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APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

Washington DC

Toronto

**REVISED AMENDED STATEMENT OF CLAIM
UNDER THE
ARBITRATION RULES
OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT**

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

Claimant/ Investor

v.

GOVERNMENT OF CANADA ("CANADA")

Respondent/ Party

Revised December 20, 2002

**Revised Amended
Statement of Claim of UPS**

-1-

Confidential

Pursuant to Article 18 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and Articles 1116 and 1120 of the North American Free Trade Agreement (NAFTA), the Claimant hereby submits its Revised Amended Statement of Claim.

I. THE PARTIES

The Claimant/Investor is:

United Parcel Service of America, Inc.
55 Glenlake Parkway N.E.
Atlanta, Georgia 30328
USA ("UPS" or the "Investor")

The Respondent/Party is:

Government of Canada
Office of the Deputy Attorney General of Canada
Justice Building
284 Wellington Street
Ottawa, ON K1A 0H1
Canada ("Canada")

II. RELEVANT ENTITIES

A. Canada Post Corporation

1. Canada Post Corporation ("Canada Post") is a Crown Corporation established on October 16, 1981 under the *Canada Post Corporation Act* (the "CPC Act"). Pursuant to the CPC Act, Canada Post is an "agent of Her Majesty in right of Canada" and an "institution of the Government of Canada".¹
2. Canada Post has been delegated by Canada the "exclusive privilege" of collecting, transmitting and delivering first class mail and addressed airmail in Canada (the "Postal Monopoly"), and has the power to make regulations including with respect to rates of postage and the definition of letters.² Canada Post exercises delegated government authority in operating the Postal Monopoly and its related businesses.

¹ *Canada Post Corporation Act*, 1980-81-82-83, c.54., s.5.

² CPC Act, s.23, s.14.

*Revised Amended
Statement of Claim of UPS*

-2-

Confidential

3. Canada Post is a government monopoly and a state enterprise designated or maintained by Canada within the meaning of NAFTA Chapter 15.
4. The definition of "mail" and "mailable matter" in section 2 of the CPC Act, and as referenced in section 19, can be considered to be so broad that it includes all items that can be posted, even products outside the monopoly. These non-monopoly products are clearly subject to Canada's delegated authority permitting Canada Post to engage in activities beyond its lettermail monopoly
5. The *Financial Administration Act*,³ characterizes crown corporations as being either "commercial" or "non-commercial". Canada Post is listed as being "commercial" and therefore required to operate its non-monopoly business on commercial terms.
6. Canada Post competes in the non-monopoly courier, small package delivery and secure electronic communication markets ("Non Monopoly Postal Services Market") directly, and through the operations of its 94% owned subsidiary, Purolator Courier Ltd. ("Purolator"). Canada Post and Purolator together have a combined market share in the courier and small package delivery market of approximately 47%.
7. As part of its Postal Monopoly, Canada Post has established a postal distribution network and related infrastructure, which includes, but is not limited to:
 - a. Air and ground transportation;
 - b. Retail Post offices;
 - c. Letter boxes; and
 - d. Sorting and storage facilities.

³ Section 3(5) of the Act states that Canada Post SHALL NOT be listed under Schedule III (Part 2) unless the Government is satisfied that: (i) the Crown Corporation operates in a competitive environment; (ii) it is not ordinarily dependent on Government appropriations (of money) for operating purposes; and (iii) it ordinarily earns a return on equity; and that the corporation will pay dividends. Schedule III (Part 2) lists only three Crown Corporations that meet the criteria of Section 3(5) and that are therefore expected to operate on a commercial basis. It is significant that from the over thirty Federal Crown Corporations, only three such corporations are listed on Schedule III (Part 2).

