

**UNDER THE UNCITRAL ARBITRATION RULES AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

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

Claimant / Investor

**-AND-**

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

Respondent / Party

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**INVESTOR'S SUBMISSION  
ON  
THE FILING OF THE STATEMENT OF DEFENCE**

**SUBMISSION ON STATEMENT OF DEFENCE**

1. Pursuant to Procedural Decision No. 1, the Investor makes this submission to the Tribunal on the issue of the timing for Canada's filing of its Statement of Defence.
2. The Investor submits that this Tribunal should order Canada to file its Statement of Defence within 30 days for the following reasons:
  - A. The Pleadings should be closed.
  - B. It would be disruptive to the orderly hearing of this claim for Canada to not file its Statement of Defence promptly.
- A. **The pleadings should be closed**
3. Article 19 of the UNCITRAL Arbitration Rules provides that the Tribunal may determine the period of time within which the Respondent may file its Statement of Defence. The purpose of the Statement of Defence is to reply to particular issues raised by the claim as well as to set the limit for the making of jurisdictional objections raised by the Respondent<sup>1</sup>. The Statement of Defence thus provides an indication of the issues to be resolved between the disputing parties. The critical issue for this Tribunal is whether the filing of a Statement of Defence will assist in defining the issues and identifying the arguments that will be raised by Canada.
4. The Investor has requested that Canada file its Statement of Defence<sup>2</sup> but Canada has refused to file until so ordered by this Tribunal. Canada has not set out any reason for why it cannot provide a Statement of Defence at this time. The Investor submits that it is time for Canada to provide its defence to the Investor's claim<sup>3</sup>. Canada has now had just more than one full year to prepare its Statement of Defence in order to close the pleadings in this arbitration.
5. Canada has supported its position to defer the filing of its Statement of Defence by stating in its September 11, 2000 letter that filing a jurisdictional argument without a Statement of Defence is "the consistent practice of NAFTA Chapter 11 Tribunals." This statement

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<sup>1</sup> See Articles 19 - 21 of the UNCITRAL Arbitration Rules.

<sup>2</sup> Letter from Barry Appleton to Sylvie Tabet, dated September 26, 2000.

<sup>3</sup>The Investor commenced this arbitration process through the submission of its Notice of Intent on January 19, 2000 and the submission of its Notice of Arbitration and Statement of Claim on April 19, 2000.

is simply not borne out by the facts.<sup>4</sup> Canada has yet to produce any award which indicates that it is established practice for a responding party to file its jurisdictional arguments before the filing of its Statement of Defence. Indeed, the experience demonstrated from the NAFTA Tribunals points to a very different conclusion.

- (i) In *Re: Pope & Talbot and Canada*, the NAFTA Tribunal ordered Canada to provide a Statement of Defence as one of the first acts of that tribunal. In that claim the Tribunal addressed Canada's jurisdictional arguments, which were raised in the Statement of Defence, in a jurisdictional phase after Canada filed its Statement of Defence<sup>5</sup>.
- (ii) In *Re: S.D. Myers and Canada*, Canada was ordered to produce its Statement of Defence within 30 days after a preliminary meeting of the Tribunal.<sup>6</sup>
- (iii) In *Re: Ethyl and Canada*, Canada's jurisdictional issues were again raised in its Statement of Defence. No jurisdictional motion was filed by Canada before the filing of its defence.

#### B. Disruption to the orderly hearing of this a claim

6. The filing of all pleadings would assist both the Tribunal and the parties in the orderly hearing of this claim.<sup>7</sup> Article 23 of the UNCITRAL rules provides general time limits for the communication of written statements, including the Statement of Defence. It states:

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<sup>4</sup> In its September 11, 2000 letter to the Tribunal, Canada made certain submissions based on the *Loewen* and the *Waste Management* cases. Canada has refused to provide the Investor with copies of the relevant procedural orders or awards on which it relies. Accordingly, the Investor is unable to make any meaningful submissions on them, and submits that it would be unfair and inappropriate for this Tribunal to rely upon these cases without the Investor and the Tribunal having an opportunity to review these cases and permitting the Investor to address them.

<sup>5</sup>The *Pope & Talbot* Tribunal decided as preliminary matters only those jurisdictional objections which it held were dispositive to the claim. Those issues that were not dispositive, were left to be decided in the final award. Thus, Canada's argument over the general arbitrability of the claim was addressed as a preliminary jurisdictional matter, while Canada's general defence of estoppel was left to be determined in the final award.

<sup>6</sup>*S.D. Myers, Inc. and Canada*, Procedural Order 1, May 28, 1999 available at [www.appletonlaw.com](http://www.appletonlaw.com).

<sup>7</sup>Messrs. Redfern and Hunter recognize the importance of expeditious arbitral proceedings. They state that "arbitration relies on speed and costs effectiveness for its survival . . . this has been recognized by legislators and institutions alike." Alan Redfern & Martin Hunter, *The Law and Practice of International Commercial Arbitration*, (3<sup>rd</sup> Edition), at 302. They cite the English *Arbitration Act* 1996, s.1(a); German *Arbitration Law* 1998, ss. 1028, 1046, and 1048; International Chamber of Commerce 1998 *Arbitration Rules* Art. 20(1) and London Chamber of International Arbitration Rules Art. 14(1)(ii), as all standing for the proposition that arbitration is expected to be expeditious.

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

7. Despite this general rule, Canada has advised the Tribunal that it has some jurisdictional issues it wishes to raise, but it appears Canada does not intend to address those concerns through the filing of a Statement of Defence but through the filing of some other document which it describes as a jurisdictional motion. Article 21 of the UNCITRAL Arbitration Rules requires Canada to disclose all jurisdictional issues no later than the filing of its Statement of Defence.
8. If this Tribunal were to adopt Canada's proposed procedure, Canada would be entitled to raise its jurisdictional objections to the Tribunal immediately, but would presumably still reserve its ability to make further jurisdictional objections when it eventually filed its Statement of Defence.
9. That would be inequitable to the Investor and disruptive to the orderly progression of this arbitration. Canada ought, once and for all, to file its defence, raising therein any jurisdictional objections it wishes to raise. Any other process might permit Canada, if it was unsatisfied with the initial decisions of this Tribunal, to raise still further jurisdictional issues in its defence. It is to avoid such unnecessary delay that the UNCITRAL rules require a responding party to identify all outstanding jurisdictional issues no later than its Statement of Defence.
10. Further, a delay in obtaining the Statement of Defence will frustrate the ability of the disputing parties to create or commence an effective documentary production process to further the hearing of this claim.
11. Finally, if this Tribunal were to order Canada to file its Statement of Defence, Canada would not suffer any prejudice to its ability to make jurisdictional arguments to this Tribunal.

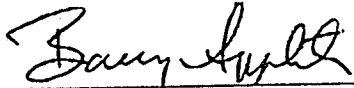
**PART THREE: RELIEF SOUGHT**

The Investor seeks the following relief:

- (i) That this Tribunal order Canada to file its Statement of Defence within 30 days.

All of which is respectfully submitted.

Submitted this 30<sup>th</sup> day of April, 2001



Barry Appleton  
for Appleton & Associates International Lawyers  
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