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12:51:51

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER
ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

----- x
:
In the Matter of Arbitration :
Between: :
:
UNITED PARCEL SERVICE OF AMERICA, INC., :
:
Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Party. :
:
----- x Volume 1

HEARING ON THE MERITS

Monday, December 12, 2005

The World Bank
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 1:05 p.m. before:

KENNETH J. KEITH, President

L. YVES FORTIER, Arbitrator

RONALD A. CASS, Arbitrator

12:51:51

Also Present:

ELOISE OBADIA,
Secretary to the Tribunal

Court Reporter:

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12:51:51

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12:51:51 APPEARANCES: (Continued)

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On behalf of the U.S. Department of Commerce:

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On behalf of the Office of the U.S. Trade
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GRAHAM COOK

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C O N T E N T S

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12:52:08 1

P R O C E E D I N G S

2 PRESIDENT KEITH: Well, could I welcome
3 everybody to this merits hearing of the UPS and
4 Canada proceeding. I do apologize for the delay in
5 starting the hearing. I think as counsel will
6 know, it was for unavoidable reasons, and I'm sure
7 that we will be able to catch up on the time that
8 we have lost.

9 We will today hear the opening statements
10 by the two parties, and I will mention some
11 procedural matters in a moment as well.

12 And if we hear those through, then the

13 estimates of the parties are that this afternoon's
14 hearing will be five-and-a-half or six hours, and
15 then we may be an hour or so short in terms of our
16 overall program, and I'm sure that in the course of
17 the remaining days of the weeks, including
18 Saturday, we can make those up.

19 Could I at the outset thank everybody for
20 their cooperation in making the arrangements for
21 the hearing, including obviously the parties and
22 their counsel, and particularly, so far as the

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13:07:41 1 Members of the Tribunal are concerned, Eloise
2 Obadia, and her colleagues for the great work in
3 supporting this arbitration.

4 Now, if I could just run through the
5 pending procedural issues as we understand them and
6 indicate how the Tribunal sees those, and if there
7 is any question about any of the things I say, I
8 think it might be better if they are taken up in
9 the morning when there's been time for
10 deliberation, not that I'm encouraging that.

11 The first issue which has been raised in
12 the last few days by UPS is the presence of their
13 official representatives during the hearing.

14 Canada had earlier suggested in a letter of 6

15 October of this year that the way to handle that
16 was for the representatives to sign the
17 confidentiality undertaking, and the view of the
18 Tribunal is that that is the appropriate way of
19 handling that matter. We take that view on the
20 basis that if UPS is to be able to present its case
21 adequately, then, that they must be able to have
22 their representatives here to provide the necessary

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13:09:14 1 assistance and the confidentiality undertaking, as
2 suggested by Canada, as I say, in that earlier
3 letter would seem to meet any concerns. So, that's
4 the first matter.

5 The second matter which has been raised
6 again over the weekend, I think, by Canada is in
7 respect of the presence of witnesses in the hearing
8 room. The position that we took earlier and the
9 position that we continue to take is that witnesses
10 should not be in the hearing room when other
11 witnesses are giving their evidence if they have
12 yet to give their evidence. They can, of course,
13 attend subsequently. That's the position that we
14 took earlier, and we see no reason to depart from
15 that.

16 A third issue is about the dealing with
17 confidential information during the hearing and the

18 problem of people having to come and go if
19 confidential information is being mentioned. Our
20 experience, I think in a wide range of different
21 Tribunals and courts, is that ordinarily that
22 matter can be handled through the good sense of

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13:10:35 1 counsel and of the witness in question, by avoiding
2 the precise reference which might breach
3 confidence, which might cause difficulty.

4 Now, if that method of avoidance is not
5 available, then obviously we will need to make the
6 appropriate arrangements, but we would urge counsel
7 to adopt their course, if possible, of avoiding the
8 references to confidential material, if they can,
9 in their way still ask the questions adequately.

10 The fourth point is about the authorities
11 which Canada filed just a week or so back. It
12 seems to us that we must decide in accordance with
13 the law; and if the authorities are relevant, then,
14 and helpful, then we should have regard to them.
15 If there is any disadvantage to UPS, I'm sure that
16 in the course of the week they will be able to
17 overcome that difficulty.

18 A fifth matter was about closing
19 statements and whether Canada would have a second

20 closing submission. In the ordinary course we
21 would have thought that appropriate only if there
22 was something new to be said, only if something had

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13:12:11 1 been raised by UPS in its reply, and I think we can
2 just wait and see whether that situation does
3 arise.

4 I think that is what the matters on which
5 there was some degree of disagreement, although
6 we're pleased that quite a lot of other matters
7 seem to have been resolved. But there are one or
8 two matters I should just quickly mention, I think,
9 and, of course, if there are other matters, no
10 doubt counsel will raise them with us, although as
11 I say, we would prefer that that be done after
12 today's hearing.

13 The other matters are the provision by UPS
14 of a CD containing the compendium and parties'
15 documents and Tribunals' orders and decisions.
16 That seems to us to be a very helpful thing for us
17 to have, if that's feasible as it appears to be.