B. United Parcel Service of America, Inc., and United Parcel Service Canada

8. United Parcel Service of America, Inc., is a corporation incorporated under the laws of the State of Delaware in the United States of America. UPS Internet Services, Inc., United Parcel Services Worldwide Forwarding, Inc., United Parcel Service, Inc. (New York), and United Parcel Service, Inc. (Ohio) (collectively, the "US Subsidiaries") are wholly owned subsidiaries of UPS. UPS also owns United Parcel Service Canada Ltd. ("UPS Canada", or the "Investment"), a company organized under the laws of Ontario, Canada. UPS Canada provides courier and small package delivery and associated services ("Express Delivery Services") and secure electronic communication services in the non-monopoly postal services market throughout Canada, and with UPS and its related companies, including the US Subsidiaries, and Fritz Starber Inc., a Canadian subsidiary of UPS.
9. UPS Canada and Fritz Starber Inc. each are an "Investment" of UPS, and UPS is an "Investor" of a Party, the United States of America, within the meaning of NAFTA Article 1139. The US subsidiaries are investments of UPS under NAFTA Article 1139.
10. UPS Canada employs over 6000 employees in 54 facilities throughout Canada, and provides delivery services to every address in Canada, and through its affiliation with UPS and its related companies, to every address in the United States and over 200 countries worldwide. UPS Canada is the third largest Canadian courier with total market share in the small package delivery and small package express delivery markets of approximately 7-8%.⁴
11. Canada Post and UPS Canada are direct competitors in the Canadian non-monopoly postal services market. With Canada's purchase of Purolator Courier in 1993, Canada Post controls the largest share of the courier market generally and also the largest share in the small parcel market in Canada.

C. The Canada Post Mandate Review (The Radwanski Commission)

12. In 1995, Canada appointed a Commission to carry out an independent review of Canada Post and its mandate. An extensive review of Canada Post's activities including its non-monopoly business activities, and Canada's role in supervising and regulating those activities was carried out by that Commission.
13. In late 1996 the Commission concluded that Canada Post is an unregulated government monopoly engaged in unrestrained competition with the private sector. It found:

⁴ Canada Post - Consolidation Marketing Plans (1992) as provided at Tab 18 of Schedule of Authorities to the Original UPS Statement of Claim.

**Revised Amended
Statement of Claim of UPS**

-4-

Confidential

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- a. Canada Post's practices raised serious concerns of fairness and appropriateness;
 - b. Canada Post 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;
 - c. 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;
 - d. Canada Post is an unfair competitor in ways detrimental to private sector companies in the non-monopolized postal market in Canada;
 - e. Canada Post's mis-allocation of costs constitutes a form of cross-subsidization;
 - f. Canada Post's ability to leverage a network built-up with public funds on the strength of a government granted monopoly gives it a pricing advantage over competitors that is seriously unfair;
 - g. Canada Post has developed a reputation as a "vicious competitor" whose predatory practices have led corporations to refrain from criticisms for fear of retaliation;
 - h. The competitive activities of Canada Post, based as they are on the foundation of the corporation's postal monopoly and of the network it has built with public funds, are incompatible with basic principles of fairness;
 - i. Canada Post Corporation should withdraw from all competition with the private sector in areas of activity outside its core public policy responsibilities for providing postal services; and
 - j. Canada Post Corporation should divest itself of Purolator Courier at fair market value and to withdraw from all other courier services, which are defined as services involving pick-up of the envelope or parcel from a business or residential address.⁵

⁵ See *Canada Post Mandate Review* at p. 124-125.

**Revised Amended
Statement of Claim of UPS**

-5-

Confidential

14. Canada did not finally respond to the Commission's finding until April 23, 1997 when it determined not to implement measures to redress these findings. Canada's official response to the Radwanski Commission ignored the discriminatory conduct that was taking place, and continues to take place, thereby putting the Investor on notice that it had to proceed elsewhere for a remedy.
15. The Investor expected that Canada would act in good faith to supervise and correct the conduct that is now at issue in this arbitration in its official response to the Radwanski Commission and with respect to other conduct that has harmed the Investor and its Investments.

III. PROCEDURAL HISTORY OF DISPUTE AND JURISDICTION

16. On January 19, 2000, UPS served upon Canada a Notice of Intent to Submit a Claim to Arbitration in accordance with Article 1119 of the NAFTA.
17. This Claim is made less than three years from the date the Investor first acquired or should have acquired knowledge of the breaches set out herein and knowledge that the Investor had incurred loss or damage. More than six months have elapsed since the events giving rise to this claim.
18. Consultations pursuant to Article 1118 of the NAFTA were held on March 17, 2000 in Ottawa.
19. UPS and UPS Canada have filed waivers and UPS has filed its consent to the extent required by NAFTA Article 1121(1).
20. Canada moved a motion to strike out portions of the Investor's Statement of Claim on the basis that the Tribunal had no jurisdiction to adjudicate this Claim. On July 28 - 29, 2002 the Tribunal held hearings in Washington, DC. On November 22, 2002, the Tribunal issued an Award on Jurisdiction that permitted this Claim to proceed to merits subject to certain amendments in the Investor's pleading.

