IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION B
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
and
IN THE MATTER OF AN ARBITRATION UNDER
UNCITRAL ARBITRATION RULES

B E T W E E N:

UNITED PARCEL SERVICE OF AMERICA, INC.
Claimant

and

GOVERNMENT OF CANADA
Respondent

PETITION TO THE ARBITRAL TRIBUNAL

Rt. Hon. Justice Sir Kenneth Keith, KBE
Hon. George W. Adams, Q.C.
Professor Kenneth W. Dam

SUBMISSIONS OF:

THE CANADIAN UNION OF POSTAL WORKERS

- AND OF -

THE COUNCIL OF CANADIANS

Introduction

1. The purpose of this petition is to request:

   (i) standing as parties to any proceedings that may be convened to determine the claim made by UNITED PARCEL SERVICE OF AMERICA, INC. (UPS) in this matter;

(ii) in the alternative, should the status as party be denied to one or both Petitioners, the right to intervene in such proceedings in accordance with the principles of fundamental justice;

(iii) disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal;

(iv) the right to make submissions concerning the place of arbitration;

(v) the right to make submissions concerning the jurisdiction of this Tribunal, and once they are fully known, the arbitrability of the matters the disputing investor has raised; and,

(vi) an opportunity to amend this Petition as further details of this claim become known to the petitioners.

2. In accordance with the submissions we set out below, the Petitioners seek the right to participate in these proceedings on the following grounds:

(i) Both Petitioners respectively have a direct interest in the subject matter of this claim, and may be adversely affected by the award of this Tribunal. Accordingly it would be unfair and inconsistent with the principles of fundamental justice to deny them the opportunity to defend their interests in these proceedings;

(ii) Both Petitioners also have an interest in the broader public policy implications of this dispute. These not only implicate the full array of Canada Post services, but many other public service sectors as well. Notwithstanding its reliance upon UNCITRAL procedures, this dispute is not essentially one that is private in character, but rather may have far reaching impacts on a broad diversity of non party interests. Accordingly it would be unfair and inconsistent with the principles of natural justice to exclude those who wish to address these issues, and are uniquely qualified to do so. Moreover, allowing such participation is certain to provide this Tribunal with a fuller appreciation of the consequences of the questions before it.

(iii) Both Petitioners share two further interests in this matter. The first, to ensure some measure of judicial oversight by Canadian courts of these proceedings. The second, to address the lack of transparency that traditionally attends international arbitral processes. But, under UNCITRAL rules only the parties have the right to make submissions concerning the place of arbitration, the arbitrability of the issues in dispute,

or the in-camera nature of the proceedings. Conversely, non-parties have no right under these rules to invoke judicial review of the tribunal's award. Accordingly, a failure to accord party standing to the Petitioners would effectively deny or limit their opportunity to make submissions concerning these key questions or to invoke the supervisory jurisdiction of Canadian courts.

3. This Petition is made without prejudice to the Petitioners' rights to challenge the validity of these proceedings or the procedures set out in Section B of Chapter Eleven of the North American Free Trade Agreement (NAFTA).

PART I: THE PETITIONERS

The Canadian Union of Postal Workers

4. The Canadian Union of Postal Workers (CUPW – STTP) represents approximately 46,000 operational employees of Canada Post who provide postal services to Canadians throughout the country. Over half are letter carriers and spend a portion of their time handling, processing and delivering expedited and express courier products (Priority Courier, and Xpresspost services).

5. Rural mail service in Canada is also provided by approximately 5000 Route Mail Couriers and Suburban Service Drivers, who are excluded by the *Canada Post Corporation Act* from the *Canada Labour Code* and collective bargaining rights. These workers are also involved in the delivery of parcel and express courier services. In March 1997, these workers formed The Organization of Rural Route Mail Couriers (ORRMC). ORRMC and CUPW-STTP have a cooperative working relationship with the latter volunteering to provide the human, material and financial resources to assist with the former with its organizing efforts. The 3rd National Vice President of CUPW-STTP is also an ex officio member of the Executive of the Organization of Rural Route Mail Couriers

6. CUPW-STTP also represents approximately 40,000 union members who are entitled to pension benefits as Canada Post employees. For many years these employees participated in the Canadian Public Service pension plan. But in consequence of recent statutory amendments (*Public Sector Pension Investment Board Act* - Bill C-78), Canada Post Corporation will no longer participate in the public service pension plan, effective Oct. 1, 2000.

7. To protect the pension entitlement of its members, CUPW-STTP has been actively involved in defending its members' pension entitlements. It has lobbied the federal government, joined advisory committees tasked with pension plan reform and will be negotiating with Canada Post. The issue of its members' pensions remains a critical priority for CUPW-STTP.

8. CUPW is also firmly committed to working within the broader labour movement, and with groups in civil society, to preserve the integrity of Canadian public services across the full spectrum of these social services from heath care and education to municipal services.

9. These and other matters material to this Petition are set out in the affidavit of Deborah Bourque, 3rd National Vice President of CUPW-STTP, which is submitted in support of this Petition.

The Council of Canadians

10. Founded in 1985, The Council of Canadians (the Council) is a non-governmental organization with more than a 100,000 members, many of whom participate in the activities of more than 60 chapters across the country. Strictly non-partisan, the Council lobbies Members of Parliament, conducts research, and runs national campaigns designed to raise public awareness, and to foster democratic debate about some of Canada's most important issues, including: the future of Canada's social programs; the need to renew its democratic institutions; and, the protecting public health and the environment.

11. The Council is strongly committed to preserving the integrity of Canadian postal services as public services providing high quality, reliable and affordable mail, parcel and courier services to all Canadians regardless of where they live. Moreover it believes that if the vitality of this public institution is to be assured for the years ahead, Canada Post must respond to new challenges, including those in the area of telecommunications, by expanding the types and availability of the services its provides, not by reducing them.

