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**APPLETON & ASSOCIATES**

INTERNATIONAL LAWYERS

*Washington DC*

*Toronto*

**CONFIDENTIAL**

**NOTICE OF INTENT TO SUBMIT  
A CLAIM TO ARBITRATION  
UNDER SECTION B OF CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**UNITED PARCEL SERVICE OF AMERICA, INC. ("UPS")**

Investor

v.

**GOVERNMENT OF CANADA ("CANADA")**

Party

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA"), the Investor, **UNITED PARCEL SERVICE OF AMERICA, INC.** serves a Notice of Intent to Submit a Claim to Arbitration for breach of the Party's obligations under the North American Free Trade Agreement.

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**A. NAME AND ADDRESS OF THE DISPUTING INVESTOR**

**INVESTOR:**

**UNITED PARCEL SERVICE OF AMERICA, INC.**

55 Glenlake Parkway N.E.  
Atlanta, Georgia 30328  
USA

**B. BREACH OF OBLIGATIONS**

The Investor alleges that the Government of Canada has breached its NAFTA obligations under Section A of Chapter 11, Chapter 12 and Chapter 15 of the NAFTA including, but not limited to the following provisions:

- (i) Articles 1102 and 1202 - National Treatment;
- (ii) Article 1105 - Minimum Standard of Treatment;
- (iii) Article 1502(3)(a) and Article 1502(3)(d) - Monopolies and State Enterprises; and
- (iv) Article 1503(2) - State Enterprises

The relevant portions of the NAFTA include:

*Article 1102: National Treatment*

1. *Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
2. *Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

*Article 1105: Minimum Standard of Treatment*

1. *Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*
2. *Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.*

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**Article 1202: National Treatment**

1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.
2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

**Article 1502: Monopolies and State Enterprises**

3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:
  - (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges; .....
  - (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anti-competitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.

**Article 1503: State Enterprises**

2. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

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**C. FACTUAL BASIS FOR THE CLAIM AND ISSUES**

**FACTS**

1. The Investor, United Parcel Service of America, Inc. ("UPS"), is a publicly traded corporation incorporated under the laws of the State of Delaware in the United States of America. The company was founded in 1907 and its shares are traded on the New York Stock exchange. UPS is the world's largest express carrier and package delivery company. In 1998 it employed 330,000 employees and delivered more than three billion packages and documents worldwide. UPS delivers packages throughout the United States and in over 200 other countries and territories.
2. The Investment, United Parcel Service Canada Ltd. ("UPS Canada"), is a corporation organized under the laws of Ontario, Canada which has operated since 1975. UPS Canada is owned entirely by the Investor. The Investment provides courier delivery and associated services throughout Canada and with the Investor, around the world.
3. Canada Post Corporation ("Canada Post") operates Canada's postal system. Canada Post has been delegated by the Canadian Parliament the "sole and exclusive privilege" of operating a postal service in Canada under s. 14.1 of the *Canada Post Corporation Act*.<sup>1</sup> Under s. 12 of the Act, Canada Post is also delegated authority to hire agents and employees to carry on its business (i.e. to operate the postal service). Canada Post is also specifically provided with exclusive authority to place its delivery and mail receptacles throughout the public domain.<sup>2</sup>
4. Canada Post is owned entirely by the Government of Canada ("Canada"). Canada Post is defined by Canadian law as a parent Crown corporation and is considered to be "wholly owned" by Canada.

**Canada Post's Non-Monopoly services compete against the Private Sector**

5. While Canada Post has a letter mail monopoly, it does not have a monopoly in other areas, such as the parcel and courier business. Canada Post expanded into the courier business with its Priority Courier, Skypak and Xpresspost operations. In 1993, Canada Post purchased 75% of the shares of the largest courier company in Canada, Purolator Courier Ltd. In January 1999, Canada Post increased its ownership to almost 96% of Purolator's shares. As a result, Canada Post, through its ownership of Purolator,

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<sup>1</sup> R.S.C. 1985, c. 54

<sup>2</sup> Section 3, *Mail Receptacles Regulations*.

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Xpresspost and Priority Courier, dominates the market by controlling approximately 50% of the domestic courier business in Canada today.

