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February 14, 2003

By Fax

The Right Honourable Sir Kenneth J. Keith
Court of Appeal of New Zealand
Corner Molesworth & Aitken Streets, P.O. Box 1606
Wellington, New Zealand

Dear Sir Kenneth:

RE: NAFTA UNCITRAL Investor-State Claim
UPS of America, Inc. and the Government of Canada
Our File No. A5245

Further to the Tribunal's procedural direction of February 7, 2003, UPS hereby responds to the procedural submissions made by Canada on January 24, 2003.

The Tribunal's Procedural Direction of December 13, 2002 stated:

> "If Canada is of the view that any part of the Revised Statement [of Claim] does not comply with the Tribunal's award on jurisdiction, it may so indicate in its Statement of Defence".

This direction clearly contemplated that Canada may have jurisdictional objections to the Revised Amended Statement of Claim to be filed by UPS and recognized that under Article 21(4) of the UNCITRAL Arbitration Rules, a tribunal may elect not to consider a jurisdictional objection as a preliminary question and, instead, proceed with the arbitration on the merits, and rule on the jurisdiction objection as part of the merits award.

Rather than leaving its remaining jurisdictional objections to the merits phase as directed by the Tribunal, Canada has now filed another jurisdiction motion, that seeks to re-litigate issues that were determined by the Tribunal in its *Award on Jurisdiction* of November 22, 2002.

The Investor believes the issues raised in this motion can and should be properly dealt with at the merits phase of the proceeding, and ought not to delay the orderly progress of the claim or the document production process.

Appropriate Procedure

In its *Award on Jurisdiction* , the Tribunal dismissed certain of Canada's objections to jurisdiction, joined other objections to the merits and granted certain objections. As a result of the Award, there will now be a merits hearing of UPS's allegations. In its procedural direction of December 13, 2002, the Tribunal recognized that, in light of the inevitability of a merits hearing, further objections by Canada to the Statement of Claim should be pleaded in its Statement of Defence.

This direction is in keeping with the terms of Article 21(4) of the UNCITRAL Arbitration Rules, which gives the Tribunal the discretion to rule on pleas concerning jurisdiction as part of its final award, and the Tribunal properly exercised its discretion to do so in this procedural order.

In its procedural direction of December 13, 2002, the Tribunal also directed the parties to make submissions on other procedural issues by January 24, 2002 if they were unable to agree. The parties were unable to agree and, accordingly, made their respective procedural submissions on January 24, 2003. In its submission, Canada indicated it would be making further jurisdictional objections in its Statement of Defence to be filed. It also proposed two options for consideration. The first option is to consider the jurisdiction objections as a preliminary motion. The second is to proceed concurrently with consideration of the jurisdiction motion and issues on the merits. In response to Canada's procedural submissions of January 24, 2003, UPS was granted leave to make a further submission on procedure within 7 days of the filing of Canada's Statement of Defence. By making another jurisdiction motion now, even though it is styled as relating to compliance with the *Award on Jurisdiction*, Canada is in effect attempting to circumvent the Tribunal's procedural directions of December 13, 2003. By not waiting for the ruling of the Tribunal on the procedural submissions made by the parties, Canada is suggesting that the Tribunal has only two choices, Canada's purported Option 1 and Option 2. In fact, the Tribunal can and should consider other alternatives. The Investor respectfully submits that, in the circumstances, any other objections made by Canada should be remitted for consideration in the merits phase.

Canada's request for a preliminary determination of another motion on jurisdiction is inconsistent with the Tribunal's procedural direction of December 13, 2002. Canada's second option also proposes an unnecessary and inefficient bifurcation of the merits phase. For example, Canada alleges in its Statement of Defence (at para. 52), that the costs associated with the Canada Post pension plan are borne by Canada Post. At the same time, in its Memorial on Jurisdiction, Canada objects to UPS's allegations that Canada Post has not properly attributed the costs of its pension plan to non-monopoly products. Canada's proposed bifurcation option could therefore result in two separate hearings where evidence of the cost of the Canada Post pension plan will need to be

introduced. Given the immediacy of a substantial merits hearing, efficiency, timeliness and practicality dictate that Canada's Motion be joined to the merits. This will result in a single hearing, instead of two sequential and unnecessarily repetitive hearings.

Canada also seeks to make new arguments that it chose not to make in the jurisdiction phase, even though it had the opportunity to do so. For example:

1. During the jurisdiction phase, Canada only challenged a small number of specific claims relating to NAFTA Article 1102: ASC paragraphs 16(f), 18 and 29. The majority of the allegations made in ASC paragraphs 15 to 19 concerning national treatment went unchallenged. The Tribunal subsequently dismissed the challenges that were made in its *Award on Jurisdiction* (paras. 100 to 102). Canada now seeks to have the Tribunal rehear jurisdictional arguments concerning the same allegations in the RASC, and makes further challenges concerning national treatment that it failed to make during the jurisdiction hearing.