12. The Council also has a close working relationship with Rural Dignity of Canada (Rural Dignity), a grassroots citizens' group committed to strengthening rural communities, and maintaining and enhancing services in rural areas. Rural Dignity's coordinator, Cynthia Patterson, is a member of the Board of Directors of the Council. Both the Council and Rural Dignity made submissions to the Canada Post Mandate Review, the conclusions of which are selectively quoted by UPS in support of its claim. Those submission are attached to the Affidavit of Cynthia Patterson which is filed in support of this Petition.

13. The petitioners are at the disadvantage of having been denied access to the disputing investor's Statement of Claim, memorials and other pleadings which may have been communicated in this matter. In these circumstances it is impossible to identify the full nature and extent of the petitioners' interests in these proceedings. Accordingly we have requested an opportunity to make supplemental submissions should this Tribunal require that UPS make this material available to us, or in the event that it otherwise becomes available. (A chronology summarizing our efforts to obtain these documents can be found at Attachment "A" to this Petition).

14. Nevertheless certain of the issues raised by this claim can be discerned from the Notice of Intent to Submit a Claim and The Notice of Arbitration which have been communicated by UPS and made publicly available. From these documents we know that UPS has made the following allegations:

- that Canada Post has used its "letter mail monopoly infrastructure" to cross-subsidize its non-monopoly courier businesses (Priority Courier, Skypak [sic], Xpresspost and Purolator) in violation of NAFTA Articles 1502(3)(d) and 1502(3)(a);[1]

- that Canada Post has denied UPS National Treatment, as required by Articles 1102 and 1202, by failing to provide it the same access to Canada Post's delivery system that it makes available to its own courier services;

- that Canada has also denied UPS National Treatment by "administering, operating, assuming all unfunded liabilities and negotiating the terms of the pension plan that governs Canada Post employees, including those employees who render service to Xpresspost, Priority Courier, and the parcel business of Canada Post while not providing such privileges to UPS;"

- that Canada has further denied UPS National Treatment by providing, through Canada Customs, preferential treatment to Canada Post and its courier and parcel services; and finally,

- that Canada has failed to provide UPS the Minimum Standard of Treatment required by Article 1105 by failing to carry out in good faith, its obligation under Article 1503(3)(d) to ensure that Crown Corporations not engage in anti-competitive practices.

15. In other words, UPS alleges that Canada Post has taken advantage of its monopoly position to underwrite the costs of its competitive parcel and courier delivery services. UPS argues that by allowing Canada Post to make its infrastructure available to its non-monopoly courier and parcel delivery services, Canada is in breach of several NAFTA provisions. It further asserts that Canada has failed to prevent Canada Post from conducting its affairs in this manner and has actually underwritten such practices by according Canada Post preferential customs treatment and by assuming certain responsibilities concerning the pension plan that governs Canada Post employees.

[1] These Articles impose certain restriction on the activities of monopolies and state enterprises, which is NAFTA terminology for crown corporations.

PART III: OVERVIEW

16. The investment provisions of NAFTA are similar to those found in more than two dozen bi-lateral investment treaties that Canada has negotiated over the past several years. The purposes of these treaties are twofold. First, to establish a number of broadly framed investor and investment rights. Second, to allow foreign investor's to directly invoke international and binding arbitration to ensure that governments respect these rights.

17. In our view, by creating this regime, NAFTA and other such investment treaties represent a dramatic departure from the norms of international law in two important ways. First, investor-state procedures give foreign investors an unprecedented right to enforce an international treaty to which they are neither party nor under which they have any obligations. Second, investor-state dispute procedures purport to extend the application of international commercial arbitration regimes to claims that have no foundation in contract or any other legal relationship, and which may only tangentially be considered commercial in character.

18. The result has placed a coercive and secretive international enforcement regime at the disposal of countless foreign investors. A growing number are now taking advantage of this opportunity to claim substantial damages from governments they allege to be in breach of their obligations under these investment provisions. The targets of these claims include water export controls, toxic fuel additive regulations, hazardous waste facility licensing procedures, hazardous waste export controls, the civil jury process of a US state, and the Softwood Lumber Agreement between Canada and the United States.

19. In the present case, UPS, which describes itself as the world's largest express carrier and package delivery company, has invoked investor-state procedures to challenge federal policy, programs and law concerning the activities of Canada Post and the delivery of postal and related services to Canadians.

20. If UPS succeeds, for reasons we set out below, Canada may be under considerable pressure to restructure the current framework of Canadian postal services. This in turn is likely to have immediate and longer term impacts upon both the providers and recipients of such services. Moreover, depending upon the particular course that is chosen, there is the further risk of undermining the ongoing financial viability of Canada Post.

21. Moreover, certain arguments put forward by UPS would render virtually all Canadian public service providers vulnerable to similar challenges. If UPS succeeds with these arguments, it would be reasonable in our view to expect similar complaints to follow. But these would be directed by other foreign investors at health care, auto insurance, utilities, water, or other public services where some element of monopoly service provision exists or where common

infrastructure has been established at public expense, and some degree of commercial service is being provided.

PART IV: GROUNDS FOR ACCORDING STANDING

22. We have organized the following submissions under three headings. These correspond to the three broad grounds that we believe justify according CUPW-STTP and the Council of Canadians the participatory rights they seek. As set out in paragraph #2 above, these grounds are:

(A) the direct interests of the Petitioners;
(B) their interests in the broader public policy implications of this dispute; and,
(C) their interest in making submissions concerning certain matters that are exclusively reserved to the parties to the proceedings.