6. With the benefit of its letter mail infrastructure, Canada Post expanded into the private sector courier and parcel business in a number of unfair and anti-competitive ways. As a monopoly service provider, Canada Post received extensive public funds to build its letter mail infrastructure. This infrastructure includes transportation, sorting, delivery, post offices and letter mail boxes.
7. Canada Post's acts of cross-subsidization of its courier business, in violation of NAFTA Articles 1502(3)(d) and 1502(3)(a) include, but are not limited to:
  - (i) Allowing customers to deposit Xpresspost courier packages into any of the thousands of Canada Post letter mail postal boxes located across Canada.
  - (ii) Hiring letter carriers whose salaries are paid for by Canada Post's monopoly, to pick up Xpresspost packages from the above postal boxes and transport them in vehicles that form part of the infrastructure of the Canada Post monopoly.
  - (iii) Sorting Xpresspost, SkyPak and Priority Courier packages at Canada Post's letter mail monopoly sorting facilities across Canada.
  - (iv) Transporting Xpresspost, SkyPak and Priority Courier packages across Canada on aircraft chartered by Canada Post's letter mail monopoly and/or trucks leased or owned by said monopoly.
  - (v) Hiring letter carriers whose salaries are paid for by Canada Post's monopoly to deliver Xpresspost packages to their destinations.
  - (vi) Storing Xpresspost, SkyPak and Priority Courier packages at Canada Post letter mail retail facilities across Canada for customers who may not be present to accept delivery (or for oversized packages).
  - (vii) Selling Xpresspost, Skypak and Priority Courier services at thousands of retail locations across Canada that belong to, or are leased by, Canada Post's letter mail monopoly.
  - (viii) Precluding franchisees at Canada Post retail outlets from selling of any courier product other than Canada Post's. This unfairly restricts competition and investment opportunities for other courier providers thereby creating a monopolistic retail outlet base for Canada Post.

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- (ix) Reducing the need to collect account receivables from Xpresspost customers by permitting those customers to use postal stamp meters (ordinarily reserved for letter mail) to affix postage to Xpresspost packages.
  - (x) Operating accounts receivable collection services for Xpresspost, Priority Post and SkyPak.
  - (xi) Operating privileged pick up services for business clients at preferred rates by employees paid for by the Canada Post monopoly.
  - (xii) Having the regulatory definition of "letter" changed from 450 grams to 500 grams in order to expand its letter mail monopoly.
  - (xiii) Subsidizing the development costs of its new e-commerce business with revenues earned from its letter mail monopoly.
  - (xiv) Pricing Xpresspost and Priority Courier services at rates that are often below the cost of providing such services as compared to other delivery products offered by private sector couriers in Canada.
  - (xv) Subsidizing the development of its subsidiary, Purolator Courier Ltd.
8. As a result of these and other practices, Canada Post cross-subsidizes and leverages its non-monopoly courier and parcel services by using its letter mail monopoly infrastructure to reduce the costs of its non-monopoly courier and parcel services. In particular, Xpresspost uses Canada Post's network of postal boxes and letter carriers. Xpresspost and Priority Courier services are also sold to the public through Canada Post's network of retail postal outlets. Postal distribution facilities, such as sorting stations, ground and air transportation, are also used for the delivery of courier products;

Canadian Review of the problems raised by Canada Post's behaviour

9. Many of the anti-competitive practices of Canada Post have been clearly and specifically documented. In 1995 Canada appointed a one person commission as the Canada Post Mandate Review ("the Mandate Review"). The Mandate Review conducted extensive public hearings about the activities of Canada Post. The Mandate Review was completed and submitted its report to Canada on July 31, 1996. The report was not released publicly until October 8, 1996.
10. The Mandate Review concluded that Canada Post is an unregulated public sector monopoly engaged in unrestrained competition with the private sector. The Mandate Review arrived at this conclusion by relying on the following findings:

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- (i) Canada Post's practices raise serious concerns of fairness and appropriateness.
  - (ii) The corporation is not subject to any effective accountability mechanisms and lacks the necessary supervision to ensure that its actions are fully consistent with the public interest.<sup>3</sup>
  - (iii) Canada Post has resisted repeated calls to adopt a satisfactory accounting system that identifies actual costs and revenues for specific products and continues to carry out its competitive activities on the basis of cost-accounting processes that lack transparency.

