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AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

B E T W E E N

UNITED PARCEL SERVICE OF AMERICA INC

AND

GOVERNMENT OF CANADA

**DECISION OF THE TRIBUNAL ON
THE FILING OF A STATEMENT OF DEFENCE**

THE TRIBUNAL:

Dean Ronald A Cass
L Yves Fortier CC, QC
Justice Kenneth Keith (Chairman)

17 October 2001

1. United Parcel Service America Inc (UPS or the Investor) alleges that the Government of Canada (Canada) has breached its obligations under Chapter 11A (Investment) and Chapter 15 (Competition Policy) of the North American Free Trade Agreement (NAFTA). The Investment in question, United Parcel Service Canada Limited (UPS Canada), is a corporation organised under the laws of Ontario and entirely owned by UPS. The Investment provides courier delivery and associated services throughout Canada and, with the Investor, around the world.
2. The alleged breaches relate to actions of Canada Post Corporation, a parent Crown corporation wholly owned by Canada, and of Canada including the Canada Customs and Revenue Agency (Canada Customs). The Investor claims that Canada has provided Canada Post with special treatment and privileges it does not provide to foreign owned competitors in the courier industry; and that Canada has failed to supervise Canada Post to prevent it from engaging in anti competitive practices. UPS claims that it and UPS Canada have suffered harm as a result of the breaches and Canada is obliged to compensate UPS for the harm.
3. Canada contends that it should not be required to file its statement of defence until the Tribunal rules on whether the claim submitted by UPS is within the terms of NAFTA. In accordance with the Tribunal's procedural decision No. 1, the parties have filed submissions on that issue.
4. Along with its initial submissions, Canada filed its Notice of Motion objecting to the jurisdiction of the Tribunal to address UPS's statement of claim. It had earlier advised the Tribunal that, given the extensive nature of its jurisdictional objections, to file the statement of defence at that stage in the proceedings would be inconsistent with the UNCITRAL rules and established practice in both NAFTA and other international arbitrations. Later, it noted that, because substantial parts of the UPS claim are outside the terms of NAFTA Chapter 11 and the statement of claim as a whole is deficient and impossible to respond to, it was premature for it to submit a statement of defence. The only appropriate

response was an objection to the jurisdiction of the Tribunal by a notice of motion.

5. UPS has requested throughout that Canada be required to file its statement of defence. It submits that it is time for Canada to provide that defence. It rejects Canada's contention that filing a challenge to jurisdiction without a statement of defence is consistent with the practice of NAFTA Chapter 11 Tribunals. The facts, it says, are against that contention. Further, the filing of all the pleadings would assist both the Tribunal and the parties in the orderly hearing of the claim. It refers to the general time limits fixed by the UNCITRAL rules for the communication of written statements, including the statement of defence. It is also concerned that, were the Tribunal 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 in its statement of defence. That would further frustrate the process, including the ability of the disputing parties to create or commence an effective documentary production process to further the hearing of the claim.
6. The Tribunal has jurisdiction under article 1116(1) of NAFTA over claims submitted by an Investor of a Party (here UPS) that another Party (here Canada) has breached an obligation under:
 - (a) Section A or Article 1503(2) (State Enterprises), or
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Under article 1116(2)

an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

7. Section A of Chapter 11 includes articles 1102 (national treatment) and 1105 (minimum standard of treatment) which were among the provisions which UPS alleges have been breached. Canada contends however that a number of the UPS claims go beyond the provisions specified in article 1116; in particular UPS claims breaches of articles 1501 and 1502(3)(d). Further, Canada says that the Tribunal is without jurisdiction to arbitrate the claim on account of the claim's failure to meet three "conditions precedent" to bringing a claim under Chapter 11 by failing to establish that:
 - i. it incurred loss or damage by reason of, or arising out, the alleged breaches;
 - ii. its claim meets the time limitations under chapter 11;
 - iii. non-Canadian subsidiaries or related foreign companies are investments of the Investor in the territory of Canada.Further, Canada says that numerous paragraphs in the statement of claim are impossible to respond to on account of being vague, open ended, frivolous or scandalous and are therefore beyond the jurisdiction of the Tribunal.
8. Canada submits that the weight of international precedent and practice, together with the UNCITRAL rules, supports the resolution of jurisdictional objections ahead of the filing of the statement of defence. Sound policy reasons underlie this result, for to require otherwise is to negate a disputing party's right not to plead to matters that it says cannot be adjudicated. It would require a disputing party to defend on the merits in the face of a live question whether it is required to do so.
9. Under article 1120, the disputing investor may submit the claim to arbitration, among other things, under the UNCITRAL arbitration rules, as UPS has done here. Those rules govern the arbitration, except to the extent modified by section B of chapter 11.
10. The UNCITRAL rules immediately relevant to pleas to jurisdiction appear in article 21:
 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect

to the existence or validity of the arbitration clause or of the separate arbitration agreement.

