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APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

Washington DC *Toronto*

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

INVESTOR'S SUBMISSIONS ON PROCEDURAL ISSUES

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A. Order for the Protection of Confidential Information

The disputing parties have agreed upon most operative provisions of the enclosed draft confidentiality order. The sole remaining issue separating the parties is the interaction of Canada's *Access to Information Act* ("ATIA") upon the Tribunal's eventual Procedural Direction. Canada seeks to have its domestic law govern the determination of confidentiality under the Tribunal's direction. The Investor seeks to have the Tribunal's direction govern whether information is confidential or not. The areas of disagreement between the parties are set out in paragraphs: 10, 11, 1(b)(iii) and 9(2)(b).

Paragraph 10

Canada has proposed the inclusion of paragraph 10. The Investor rejects the inclusion of this paragraph. Paragraph 10 provides that :

> Nothing in this agreement shall be construed as to abrogate any claim or entitlement to refuse to disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada.

The effect of Canada's proposed paragraph 10 would be that Canada could unilaterally change the substance of an agreed procedural order of this NAFTA Tribunal through a unilateral "interpretation" and application of its own domestic law. The Investor submits that Canada's approach should be rejected by this Tribunal for the following reasons:

1. It is a violation of the provisions of Article 15 of the UNCITRAL Arbitration Rules and the NAFTA itself to permit Canada to rely on its domestic law to unilaterally determine what confidential information in this arbitration may be released. It is simply inconsistent with Canada's good faith acceptance of this international arbitral process provided for in Chapter 11. For example, Canada's domestic concept of Cabinet Privilege may not be consistent with international law concepts of privilege. Canada would have Canadian domestic law trumping the NAFTA and the laws of its NAFTA partners.

   This NAFTA claim is governed by international law and the provisions of the NAFTA. The *Pope & Talbot* NAFTA Chapter 11/ UNCITRAL Tribunal denied that a domestic law could determine the production of evidence in an international arbitration. The Tribunal did not agree with Canada's refusal to produce documents, nor that section 39 of the *Canada Evidence Act* (dealing with Cabinet Confidentiality) applied to a NAFTA Chapter 11 arbitration. The Pope & Talbot Tribunal ordered Canada to provide descriptions of the documents in question. The Tribunal concluded:

   > In the specific context of a NAFTA arbitration where the parties have agreed to operate by UNCITRAL Rules, it is an overriding principle (Article 15) that the parties be treated with equality. The other NAFTA Parties do not, so far as the Tribunal has been made aware, have domestic law that would permit or require them to withhold documents from Chapter 11 tribunals without any justification beyond a simple certification that they are some kind of state secret. In

> these circumstances, Canada, if it could simply rely on s. 39 might be in an unfairly advantaged position under Chapter 11 by comparison with the United States or Mexico.[1]

The *Pope & Talbot* Tribunal addressed this issue again in its *Award on the Merits of Phase 2*[2] noting that during the document production process, Canada objected to producing cabinet confidential documents, and the Tribunal ruled that the *Canada Evidence Act* by its terms did not apply to NAFTA Chapter 11. Canada refused to comply with the Tribunal order and did not produce nor even identify the documents, so that the Tribunal could "make a reasoned judgment as to their relevance and materiality." The Tribunal stated in its *Award* that:

> . . . The Tribunal deplores the decision of Canada in this matter. As the Tribunal noted in its decision on this matter dated September 6, 2000, Canada's position may well be a derogation from the "overriding principle" found in Article 15 of the UNCITRAL Arbitration Rules, under which these proceedings have been conducted, that all parties should be treated with equality. Moreover, Article 1115 of the NAFTA declares that there shall be "equal treatment among investors of the Parties." As Canada's refusal to disclose or identify documents in these circumstances is at variance with the practice of other NAFTA Parties, at least the United States, that refusal could well result in a denial of equality of treatment of investors and investments of the Parties bringing claims under Chapter 11.

