Claim also contains numerous paragraphs that are impossible to respond to by virtue of being vague, open-ended, frivolous, vexatious or scandalous.

30. If one accepts, for the purposes of the Notice of Motion, the truth of the allegations of fact in the Statement of Claim then, on the basis of the foregoing objections, these allegations are not sufficient by themselves to establish the alleged breaches and, therefore, to sustain the claim.

31. In accordance with the practice in international arbitration for tribunals to suspend proceedings on the merits when a jurisdictional objection is raised Canada should not be required to respond to allegations in the Statement of Claim until it is decided whether it raises a claim within the terms of NAFTA Chapter Eleven. To do otherwise negates Canada's right not to plead to matters which cannot be adjudicated.

C. Applicable Law does not Require the Submission of a Statement of Defence

32. **It is essential that a statement of claim sufficiently define the facts and issues in order to enable a respondent to reply by statement of defence.**³

33. The requirements of Article 18(2) of the UNCITRAL Rules therefore include the objectives normally associated with pleadings, namely:

- a. Define with clarity the issues between the disputing parties;
- b. Give fair notice of the case which has to be met so that the disputing parties can marshal the relevant evidence; and
- c. Assist tribunals in regulating the proceeding before it.⁴

34. According to Pelonpaa and Caron:

Although the requirements of Article 18(2) [subparagraph 1] may be somewhat flexible depending on the nature of the case, a statement which fails to meet these requirements is not a 'statement of claim' in the sense of Article 18.⁵

[...]

The intent of [Article 19(2) of the UNCITRAL Rules] is to ensure that the statement of defence responds to the information and contentions included in the statement of claim. If a document purporting to be a statement of claim does not fulfill the requirements of Article 18, then there is no duty to submit a statement of defence in accordance with the present provision.⁶

35. Article 19 of the UNCITRAL Rules sets forth the requirements for a Statement of Defence. Articles 19(1) and 19(2) provide:

1. Within a time period to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para.2). The respondent may annex to

3 *Ibid* at pp. 338 and 339. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd Edition at para. 6-48. [Tab 3]

4 See, for example, *Weatherall v. Canada (A.G.)* [1989] 1 F.C. 18 (C.A.) and *Murray v. Public Service Commission* (1978), 21 N.R. 230 (FCA).

5 Matti Pelonpaa, David D. Caron, *supra*, note 1 at pp. 338 and 339.

6 *Ibid* at p.347.

his statement the documents on which he relies for his defence or may add a reference to the documents

36. The obligation upon Canada under Article 19(2) of the UNCITRAL Rules is to respond to the particulars of what is alleged under Articles 18(2) (b), (c) and (d).⁷ Here, where there is a live issue as to whether the Statement of Claim is sufficiently precise or particular, the submission of a Statement of Defence is necessarily premature and incapable of providing an informed response. It is prejudicial to require Canada to defend an undefined case

37. Therefore, quite apart from jurisdictional failings, the Statement of Claim does not meet the minimum standard of pleading.

D. Failing to Meet Conditions Precedent under NAFTA Chapter Eleven

38. NAFTA Article 1120(2) stipulates that the UNCITRAL Rules govern the arbitration. The requirement in Article 18(b) of the UNCITRAL Rules is to include a statement of facts supporting the claim. This includes the obligation to plead to the facts necessary to demonstrate that the claim *prima facie* falls within the terms of NAFTA Chapter Eleven.

39. NAFTA Article 1121(1) states, in relevant part:

A disputing investor may submit a claim under Article 1116 to arbitration only if,

(a) the Investor consents to arbitration in accordance with the procedures set out in this Agreement; [...]

40. NAFTA Article 1122(1) states

Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

41. An arbitral tribunal should deal with preliminary questions prior to filing a Statement of Defence if the Investor's Statement of Claim does not meet the requirements of Article 18(2) of the UNCITRAL Rules.

⁷ *Ibid.*

42. According to the Tribunal in *Waste Management, Inc. v. United Mexican States*:

Under NAFTA Article 1121 a disputing party may submit to arbitration proceedings, to quote literally “*Only if*” certain pre-requisites are met, comprising, in general terms, consent to and waiver of determined rights.

In light of this Article, it is the fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration held in accordance with the dispute settlement procedure established under Chapter XI of the said text.

[...]

From the literal tenor of [NAFTA Article 1122], it is understood, for those effects of interest to us present, that fulfilment, *inter alia*, of the prerequisites laid down in Article 1121, would translate as consent by NAFTA signatory parties to the dispute settlement procedure established under NAFTA Chapter XI, Section B.

On the basis of the above, it is the understanding of this Tribunal that any analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim under NAFTA Article 1121 calls for the utmost attention, since fulfilment thereof opens the way, *ipso facto*, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to the said international treaty.⁸

43. In other words, the failure of an Investor to meet prima facie the conditions precedent in NAFTA Chapter Eleven deprives arbitral tribunals of jurisdiction to hear its claim under NAFTA Chapter Eleven. Among the conditions precedent that must be fulfilled, the Statement of Claim must satisfy prima facie the requirements of NAFTA Articles 1101, 1116 and 1120 to establish the jurisdiction of an arbitral tribunal.

44. NAFTA Article 1101(1) states, in relevant part:

This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; [...]

