

**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 RESPONSE TO CANADA'S MOTION ON
INTERROGATORIES**

Appleton & Associates
International Lawyers
1140 Bay Street, Suite 300
Toronto, Ontario M5S 2B4
Tel.: (416) 966-8800
Fax: (416) 966-8801
Barry Appleton
Counsel for the Investor

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1. On February 26, 2004, Canada delivered its submissions disputing the Investor's refusals to certain of its interrogatories ("*Canada's Submissions*"). The disputed interrogatories, together with the reasons for the Investor's refusal to answer them, are attached as Appendix "A" to this response.
- I. **Overview**
2. Canada's disputed interrogatories are not proper and are not consistent with international arbitral practice under NAFTA Chapter 11 and the UNCITRAL Arbitration Rules as:
 - a. **Questions relating to the presentation of the Investor's case** - Many of the disputed interrogatories fail to meet the requirements of the Tribunal's April 4, 2003 *Procedural Directions* as they seek general information about the manner in which counsel for the Investor will present its case to the Tribunal. Such questions are improper as they do not seek narrow and specific witness information, but rather seek particulars, legal argument and expert opinion that is

to be provided in the Investor's Memorial. The Tribunal has dismissed Canada's demands for such particulars on two previous occasions and it should do so again on this motion.

- b. **Irrelevant questions** - Canada asks a number of questions that are overbroad or not relevant to matters at issue in this arbitration;
- c. **Questions asking for documents** - A number of Canada's interrogatories are simply documentary requests clothed as interrogatories. The Investor objects to producing additional documents as the time for requesting such documents has long passed; and
- d. **Information within Canada's knowledge** - Some of Canada's interrogatories seek information that is already in Canada's knowledge and, as such, do not conform with the requirements set out in paragraphs B.3(c) and D.1 of the Tribunal's April 4, 2003 *Procedural Directions*.

3. Accordingly, the Tribunal should dismiss *Canada's Submissions* in their entirety.

II. Procedural History

4. On April 4, 2003, the Tribunal issued its *Procedural Directions and Order* ("*Procedural Directions*"). The *Procedural Directions* established a process for both document production and interrogatory requests. The Tribunal set a deadline of April 25, 2003 for the delivery of each party's document requests but permitted interrogatory requests at any time during the document production process.

5. The *Procedural Directions* provided that:

D.1 "The interrogatories shall, in addition to the questions posed, list the persons or class of persons (the "person") to whom the question(s) are targeted".¹

D.2 "Upon receipt of an interrogatory, the responding party shall ensure that an answer be provided to the best of the person's knowledge and the person answering may consult the lawyers representing them in the arbitration for general advice".²

6. The Investor delivered its interrogatories along with its document production request on April 25, 2003. Canada did not deliver its interrogatories until September 12, 2003, and

¹*Procedural Directions* at para. D.1 at Tab 1.

²*Procedural Directions* at para. D.2.

then only because the Tribunal's *Direction on Document Production* of August 1, 2003³ (the "*Direction*") mandated that interrogatories be completed by October 1, 2003.⁴

7. Canada submitted 197 interrogatories to the Investor.⁵ On September 26, 2003, the Investor agreed to answer 89 of these interrogatories.⁶
8. On October 1, 2003, the parties mutually agreed to suspend the arbitration until January 19, 2004. The parties later agreed to extend the suspension of time to March 8, 2004, subject to the condition that, after February 15, 2004, either party could give 72 hours notice of the recommencement of the arbitration.
9. By letter dated February 23, 2004, the Investor notified the Tribunal that arbitration would be resuming as of 5:00 pm EST on February 26, 2004.