The *Pope & Talbot* Tribunal also rejected the language that Canada is now attempting to insert as new paragraph 10 in its version of a revised agreement.[3] The *Pope & Talbot* Tribunal also rejected Canada's suggestion that the ATIA overrides the procedural order of the NAFTA Tribunal.[4]

2. There are three different domestic information disclosure regimes operating throughout the three NAFTA Parties. The differences between these Regimes could create a situation where the same information could be confidential in one country while being subject to disclosure in another. To avoid inconsistent results, the NAFTA itself incorporated by reference reliance upon the UNCITRAL Arbitration Rules which provide explicitly for confidentiality, unless both disputing parties agree to the contrary. Canada's suggestion is that its domestic law should govern the multiplicity of jurisdictions involved in this claim and should be adopted by this Tribunal as the governing law.

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[1] *Pope & Talbot and Canada*, Decision by Tribunal, September 6, 2000 at para. 1.5.

[2] *Pope & Talbot and Canada*, Award on the Merits of Phase 2 by the Tribunal dated April 10, 2001, at para. 193

[3] *Pope & Talbot and Canada*, Decision and Order of the Tribunal dated March 11, 2002 at para.12.

[4] *Pope & Talbot and Canada*, Decision and Order of the Tribunal dated March 11, 2002 at para 17.

3. Under the ATIA, in response to a request for information from the public, Canada is entitled to invoke the "international affairs" exemption to protect the confidentiality of documents submitted in a NAFTA arbitration. This exemption permits Canada to deny a requestor documents that relate to "international affairs". The documents protected by a procedural order issued by the *Pope & Talbot* Tribunal were ordered confidential, but in response to the Investor's complaint that such an exemption should apply, Canada refused to comply with that Tribunal's order and indicated its intention to make the documents public. This is an example of the fact that Canada's own access to information law does not permit an investor to have input into Canada's determination as to whether to comply, or not, with its own exemptions. This is another reason why the Investor requires the safeguard of a confidentiality agreement subject to international law.

Consequential Amendments

If it is determined that this Tribunal orders government confidentiality as advocated by the Investor, it will be necessary to adopt the bracketed text contained in Paragraphs 1(b)(iii) and 9(2)(b) .

Paragraph 11 - The Obligation to provide Prompt Notice to the Investor of Information Requests

Canada has proposed amendments to the Investor's text in paragraph 11 dealing with the obligation of Canada to provide adequate notice to the Investor of an information request. The Investor submits that Canada's approach should be rejected by this Tribunal as being in violation of the provisions of Article 15 of the UNCITRAL Arbitration Rules and NAFTA Article 1115 as this proposal fails to treat both of the disputing parties equally.

This same question was considered by the NAFTA Tribunal in the *Pope & Talbot* claim. In that arbitration, a member of the public had requested documents under the ATIA fifteen months prior to Canada giving the Investor notice of such request. After being in breach of its own time requirements under the ATIA, Canada then gave only thirty days notice to the Investor.[5] The Tribunal reacted swiftly by amending its procedural order to allow the Investor more time to adequately respond and denied Canada's reliance on the ATIA as overriding the NAFTA Tribunal's procedural order on the protection of confidential information.

The inclusion of this paragraph in the NAFTA procedural order for this arbitration was proposed by the Investor to ensure that prompt notice in future is given to UPS once a request is made to Canada by a member of the public under the domestic ATIA. This is to give the Investor an adequate opportunity to respond to such request for disclosure. While a thirty day period to respond to any notification can be safeguarded by means of a procedural order, only with the inclusion of the Investor's proposal can it be assured that it will be notified promptly upon a request under the ATIA. In light of the conduct towards the Investor in the Pope & Talbot

[5] *Pope & Talbot and Canada,* Decision and Order of the Tribunal dated March 11, 2002 at para 22.

arbitration, this request is a reasonable course for this Tribunal to take to avoid such future unfortunate situations.

Consequential Amendments

If the Tribunal decides to permit a meaningful consultation period as advocated by the Investor, it will be necessary to adopt the bracketed text contained in Paragraph 18.

B. The process for documentary production and interrogatories

The Investor proposes that the Tribunal follow the approach to documentary production taken in other NAFTA Chapter/ UNCITRAL arbitrations involving Canada. In particular, the Investor proposes that the Tribunal adopt the following procedure:

1. Documentary discovery is to be based on a specific Request to Produce ("Request") from one disputing party to the other for the relevant phase of the arbitration. A "document" means a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or other mechanical or electrical means of storing or recording information.

2. The other party to whom the Request is made shall respond within 14 days of the Request, either agreeing to produce the requested documents, including public documents and those in the public domain, except for any documents that have already been submitted by another party, or by refusing the Request, in whole or in part.