23. We should begin by acknowledging the relative novelty of this application. While the issue of third party intervention in arbitral proceedings is not without precedent, it has very rarely arisen in the modern era of international commercial arbitration.[2] In fact, the issue of third party intervention has either been ignored, or given very low priority by those crafting the international and domestic regimes providing for international commercial arbitration.[3] This indifference to third party rights appears to derive from certain assumptions that have guided the development of these conventions. However, for reasons that we describe below, we believe that these assumptions no longer hold, and that much greater role must now be assigned to third parties with a legitimate interest in such proceedings.

(A) THE PETITIONERS' DIRECT INTERESTS

24. The relief sought by UPS includes damages in excess of $160 million US. If this Tribunal finds Canada to be in breach of its obligations under NAFTA concerning the activities of Canada Post, the attendant liability would presumably continue so long as Canada remains in non compliance. In this circumstance, it would not be reasonable in our view, to anticipate that Canada would maintain such offending measures at the price of paying damages in perpetuity, or suffering ongoing disapprobation for failing to honour its international obligations.

25. For example, UPS complains that by integrating the delivery of letter, package and courier services Canada Post has cross-subsidized its courier business in breach of NAFTA constraints. In support of this assertion it lists the provision of a number of

---

[2] We are aware that at least two non-governmental organizations are seeking standing as Amicus Curiae before the Tribunal convened to hear a claim by Methanex against the United States.

[3] C. Chinkin, *Third Parties in International Law*, (Oxford: Clarendon Press, 1993) at 248-249.

services which are currently provided by Canada Post Employees, and CUPW-STTP members, including: postal box pickups, sorting, handling, storage, delivery, retail sales, accounts management, and e-commerce.

26. If this argument prevails, Canada would be under considerable pressure to restructure the current framework of Canada Post service delivery. The particular approach it chooses would obviously reflect the precise findings of this Tribunal. Nevertheless one foreseeable outcome would dismantle the integrated mail, courier and package delivery services that Canada Post currently provides. This result would have both immediate and long term consequences for Canada Post employees including those who are members of CUPW-STTP.

27. In the short term, these consequences are certain to include revised job classifications for those employees currently providing the services that Canada Post may be directed by the Canadian federal government to abandon. Such downsizing of service delivery may also include lay-offs and permanent job reductions.[4] Indeed, postal service restructuring has had serious impacts on workers in the past. For example, when the government accepted the recommendation of the Canada Post Mandate Review that the crown corporation get out of most of its admail business, within a week of receiving that direction, Canada Post fired 10,000 admail workers. This represented the largest lay off in Canadian history.[5]

28. Over the longer term, and to the degree that the financial viability of Canada Post is compromised by constraints that preclude it from providing the full range of current services, the job security of all of its employees may be adversely affected. As one example, the Canada Post Mandate Review concluded that Canada Post revenues would be reduced by between $80 million and $250 million were it to divest itself of competitive courier and admail businesses. New revenue constraints often lead to efforts to cut labour costs, and indeed this did occur when Canada Post abandoned most of its admail business. [6]

29. Furthermore the security of CUPW-STTP members' pensions has also been put at risk by UPS allegations that Canada is in breach of its NAFTA obligations by, *inter alia*, having acted as guarantor of the pension plan's unfunded liability. The nature of this UPS complaint is not clear from the limited material available, and we can only speculate about how UPS would suggest that Canada cure this alleged NAFTA breach. This leaves entirely at large the possibility that the future financial security of tens of thousands of Canada Post employees, both past and present, may be at stake in these proceedings.

---

[4] While the current collective agreement between CUPW-STTP and Canada Post includes certain restrictions on lay-offs, these provisions will be subject to renegotiation.

[5] Affidavit of Deborah Bourque., Appendix "A", at 8.

[6] *Ibid.* at 8 and 10.

30. For the membership of the Council of Canadians, this case also has foreseeable and direct potential consequences, as it does for others who depend upon the mail, parcel and courier services delivered by Canada Post. Moreover, the UPS claim threatens to undermine the integrity of the public infrastructure of Canadian postal services that the Council of Canadians, in partnership with such groups as Rural Dignity of Canada, has worked hard to defend (see affidavit of Cynthia Patterson).

31. As long as postal, parcel and courier services are delivered by Canada Post, they are subject to the statutory mandate of this Crown Corporation and to the policy direction of its sole shareholder, the Canadian government. Thus, Canada Post must provide universal service to all Canadians.

32. If Canada Post is required to divest itself of these service functions, or otherwise devolve them to an arms length enterprise, they may no longer be subject to these statutory requirements. Potential consequences of such a divestiture would include a reduction in the availability of certain services, or an increase in their cost, or both. These impacts are likely to be most acute for residents of rural or remote communities because of the increased costs associated with providing such services to less populated communities.

33. For example, for residents of rural areas, potential consequences would include: reductions in the availability and quality of mail, parcel and courier services; substantial commutes to access basic postal services; a differential and higher fee structure for services; reduced employment opportunities for local residents; and a weakened support system that has played an important role in allowing many seniors to live independently.[7]

34. Moreover, if post offices closures result, an important part of the institutional framework of Canadian society would be damaged. The importance of the post office to rural communities is underscored by the thousands of resolutions that have been passed over recent years by municipal councils opposing the closure of their local post office.[8]

35. Furthermore, the experience in many rural areas with private courier delivery services reveals that such companies may have little interest in providing service to rural communities. For example in 1993, UPS closed more a third of its Canadian outlets. Most of these closures took place in Northern Ontario and rural Quebec. Moreover, the quality of service offered by companies such as UPS to remote communities has often been inadequate, even when it was provided.[9]

---

[7] See Affidavit of Cynthia Patterson, Appendix "B", at 11-15.
[8] *Ibid.*
[9] *Ibid* at 21.