IV. OVERVIEW - BREACHES OF NAFTA

21. By virtue of the facts set out herein, Canada has breached NAFTA Articles 1102, 1103, 1104, 1105 and NAFTA Articles 1502(3)(a) and 1503(2), all in a manner such that UPS is entitled to bring this Claim for compensation under Section B of Chapter 11 of NAFTA.

**Revised Amended
Statement of Claim of UPS**

-6-

Confidential

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22. More particularly, Canada has:
- a. Breached its obligations under NAFTA Article 1102, directly and through Canada Post its agent, by not providing UPS and UPS Canada with the best treatment available to domestic competitors in the non-monopoly postal services market, and in particular, to Canada Post;
 - b. Breached its obligations under NAFTA Article 1103 by failing to accord UPS and UPS Canada most favored nation treatment by providing treatment to non-NAFTA Party Investors that is better than the treatment provided to UPS and UPS Canada;
 - c. Breached its obligations under NAFTA Article 1104 by failing to accord UPS and UPS Canada the better of national treatment or most favored nation treatment;
 - d. Breached its obligations under NAFTA Article 1105 by failing to accord UPS and UPS Canada treatment in accordance with international law including fair and equitable treatment and full protection and security; and
 - e. Breached its obligations under NAFTA Articles 1502(3)(a) and 1503(2) by failing to ensure that Canada Post not act in a manner inconsistent with Canada's obligations under the NAFTA under Section A of NAFTA Chapter 11.

V. CANADA'S NAFTA OBLIGATIONS

A. National Treatment

23. NAFTA Article 1102 requires Canada to accord to Investors of another NAFTA Party and to Investments of Investors of another NAFTA Party (such as the Investments of UPS) treatment as favorable as the best in-jurisdiction treatment with respect to, among other things, the establishment, acquisition, expansion, management, conduct and operation of investments in like circumstances to the investments of Canadian investors.
24. UPS is in 'like circumstances' with Canada and Canada Post by virtue of the fact that they compete in the same market and for the same market share. Canada Post non-monopoly products are generally substitutable with UPS courier products.

*Revised Amended
Statement of Claim of UPS*

-7-

Confidential

Breaches of National Treatment by Canada

25. Canada has granted to Canada Post treatment from which Canada Post is able to reduce its cost of its non-monopoly postal services, which treatment is not correspondingly made available to UPS or UPS Canada. Canada's unusual structuring of the legal and accounting relationships between Canada Post and other entities of the Canadian government results in less favorable treatment to UPS than to Canada Post as a competitor in the non-monopoly segment of the market. The consequence of this structuring is that Canada Post is able to exploit, in the non-monopoly market where it directly competes with UPS, numerous advantages to which UPS has no access. This treatment includes, but is not limited to:
- a. Treatment accorded to Canada Post under a heretofore secret agreement dated April 25, 1994, between Canada Post and the Canadian Department of National Revenue (the "Postal Imports Agreement"), which agreement was not disclosed to UPS or to UPS Canada until 1999, including:
 - i. Payments by the Canadian Department of National Revenue to Canada Post calculated on the basis of the number of packages imported into Canada through the postal system;
 - ii. The provision by Canada Customs employees to Canada Post of customs brokerage services or services equivalent to customs brokerage services without fee;
 - iii. The provision of Customs officers to Canada Post during evenings and weekends without cost to Canada Post;
 - iv. The exemption of Canada Post from interest and penalties for late payment or nonpayment of duties or taxes;
 - v. Permitting Canada Post employees to perform customs functions; and
 - vi. The exemption of Canada Post from responsibility for the costs associated with maintenance and upgrading of the "PICS" computer system and electronic data interchanges through which Canada Post communicates with Canada Customs, and from paying for computer and processing equipment used by Canada Customs on Canada Post premises.

