

**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
COMPLIANCE WITH
THE AWARD ON JURISDICTION**

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 the following paragraphs in the Revised Amended Statement of Claim be struck: paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 51, 52(a), 52(b), 52(c).

A ruling that consequential references to Articles 1103, 1104, 1105, 1502(3)(a) and 1503(2) in paragraphs 21, 22 and 53 should also be struck.

IN SUPPORT OF THE MOTION AND ATTACHED MEMORIAL Canada will make such additional submissions, as requested by the Tribunal and 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 Revised Amended Statement of Claim and requires no evidence in support of its motion.

THE GROUNDS FOR THE MOTION ARE:

1. The allegations of lack of transparency and supervision over Canada Post in paragraphs 40 to 42 are simply a re-formulation of claims the Tribunal ordered struck in its Award on Jurisdiction and should be struck again.
2. The allegations in paragraphs 43 and 51 allege that the facts pleaded with respect to Article 1102 also amount to a breach of Article 1105. The allegations are too unclear to allow Canada to respond to them in its defence. In any event, UPS appears to be re-introducing allegations of anti-competitive behaviour under Article 1105, contrary to the Tribunal's Award on Jurisdiction. These allegations should be struck again.
3. Articles 1502(3)(a) and Article 1503(2) only require monopolies and state enterprises to comply with Chapter 11 obligations in their exercise of delegated governmental authority. The UPS claim does not allege and does not involve their exercise of delegated governmental authority. Accordingly, allegations in paragraphs 26

through 31 and paragraph 52(a) of the Revised Amended Statement of Claim do not fall within the scope of Article 1116 and should be struck.

4. In any event, the allegations of anticompetitive conduct, including cross-subsidization and predatory conduct, in paragraphs 27-30 and 52(a) of the Revised Amended Statement of Claim are not capable of constituting a breach of Article 1102 and should be struck.

5. In any event, the allegations in paragraphs 27, 28 (a), (c), (e), (f) and (h), 29 (in its alternative formulation), 30 and 52(a) are allegations of anticompetitive conduct such as cross-subsidization and predatory conduct, which are expressly covered by Article 1502(3)(d), and as such are outside the Tribunal's jurisdiction pursuant to Article 1116 and should be struck.

6. The claims for breaches of Articles 1103 and 1104 were not included in the Notice of Intent as required by Article 1119 and are not properly before the tribunal. UPS is not entitled to introduce new claims in its Revised Amended Statement of Claim and accordingly paragraphs 32 through 35 and references to Articles 1103 and 1104 in paragraph 52(b) should be struck.

7. The claims concerning Fritz Starber were not included in the Notice of Intent as required by Article 1119 and are not properly before the tribunal. Accordingly, paragraphs 37 through 39 and 52(c) 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 1102, 1105, 1116, 1119, 1502(3), 1503(2)

UNCITRAL Arbitration Rules, Articles 21 and 33

Submitted this 7th day of February 2003 at Ottawa, Ontario, Canada.

of Counsel to the Government of Canada