(B) THE PUBLIC POLICY IMPLICATIONS OF THIS DISPUTE

36. Notwithstanding the foreseeable impact of this claim on members of CUPW-STTP and the Council of Canadians, this claim has broader public policy implications that are also of vital concern to the Petitioners. These extend well beyond the delivery of postal, and courier services and may include health care, education, auto insurance, energy, municipal and other services where some degree of public service monopoly exists. These broader implications arise from the expansive interpretation that UPS is urging this tribunal to adopt in determining the extent of Canada's obligations under NAFTA.

37. As noted, a key element of the UPS complaint is that Canada Post has cross-subsidized its courier business in violation of Articles 1502(3)(d) and 1502(3)(a). Arguably however, neither of these provisions apply in the present case. Indeed, the issue of compliance with the requirements of Article 1503(3)(d) can be seen as entirely beyond the scope of investor-state claims, because this particular article is not included by reference in Article 1116 which limits the ambit of such claims to those provisions explicitly cited. While Articles 1503(2) and 1502(3)(a) are noted in Article 1116, Article 1503(3)(d), is not. This point should be stressed, because many of the allegations made by UPS concerning the activities of Canada Post rely upon this provision.

38. To get around this constraint, we understand that UPS is making the following argument: Article 1105: *Minimum Standard of Treatment,* obligates Canada to treat investors of another party "in accordance with international law." UPS argues that this engenders a duty for Canada to carry out its international obligations in good faith. It would be our submission, that UPS has materially overstated the standing of the concept of "good faith" in international law, where it is it only considered a background principle - "not in itself a source of obligation where none would otherwise exist."[10] Yet this is precisely the purpose for which UPS has cited this principle.

39. Thus UPS asserts that because this "good faith" obligation extends to all NAFTA obligations, any breach of NAFTA rules necessarily violates Article 1105. UPS argues that this is the case whether the violation is one that could otherwise have been directly enforced by a foreign investor or not.

40. As noted, it not our purpose here to address the merits of this argument, but rather to seek standing before this tribunal to make such submissions. But for the sake of exposing the broader public policy implications of this dispute, we must note that this particular UPS argument would, in our submission, elevate the concept of

---

[10] Case Concerning Border and Transborder Armed Actions. (Nicaragua v. Honduras), Jurisdiction and Admissibility, [1988] C.J. Rep. 69 at 105. See also the statement by the Inter-American Court of Human Rights in *the Re-introduction of the Death Penalty in Peru* case (1995) 16 Human Rights Law Journal 9 at 13.

"good faith" to a status under international law that it has never achieved. Furthermore UPS would have this Tribunal ignore the explicit limits imposed by Article 1116 on the scope of investor-state disputes. If UPS were to succeed with this argument, there would be no provision of NAFTA that could not be invoked, on similar reasoning, to found foreign investor claims. This would in our submission, open the proverbial floodgates to investor-state litigation.

41. Furthermore, UPS invites this Tribunal to give Article 1503.3(d) such an expansive reading that it would substantially undermine the capacity of governments to maintain many public services in an era when monopoly and commercial service delivery is often commingled. Thus if the UPS view prevails, the integration of competitive services, even when offered on a not-for-profit basis, would taint the delivery of public services provided on a monopoly basis and render their providers vulnerable to similar investor-state claims.

42. If UPS does succeed with this argument, it would be reasonable in our submission, to expect similar claims for damages by foreign investors who have been "denied" access to the infrastructure of health care, municipal, education and other public services - in the same manner that UPS alleges it has been denied access to Canada Post infrastructure.

43. For example, in the area of public health care, an increasing array of services are now offered by public hospitals that are also provided by the private clinics on a for-profit basis. According to the reasoning UPS would have this tribunal adopt, a US health care company operating such a clinic that was denied access to publicly funded hospital infrastructure, could assert a claim for damages alleging that the public hospital had engaged in anti-competitive practices. One can readily think of any number of "monopolies and state enterprises" which would be vulnerable to a similar attack - public utilities, public auto insurance schemes and dozens of provincial and federal crown corporations.

44. On a related point, allegations concerning non-compliance by Canada with its obligations under Articles 1503(2) and 1502(3)(a) would extend the application of NAFTA investment disciplines to crown corporations and public agencies that should not arguably be subject to these requirements. This potential outcome arises because the practices complained of by UPS do not represent the exercise of "any regulatory, administrative or other government authority" that Canada has delegated to Canada Post. Indeed UPS makes no such assertion. Yet this proviso is a necessary element of the constraints established by these two provisions.

45. Rather the activities UPS impugns can readily be regarded as business or administrative practices internal to the operations of Canada Post. Again, if the UPS position prevails, far reaching consequences are likely to ensue for many other public sector service providers operating with mandates similar to this particular federal crown corporation. Because both Petitioners share a commitment to

preserving the full spectrum of Canadian public services, they also share a vital interest in the resolution of this issue.

46. Yet another issue that the Petitioners' are seeking the right to raise, concerns the application of *UNCITRAL Arbitration Rules*, and the *New York Convention*[11] to disputes arising under NAFTA investment provisions. We believe that there are serious public policy issues concerning the nature of disputes that should properly be subject to procedures established to resolve disputes arising under legal and commercial relationships.

47. These concerns arise from what may be regarded as a fundamental conflict overshadowing the entire regime of investor-state dispute resolution which NAFTA purports to establish. Thus investor-state procedures seek to import to NAFTA, international arbitral processes established to resolve commercial disputes arising from defined legal relationships. Neither the *New York Convention*, nor the *Model Law*[12] was established to provide for the enforcement of broadly framed rights created by international treaty for the benefit of an exclusive class of individual and corporate claimants.