3. A Request shall contain a description of a requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a specific requested category of documents that are reasonably believed to exist.

4. If copies are submitted or produced, they must conform fully to the originals. At the request of the Tribunal, any original document must be presented for inspection.

5. In the event of a "Refusal", the refusing party shall give its reasons for such refusal in writing to the requesting party. Specifically, if the Refusals are based on privilege, then the type of privilege asserted and support for such assertion shall be specified by the refusing party along with a general indication of the nature of the document for which privilege is claimed.

6. If the requesting party wishes to dispute the Refusals made, it may do so within seven (7) days from the receipt of the notice of refusal by making written submissions to the Tribunal.

7. The refusing party will then have 7 days from the date of the submission to the Tribunal to respond.

8. Where a party agrees to produce certain documents, it shall notify the requesting party the period of time it expects to provide the documents. If the requesting party is not satisfied with such time period, it shall make a written motion to the Tribunal within seven (7) days of such notice. If there is no such notice within seven (7) days then the requesting party will be deemed to have acquiesced to the period of time proposed and will be barred from making a motion thereafter on the same documents.

9. This procedure shall be conducted by written submissions.

10. The Investor proposes that there be a maximum of three Request deadlines established pursuant to this order between the parties without the further leave of the Tribunal.

Interrogatories

11. At any time during the document production process, any disputing party may deliver written interrogatories to the other party. 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. The same general time frames and process with respect to refusals as adopted with respect to document production shall apply with respect to interrogatories.

12. 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. The Person(s) to whom the interrogatories are posed should not consult other witnesses of the party. In the event that an answer cannot be made without such prohibited consultations, the identity of all such consulted persons much be disclosed.

13. The Tribunal reserves the right to make specific procedural directions to resolve any disputes between the disputing parties with respect to document production and interrogatories.

C. The proper ordering of the proceedings

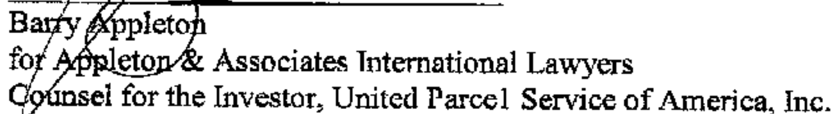
The disputing parties have been unable to agree upon a common approach regarding whether the remaining arbitration proceedings should be heard in one phase or two. Canada suggests that there be one phase while the Investor submits that there be two: one phase to determine merits and one phase to determine quantum of damages, if necessary.

The Investor submits that it would be most efficient to bifurcate the merits questions from the valuation issues in this claim. Such an approach is commonplace in international arbitrations and would be most efficient in this particular claim. Canada is familiar with this approach as it was adopted in both the S.D. Myers and Pope & Talbot arbitrations that are now completed.

This claim involves complicated issues of international law and economics. For some of these issues, it will be the first time they have been addressed before an international tribunal. Accordingly, it would be exceedingly difficult to prejudge the conclusions of the Tribunal on merits in order to prepare an accurate valuation submission. A bifurcation would avoid unnecessary costs to the disputing parties of proving damages in areas where the Tribunal may rule that no NAFTA violation occurs. Bifurcation is the least costly and most efficient approach in which to conduct the remainder of this arbitration.

All of which is respectfully submitted.

Submitted this 24th day of January, 2003



Barry Appleton
for Appleton & Associates International Lawyers
Counsel for the Investor, United Parcel Service of America, Inc.

January 6, 2003

Part I – Protection and Disclosure of Confidential Information

1. For purposes of this Agreement:

   (a) "disputing party", means, in the case of the Investor, United Parcel Service of America, Inc., and in the case of the Respondent, the Government of Canada;

   (b) "confidential information" means any information designated by a disputing party as confidential. A disputing party may designate as confidential, and protect from disclosure, any information that may otherwise be released under the terms of this agreement, on any of the following grounds:

      (i) business confidentiality;

      (ii) business confidentiality relating to a third party; and

      (iii) information that [is]/[could] otherwise protected from disclosure by legislation including Canada's *Access to Information Act*, *Customs Act* and the *Competition Act*.