2. Canada also now seeks to have the Tribunal address the question of "UPS' expansive interpretation of the national treatment obligation" as going to the jurisdiction of the Tribunal (Canada's Memorial, paras. 36 to 42). This is an example of subject matter that fits squarely into the merits process. The Tribunal specifically noted in its *Award on Jurisdiction* that "Canada raises no jurisdictional issue in respect of matters falling within article 1502(3)(a) read with article 1102" (para. 70). Now Canada is attempting to raise exactly the arguments it failed to raise in the jurisdiction phase.

Canada's contention that "The UPS claim does not allege and does not involve the exercise of delegated governmental authority" is also a clear example of an issue in respect of which Canada made specific submissions in the jurisdiction phase. The factual allegations relating to Fritz Starber, while new in the pleadings, go directly to the merits and not to jurisdiction at all. The amendment of UPS' claim to add such allegations is permitted by Article 20 of the UNCITRAL Arbitration Rules and Canada has filed no evidence to support its allegations of prejudice.

If the Tribunal nonetheless chooses to entertain another jurisdiction motion from Canada as a preliminary matter, then we respectfully commend the Tribunal to set a strict timetable that would permit an expedited determination of this Motion on written submissions without an oral hearing. UPS, however, respectfully reiterates that this motion is simply an attempt to re-litigate issues already determined in the Tribunal's Award on Jurisdiction, and prematurely contest issues that are not properly raised by Canada in advance of the merits being heard, since they actually need to be informed by the merits in order to be determined.

Procedure for Document Production and Interrogatories

We are unable to agree with either of Canada's proposed options for document production and hearings, as both will cause unnecessary delay in the determination of the merits. There is no legitimate reason to defer the delivery of Requests to Produce and objections to the scope of Requests to Produce. Document production can immediately begin once the Requests to Produce are settled. There is no legitimate reason for document production to be delayed simply because issues remain in dispute.

UPS submits that the most efficient and fair procedure would involve the holding of a single hearing, with preliminary document production according to the following procedure:

1. *Requests to Produce and Interrogatories*

    a. Each disputing party will serve a First Request to Produce ("Request") within 21 days of the Tribunal's order on document production. The Requests to Produce may deal with all issues raised by the Revised Amended Statement of Claim and the Statement of Defence.

    b. The disputing party to whom a Request is made will have 14 days to make a refusal to any part of the Request, stating the grounds for refusal.

    c. Submissions on refusals could then be made by the disputing parties in the manner set out in the Investor's previous submissions on procedural issues. Namely, the requesting party may make written submissions to the Tribunal within 7 days of the refusal and the refusing party will have a further 7 days to respond.

    d. A Second and Third Request to Produce may be made by either disputing party on a time schedule to be determined by the Tribunal on the same terms as set out above.

2. *Document Production*

    a. Document production should begin immediately after any refusals are decided. If the disputing parties are unable to agree to a timetable for the delivery of documents, the Tribunal will establish the timetable for production.

UPS respectfully submits that this procedure will expedite fair and efficient document disclosure for which there is no reason for any delay. Should the Tribunal grant Canada's request for a preliminary determination of its motion notwithstanding UPS' objections, Requests to Produce can

still be exchanged on all issues and document production can commence on those issues that are not covered by Canada's Motion.

Bifurcation of Liability and Damages

In its merits examination, the Tribunal must find evidence of harm to the Investor, but it need not determine all of the harm caused to the Investor by Canada's NAFTA violations. There is also nothing in Article 1116 that prevents the Tribunal from considering the breach of the NAFTA separately from the quantification of loss or damage resulting from the breach. Indeed, the wording of Article 1116 itself suggests that the issues may be considered separately, and all other NAFTA Tribunals considering Canada's conduct have adopted this bifurcation approach, notably the *S.D. Myers* and *Pope & Talbot* cases. Canada offers no authority in support of its interpretation of NAFTA Article 1116, which is contrary to the procedure adopted in these cases.

Indeed, Canada simply wishes to bifurcate the merits phase in a manner of its choosing, with each phase requiring its own damage evidence. The liability issues that Canada wishes to be characterized as jurisdictional, however, overlap with issues that relate direct to the merits, each of which raises distinct damage issues. It is in the interest of both disputing parties to avoid unnecessary costs associated with duplicating damages evidence.

Confidentiality

The positions of the disputing parties with respect to confidentiality are the result of over twelve months of negotiations between them. The key issue of the status of international law orders under Canadian law remains outstanding and intractable. The Investor respectfully requests the Tribunal to make a ruling on this issue at this point. If the Tribunal considers additional submissions are necessary, the Investor suggests that each disputing party make additional submissions on the issue of confidentiality within seven days of the Tribunal's order.

Conclusion

Canada's motion, styled as relating to compliance with the *Award on Jurisdiction*, is simply an attempt to raise another jurisdiction motion. UPS respectfully submits the Tribunal should defer considering it as a preliminary question, proceed with the arbitration, and make any further jurisdictional rulings it deems necessary as part of its award on the merits.

Yours very truly,

Barry Appleton
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