48. Having drafted a treaty to dramatically expand the reach of international commercial arbitration, Canada has then sought to graft this new limb onto the tree of domestic law that arguably was never intended to bear such fruit.[13] Quite apart from the issue of its legal authority to do so, there is a serious question in our view about the effectiveness of its efforts to bring about this transformation. This arises because the provisions of the UNCITRAL rules, the *New York Convention* and Canadian law - explicitly limit their application to disputes that require a more commercial, contractual, international and legal character than those arising solely from NAFTA provisions.

49. As noted, we raise these issues not for the purpose of making substantive submissions on their merit, but rather to illustrate the broader public interest that is at stake in this matter. Moreover, we believe the Petitioners are uniquely qualified to contribute a perspective to these proceedings that would otherwise be absent. However, if the Petitioners are to be accorded a fair opportunity to address the broader public sector, and public policy implications of this dispute, they will require full access to the pleadings, evidence and submissions of the parties.

---

[11] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, 10 June 1958, 330 U.N.T.S. 38 (entered into force 7 June 1959).

[12] The *UNCITRAL Model Law on International Commercial Arbitration,* UN Commission on International Trade Law, Annex 1, UN Doc. A/40/17 (1985), 24 I.L.M. 1302.

[13] See for example, the *United Nations Foreign Arbitral Awards Convention Act*[R.S.C. 1985 (2nd Supp.), c.16 and the *Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), C17.

(C) THE SPECIAL RIGHTS OF PARTIES

50. In this section we consider the particular characteristics of the UNCITRAL process which reserve, exclusively to those with standing as parties, certain matters that are of vital concern to the Petitioners. These issues include the extent to which Canadian courts will maintain judicial oversight of these proceedings, and the lack of transparency that traditionally characterizes such arbitral processes. Because, issues such as the choice of venue, or openness of this process may be resolved by the parties, the right to have their views considered on these and other key issues depends upon the Petitioners being accorded standing as a parties to these proceedings.

The right to negotiate or make submission concerning the place of arbitration

51. Pursuant to the provisions of Article 16 of the UNCITRAL Arbitration Rules, the parties may agree upon the place where the arbitration is to be held. Failing that agreement, the place of arbitration is to be determined by the tribunal.

52. The choice of jurisdiction is of particular importance because it will determine the extent to which Canadian courts may exercise supervisory jurisdiction with respect to these arbitral proceedings.

53. For example, certain provisions of the *Commercial Arbitration Act*, (which applies, *inter alia*, to arbitrations involving federal Crown Corporations) apply only where the place of arbitration is in Canada.[14] These include Article 16 of the *Commercial Arbitration Code* which is scheduled to the Act and which effectively adopts the *UNCITRAL Model Law*. Article 16 provides the arbitral tribunal with authority to rule on its own jurisdiction and requires that any challenge to the arbitrability of the matter at issue, be raised not later than the submission of the statement of defence. The tribunal may rule on such an objection either as a preliminary question or in its award on the merits.[15] Where it does the former, subsection (3) of Article 16 provides:

> *Any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

---

[14] Schedule (Section 2), Chapter I, Art. 7 (2).

[15] Article 21 of the UNCITRAL Arbitration Rules similarly empowers the tribunal to rule on objections that Canada has denied UPS National Treatment, as required by Articles 1102 and 1202, by failing to require that Canada Post provide it with the same access to Canada Post's delivery system that it make available to its own courier services.

54. The Application of the *Commercial Arbitration Act* to these proceedings is uncertain in our view for reasons we set out in Part IV below. Nevertheless the distinction drawn by this legislation is indicative of the deference Canadian courts are likely to show to arbitral proceedings which take place outside the country.

55. Similarly Article V of the *New York Convention* delineates the grounds upon which the recognition and enforcement of arbitral award may be refused. In addition to other grounds, Article V(2) provides:

> *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) The subject matter of the difference is not capable of settlement by arbitration* ***under the law of that country****; or*
>
> *(b) The recognition or enforcement of the award would be contrary to the* ***public policy of that country****. [emphasis added]*

56. It would be highly inappropriate, in our submission, for Canadian public policy concerning postal services to be judged by the public policy standards of the United States or Mexico. The same is true for the arbitrability of the issues in dispute. For these reasons the place of arbitration will not only determine whether Canadian courts may exercise judicial oversight of these proceedings but will also ultimately determine the public policy and legal framework against which the award may be judged.

57. Selecting a place of arbitration outside Canada might also cause hardship for non-parties who may be accorded the right to participate in the proceedings.

The right to make submissions concerning various procedural matters

58. Under the following UNCITRAL rules, only the parties to the proceeding are specified as having the right to make submissions or to participate in decision-making concerning the following matters:

- whether the hearings will be held in camera (Art. 25)
- the right to introduce evidence (Art. 24)
- the right to seek interim orders of protection (Art. 26)
- the right to participate in settlement negotiations (Art. 34)
- the right to seek an interpretation of the award (Art. 35)

The right to invoke judicial oversight of the arbitral proceedings

59. Subject to any common law or other statutory right to do so, the provisions of the *Commercial Arbitration Act* and the *New York Convention* set out procedures for invoking judicial review of arbitral awards. For the most part these remedies are only available to the parties. These include:

- the right to seek judicial review of a preliminary ruling by a tribunal on an objection to its jurisdiction (*Commercial Arbitration Code*, Article 16(3)).
- the right to make an application to court for an order setting aside an award under the *Commercial Arbitration Code*, Article 34(2)(a).
- the right to request a judicial order refusing recognition or enforcement of an arbitral award under the *Commercial Arbitration Code*, Article 36(1)(a) and under Article V (1) of the *Schedule to the United Nations Foreign arbitrations Awards Act* which replicates the provisions of New York Convention.