III. Discovery in International Arbitration

A. International Law And The UNCITRAL Rules Govern

10. *Canada's Submissions* are misconceived because they rely entirely on US and Canadian civil litigation principles and jurisprudence that take a broad and expansive approach to all forms of discovery. These principles have no application in a NAFTA Chapter 11 arbitration under the UNCITRAL Arbitration Rules ("UNCITRAL Rules").
11. NAFTA Chapter 11 arbitrations are governed by international law and, in this case, the UNCITRAL Rules.⁷ Accordingly, the Tribunal does not need to look to any municipal law to assist it in its deliberations.
12. The UNCITRAL Rules are widely-recognized as a complete procedural law that is independent of any national procedural law. Indeed, under the UNCITRAL Rules, there is a presumption *against* the application of domestic procedural law.⁸

³*Direction* dated August 1, 2003 attached at Tab 2

⁴*Canada's Submissions*, para 2.

⁵Letter from I.G. Whitehall, QC to B. Appleton dated September 12, 2003 and attachment, Tab 3.

⁶Letter from B. Appleton to I.G. Whitehall, QC dated September 26, 2003, and attachment, Tab 4.

⁷NAFTA Articles 1120(1) and 1131 attached at Tab 5. The ICSID (Additional Facility) Rules are also available to claimants. Upon Canada's or Mexico's ratification of the ICSID Convention, the ICSID Arbitration Rules will also be available.

⁸Karl-Heinz Bockstiegel, "The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL Rules" 1 *Journal of International Arbitration* 223, 227, attached at Tab 6.

13. In international cases, there is a “special need for freedom from unfamiliar local standards and requirements”.⁹ Independence from domestic litigation procedure, timeliness and finality are the primary reasons that parties from different nationalities and legal cultures choose international arbitration to resolve their disputes.

B. Memorials Define The Issues and Provide Disclosure

14. In US and Canadian civil litigation, once the pleadings have closed, the discovery process is the only method available for each side to learn about the particulars of the opponent’s case prior to trial. As a result, the scope of discovery tends to be broad in order to ensure that there will be no surprises at trial.
15. International arbitral practice does not generally use this type of expansive discovery. Instead, it relies upon the exchange of Memorials between the parties. Memorials serve two important functions in this respect. First, they advance the factual and legal claims in support of a party’s case, usually accompanied by documents and written testimony of witnesses and experts. Second, they effectively inform the members of the arbitral tribunal and the other party of the opposing side’s case before the hearing.¹⁰
16. In many respects, the exchange of Memorials effectively substitutes for the various objectives of discovery in Canadian litigation cited at paragraph 11 of *Canada’s Submissions*. Namely, Memorials serve to:
- (a) inform the other side of the nature of the case they have to meet;
 - (b) prevent the other side from being taken by surprise at the hearing;
 - (c) enable the other side to know what evidence they ought to prepare for the hearing;
 - (d) limit the generality of the pleadings;
 - (e) limit and decide the issues to be tried; and
 - (f) tie the hands of the parties at the oral hearing so that they cannot without leave go into any other matters.
17. Canada’s concerns about “surprise,” “trial by ambush” and “lying in the weeds” simply have no basis in international arbitration. Given the important function that Memorials serve in setting out a party’s legal and factual argument, there is no need for broad discovery in international arbitration. To the extent that discovery is allowed, it must be narrow, specific and relevant to issues material to the arbitration.

⁹Matti Pellonpaa and David Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied* (Helsinki: Finnish Lawyers’ Publishing, 1994) at 21-2, attached at Tab 7.

¹⁰Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2003) at 305, attached at Tab 8.

18. Contrary to paragraph 29 of *Canada's Submissions*, the Investor has not proposed that the parties file Memorials concurrently. Rather, the Investor stated that witness statements and supporting documents will be filed together with the Memorials.¹¹ The timetable for the filing of the Memorial, Counter-Memorial, Reply and Rejoinder remains to be determined by the Tribunal.

