

**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

**NOTICE OF MOTION IN RESPECT OF
JURISDICTIONAL OBJECTIONS TO THE INVESTOR'S AMENDED
STATEMENT OF CLAIM**

THE MOTION IS FOR:

A ruling by the Tribunal as a preliminary question, pursuant to Articles 21(1) and (4) of the UNCITRAL Arbitration Rules, that:

- a. the Investor's claim is not within the jurisdiction of the Tribunal and should be dismissed; or
- b. alternatively, numerous allegations in the Investor's Amended Statement of Claim are not within the Tribunal's jurisdiction and as such cannot be submitted to investor-state arbitration under NAFTA Chapter Eleven and should be struck.

IN SUPPORT OF THE MOTION Canada will make written and oral submissions in accordance with the schedule fixed by the Tribunal.

FOR THE PURPOSE OF THE PRESENT MOTION ONLY Canada does not dispute the allegations of fact in the Notice of Intent, Notice of Arbitration and Amended Statement of Claim and requires no evidence to support of its motion. The present motion is submitted without prejudice to Canada's right under Article 21(3) of the UNCITRAL Arbitration Rules to raise in its Statement of Defence further defences or objections which require evidence.

THE GROUNDS FOR THE MOTION ARE:

1. The Tribunal is without jurisdiction to arbitrate breaches of NAFTA Articles 1501 and 1502(3)(d) alleged in the Amended Statement of Claim on the grounds that these breaches are beyond the scope of NAFTA Chapter Eleven.

2. The Tribunal is without jurisdiction to arbitrate the Investor's claim because UPS failed to meet the conditions precedent to bringing a claim under NAFTA Chapter Eleven by not establishing that;
 - i. it incurred loss or damage by reason of, or arising out of, the alleged breaches;
 - ii. non-Canadian subsidiaries or related foreign companies are investments of the Investor in the territory of Canada.

3. Numerous paragraphs in the Amended Statement of Claim are impossible to respond to on account of being vague, open-ended and not defining with sufficient particularity the measure, the alleged breach of the NAFTA and the facts supporting the claim.

THE GROUNDS FOR THE MOTION INCLUDE THE FOLLOWING:

1. Numerous Allegations in the Investor's Amended Statement of Claim are Beyond the Scope of NAFTA Chapter Eleven

1.1. Allegations Of Anti-Competitive Practices Are Outside The Tribunal's Jurisdiction

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

2. Accordingly, the Tribunal has no jurisdiction to adjudicate allegations by the Investor that Canada allowed Canada Post Corporation to engage in

anti-competitive practices including cross-subsidization and predatory pricing (NAFTA Articles 1501 and 1502(3)(d)).

3. The following paragraphs in the Amended Statement of Claim refer either directly or indirectly to breaches of NAFTA Articles 1501 and 1502(3)(d) and therefore should be struck:

Paragraphs:

- 16(f)(g)
- 22
- 23
- 25
- 26
- 27
- 28
- 30
- 31
- 34
- the reference to article 1502(3)(d) in paragraph 36

4. These allegations of anti-competitive practices are outside the Tribunal's jurisdiction pursuant to Article 1116 and cannot be saved by the Claimant's attempt to bring them in indirectly by alleging that they constitute breaches of NAFTA Article 1105 and 1502(3)(a).

1.2 Allegations that the Canada Publications Assistance Program breaches NAFTA Article 1102 are outside the Tribunal's jurisdiction

5. The allegation that Canada's Publications Assistance Program breaches NAFTA Article 1102 is not within the Tribunal's jurisdiction.

6. Paragraph 18 of the Amended Statement of Claim alleges that the Publications Assistance Program is a subsidy of the Canadian magazine industry that results in a breach of national treatment with respect to UPS because of the program's requirement that the distribution occur through Canada Post.

7. NAFTA Article 2106 and Annex 2106 provide that measures with respect to cultural industries shall be governed by the Canada-United States Free Trade Agreement. Article 2005 of the Canada-U.S. FTA specifies that cultural industries are exempt from the Agreement. Cultural industries are defined in NAFTA 2012 as:

[...] an enterprise engaged in any of the following activities:

- a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.