60. Finally on this point, the right invoke judicial oversight of arbitral awards for excess of jurisdiction, or for being contrary to public policy, is not one explicitly limited to the instigation of the parties.[16] This suggests an opportunity for non-parties to make submissions with respect to these matters. Here again the issue of notice becomes paramount because only the parties are guaranteed the right to notice of the tribunal's award.

PART V: THE AUTHORITY TO GRANT INTERVENORS STANDING

61. Pursuant to Article 1131 of NAFTA this Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Article 38(1) of the *Statute of the International Court of Justice* is regarded as offering an authoritative definition as the sources of international law. It provides that:

> *The court, whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
>
> *(a) international conventions, whether general or particular establishing rules expressly recognized by the contesting parties;*

[16] See Articles 16, 34 and 36 of the *Commercial Arbitration Code*, Article V (2) of the *New York Convention, supra*, and of the *United Nations Foreign Arbitrations Awards Act, supra*, which adopts this convention.

> *(b) international custom, as evidence of a general practice accepted as law;*
>
> *(c) the general principles of law recognized by civilized nations;*
>
> *(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

International Conventions

62. Unfortunately, with the exception of the formal Parties, the provisions of NAFTA are silent on the subject of third party rights. This is also the case with respect to the *New York Convention*. Similarly, the UNCITRAL Arbitration rules offer little guidance on this subject. However, Article 15 of the UNCITRAL rules provides:

> *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 his case.*

63. Not only does this provision provide the Tribunal with considerable latitude in conducting these proceedings, but the requirement for equality in the treatment of the parties,[17] is generally regarded as a restriction on principle of party autonomy.[18] Admittedly, this requirement was not established with the interests of third parties in mind, but neither do the rules proscribe the extension of this principle to them.

64. Moreover in our view, the notion of fairness which imbues these provisions carries with it certain broader implications which are relevant to the new era of investor-state arbitration. In light of the public character of disputes such as the present one, and the diverse interests that may be adversely affected by such claims, we believe that the principle of equality must now be given broader reading than would be necessary if this dispute was essentially private in character and implication.

65. This argument is lent further support by the other recognized limit on party autonomy – having to do with matters of public policy. An authoritative text on this subject describes this limitation in the following way:

---

[17] This requirement is also codified by the Model Law , Article 18.

[18] A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed. (London: Sweet and Maxwell, 1991) at 292-293.

> *The parties may not confer powers upon an arbitral tribunal which would cause the arbitration to be conducted in a manner contrary to public policy of the state where the arbitration is held. One important mandatory rule .... is that which requires that each party should be given a fair hearing, or as the Model Law puts it, " a full opportunity to presenting his case."*[19]

66. We would also ask this Tribunal to be mindful of international conventions concerning human rights and labour rights which can be seen as lending further support for the notion of extending the principle of equality to third parties with an interest in arbitral proceedings. For example, Article 23 of the *Universal Declaration of Human Rights*[20] speaks of the "protection from unemployment" and to the "right to form and join trade unions...". Article 14 of *the International Covenant on Civil and Political Rights*[21] stipulates that:

> *All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

Article 26 of this convention further provides:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.*

67. We would also reference a number of the conventions established under the auspices of the International Labour Organization such as the *Convention (No.168) Concerning Employment Promotion and Protection against Unemployment* and *Conventions dealing with Freedom of Association and Protection of the Right to Organize.*

68. We don't recite these conventions to suggest that they establish a formal right of participation in these proceedings. But rather as an important source of international law from which guidance can be taken in resolving issues as novel as the ones

---

[19] *Ibid.*

[20] GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71

[21] 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976)

which arise in the present case. These conventions reinforce the notions of equal treatment before the law which is the basic principle upon which this Petition for standing is grounded. Our reference to conventions concerning the rights of workers is made to underscore the international dimension of these concerns, and the broader public policy significance of the present case.

International Custom and Jurisprudence

69. The doctrine of party autonomy has been accorded great weight in the interpretation and application of both domestic and international arbitration agreements that arise from private and consensual relationships among parties.[22] In this traditional context, the consistent view has been taken that third parties have no inherent right of intervention.[23]

70. Even in this context however, intervention by third parties in international arbitrations is not without precedent. Indeed in one such case, the tribunal applied the "generally recognized principle" of according standing to anyone who could show a legitimate interest that might be affected by the decision in the case.[24]

71. It has also been recognized as undesirable for states to conclude international agreements that are prejudicial to the interests of third parties without according them an opportunity to intervene. This has caused some knowledgeable commentators to question the validity of awards that infringe third party rights.[25]

Public vs Private Disputes

72. As noted, deference to party autonomy is the first principle of international commercial arbitration. However, it is clear that this guiding principle derives from the fundamental characterization of arbitration as a private not public function that should accordingly be left to the parties to guide.[26] However there are several reasons to distinguish the procedures established under NAFTA investment rules from those that might otherwise invoke the UNCITRAL process. Moreover, these differences negate the assumptions that underlie the conventional deference shown such proceedings, and demand much greater recognition of the broader public interest that has now been drawn into this arena.

---

[22] *Ibid.* at 290-294.
[23] C. Chinkin, *supra* note 3 at 247 - 274.
[24] *Levis & Levis & Veerman v. Federal Republic of Germany* – Decision of the Arbitral Commission on Property, Rights and Interests in Germany, 28 ILR 587 (Decision of 27 Jan. 1959).
[25] W.M. Reisman, *Nullity and Revision* (New Haven: Yale, 1970) at 330.
[26] C. Chinkin, *supra* note 3 at 265-272.