   (c) "business confidentiality" means:

      (i) trade secrets;

      (ii) financial, commercial, scientific or technical information that is confidential business information and is treated consistently in a confidential manner by the party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;

      (iii) information the disclosure of which could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the disputing party to which it relates; or

      (iv) information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates.

2. A disputing party may designate information as confidential in which event the disputing party shall clearly identify on each page of the document containing such information the notation "Confidential information, Unauthorized Disclosure Prohibited" or some variation thereof, and shall take equivalent measures with respect to information contained in other material produced in electronic and similar media.

   Except as otherwise provided herein, when a disputing party files with the Tribunal material

containing confidential information, it shall provide, within five business days of production of an unredacted version of the material, a copy of that material with the confidential information redacted.

4. Confidential information shall not be disclosed except in accordance with the terms of this agreement or with the prior written consent of the disputing party that claimed confidentiality with respect to the information and, in the case of materials from third parties, the owner of such confidential information.

5. Except as otherwise provided in this agreement, information and materials containing confidential information may be used only in these proceedings and may be disclosed only for such purposes to and among:

   (a) counsel to a disputing party whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;

   (b) counsel or employees of Canada Post Corporation and United Parcel Service Canada Ltd. to whom disclosure is reasonably considered by a disputing party to be necessary;

   (c) officials or employees of the disputing parties, to whom disclosure is reasonably considered by a disputing party to be necessary;

   (d) independent experts or consultants retained or consulted by the disputing parties in connection with these proceedings; or

   (e) witnesses who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings but only to the extent material to their expected testimony.

6. All persons receiving material in this proceeding containing confidential information shall be bound by this agreement. Each disputing party shall have the obligation of notifying all persons receiving such material of the obligations under this agreement. The obligations created by this agreement shall survive the termination of these proceedings.

7. It shall be the responsibility of the disputing party wishing to disclose material containing confidential information to any person pursuant to paragraphs 5(d) or (e) to ensure that such person executes a Confidentiality Agreement in the form attached as Appendix "A" before gaining access to any such material. Each disputing party shall maintain copies of such Confidentiality Agreements and shall make such copies available to the other disputing party upon order of the Tribunal or upon the termination of this arbitration. Where material containing confidential information is to be disclosed to a firm, organization, company or group, all employees and consultants of the firm, organization, company or group with access to the material must execute and agree to be bound by the terms of the attached Confidentiality Agreement.

Restricted Access

8. Where a disputing party wishes confidential information, as described in paragraph 1(b), to be kept confidential from the other disputing party, the disputing party shall clearly identify on each page of the material containing such information the notation -"Restricted Access - Dissemination Prohibited".

9. (1) A person is entitled to receive access to information described in paragraph 8 of this Order only if that person:

   (a) is legal counsel employed or retained by Canada, Canada Post Corporation, United Parcel Service of America, Inc. or United Parcel Service Canada Ltd., and their support staff;

   (b) is an expert or consultant retained by a disputing party in connection with this proceedings; and, in either case

   (c) their access to the information is necessary for the preparation or the conduct of the case

   (2) Information provided under this section shall only be used for the purpose of these proceedings and shall only be given to persons referred to in subsection (1) if such persons:

   (a) execute a Confidentiality Agreement in the form attached as Appendix "A"

   (b) undertake not to reproduce **[or disclose]** the information or permit to be reproduced the information in whole or in part, except for the purposes of use during the course of this proceeding; and

   (c) return the information and file a certificate to the effect that any notes or copies, in paper or electronic format, have been sealed or destroyed.

Disclosure of Material Pursuant to Law

[10. Nothing in this agreement shall be construed as to abrogate any claim or entitlement to refuse to disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada.]

11. Any request to the Government of Canada for documents under the *Access to Information Act*, including documents produced to Canada in these proceedings, will be governed by the provisions of that Act, **[except that no information designated by United Parcel Service of America, Inc. as confidential shall be disclosed to any requestor unless prompt notice of such request has been made and United Parcel Service of America, Inc. has been afforded the opportunity to make representations concerning such disclosure.]**

12. No party shall file any confidential material covered by the terms of this agreement in any Court without first bringing this agreement to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality.

