AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE OF AMERICA INC.

Claimant/Investor

AND

THE GOVERNMENT OF CANADA

Respondent/Party

INVESTOR'S REJOINDER TO CANADA'S REPLY ON INTERROGATORIES

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1. On March 5, 2004, Canada delivered its Reply to UPS' Response to Canada's Motion on Interrogatories ("Canada's Reply"). Canada seeks to justify its disputed interrogatories by referring to two articles on international arbitration and by comparing its disputed interrogatories to those asked by the Investor.

2. The authorities referred to in Canada's Reply only confirm that the scope of discovery in international arbitration is much narrower than the expansive approach advocated by Canada. Furthermore, the UPS interrogatories to Canada cited in Canada's Reply illustrate the difference between the narrow and specific approach advocated and adopted by the Investor and the sweeping, over-broad questions asked by Canada.

Canada's Position is Inconsistent With International Arbitration Practice

3. The Investor does not dispute that the UNCITRAL Arbitration Rules grant this Tribunal considerable discretion in the conduct of the proceedings and that, where international arbitration practice is unclear, this Tribunal may consider relevant decisions of municipal courts. However, the decisions from Canadian and U.S. courts relied on by Canada are not helpful as they are made in the context of a completely different procedural system than that commonly followed in international arbitration.

4. Canadian and U.S. courts do not require the exchange of Memorials, Counter Memorials, Replies and Rejoinders before trial. In this context, an expansive approach to discovery may be reasonable. Even then, one of the reasons that parties in the U.S. and Canada choose arbitration is to avoid the expense and delay of such expansive discoveries.

5. Equally experienced trial and appellate judges from other jurisdictions take a much more restrictive approach to discovery, often dispensing with it altogether. As a result, international arbitration has developed a now well established practice that is reflected in the IBA Rules and the Tribunal's *Procedural Directions*. This practice consists of two exchanges of Memorials supplemented by narrow and specific document requests.

6. The commentators cited by Canada only confirm the significant differences between U.S. or Canadian litigation and international arbitration procedures. For example, Mr. Arnott's article confirms that the practice of exchanging documentary evidence, witness statements and expert reports as attachments to Memorials eliminates the possibility of surprise. The quoted passage does not refer to discoveries, but rather to the documents that are to be attached to Memorials. The quote from the article by Mr. Hichey and Ms. Taylor also confirms that parties in international arbitration expect less discovery than parties to litigation before a United States court.[1]

7. Recognizing that its interrogatories do not meet the "narrow and specific" standard for document requests in paragraph B.3(a) of the Tribunal's *Procedural Directions*, Canada argues that the Tribunal "included no similar limitation with respect to interrogatories". However, such a limitation was included by reference in paragraph D.1 of the *Procedural Directions* which applied the procedures for document requests to interrogatories.

8. Canada attempts to distinguish the *Waste Management v. Mexico* Procedural Order on the grounds that it is seeking the facts, not the evidence, that the Investor will rely upon. Once

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[1] Canada's Reply, paras. 6 and 10

again, Canada reveals that it is using the Interrogatories process to obtain further particulars of the nature of the Investor's claim rather than specific information from UPS management. The material facts relied upon by the Investor will be set out in its Memorial and accompanying documents, witness statements and expert reports. There is no need to duplicate this effort through the use of interrogatories that are directed at legal counsel or experts rather than at UPS representatives.

The UPS Interrogatories Illustrate The Deficiencies in Canada's Approach

9. The UPS interrogatories to Canada cited in Canada's Reply demonstrate the "clearly circumscribed" approach to interrogatories advocated and adopted by the Investor. Unlike Canada's disputed interrogatories, none of the Investor's interrogatories seek "all facts relied upon" by Canada with respect to an allegation in the Statement of Defence. None of them requests "authoritative sources" or the application of law to facts.

10. Rather, the UPS interrogatories cited by Canada (which are presumably the broadest questions that Canada could find in the Investor's Information Request) all seek narrow and specific that can be answered by lay witnesses rather than counsel or experts. Thus, the Investor requested that Canada:

a) describe a specific consultation process that began in a specific year;
b) identify the stakeholders that participated in these consultations;
c) provide the amounts of money paid pursuant to specific provisions of an agreement;
d) identify job functions that were outsourced pursuant to a specific agreement;
e) provide specific data on shift work and packages delivered.

11. Indeed, Canada alleges that the UPS interrogatories "descended to the minutia" and admits that it did not formulate the "type of detailed questions" asked by UPS.[2] Canada's description of the UPS interrogatories as seeking "minutia" demonstrates its failure to comply with the standards of specificity required by the Tribunal. Canada's failure to follow such standards cannot be blamed on the contents of the Revised Amended Statement of Claim as this pleading is no less general than Canada's Statement of Defence.

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[2] Canada's Reply, para. 21 and para.18

12. The differences between the two approaches to interrogatories adopted by the disputing parties reflect the differences between their objectives. While the Investor sought specific information that could be answered by representatives of Canada, Canada sought particulars, legal argument and expert evidence that would eventually be provided in the Memorial. Such interrogatories are not proper and, as a result, Canada's motion to compel the Investor to answer them should be dismissed in its entirety.

All of which is respectfully submitted

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March 9, 2004