Treaties vs. Contract

73. To begin with, a clear distinction can be drawn between an arbitral process which is established pursuant to a contract or other written agreement, and one which is founded upon the provisions of an international treaty. While the former may be considered as arising from private agreement, the latter can not. Conversely a similar distinction can be drawn between the role of government as a party to a commercial agreement or contract on the one hand, and as a party to an international treaty on the other. While the former may imbue its activities of a private character, the latter should not. Under NAFTA there is no requirement for privity of contract, or for any other agreement between the parties as a precondition for invoking international dispute resolution.

Breadth of Issues

74. Another obvious point of distinction has to do with the nature of the issues that might be the subject of adjudication under these respective regimes. UNCITRAL awards typically arise out of disputes concerning commercial contracts between two parties. The ambit of these disputes is constrained by the parameters of the particular commercial relationships. Generally, the issues involved are of no greater public policy significance than the underlying contract itself.

75. In the case of investor-state claims, the scope of the issues that may arise are virtually unbounded, and may include broad issues of public policy and law. For instance, the UPS claim alleges a breach of Canada's obligations to provide National Treatment to foreign investors and their investments. National Treatment obligations as defined by Article 1102 apply to all government measures, whether provincial or federal, unless those measures have been explicitly reserved. Moreover, "measure" is defined to mean "any law, regulation, procedure, requirement or practice." It becomes trite to note that the breadth and scope of the disputes engendered by these provisions is dramatically more expansive than those arising under commercial disputes based in contract.

Private Rights vs. Public Policy

76. A related point concerns the public character of the issues that may be adjudicated in these arbitral fora. We will return to consider the issue of whether NAFTA disputes can be considered "commercial" within the meaning of Canadian law recognizing the validity of international arbitration awards. For present purposes however, it is important to emphasize the public character of the disputes that may arise under the broadly framed investor rights set out in NAFTA Chapter Eleven.

77. The UPS case is illustrative on this point because it puts at issue the entire framework of Canadian public policy and law as it relates to the provision of postal

services. Moreover, this is a dispute that has no foundation in contract, and no private character. Nor can it been seen as arising from a commercial relationship with the government of Canada. This contrasts sharply with the commercial and contractual relationships that would otherwise give rise to foreign arbitration awards.

Claims for Damages vs. Judicial Review

78. Another distinction relates to the fact that investor-state claims can be viewed as more analogous to applications for judicial review of government policy and law than akin to private disputes arising under contract. While the remedies available in investor-state proceedings are essentially limited to an award of damages, the consequences of such an order are likely to be just as coercive as the more directive orders of a court arising from an application for judicial review.

Unilateral and Unbounded Consent

79. A final distinction between NAFTA based investor-state arbitrations and the more conventional disputes which might be resolved pursuant to UNCITRAL rules relates to the unilateral character of the consent given by Canada to be bound by arbitration with respect to Chapter 11 disputes. Under Article 1122.1, Canada has given its consent to arbitration of any dispute that satisfies the modest pre-requisites of the Agreement. These pre-requisites require only that a foreign investor be able to demonstrate that status, consent to arbitration, and waive any right to pursue domestic remedies with respect to the same measure.

80. While Canada may raise objections to the arbitrability of the dispute before the tribunal, it is absolutely bound by its consent and the arbitration process will proceed under Article 1124, even if Canada declines to participate. In other words, under NAFTA, Canada has given unilateral consent to arbitrate claims that may be made by an unknown number of foreign investors with respect to matters that may touch upon virtually any sphere of public policy and law at both the provincial and federal levels. The ambit, and unqualified character of this consent, sharply distinguishes NAFTA investor-state claims from those arising from commercial relationships.

The World Trade Organization

81. Finally on this point, the issue of third party intervention has also been addressed by dispute panels and the Appellate Body of the World Trade Organization, and in more than one case *amicus* submissions have been received by these dispute bodies. In doing so, the Appellate Body has noted the "ample and extensive authority to

undertake and control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."[27]

82. Admittedly, in accepting *amicus* briefs, the Appellate Body has distinguished between the "right" to make submissions, and the authority granted by the Appellate Body to consider *amicus* submissions. The Appellate Body has taken the view that it had broad authority to adopt procedural rules that do not conflict with the Dispute Settlement Understanding (DSU). In one case, it concluded:

> *"Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."* [28]

83. While these decisions offer strong support for the intervention of non parties as Amicus Curiae, they are not particularly helpful on the question of allowing intervention as an added party. However, in our view, a clear distinction can and should be drawn between the state-to-state dispute settlement regime of the DSU, and the investor-state dispute apparatus established by NAFTA. While the former is justifiably limited to the Parties to the DSU and other agreements of the WTO, the latter explicitly invites non-Party participation by allowing foreign investors to invoke the dispute resolution machinery created by this treaty. Accordingly, in the case of investor-state claims, for reasons of equality and fairness, third party intervention is warranted in our submission.

General Principles of Law

84. Under Canadian law the right to intervene as a party or amicus curiae in civil proceedings is well recognized. Indeed these rights have been codified by the rules of civil procedure of the provinces and of the federal government.[29] Typically these rules distinguish between intervention as an added party or as amicus curiae. In the case of the former, the intervenor is accorded the same procedural rights as existing parties, including the right to file pleadings, adduce evidence, cross examine witnesses and make oral arguments.

85. To justify a request for intervention as an added party, a person must typically establish, *inter alia*, an interest in the subject matter of the proceeding or that the

---

[27] *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc. WT/DS58/AB/R at para. 106 (Appellate Body Report 12 October 1998).