13. Notice pursuant to this Agreement shall be provided to the Claimant by sending notice by fax to the counsel of record for United Parcel Service of America, Inc., while these proceedings are pending, (or after the completion of the proceedings, to the Claimant to the attention of the General Counsel) and to Canada by sending notice by fax to the Principal Counsel of the Trade Law Division of the Department of Foreign Affairs and International Trade (or his or her successor or designate), Notice to a third party to whom the confidential information relates shall be sent by fax and/or registered mail.

Part II- Conduct of Proceedings and Public Disclosure of Documents

14. In accordance with UNCITRAL Arbitration Rules Article 25(4), to the extent the disputing parties have agreed in this Agreement, the hearings in this arbitration shall not be held *in camera.*

15. Subject to the terms of this Agreement, and any further agreement between the disputing parties, the disputing parties agree that either disputing party shall be free to disclose to the public, including by posting on the internet, the following materials:

    Pleadings, and submissions of any disputing party or NAFTA Party, together with their appendices and attached exhibits, including the notice of intent, notice of arbitration, amended statement of claim, statement of defence, memorials, affidavits, responses to tribunal questions, transcripts of public hearings, correspondence to or from the Tribunal, and any awards, including procedural orders, rulings, preliminary and final awards

16. Any material disclosed to the public pursuant to paragraph 15 hereof shall not contain any information designated by a party as confidential or restricted access.

17. Except as permitted by this Agreement, neither disputing party shall publicly disclose material produced by the other disputing party in the course of this dispute.

18. A disputing party has thirty (30) days from the date of notice by the other disputing party of its intent to publicly disclose material referred to in paragraph 15, to object to disclosure on the basis it contains confidential information. Such material may not be released **[prior to the end of this period]** unless both parties have confirmed that they do not object to such release or agreed on the redaction of the material containing confidential information.

19. Where counsel for either disputing party reasonably expects that information, whether documentary or oral, designated by a disputing party as confidential information shall be referred to during the course of any hearing held by the Tribunal, then such portion of the hearing as is reasonably necessary to protect that confidential information shall be conducted in camera, and may only be attended by those persons designated in paragraph 5.

20. Where counsel for either disputing party reasonably expects that information, whether documentary or oral, designated by a disputing party as restricted access information shall be referred to during the course of any hearing held by the Tribunal, then such portion of the hearing as is reasonably necessary to protect that restricted access information shall be conducted in camera, and may only be attended by those persons designated in paragraph 9(1).

21. The proceedings shall not be recorded in any way, except by a court reporter, and shall not be broadcast.

22. Transcripts of the proceedings containing any information designated by a disputing party as confidential information shall be redacted.

23. The obligations created by this Agreement shall survive the termination of these proceedings.

24. At the conclusion of these proceedings thereof, all material produced hereunder, or otherwise submitted to the Tribunal, and any copy of those materials, and any materials containing any confidential information, are to be returned to the disputing party who supplied the materials, together with certification that no duplicate has been retained.

APPENDIX "A"

CONFIDENTIALITY AGREEMENT

TO: The Government of Canada (and its legal counsel); and United Parcel of America Inc. ("UPS") (and its legal counsel)

FROM:

1. IN CONSIDERATION of being provided with materials ("Confidential Information" or "Restricted Access Materials") in connection with an arbitration between UPS and the Government of Canada over which claims for confidentiality or restricted access have been advanced, I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.

2. I acknowledge that I am aware of the agreement of the disputing parties regarding confidentiality and restricted access, a copy of which is attached as Schedule "A" to this Agreement, and agree to be bound by it.

3. I will promptly return any Confidential Information or Restricted Access Materials received by me to the disputing party that provided me with such materials, or the information recorded in those materials, at the conclusion of my involvement in these proceedings. All material containing information from Confidential Information or Restricted Access Material will be destroyed.

4. I acknowledge and agree that in the event that any of the provisions of this Confidentiality Agreement are not performed by me in accordance with the specific terms or are otherwise breached, that irreparable harm may be caused to either of the disputing parties to this arbitration. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to seek injunctive relief restraining breaches of this Confidentiality Agreement and to specifically enforce the terms and provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.

5. I agree to submit to the jurisdiction of the courts of the Province of Ontario, (in the case of residents of Canada) or the State of ______________ (in the case of residents of the United States of America) to resolve any disputes arising under this Agreement.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of ___________, 2002.

____
(Print Name)

_____________________ _____________________
(Witness) *(Signature)*