8. On the face of the allegations in paragraph 18 of the Amended Statement of Claim, the measure complained relates to a distribution of magazines and as such, it meets the definition of cultural industry. Accordingly, it falls within the

exemption of Article 2005 of the Canada-U.S. FTA and NAFTA Article 2106 and Annex 2106 and is outside the Tribunal's jurisdiction.

9. In addition, NAFTA Article 1108(7) provides that:

Articles 1102, 1103 and 1107 do not apply to: [...]

b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.

10. On the face of the allegations in paragraph 18 of the Amended Statement of Claim, the allegation falls within the exception provided in NAFTA Article 1108(7)(b) and is therefore outside the Tribunal's jurisdiction.

11. As a result, paragraph 18 of the Amended Statement of Claim should be struck.

2. Various Conditions Precedent to the Submission of the Investor's Claim have not been met

12. The Tribunal has no jurisdiction to adjudicate all or part of the Investor's claim on account of its failure to meet the conditions precedent to bringing a claim under NAFTA Chapter Eleven as a result of failing to establish prima facie that,

- a. it has incurred loss or damage by reason of, or arising out of, alleged breaches,
- b. the Investor's non-Canadian subsidiaries or related foreign companies are investments in the territory of Canada.

2.1 The Investor Failed To Establish That It Incurred Loss Or Damage By Reason Of, Or Arising Out Of, The Alleged Breaches

13. NAFTA Article 1116(1) provides that an investor of a Party may submit to arbitration a claim that another Party has breached an obligation encompassed by paragraphs (a) and (b) of this Article and that it incurred loss or damage by reason of, or arising out of that breach.

14. The Amended Statement of Claim merely contains a bold, general claim for damages, unrelated to the alleged breaches of obligations under NAFTA Chapter Eleven. It fails to plead,

- (a) the specific damage or loss arising out of each measure or alleged breach of NAFTA Chapter Eleven;
- (b) the causal connection between alleged losses or damages and each alleged "measure" or breach of NAFTA Chapter Eleven.

15. The Amended Statement of Claim does not include or plead the necessary material facts to establish that any of the alleged loss or damage was suffered by the Investor itself and not by its Investment.

16. The Amended Statement of Claim is therefore beyond the Tribunal's jurisdiction and should be struck in its entirety.

2.2 The Investor Failed to establish that Non-Canadian Subsidiaries or Related Foreign Companies are Investments of the Investor in the Territory of Canada

17. 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;
- [...]

18. Paragraph 7 of the Amended Statement of Claim alleges that the four U.S. subsidiaries are investments of UPS within the meaning of the NAFTA. On the face of this allegation the U.S. subsidiaries of UPS are not investments of an investor in the territory of another NAFTA Party. Allegations relating to the US subsidiaries fall outside the scope of Chapter 11 in accordance with Article 1101. Therefore, paragraph 7, 19 and 35 of the Amended Statement of Claim as well

as any allegation of measures affecting the US subsidiaries or loss in relation to the US subsidiaries should be struck.

3. Numerous Allegations In The Investor's Amended Statement Of Claim Fail To Disclose Sufficient Facts To Support The Claim Or Do Not Give Adequate And Fair Notice Of The Case To Be Met

19. The Amended Statement of Claim contains numerous paragraphs that are impossible to respond to by virtue of being vague, open-ended, and not defining with sufficient particularity the measure, the alleged breach and the facts supporting the Claim. The following paragraphs in the Amended Statement of Claim are vague or open-ended and should be struck:

Paragraphs:

- 16 and 16 (a)
- 19
- 22
- 27, 27 c), 27(d)
- 34
- 35
- 36

20. Alternatively, the vague and open language in these paragraphs should be struck.


**THE FOLLOWING PROVISIONS OF THE NAFTA AND UNCITRAL
ARBITRATION RULES** will be relied upon at the hearing of the motion:

NAFTA Articles 201, 1101, 1108, 1115, 1116, 1117, 1119, 1121, 1122, 1131,
1139, 1501, 1502(3), 1503(2), 2106 and Annex 2106

Canada-U.S. FTA Article 2005 and 2012

UNCITRAL Arbitration Rules, Articles 15, 18, 19, 21 and 33

DATED in the City of Ottawa, in the Province of Ontario, Canada this 7th day
of January 2002.



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