*Revised Amended
Statement of Claim of UPS*

-8-

Confidential

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- b. Permitting Canada Post to levy and retain a \$5 handling fee for the collection of duties and taxes from recipients of packages imported through the postal system, irrespective of the costs properly or fairly attributable to that transaction;
- c. Exempting Canada Post from charging recipients of packages imported through the postal system the seven percent (7%) goods and services tax on the \$5 handling fee;
- d. Exemption from *Customs Sufferance Warehouse* Regulations and the requirement to post:
- i. Customs Broker License Bonds;
 - ii. Temporary Importation Bonds;
 - iii. Bonded Air Carrier Operation Bonds;
 - iv. Bonded Freight Forwarder Operations Bonds;
 - v. Bonded Highway Carrier Bonds; and
 - vi. Sufferance Warehouse Bonds.
- e. Failing or neglecting to accord UPS and its Investments national treatment by either failing or neglecting to ensure that Canada Post charges duties and taxes to Canadian importers on packages imported by Canada Post through the postal system for which duties and taxes are payable and has allowed large volumes of packages to be imported into Canada without the collection of such duties and taxes. Where packages are imported by UPS Canada, duties and taxes are appropriately collected. As a result of the differential treatment, Canada Post receives a competitive advantage over UPS Canada, to the detriment of UPS Canada;
- f. Exempting Rural Route Contractors engaged under contract with Canada Post from the application of the *Canada Labour Code*, and denying those individuals the right to unionize;
- g. Granting Canada Post the exclusive right to place its mailboxes in any public place, including a public roadway, without payment of any fee or charge when those mailboxes are also used for the deposit of non-monopoly products;
- h. Provision to Canada Post of benefits respecting the pension plans made available to its employees, including by providing Canada Post free of charge with administrative and other services, by providing Canada Post employees with indexed pension benefits without requiring Canada Post to fund any actuarial deficiency, by prohibiting Canada Post employees'

*Revised Amended
Statement of Claim of UPS*

-9-

Confidential

unions from negotiating improvements to the pension plan, and by making excessive payments to Canada Post upon Canada Post taking over administration of the pension plan; and

- i. Designing and implementing a Publications Assistance Program, in such a way as to provide financial assistance to the Canadian magazine industry, but only on the condition that any magazines benefiting from that financial assistance are distributed through Canada Post, and not through companies such as UPS Canada.

Breaches of National Treatment by Canada through its Agent, Canada Post

26. Canada Post has provided treatment more favorable than that provided to UPS or UPS Canada. UPS has been denied access to the monopoly infrastructure and network, unlike Purolator and other divisions of Canada Post which compete in the non-monopoly market.
27. Canada Post has failed to use appropriate accounting devices to properly allocate costs as between the monopoly and competitive dimensions of its business. Because of these inappropriate practices, Canada Post has been able to understate, misstate or omit the appropriate costs to Canada Post of its activities in the competitive sector of the market. The Investor has been afforded less favorable treatment, since Canada Post's ability to avoid allocating the appropriate costs thereof to its competitive activities allows it to engage in forms of discriminatory and unfair behavior.
28. Canada Post has engaged in the following activities which are inconsistent with treatment required by the NAFTA:
 - a. Requiring Canada Post retail franchisees to enter into a standard dealership agreement prohibiting those franchisees from selling products that compete with Canada Post's "courier or messenger services" such as UPS and UPS Canada's courier products;
 - b. Providing access to the monopoly Canada Post infrastructure to permit Canada Post to provide its non-monopoly products, and in particular "Xpresspost", "Priority Courier", "Regular Parcel" and "Expedited Parcel" in a discriminatory and unfair manner;
 - c. Using its extensive network developed for the purposes of facilitating the delivery of monopoly letter mail in order to compete in the non-monopoly postal services market without fairly charging or disclosing the appropriate costs.

*Revised Amended
Statement of Claim of UPS*

-10-

Confidential

Examples of less favorable treatment and unfair access include:

- i. allowing non-monopoly products to be deposited into Canada Post's 936,000 red letter mail boxes for pick up by Canada Post employees using Canada Post vehicles;
 - ii. use of Canada Post's employees to pick up non-monopoly products;
 - iii. use of monopoly mail processing facilities to process non-monopoly products;
 - iv. use of Canada Post ground and air vehicles for the purpose of moving non-monopoly products;
 - v. delivery of non-monopoly products by Canada Post letter carriers as part of their regular mail delivery function;
 - vi. use of Canada Post retail outlets for the sale of non-monopoly products, including the recent decision to sell Purolator's domestic and international courier products from Canada Post retail outlets;
 - vii. permitting the sale of Purolator products in Canada Post retail outlets;
 - viii. delivering non-monopoly products to locked apartment mail boxes, to post office boxes at retail postal outlets, and to community mail boxes, access to which Canada Post employees have solely by reason of their delivery of monopoly mail;
- d. Making available to its subsidiary, Purolator, the benefit of the financial strength of Canada and the buying power of Canada Post to reduce the costs incurred by Purolator and to improve its competitive position, and by contracting directly with Purolator for the provision of airlift services so as to reduce the costs incurred by Purolator, while not permitting UPS Canada to bid competitively for such airlift services;

