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APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

Washington DC

Toronto

March 26, 2003

By Fax

The Right Honourable Sir Kenneth J. Keith
Court of Appeal of New Zealand
Corner Molesworth & Aitken Streets, P.O. Box 1606
Wellington, New Zealand

Dear Sir Kenneth:

**RE: NAFTA UNCITRAL Investor-State Claim
UPS of America, Inc. and the Government of Canada
Our File No. A5245**

We are writing in response to Canada's further submissions regarding document production and confidentiality dated March 21, 2003.

Document Production

Canada addressed the issues surrounding document production in its letters of January 24 and February 25, 2003. Canada's delivery of a third set of submissions in this regard is improper as these submissions do not respond to any new arguments raised by UPS. Regrettably, UPS must now respond to Canada's additional submissions on document production.

Timing of Document Requests

As set out in UPS' letter of February 14, 2003, Requests for Documents should be delivered immediately following the Tribunal's procedural order. UPS will not repeat its previous submissions in this regard.

IBA Rules

In its March 21st letter, Canada suggests that all Requests for Documents be done in accordance with the IBA Rules on the Taking of Evidence in International Commercial Arbitration. Article 9(2)(f) of these Rules allows the Arbitral Tribunal to exclude from evidence or production any document, statement or oral testimony "on grounds of special political or institutional sensitivity (including evidence that has been described as secret by a government or public international institution)".

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If followed in an Investor-State arbitration, these rules would provide Canada with the unilateral ability to justify blanket refusals to produce evidence on the basis of political sensitivity or government secrecy. Such an approach to evidence would undermine the fundamental principle of the equality of the parties as provided for by Article 15 of the UNCITRAL Arbitration rules. Therefore, UPS cannot agree that the IBA Rules on Taking of Evidence apply in this arbitration without appropriate modification.

Documentary Record and Expert Reports

UPS agrees with Canada that the documentary record should be fixed prior to the parties' submissions on the merits, subject to leave from the Tribunal. UPS also agrees that expert reports should be submitted concurrently with the parties' submissions on merits. These issues have never been in dispute and UPS sees no reason why Canada has raised them for the Tribunal.

Interrogatories

UPS believes that a clearly circumscribed process for interrogatories would greatly increase the efficiency of the proceedings. Through a process of interrogatories, the disputing parties may significantly narrow the issues in dispute, limit the risk of multiple document requests and materially enhance the evidence before the Tribunal before the merits hearing. Moreover, UPS notes that such a process has been previously used in the *S.D. Myers, Inc. and Canada* NAFTA/UNCITRAL arbitration.¹

Confidentiality

We refer to our letter of January 24, 2003 on this issue and have no further submissions.

Yours very truly,



Barry Appleton
Counsel for the Investor

cc: Dean Ronald A. Cass
L. Yves Fortier, C.C., Q.C.
S. Tabet, DFAIT
Michael P. Carroll, Q.C.,
U. Onwuamaegbu, ICSID

Encl.

¹*S.D. Myers and Canada*, NAFTA/UNCITRAL Arbitration, Tribunal's Procedural Order #8 dated October 31, 1999.

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 8

This order confirms certain directions given orally by the Tribunal during the Third Case Management Meeting held in Toronto on 28 October 1999, concerning written questions to be put by the Tribunal to Mr Reg Plummer, Mr Richard Fosbrooke and Mr Aharon Mayne:

1. By 8 November 1999 MYERS shall propose to the Tribunal, with a copy to CANADA, a list of questions to be put to the above named persons together with draft introductory instructions concerning the preparation of their written answers.
2. By 11 November 1999 CANADA shall deliver to the Tribunal its comments, if any, on the proposed questions and draft introductory instructions
3. The Tribunal shall as soon as possible thereafter settle the form of the questions and deliver them to the parties.
4. CANADA shall make arrangements to deliver the written answers to the Tribunal and to MYERS by 30 November 1999.
5. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or reviewed.

Signed: "Martin Hunter"
(on behalf of the Tribunal)

Dated: 31 October 1999