[28] *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (2000), WTO Doc. WT/DS138/8 at para. 39 (Appellate Body Report 10 May 2000).

[29] See for example Ontario, *Rules of Civil Procedure*, Rule 13 (Intervention).

person may be adversely affected by a judgment in the proceeding. Similar approaches have been adopted in other common law jurisdictions.[30]

86. With respect to ensuring procedural fairness the Courts of several common law jurisdictions have developed rules governing the conduct of proceedings by public-decision-makers. The content of these procedural rules vary depending on the character of the decision. While the Courts have declined to review the process of legislative decision-making, the closer the process resembles that of a court, the more likely the Courts will be to require a full range of procedural protections including that individuals affected by a decision be given adequate notice in respect of the proceedings, a fair opportunity to present their case and to respond to the opposing party and a right to an independent and unbiased decision-maker.[31]

87. Thus, at common law, a person may be accorded standing if he or she is an "aggrieved person", an "affected person" or someone who is "exceptionally prejudiced" by the proceedings. In making these determinations, the courts look to first identify the interest involved and then determine whether or not the causal relationship between the decision-making process under review and that interest are sufficiently close so that there will be some "causal nexus" between the decision and the interest identified.[32]

88. In our submission, the principle of according party standing to those whose interests may be directly and adversely affected by civil proceedings, represents an appropriate standard for this Tribunal to adopt. Subject to the qualification that the Petitioners do not as yet know the full nature of the UPS claim, even on the basis of available materials, the interests of the Petitioners are sufficient in our view to satisfy this standard. Furthermore, under UNCITRAL rules, certain rights and remedies are available only to the parties. This serves to underscore the importance of full party standing.

89. Moreover the courts have been willing to accord standing to intervenors even where this causal nexus is weak or even absent. Thus, in *Finlay and Minister of Finance of Canada*,[33] the court held that a claimant for judicial review who had not suffered special damage could nonetheless be granted standing as a public interest litigant where there was no reasonable prospect that a better plaintiff would emerge. In our view, both the Council of Canadians and CUPW-STTP are uniquely qualified as intervenors in this regard.

---

[30] Ontario Law Reform Commission, *Report on the Law of Standing*, (Toronto: Ontario Law Reform Commission, 1993).

[31] *Martineau v. Matsqui*, [1980] 1 S.C.R. 602 at 608.

[32] Brown & Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvassback, 1998) at 4-13 and 4-17.

[33] *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 621-624.

PART VI: THE JURISDICTION OF THIS TRIBUNAL

90. We are also seeking with this Petition, the right to make submissions concerning the jurisdiction of this Tribunal and the arbitrability of the issues which UPS has raised. Of course, we are unable to properly address these jurisdictional questions without having full knowledge of the nature of the allegations that UPS is making.

91. We should also indicate that we are aware of no provision of the UNCITRAL Rules which explicitly precludes this tribunal from considering objections by non-parties to its jurisdiction, including objections with "respect to the existence or validity of the arbitration clause or of the separate arbitration agreement"(Article 21.1).

92. Similarly, Article 16(1) of the Code appended to the Commercial Arbitration provides that the "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Accordingly, in our view this authority is not limited to objections that may be brought forward by the parties. The tribunal has inherent authority to determine the extent of its jurisdiction and may do so on its own motion.

PART VII: ORDER SOUGHT

The Claimant respectfully submits that the Tribunal order that:

(i) the Petitioners be made parties to these proceedings;

(ii) in the alternative, the petitioners be according standing as intervenors, but nevertheless with the full right to present and to test any and all of the evidence which may introduced in these proceedings;

(iii) the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal, be disclosed publicly;

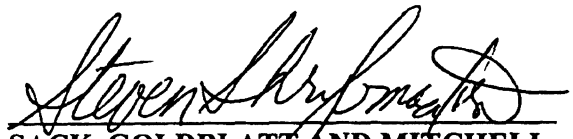
(iv) the Petitioners be accorded the right to make submissions concerning the place of arbitration;

(v) the Petitioners be accorded the right to make submissions concerning the jurisdiction of this Tribunal, and once they are fully known, the arbitrability of the matters the disputing investor has raised; and,

(vi) the Petitions be allowed to supplement these submissions to reflect the additional information made available by reason of such disclosure.

(vi) the Petitions be allowed to supplement these submissions to reflect the additional information made available by reason of such disclosure.

Respectfully submitted this 8th day of November, 2000.



SACK, GOLDBLATT AND MITCHELL
20 Dundas St. West, Suite 1130
Toronto, Ontario
M5G 2G8

Steven Shrybman
(613) 862-4862 - telephone
(416) 591-7333 – facsimile

Counsel for the Petitioners

ATTACHMENT "A"

Chronology of efforts made to obtain a copy of the Statement of Claim and other documents in this matter.

- In April, 2000, CUPW sent a letter to letter to Allan Kaufman, Vice President for UPS, requesting the Statement of Claim. That request has been refused.

- On May 1, 2000 a similar request was made of the Department of Foreign Affairs and International Trade, and that too was declined.

- On July 3, 2000, Counsel for the petitioners wrote to the parties advising of their respective interests in this matter, and seeking certain information and documents relevant to the UPS claim.

- On July 4, 2000 a similar letter was sent to the NAFTA Secretariat which responded by providing a copy of the UPS Notice of Arbitration but directing us to the parties for further information.

- On Aug. 3, 2000, Canada's Department of Foreign Affairs and International Trade answered that correspondence by providing certain information about the proceedings, but declining our request for the Statement of Claim made by UPS.

- To date we have received no acknowledgment of our correspondence from Mr. Appleton who is identified as the disputing investor's Counsel of record. A subsequent telephone call to his office has also gone unanswered.