*Revised Amended
Statement of Claim of UPS*

-11-

Confidential

- e. Using revenues from its monopoly products to develop and sell E-commerce products at prices below the fair cost of developing and selling those products;
- f. Allowing Purolator to sell stamps at its retail outlets while at the same time prohibiting the sale of stamps at retail outlets that sell UPS Canada or other competitor non-monopoly products;
- g. Allowing Global Distributing Express exclusive access to Canada Post's infrastructure and network to sell and distribute its non-monopoly product for the international market; and
- h. Not properly attributing the costs incurred in administering the Canada Post pension plan to non-monopoly products and otherwise taking the benefit of Canada's administration of the pension plan for Canada Post employees, thereby permitting Canada Post to price its non-monopoly products below their properly attributable costs.

Permitting the continued operation of such conduct is inconsistent with Canada's obligations under Section A of NAFTA Chapter 11.

- 29. Canada Post has acted inconsistently with Canada's obligations under NAFTA Article 1102 by not allowing the Investment similar access to Canada's monopoly infrastructure and network that is provided to Canada's non-monopoly business or alternately by failing to ensure, through accounting, regulatory and/or structural measures, that Canada Post does not employ the monopoly infrastructure and network on such terms and in such a way as to alter the conditions of competition in the non-monopoly market to the disadvantage of the Investor.
- 30. Canada Post is further able to obtain treatment more favorable than that obtained by the Investor and its Investment through Canada's provision of borrowings to Canada Post at less than market rates by using a guarantee of Canada and by virtue of the fact that Canada does not require a market or commercial rate of return upon its investment in Canada Post. As a result of this and other more favorable treatment, Canada Post is able to price its non-monopoly products at below properly or fairly attributable costs by taking advantage of below market debt charges and the lack of a requirement by Canada that Canada Post provide a return on its capital. Canada Post is further able to use these advantages to develop and compete in non-monopoly postal services markets, without properly attributing costs incurred in so doing and while pricing below those costs.
- 31. By reason of the benefits and privileges set out above, which are not correspondingly made available by Canada to UPS Canada, UPS, and the US Subsidiaries have suffered

*Revised Amended
Statement of Claim of UPS*

-12-

Confidential

harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share, and increased out of pocket expense. Canada has violated its obligation to accord national treatment pursuant to NAFTA Article 1102 to UPS and UPS Canada, and is therefore liable to pay compensation.

B. Canada's Obligations under Articles 1103 and 1104

32. Canada is obliged under NAFTA Article 1103 to provide UPS and UPS Canada with treatment no less favorable than treatment provided to Investors of any other Party. Specifically, Article 1103 reads:

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

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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

NAFTA Article 1104 provides as follows:

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

33. Canada has entered into treaties with non-NAFTA Parties since ratifying the NAFTA which provide better treatment to non-NAFTA Party Investors than to NAFTA Party Investors. UPS and UPS Canada are entitled to rely upon the benefit of those more favorable treaty obligations within this NAFTA claim.
34. Specific examples of international agreements where the Government of Canada has provided a better level of treatment to non-NAFTA Party investors include, but are not limited to, treaties entered into between the Government of Canada and the Governments of Barbados, Costa Rica, and Venezuela. Article II in each of these treaties, which came into effect after the NAFTA came into force January 1, 1994 provides treatment that is better than that provided under Section A of NAFTA Chapter 11. UPS and UPS Canada are entitled to the better treatment provided in these treaties.
35. UPS and UPS Canada have suffered harm resulting from Canada's breaches of Articles 1103 and 1104.