C. Discovery in International Arbitration Is Narrow

19. The procedure for discovery in international arbitrations is a blend of both the common law and civil law traditions. Unlike common law systems, there is no automatic right to discovery in international arbitration.¹²
20. In commenting about the differences between the discovery process under international arbitration and common law systems, Gary Born has stated:

Nonetheless, in many senses, the very term "discovery" can be misleading in arbitration; discovery in arbitration is usually much less extensive than in common law (particularly U.S. litigation), and sanctions are seldom requested or ordered. ... Even where discovery is in principle permitted, the scope of discovery is markedly more limited than in litigation. As a practical matter, most tribunals are hesitant to issue discovery orders, in part because they lack both the direct authority to sanction disobedience and the resources to supervise the process. In addition, it is widely recognized that one of the reasons that parties agree upon arbitration to resolve their disputes is to avoid the expense and delay of discovery.¹³

21. The fact that an arbitration may be taking place in the United States does not invite broad discoveries. As Redfern and Hunter have noted, the restrictive discovery rules in international arbitration apply to hearings taking place in the United States to the same extent as any other place of arbitration:

There is however, a misconception that arbitrations taking place in the United States are subject to the extensive discovery procedures available in litigation. The reality is that in the United States there is generally no right to any discovery in arbitrations and the extent to which discovery is permitted is entirely in the hand of the arbitral tribunal if the parties do not agree. The national courts will not interfere to expand any right of discovery ordered by the arbitral tribunal.¹⁴

22. In international arbitration, if document discovery is permitted, the scope of discovery is limited to those *narrow and specific* categories of documents which are *relevant and necessary* to the outcome of the case but which are not available to the requesting party.

¹¹See first page of letter from B. Appleton to I.G. Whitehall, QC, Tab 4.

¹²Redfern and Hunter at 317.

¹³Gary Born, *International Commercial Arbitration in the United States* (Boston: Kluwer Law and Taxation Publishers, 1994) at 82-3, attached at Tab 9.

¹⁴Redfern and Hunter at 317.

This general principle is reflected in the International Bar Association's Rules of Evidence¹⁵ ("IBA Rules"), which are adopted in paragraph B.3 of the Tribunal's *Procedural Directions*:

3. A Request shall contain:

(a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a *narrow and specific* requested category of documents that are reasonably believed to exist;

(b) a description of how the documents requested are *relevant and material* to the outcome of the case; and

(c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party". [emphasis added]

23. Canada alleges that "UPS wrongly asserts...that, given that the parties will file memorials that disclose the facts and arguments supporting their case, the Tribunal has limited the scope of discovery to be 'narrow and specific.'" Yet, this is precisely the language used in the Tribunal's *Procedural Directions*. Paragraph B.3(a)(ii) of the *Procedural Directions* limits document production to "narrow and specific" categories. Paragraph D.1 applies the very same procedural requirement to interrogatories. Thus, UPS' assertion is accurate and Canada's position is mistaken.
24. Interrogatories and depositions are very rare in international arbitration.¹⁶ The fact that an interrogatory process has been ordered in this particular case does not relieve Canada of the obligation to make its requests for information "narrow and specific." On the contrary, as set out in paragraph D.1 of the Tribunal's *Procedural Directions*, the same requirements apply for interrogatories as for document requests.
25. Instead of the procedure mandated by the *Procedural Directions*, Canada repeatedly cites Canadian cases allowing for a "far-reaching and liberal exploration" and "a line of inquiry that would uncover admissible evidence."¹⁷ Canada's appeal to such procedures indirectly acknowledges that its disputed interrogatories do not meet the standards of specificity required by international arbitration.
26. The restriction of discovery to narrow and specific categories implies that Canada's repeated requests for "all facts relied upon" with respect to a given claim are far too

¹⁵The IBA Rules, attached at Tab 10

¹⁶G. Kaufmann-Kohler, "Globalization of Arbitral Procedure," *Vanderbilt Journal of Transnational Law* (October 2003) at p. 8, attached at Tab 11.