11. The Mandate Review concluded that cross-subsidization has given Canada Post's competitive products "an advantage over those of Canada Post's competitors that they would otherwise not have". The Review continued that:

*[to] the extent that Canada Post's ability to misallocate its costs flows directly from being a Crown corporation endowed with a Government-granted monopoly, this can be characterized as an unfair use of its privileged position.<sup>4</sup>*

12. The Mandate Review was clear concerning the issue of Canada Post leveraging the distribution costs of its competitive courier businesses:

*The leveraging issue underscores the fundamental problem with Canada Post's competitive activity. It is undoubtedly true that other multi-product companies regularly use leveraging of their networks to maximize efficiency - but these private sector companies did not build their networks with public funds, on the foundation of a government-granted monopoly. None of Canada Post's competitors have access to the cost advantages that leveraging such a network automatically provides.*

*In the opinion of the Review, consequently, the position of the corporation is not made acceptable by a simple finding that its competitive product lines are not actually losing money. Because any contribution they make is really "gravity" - additional revenues to offset network costs that would be incurred in any event - it does not necessarily matter to the corporation if these contributions are relatively small. This enables Canada Post to charge prices lower than would make sense for its competitors. The conclusion is inescapable that this makes Canada Post an unfair competitor.<sup>5</sup>*

13. The Mandate Review also found evidence of another anti-competitive practice: predatory conduct. The Mandate Review confirmed that evidence existed supporting the view that Canada Post's courier services were "aggressive price leaders". The Mandate Review

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<sup>3</sup> Canada Post Mandate Review, July 31, 1996, released to the public by the Minister Responsible for Canada Post, Diane Marleau, on October 8, 1996, at para. 3.4.2.

<sup>4</sup> Canada Post Mandate Review at para 3.4.2.

<sup>5</sup> Canada Post Mandate Review at para. 3.4.3.



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uncovered evidence of aggressive underpricing employed by Canada Post in order to lure customers away from private sector competitors. In light of Canada Post's aggressive pricing and selling tactics, the Mandate Review concluded that: "... Canada Post is an unfair and inappropriately aggressive competitor in the courier industry."<sup>6</sup>

14. The Mandate Review concluded that Canada Post engaged in discriminatory and anti-competitive practices such as cross-subsidizing its participation in the courier business through the misallocation of costs from its lettermail monopoly through its accounting practices.
15. On April 23, 1997, the Canadian Minister Responsible for Canada Post, the Hon. Diane Marleau provided the Government's final response to the findings of the Mandate Review. In light of its knowledge of the problems raised in the new report, Canada chose not to implement the majority of the recommendations.
16. As a result of the report of the Mandate Review, Canada was aware of Canada Post's unfair and anti-competitive practices. Despite this knowledge, Canada failed to ensure through regulatory control or supervision that Canada Post stopped its anti-competitive behaviour.

#### National Treatment

17. The NAFTA Investment Chapter national treatment obligation ensures that all investments, operating in like circumstances, whether domestic or foreign, are treated equally.
18. Canada Post established and maintains a distribution system under government authority delegated to it in connection with its postal monopoly. This system includes air and land transportation fleets, postal sorting and distribution carriers, retail postal outlets, a network of mail storage containers and a workforce of postal carriers.
19. Canada Post permits access to this distribution system for its courier products. Access is not similarly provided to courier service investments (such as UPS Canada) of Investors from other NAFTA Parties. UPS is entitled to receive the best treatment available in Canada with respect to the treatment of its investment. This treatment would include having equal access to the postal distribution system provided to Xpresspost and Priority Courier by Canada Post.
20. UPS customers cannot use letter mail boxes to send pre-paid packages as Xpresspost customers can. UPS packages cannot be sent across Canada as part of domestic mail shipments, or delivered by letter carriers, as can Xpresspost or Priority Courier packages.

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<sup>6</sup> *Canada Post Mandate Review* at para. 3.2.2.