C. Treatment in Accordance With International Law under Article 1105

36. Canada is obligated under NAFTA Article 1105 to accord to UPS or UPS Canada treatment in accordance with international law, including fair and equitable treatment. Canada must ensure that the Investor and its Investments receive fair and equitable treatment, freedom from discrimination and full protection and security.
37. Canada has violated its Article 1105 obligation through its arbitrary, discriminatory and unfair treatment of a UPS subsidiary. Fritz Starber, Inc. is a Canadian subsidiary of UPS which operates a freight forwarding and customs brokerage business based in Montreal, Canada.
38. On April 12, 2001 Canada Post solicited Fritz Starber of Montreal to submit a bid to provide certain freight forwarding services for Canada Post's bulk mail from Montreal to Latin America and the Caribbean. Fritz Starber, a company in operation for almost seventy-five years with its Canadian headquarters in Montreal, was well positioned to provide those services.
39. Fritz Starber sent its bid to Canada Post on May 9, 2001 before Fritz Starber was acquired as a wholly owned subsidiary of UPS and UPS Canada on May 24, 2001. On December 5, 2001 Canada Post communicated by formal e-mail message addressed to Fritz-Starber that Canada Post would no longer entertain any bid from Fritz Starber. The reasons for this decision as provided by Canada Post in that email message were that UPS had commenced a NAFTA lawsuit against Canada Post and that Fritz Starber was now affiliated with UPS. Fritz Starber was denied its right to do business in Canada with Canada Post on this arbitrary and discriminatory basis. This treatment constitutes a violation of Canada's obligation to accord fair and equitable treatment under NAFTA Article 1105.
40. In addition, Canada and Canada Post have failed to provide crucial information to the public concerning government policies, regulations and practices that affected the conditions of competition between UPS and UPS Canada and Canada Post/Purolator. Canada placed UPS and UPS Canada in a position where it did not know that Canada was, in a number of respects, violating the Investor's rights under NAFTA. Canada in this manner prevented UPS and UPS Canada from seeking legal redress during this period. This constitutes a denial of justice in contravention of public international law and therefore a violation of Canada's obligation under NAFTA Article 1105. This concealment taken together with the government's direction in the *Financial Administration Act* that Canada Post is to operate its competitive business on commercial terms, amounts to a breach of good faith thereby constituting a breach of the fair and equitable standard under Article 1105.

*Revised Amended
Statement of Claim of UPS*

-14-

Confidential

41. Since the filing of this NAFTA claim, Canada has continued, and continues to permit Canada Post, to take further actions that are inconsistent with NAFTA Chapter 11 obligations. UPS became subject to continued and entirely new violations of unfair treatment as Canada Post implemented business plans such as Xpresspost to the United States and Epost to compete with UPS. Canada Post has also implemented a new program whereby Purolator Courier's domestic and international products are now being sold throughout Canada Post's retail network.
42. Canada's lack of transparent regulatory framework for Canada Post is an example of the intentional effort of Canada to prevent UPS from becoming aware of the continued unfair and discriminatory policies and practices it had been subjected to within the context of NAFTA violations.
43. The Investor asserts that the facts pleaded with respect to Canada's breach of NAFTA Article 1102 constitutes a breach of the international law standard of treatment, including fair and equitable treatment, under NAFTA Article 1105. Such claims are so incorporated into this part of the Investor's Claim to the extent that they do not assert an independent breach of anti-competitive conduct *per se*.
44. UPS and UPS Canada have suffered harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share, and increased out of pocket expense. Canada has violated its obligations under NAFTA and is liable to pay compensation.

D. Canada's Obligations under Chapter 15

(i) NAFTA Article 1502(3)(a) and 1503(2) Obligations

45. Under NAFTA Article 1502(3)(a) Canada is obliged to ensure that Canada Post acts in a manner that is not inconsistent with Canada's obligations under NAFTA whenever Canada Post exercises any governmental authority that Canada has delegated to it.
46. Under NAFTA Article 1503(2), Canada is obliged to ensure through regulatory control or other supervision that Canada Post acts in a manner that is not inconsistent with Canada's obligations under Chapter 11 of NAFTA whenever Canada Post exercises any delegated governmental authority.
47. The Tribunal in its decision on jurisdiction dated November 22, 2002 has concluded that NAFTA Chapter 11 Investor-State arbitrations may assert claims alleging a breach of Article 1502(3)(a) or 1503(2) that violate Section A of Chapter 11 obligation.
48. The Tribunal has the jurisdiction to rule on claims made by UPS regarding Canada's failure to adequately supervise or regulate Canada Post when it violated provisions in

*Revised Amended
Statement of Claim of UPS*

-15-

Confidential

Section A of Chapter 11 such as NAFTA Article 1102 or Article 1105. The Tribunal held that:

69. We therefore conclude that, to the extent that a claim is brought under article 1116(1)(a), a breach of Section A must be alleged. UPS's claims under article 1502(3)(a), thus, are limited to claims of violations of obligations associated with claimed failures to abide by terms of chapter 11A. UPS asserts two such bases for such claims, under articles 1102 and 1105. Although the facts asserted by UPS may make out a violation of other provisions of NAFTA as well as a violation of obligations under these articles, our jurisdiction extends to the claims associated with article 1502(3)(a) only so far as they can be brought within one of these provisions.