45. Pursuant to NAFTA Article 1116(1), an investor of one Party may submit to arbitration a claim that another Party has breached an obligation under:

⁸ Arbitral Award, (ICSID Case No. ARB AF/98/2), pp. 11 and 12, paras. 16 and 17. [Tab 4]

- i. Section A of NAFTA Chapter Eleven
- ii. NAFTA Article 1503(2) with respect to state enterprises; or
- iii. NAFTA Article 1502(3)(a) where a monopoly has acted inconsistently with that Party's obligations under Section A of NAFTA Chapter Eleven;

and that it incurred loss or damage by reason of, or arising out of that breach

46. NAFTA Article 1116(2) states:

An investor may not make a claim if more than three years have elapsed from the date on which the Investor acquired, or should have acquired, knowledge of the alleged breach and knowledge that the Investor has incurred loss or damage.

47. NAFTA Article 1120 states, in relevant part:

Except as provided for in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing Investor may submit a claim to arbitration under: [...] (c) the UNCITRAL Arbitration Rules.

48. Unless the requirements in NAFTA Article 1101(1), and the events giving rise to breach and damage under NAFTA Article 1116(1) are established *prima facie*, and the investor indicates when it gained knowledge of the latter two elements, a tribunal cannot determine whether a claim falls within the terms of NAFTA Chapter Eleven.

49. The onus is on UPS to ensure that the essential requirements of pleading jurisdiction 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.

E. Practice of NAFTA Chapter Eleven Tribunals Support Canada's Position

50. UPS makes reference in its letter of March 22, 2001 to the practice followed in the Ethyl case, and in *S.D. Myers v. The Government of Canada* ("Myers") and *Pope & Talbot, Inc. v. The Government of Canada* ("Pope & Talbot"):

... [I]n *Pope & Talbot*, the NAFTA Tribunal ordered Canada to provide a Statement of defence as one of the first acts of that tribunal. The jurisdictional arguments were addressed after the Statement of Defence was filed. ...

Additionally, in *Re S. D. Myers and Canada*, Canada was ordered to produce its Statement of defence within 30 days after the preliminary meeting of the Tribunal. In *Re Ethyl and Canada*, Canada's jurisdictional issues were again raised in the Statement of Defence.

51. In each of the three foregoing cases the Investor alleged breaches of Canada's NAFTA obligations that, by the express terms of NAFTA Articles 1116 and 1117, are subject to NAFTA Chapter Eleven Investor-State arbitration. Canada did not raise any objections with respect to the adequacy of the Statements of Claim in these cases.⁹ There was therefore no question as to the ability and appropriateness of Canada responding to the Investors' claim with the submission of a Statements of Defence and therein setting forth its objections, if any, to the jurisdiction of the Tribunal.

52. For example, in dealing with Canada's jurisdictional objections in *Ethyl* case the Tribunal began by noting that:

On the face of the Notice of Arbitration and Statement of Claim, Ethyl states claims for alleged breaches by Canada of its obligations under Articles 1102 (National Treatment), Article 1106 (Performance Requirements) and Article 1110 (Expropriation and Compensation). The Claimant indisputably is an "investor of a Party", namely the United States, and alleges that it has "incurred loss or damage by reason of, or arising out of" such breaches, all as required by Article 1116(1). It is likewise beyond doubt that the Claimant has acted within three years of the time when it "first acquired or should have acquired, knowledge of the alleged breaches and knowledge that [it] incurred damage or loss" as stipulated in Article 1116(2). Claimant's Statement of Claim satisfies *prima facie* the requirements of Article 1116 to establish the jurisdiction of this Tribunal.¹⁰

9 In the *Ethyl* case, the Investor claimed that Canada's Manganese Based Fuel Additive Act breached three obligations of Canada under NAFTA Chapter Eleven: NAFTA Article 1102 (National Treatment); NAFTA Article 1105 (Minimum Standard of Treatment) and NAFTA Article 1110 (Expropriation and Compensation). (*Supra*, note 2 at pp.3 and 4, para. 7) [Tab 1] In the *Myers* case, the Investor challenged the PCB Waste Management Order ("Order") issued by Canada, which prohibited the export of PCB wastes from Canada to the United States. The Investor alleged that the Order breached the same three obligations of Canada plus NAFTA Article 1106 (Performance Requirements). [Tab 5] In the *Pope & Talbot* case, the Investor challenged Canada's implementation of the Canada-U.S. Softwood Lumber Agreement and alleged the same four breaches under NAFTA Chapter Eleven. (Award by the Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Dismiss the Claim Because it Falls outside the Scope and Coverage of NAFTA Chapter Eleven, January 26, 2000, pp. 10 and 11, paras. 24 and 25.) [Tab 6] 10 *Supra* note 1, at paragraph 61, p. 31. [Tab 1]

53. By comparison, the UPS Statement of Claim relates to alleged measures that, by the express terms of NAFTA Articles 1101, 1116 and 1120 are prima facie beyond the scope of NAFTA Chapter Eleven Investor-State arbitration or otherwise does not comply with the requirements of Article 18(2) of the UNCITRAL Rules.

54. In any event, UPS goes on to note in its letter of March 22, 2001 that:

The real issue, however, is not what is the established practice before these various tribunals, but rather, whether the filing of a Statement of Defence will assist the tribunal in addressing the various jurisdictional arguments which Canada has said it wishes to advance, but which it has not yet articulated.

55. Given the nature and extent of Canada's objections to UPS's Statement of Claim and the agreement of UPS that jurisdictional objections should be dealt with as preliminary questions, the appropriate response to the Statement of Claim is the Notice of Motion which, in the circumstances, will best assist the Tribunal in regulating this stage of the proceeding and facilitate the fair and efficient conduct of the remainder of the arbitration.

PART V: RELIEF SOUGHT

56. For the foregoing reasons Canada asks the Tribunal to 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 30th 2001 as to the a schedule for the 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, the Province of Ontario, this 30th day of April, 2001.

of Counsel for Canada

Donald Rennie

Patrick Bendin