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UPS services cannot be purchased from Canada Post retail outlets, as can Xpresspost and Priority Courier. In fact, Canada Post has threatened to revoke franchise rights from any of its retail agents who sell courier services other than those owned by Canada Post.

21. Canada is aware of the unfair and discriminatory activities which have taken place but it has established a practice of support for this behaviour which creates greater profits for its wholly-owned Crown corporation and its business lines.
22. Canada has also failed to provide national treatment to the Investor and its Investment by administering, operating, assuming all unfunded liabilities and negotiating the terms of the pension plan that governs Canada Post employees, including those employees who render service to Xpresspost, Priority Courier, and the parcel business of Canada Post while not providing such privileges to UPS.
23. Further, Canada Post's parcel importation services enjoy better treatment from Canada than that afforded by Canada to packages imported by UPS. This difference in treatment includes the following practices:
  - (i) Canada Customs officials are less stringent in their enforcement of customs rules and regulations at Canada Post facilities; and
  - (ii) Canada Customs has taken on the responsibility for clearing imported packages for Canada Post.

Currently, Canada Post has been provided with an unfair advantage not offered to its competitors. Under NAFTA Article 1102, UPS and its investment in Canada, are entitled to the best treatment available from customs officials for parcel importation. This best treatment is being enjoyed exclusively by Canada Post's parcel importation services.

24. Canada has failed to provide national treatment to the Investor and its Investment regarding the importation of packages into Canada. These failures include, but are not limited to, the following measures:
  - (i) Requiring Canada Customs to pay Canada Post a payment for each package imported into Canada via the postal system, that is not paid to businesses in direct competition with Canada Post.
  - (ii) Providing Canada Post with preferential access to Canada customs staff and facilities.
  - (iii) Performing Canada Customs staff operations on site at a nominal or no cost to Canada Post. In particular, Customs staff are provided to Canada Post during the evenings and weekends at some locations without cost to Canada Post.

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- (iv) Providing secondary customs inspection activities for Canada Post at no charge while requiring the customers of the Investment to hire a brokerage service to do the same function.
  - (v) Providing Canada Post with preferential payment, interest and penalty terms for the remission of duties and taxes to Canada than that provided to the Investment.
  - (vi) Requiring the Investment to pay for customs equipment used at the Investment's facilities while not requiring Canada Post to pay for similar equipment located at Canada Post facilities.
  - (vii) Permitting Canada Post to charge a rental fee to Canada Customs for additional space at its facilities while not permitting any similar charge to be imposed by the Investment.
  - (viii) Insisting that Canada Post charge the Canadian importer an unduly low flat handling fee of only \$5.00 (Can.) on packages where duties must be collected, regardless of the value or complexity of the transaction. The Investment must supply a broker and thereby incur significantly higher *ad valorem* or complexity-based costs.
  - (ix) Permitting Canada Post to refrain from imposing the Goods and Service Tax on the \$5.00 handling fee while requiring the collection of the same tax on all charges imposed by the Investment.
  - (x) Absorbing a substantial portion of the cost of importing parcels by Canada's postal system rather than charging Canadian consumers (who are the recipients of the parcels) the true cost of the service.
  - (xi) Allowing Canada Post to refrain from charging any handling fee whatsoever on packages where no duties and taxes must be collected.
  - (xii) Providing an indemnity to Canada Post for losses arising while packages are under the control of Customs officers while not providing similar treatment to the Investment.
  - (xiii) Failing to charge duties and taxes to Canadian importers on many packages which are in fact dutiable or taxable.
  - (xiv) Providing more favourable rules for Canada Post regarding the treatment and seizure of letters by Customs Canada than for the Investor.

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- (xv) Storing packages imported into Canada at premises owned or operated by Canada Post's letter mail monopoly so as to accommodate Canadians not present to accept delivery.