¹⁷See *Canada's Submissions*, at paras. 21 and 41.

broad. In commenting about the procedure of the US-Iran Claims Tribunal under the UNCITRAL Rules, Professors Pellonpaa and Caron have stated:

Although Article 24(3) grants wide discretion to the arbitral tribunal, the tribunal should not accept non-specific requests or permit so called "fishing expeditions" for discovery of say, "all possibly relevant material". Requests of this kind are rarely tolerated even in court litigation in countries whose legal systems normally include discovery. It comes as no surprise, then, that the Iran-US Claims Tribunal has been unable to grant requests which fail to specify the documents in question.¹⁸

27. NAFTA Tribunal decisions reflect this narrow and specific approach towards discovery. For example, in *Waste Management, Inc. v. Mexico*¹⁹ the NAFTA ICSID (Additional Facility) Tribunal denied broad documentary discovery on a number of grounds including that the Claimant's requests:
- (a) were not specific in terms of time and place;
 - (b) asked for matters that could form the basis of the Respondent's Counter-Memorial;
 - (c) were in the Claimant's possession;
 - (d) were too wide in breadth and were speculative;
 - (e) asked for documents potentially relied on by the Respondent's expert prior to the delivery of the Counter-Memorial; and
 - (f) called for witness statements prior to the delivery of the Counter-Memorial.²⁰
28. Similarly, in *ADF Group Inc. v. United States*, the NAFTA Tribunal denied document production in respect of requests which lacked the "necessary particularity and indication of potential relevancy to the case".²¹ The Tribunal also ruled that where documents requested were "equally and effectively" available to both parties, the documents in question would not have to be produced unless the requesting party could show an undue burden in obtaining them.²²

¹⁸Pellonpaa and Caron at 482-83.

¹⁹*Waste Management, Inc. v. Mexico (II)*, (ICSID Case No. ARB (AF)/00/3) *Procedural Order No. 2* (November 27, 2002), attached at Tab 12. The ICSID (Additional Facility) Rules are nearly identical to the UNCITRAL Rules in this respect. Article 24(3) of the UNCITRAL Rules provides "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the tribunal shall determine." Similarly, Article 41(2) of the ICSID (Additional Facility) Rules provides that: "The Tribunal may, if it deems it necessary at any stage of the proceedings, call upon the parties to produce documents, witnesses and experts."

²⁰*Waste Management (II)*, at paras. 19-24.

²¹*ADF Group Inc. v. United States* (ICSID Case No. ARB(AF)/00/01) *Procedural Order No. 3*, October 4, 2001 at para. 10, attached at Tab 13.

²²*ADF Group* at para. 4

III. Canada's Interrogatories Are Improper

A. Questions Relating to The Presentation of The Investor's Case

29. Canada's interrogatories repeatedly seek general information about the manner in which counsel for the Investor may present its case to the Tribunal. These interrogatories are overbroad and seek counsel's evidentiary strategy, legal argument or expert opinion. These questions are not directed at any particular witness or class of witnesses of the Investor as mandated at paragraph D.1 of the *Procedural Direction*.
30. *Canada's Submissions* demonstrate that Canada is not seeking information from witnesses, but rather asking "UPS to state its case and to clarify the issues that this Tribunal will have to address in the course of the arbitration."²³ This is essentially a request for the particulars contained in the Investor's Memorial and accompanying documents and witness statements.
31. *Canada's Submissions* also refer to two prior unsuccessful attempts by Canada to obtain the level of particularity found in Memorials before the Memorial phase has begun. Canada's challenges to the adequacy of the Amended Statement of Claim and the Revised Amended Statement of Claim were dismissed in the Tribunal's Award of November 22, 2002²⁴ and the letter from its Secretary of August 1, 2003. Indeed, the letter of August 1, 2003 expressly indicated that the Tribunal "will consider addressing Canada's submissions about lack of necessary precision in the Revised Amended Statement of Claim *when the document production and interrogatory phases have been completed.*"²⁵
32. Thus, Canada's own submissions demonstrate that Canada seeks to abuse the interrogatory process to obtain relief that has been denied twice by the Tribunal. The purpose of the interrogatory process set out in the Tribunal's *Procedural Directions* is to obtain specific information from witnesses. It is not to allow one party to obtain an advance copy of the other's Memorial.
33. Canada's claims that the Memorial phase does not allow enough time for its response are unsubstantiated. Furthermore, these concerns go to the timing of the Memorial and Counter-Memorial rather than the scope of the discovery process.
34. The following interrogatories are examples of Canada's attempt to seek the Investor's Memorial through the interrogatory process:

²³*Canada's Submissions*, at para. 5.