- ...
3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.
 4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.
11. It will be seen that that provision does not say that the plea to jurisdiction may be made only in the statement of defence. Rather the filing of the statement of defence marks the latest time at which such a plea may be made. Further, in general, jurisdictional pleas are to be resolved as a preliminary matter, whether they are raised in a statement of defence or in some other way. The parties indeed accept that the rules are not decisive on the present issue.
12. The first general provision of the rules, article 15, emphasises the power of the Tribunal to regulate its own affairs, subject to the controlling principle of natural justice:
1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.
13. The parties also referred the Tribunal to the rules governing the content of the statement of claim and the statement of defence:

Article 18(2)

The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Article 19(2)

The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

14. It is by reference to those provisions that Canada has contended that the statement of claim is defective : “A response [to the statement of claim in this case] does little to bring precision or certainty to the matter in issue.”
15. Arbitral Tribunals have jurisdiction, of course, only to the extent that the parties have consented. Here there is the additional element that the respondent is a state and that some of the matters pleaded by UPS, the respondent contends, could be the subject of proceedings between the states parties to NAFTA and between them alone under chapter 20.
16. We do not see this issue as a matter of clear rules or of precise right. The frequent practice, as the cases to which UPS has referred us demonstrate, is for jurisdictional issues to be raised in the statement of defence and not by separate proceedings. They are then however frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter. They are nevertheless dealt with, to respond to an issue which concerns UPS, in a binding way. It is plainly established that the ruling on jurisdiction binds the parties. Moreover, in the context of the present case, Canada has, we take it, pleaded all the possible jurisdictional arguments that it would want to raise. It says in both of its submissions that “all of its jurisdictional objections can be efficiently and effectively resolved on the statement of claim alone”.
17. The resolution of this issue of procedure turns on essentially practical matters. Canada has made very extensive objections in its notice of motion in respect of jurisdiction. (More than 100 paragraphs of the statement of claim appear to be in issue for instance.) As already indicated, it contends that the Tribunal has no jurisdiction in respect of alleged breaches of certain provisions of NAFTA. It

accordingly says that many paragraphs of the statement of claim alleging those breaches ought to be struck. Further it claims that a number of other paragraphs fail to plead the time requirements set by chapter 11. As well, it says, the Investor has failed to establish that non-Canadian subsidiaries are investments of the Investor in Canada and numerous other allegations do not give adequate and fair notice of the case to be met.

18. UPS contends that those matters can be dealt with in the course of a fully developed statement of defence and then by way of appropriate preliminary hearings, if necessary. It also argues that some of the matters, especially those relating to time limitations and pleading, do not go to jurisdiction.
19. UPS submits that Canada would not suffer any prejudice, were it to file its statement of defence, in respect of its ability to make jurisdictional arguments to the Tribunal. Canada responds by saying that, regardless of prejudice, there is no legal principle requiring the filing of a defence to matters beyond the Tribunal's authority. In any event, requiring the submission of a statement of defence in these circumstances is prejudicial since it would be compelled to proceed on the assumption that all allegations in the statement of claim are relevant and within the jurisdiction of the Tribunal. Canada would have to waste significant time and effort responding to lengthy and complex allegations that *prima facie* are not properly before the Tribunal and also, according to UPS, begin the document discovery process. Canada says that the identification of the elements of the statement of claim that are properly before the Tribunal is critical to ensuring an appropriate and fair document discovery process.
20. In the end the Tribunal has to have in mind the practical administration and determination of the arbitration, while applying the underlying principles. The objections made by Canada are so extensive that it seems to the Tribunal that it is better for them to be resolved in advance and for any necessary amendments to be made to the statement of claim before Canada pleads to it.

21. Accordingly the Tribunal rules

- (1) that Canada's Notice of Motion objecting to the jurisdiction of the Tribunal be addressed at this stage in the proceedings, and
- (2) that the Parties make representations by 2 November 2001 on a schedule for the filing of submissions and the hearing of argument on the issues raised in the Notice of Motion.

KD Keane

for the Tribunal

17 October 2001