Minimum Standard of Treatment

25. The NAFTA requires a Party to accord to investments of investors of other NAFTA Parties treatment in accordance with international law including fair and equitable treatment and full protection and security.
26. As a signatory to an international agreement, Canada owes a duty to carry out its international law obligations in good faith. Canada's failure to observe its NAFTA treaty obligations (including its obligation contained in NAFTA Article 1502(3)(d)) constitutes a violation of Canada's general international law obligation to act in good faith. This behaviour is inconsistent with Canada's obligations under NAFTA Article 1105.
27. Canada's failure to properly investigate and resolve allegations of anti-competitive behaviour by Canada Post, and its failure to make Canada Post's accounting records available for review by an impartial agency such as the Auditor General's Office, are examples of these breaches.
28. Thus, US Investors who have investments in courier companies in Canada, such as the Investor, are not accorded treatment in accordance with international law as required by NAFTA Article 1105 and the Investor has suffered harm as a result of this breach of Canada's international treaty obligation.

Canada's conduct is inconsistent with its NAFTA obligations

29. The courier and parcel services of Canada Post have benefited from special and preferential treatment from Canada Customs and Revenue Agency which has provided special consideration to Canada Post but not to private courier service companies. Canada does not provide such special privileges to UPS.
30. The NAFTA obligates its state Parties to supervise monopolies and to assure the fair treatment of investors and their investments. Under the NAFTA, Canada must ensure that Canada Post does not abuse its special position to engage in anti-competitive practices.
31. The special treatment provided to Canada Post's courier services is inconsistent with a number of Canada's NAFTA obligations, including:
- (i) The NAFTA obligation to ensure regulatory control and supervision over state enterprises (NAFTA Article 1503(2));

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- (ii) The NAFTA prohibition against anti-competitive practices by a government monopoly (NAFTA Article 1502(3)(d) and 1502(3)(a));
  - (iii) the national treatment obligations for investments and cross-border services (NAFTA Articles 1102 and 1202, respectively); and
  - (iv) the obligation to treat investors and their investments consistently with international law (NAFTA Article 1105).
32. Canada must compensate UPS for these damages caused by the failure to act in a manner consistent with its NAFTA obligations.
33. Canada's formal response to the Mandate Review on April 23, 1997 demonstrates that Canada did not meet its NAFTA obligations.
34. The Investor has suffered harm as a result of Canada's breach of its NAFTA Chapter 15 obligations.

**ISSUES**

1. Has the Government of Canada taken measures inconsistent with its obligations under Section A of NAFTA Chapter 11, Chapter 12 and NAFTA Chapter 15, including but not limited to Articles 1102, 1202, 1105, 1502(3)(a), 1502(3)(d) and 1503(2)?
2. If the answer to question 1 is yes, what is the quantum of compensation to be paid to the Investor as a result of the failure of the Government of Canada to comply with its obligations arising under Chapter 11 of the NAFTA?

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**D. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED**

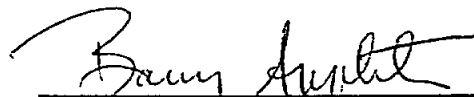
The Investor claims damages for the following:

1. Damages of not less than US \$100 million as compensation for the damages caused by, or arising out of, Canada's measures that are inconsistent with its obligations contained in Part A of Chapter 11, Chapter 12 and Chapter 15 of the North American Free Trade Agreement.
2. Costs associated with these proceedings, including all professional fees and disbursements.
3. Fees and expenses incurred to oppose the effect of the measure.
4. Pre-award and post-award interest at a rate to be fixed by the Tribunal.
5. Tax consequences of the award to maintain the integrity of the award.
6. Such further relief that counsel may advise and that this Tribunal may deem appropriate.

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**Appleton & Associates International Lawyers**  
816 Connecticut Ave, Suite 1200  
Washington, DC 20006  
Telephone: (202) 293-0900  
Fax: (202) 293-0988

1140 Bay Street, Suite 300  
Toronto, ON M5S 2B4  
Telephone: (416) 966-8800  
Fax: (416) 966-8801



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**BARRY APPLETON**  
Counsel for the Investor

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**Hogan & Hartson L.L.P.**  
Columbia Square  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004-1109  
Telephone: (202) 637-5600  
Fax: (202) 637-5910

*Hogan & Hartson L.L.P.*

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Raymond S. Calamaro  
Jeanne S. Archibald  
Counsel for the Investor

SERVED TO:

**Office of the Deputy Attorney General of Canada**  
Justice Building  
284 Wellington Street  
Ottawa, Ontario K1A 0H8