²⁴Tribunal's Award of November 22, 2002 attached at Tab 14.

²⁵*Direction* at Tab 2

19. On what facts does UPS rely to assert that Canada Post competes in the non-monopoly courier, small package delivery and secure electronic communications markets? Identify each of the markets, both domestic and international, where UPS Canada and Canada Post compete.
 45. Provide the facts on which UPS relies to assert that Canada Post and UPS Canada are direct competitors in the Canadian "non-monopoly postal services market"?
 84. On what facts does UPS rely in asserting that there is an "unusual" structuring of the legal and accounting relationship between Canada and Canada Post?
35. Each of these overbroad questions seeks all facts relied upon by the Investor for one of its claims. These are not questions that can be answered by a witness. They are matters for legal counsel to set out in its Memorial based on a wide range of documents, witness statements and expert evidence.
36. In *Waste Management v. Mexico*, the NAFTA Tribunal considered whether documents relied upon by Mexico to support an allegation in its defence were producible. Mexico was asked to disclose all documents which demonstrated that the Claimant "failed to comply with the obligations" in a contract. The NAFTA Tribunal ruled that documents which could be relied upon in support of Mexico's defence were not to be produced since "[t]his was a matter for the Respondent to take up in its pleading [counter memorial]..."²⁶ The NAFTA Tribunal's ruling in *Waste Management* demonstrates the proper role of the Memorial process in providing the particulars of a claim or a defence.
37. The above interrogatories also demonstrate that Canada has attempted to obtain expert evidence and legal argument through its interrogatories. The following examples also illustrate this point:
114. In the context of UPS' Revised Amended Statement of Claim, what constitutes Canada Post's "monopoly infrastructure"? Explain the basis for the response.
 115. What would constitute fair and non-discriminatory access to Canada Post's infrastructure?
 119. Provide any authoritative sources on which UPS relied in establishing what constitutes "fair and non-discriminatory behavior" and provide references to those sources.
 120. Provide any other justification for UPS' interpretation of what constitutes "fair and non-discriminatory behavior".
38. The precise extent of monopoly and competition in various markets are matters that may require expert opinion. Similarly, the determination of "fair and non-discriminatory"

²⁶*Waste Management (II)* at para. 20.

behavior is a conclusion of mixed fact and law.²⁷ This determination necessarily requires legal argument on the scope of the national treatment obligation in Article 1102 of the NAFTA. Again, there is no witness of the Investor to whom such a question could be directed. Interrogatories calling for such legal argument or expert evidence are not appropriate.

39. Indeed, in paragraph 36 of its *Submissions*, Canada admits that it is seeking “explanations of words and phrases used in the RASC” and “questions that call for the application of law to fact.” Explanations of legal terms and questions that call for application of law are not proper interrogatories.
40. Requiring the Investor to answer the disputed interrogatories at this time would be unduly burdensome and result in an unnecessary duplication of the effort required for the Investor’s Memorial. The Investor has already agreed to answer 89 of the 197 interrogatories. Additional unnecessary burdens only serve to delay the orderly progress of this arbitration.

B. Irrelevant Questions

41. Canada did not indicate how any of its interrogatories were relevant and material to the outcome of the case as required by the Tribunal in paragraph B.3(b) of its *Procedural Directions*. While the Investor nonetheless agreed to answer 89 of these interrogatories, a number of others were simply not relevant or material.
42. For example, Canada has asked a number of interrogatories that seek detailed business information prior to 1997.²⁸ To the extent that any interrogatories relate to the pre-1997 period, they are not relevant or material to matters at issue in this arbitration. The Investor’s Notice of Intent to submit this dispute to arbitration was filed on January 19, 2000 and the Investor only seeks damages for three years prior to this date, pursuant to NAFTA Article 1116(2).
43. Questions seeking information regarding financial and non-financial assistance provided by UPS to trade associations are also irrelevant.²⁹ UPS has agreed to identify any trade associations of which it is a member. The manner of its participation is not relevant and Canada’s questions in this regard are a “fishing expedition”.