49. The Tribunal held that there was no international customary law regulatory anti-competitive behavior. Thus the Tribunal concluded:

99. ... that those parts of the ASC, which are based on Article 1105, and which challenge anticompetitive behaviour and the failure to prohibit or control it are not within its jurisdiction.

Accordingly the Investor has only pleaded claims under Articles 1502(3)(a) or 1503(2) that do not allege specific violations of an international customary law of anti-competitive activities. Only violations of NAFTA Chapter 11, Section A obligations have been claimed.

50. The Investor has suffered damage resulting from Canada's failure to meet its NAFTA obligations under Articles 1502(3)(a) and 1503(2).

51. To the extent that the factual allegations made by the Investor with respect to Section A of NAFTA Chapter 11 also contribute to breaches of fair and equitable treatment under the international law standard of treatment under NAFTA Article 1105, they are so incorporated into this part of the Investor's Claim. Such Claims are so incorporated into this part of the Investor's Claim to the extent that they do not assert an independent breach of anti-competitive conduct *per se*.

(ii) Breaches of Articles 1502(3)(a) and 1503(2)

52. Canada has failed to supervise or exercise control over Canada Post to ensure Canada Post has not acted in a manner inconsistent with Canada's obligations under Section A of NAFTA Chapter 11. These NAFTA inconsistencies include the violation of:

a. NAFTA Article 1102 by permitting non-monopoly products the benefits realized from the monopoly infrastructure without the appropriate charges being allocated to the non-monopoly sector. These benefits are not provided to the Investor and its Investment resulting in less favorable treatment.

*Revised Amended
Statement of Claim of UPS*

-16-

Confidential

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- b. NAFTA Articles 1103 and 1104 by providing better treatment to Investors and Investments that are parties to other trade and investment treaties that Canada has entered into after the NAFTA came into force; and
 - c. NAFTA Article 1105 through arbitrary and unfair conduct such as the unfair and discriminatory treatment of UPS's Canadian subsidiary, Fritz Starber, Inc.

VI. POINTS IN ISSUE

- 53. Has Canada taken measures inconsistent with its obligations under Section A of NAFTA Chapter 11 and Chapter 15, including but not limited to Articles 1102, 1103, 1104, 1105, 1502(3)(a) and 1503(2)?
- 54. If so, what is the quantum of compensation to be paid to UPS as a result of the failure of Canada to comply with its obligations under Chapter 11 of NAFTA?

VII. RELIEF SOUGHT AND DAMAGES CLAIMED

- 55. UPS claims damages of not less than US \$160 million as compensation for the damages caused by or arising out of Canada's breaches of its obligations under NAFTA, costs including professional fees and disbursements, costs of the arbitration, interest, compensation to remedy the tax consequences of any award and such further relief as this tribunal might deem appropriate.

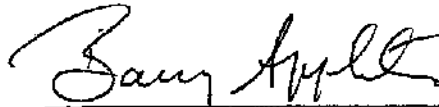
**Revised Amended
Statement of Claim of UPS**

-17-

Confidential

Date of Issue: April 19, 2000 - Amended November 30, 2001 – Revised Amendment December 20, 2002

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FRITZ STARBER INC.



December 18, 2002

The Government of Canada
Office of the Deputy Attorney General of Canada
Justice Building
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K1A 0H8

Dear Mr. Sir/Madame:

Re: United Parcel Service of America, Inc. v. The Government of Canada
Investor-State Dispute Pursuant to Chapter 11 of the NAFTA

Pursuant to Article 1121(1)(b) of the NAFTA, Fritz Starber Inc. waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to all measures, including any laws, regulations, procedures, requirements or practices, taken by the Government of Canada in any measure that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except of the costs of the action), before an administrative tribunal or court under the laws of Canada.

Fritz Starber Inc.

Director

Ricardo Garcia

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