²⁷The Federal Court of Canada recently characterized a finding of discrimination contrary to Article 1102 as a question of mixed fact and law. See *Attorney General (Canada) v. S.D. Myers Inc* (January 13, 2004) at para. 74, Tab 15.

²⁸See, e.g. interrogatories #3, 7 and 124.

²⁹See, e.g. interrogatories #8 to 12.

44. Canada's Interrogatory #173 asks: "How does UPS Canada finance the development of new services?". There is no issue in this arbitration as to the manner in which UPS finances its new services. Thus, this interrogatory is irrelevant. This interrogatory is also vague and overbroad.
45. *Canada's Submissions* incorrectly suggest that the Investor has refused to answer interrogatories demonstrating it has suffered harm. Although many of Canada's interrogatories seek detailed financial information that should be left to the damages quantification phase, the Investor has not objected to any interrogatories on that basis. Rather, the irrelevant disputed interrogatories referred to above do not relate to any material issue in this arbitration.

C. Questions That Call For Documents

46. Canada and the Investor filed their respective documentary production requests by April 25, 2003 in accordance with the deadline set by the Tribunal in its *Procedural Directions*. Canada is now trying to circumvent that process by asking the Investor certain interrogatories and demanding documentation in support of the answers given.
47. For example, Canada's interrogatory #61 asks "Has UPS Canada ever concluded any agreement with foreign postal administrations for the delivery of postal or courier products? If so, please provide copies of the agreements." The Investor has agreed to provide Canada with the answers to its interrogatory, but will not provide it with the accompanying document production, as this would violate both the spirit and the letter of the *Procedural Directions*.
48. Canada had the option to include the documentary requests which accompany these interrogatories in its document production request of April 25, 2003. It chose not to do so. It now asks the Tribunal to essentially overrule the deadline set in its own *Procedural Directions*.
49. If Canada's disputed questions calling for documents were to be permitted, they would effectively give Canada the advantage of two opportunities to request document production as compared to the Investor's one. Such an outcome would be inconsistent with the principle of equality of the parties under Article 15 of the UNCITRAL Rules.

D. Questions That Call For Information Within Canada's Knowledge

50. Canada has posed questions seeking information that is already within its own knowledge. Canada has not denied its knowledge of these facts, but it claims it seeks such information for the purpose of obtaining certain "admissions" from the Investor.³⁰

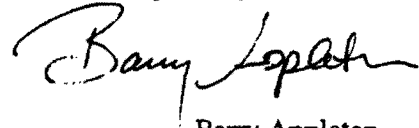
³⁰*Canada's Submissions*, at para. 54.

51. Canada again confuses the objectives of discovery in domestic litigation as compared to international arbitration. In international arbitration practice, the obtaining of admissions is not a proper basis for asking discovery questions within the knowledge of the requesting party. Under NAFTA jurisprudence, where the information in question is “equally and effectively” available to both parties,³¹ a party does not have a right to request it.
52. The questions in this category ask about the Investor’s dealings with the government, its Ministries or public commissions appointed by the government. In all these respects, the answers to the questions are as equally if not more readily accessible by Canada as compared to the Investor. Accordingly, there is no need for the Investor to answer these interrogatories.

IV. Conclusion

53. At Appendix A, the Investor has grouped the disputed interrogatories according to the categories of objections discussed above. For each question, we elaborate upon the specific objections that apply thereto.
54. For the reasons set out herein, the Investor submits that all of Canada’s interrogatories attached at Appendix A are improper and asks the Tribunal to dismiss *Canada’s Submissions* in their entirety.

All of which is respectfully submitted



Barry Appleton
Counsel for the Investor

March 4, 2004

³¹ *ADF v. United States* at para. 4.