18 Another matter is ruling on the amicus or
19 the amici curiae applications and submissions. We
20 thought we would make those decisions when
21 necessary in the course of our own deliberations.

22 It's not a practical issue, of course, because the

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13:13:27 1 amici don't have any right to make oral
2 submissions.

3 Well, I think they were the range of
4 matters that we were aware of. As I said, if there
5 are others, then we would ask that they be raised
6 subsequently, and I think we now proceed to the
7 opening statements. But I should give the parties
8 the opportunity to present their teams.

9 MR. WHITEHALL: Mr. President, there is
10 one matter. You have indicated that I have written
11 to the Tribunal earlier saying that the official
12 representative of UPS may be present, including
13 during the confidential part of the hearing,
14 provided there is a signed undertaking.

15 I have done so, but it appears that I was
16 frankly out on the limb. I have subsequently
17 received instructions that are different, and I
18 have corresponded both to my friend and to the
19 Tribunal indicating that our position is that the
20 confidentiality order, and particularly paragraph
21 20 of the confidentiality order, should govern
22 these proceedings as well.

13:14:53 1 So, to the extent that I have indicated
2 otherwise, I apologize to the Tribunal. It appears
3 that I was, as I say, out on the limb, but our
4 position is as it was indicated in my last letter
5 to the Tribunal.

6 PRESIDENT KEITH: Thank you. I had
7 indicated that we will take those matters up after
8 today's proceedings.

9 Well, could I then call on Mr. Appleton, I
10 take it, to make the opening statement and any
11 other matter that he wants to mention.

12 MR. APPLETON: Would you like us to
13 introduce the members of our teams first before we
14 do the opening?

15 PRESIDENT KEITH: Yes.

16 MR. APPLETON: I think our friend might to
17 want do that as well, and then we could proceed to
18 the opening that way. Very good.

19 For the convenience of the Members of the
20 Tribunal, I have also prepared a delegation list
21 which I have given to the Secretary, and I believe
22 I have an additional copy that could go over to the

13:15:53 1 Government of Canada. If not, I would ask one of
2 my colleagues to take care of that right now.

3 I am, of course, Barry Appleton, and--

4 ARBITRATOR FORTIER: What's the of course
5 for?

6 MR. APPLETON: Because, of course, the
7 President of the Tribunal has already identified
8 me. That's why, Mr. Fortier.

9 But I am assisted here at this hearing
10 today by my colleagues Stanley Wong--I'm going to
11 ask them just to--and Robert Wisner, and Frank
12 Borowicz. The other members of our legal team are
13 set out in the delegation list, I think that will
14 make it easier, but I would like to introduce some
15 of the members from United Parcel Service because I
16 think that's important. I would like to first call
17 on Alan Gershenhorn, and Mr. Gershenhorn is the
18 party representative who will be here to instruct
19 us today. Then I would like to call upon Norm
20 Brothers and Alice Lee, and Alex Apollon. I'm sure
21 it's hard to see them behind the podium, but I can
22 assure you that they are all here. The other

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13:17:06 1 members of our delegation again are listed on the
2 sheet which you will have before you. I think that
3 would make it easier to be able to proceed, and I

4 would ask Mr. Whitehall if he would like to
5 introduce the members of his delegation.

6 PRESIDENT KEITH: Yes, Mr. Whitehall.

7 MR. WHITEHALL: Let me introduce myself.
8 I'm Ivan Whitehall. Immediately, and I will just
9 simply proceed along this table, if I may.
10 Immediately next to me is Ms. Knobel who is Counsel
11 with International Trade; Ms. Kirsten Hillman, who
12 is Deputy Director of International Trade, Canada;
13 Mr. Thomas Conway of the firm of McCarthy Tetrault.
14 Mr. Richard Casanova with the Department of

15 Justice. Ms. Sylvie Tabet, Counsel, International
16 Trade; Mr. Neufeld, Rodney Neufeld, Counsel,
17 International Trade. Mr. Alan Willis, who is a
18 counsel and agent for the Attorney General of
19 Canada.

20 Behind me we have--as part of the
21 litigation team, we have Mr. Deveen, who is Counsel
22 with Canada Post; Mr. Campbell, Counsel, Canada

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13:18:26 1 Post; Mr. David Olson who is Assistant General
2 Counsel, Canada Post; Mr. Brian McLean, who is
3 Counsel with Customs Canada now called Canadian
4 Border Protection Agency; Mr. Andrew Gibbs, also
5 with Canadian Border Services Agency; my left,

6 right, and every other hand, Ms. Robin Nicol, who
7 is our paralegal, who has, like I say, she's my
8 left, right, and every other hand, so obviously
9 she's out helping me. Mr. Jamie Johnson, who is
10 assisting us with the technical presentation; and
11 Ms. Jennifer Long, who is Clerk with Justice; and
12 finally Ms. Carolyn Bertrand, who is a paralegal
13 with International Trade.

14 Thank you very much.

15 OPENING STATEMENT BY COUNSEL FOR CLAIMANT/INVESTOR

16 MR. APPLETON: Very good. Before we
17 begin, I think it might be useful to just refer to
18 the materials that have, in fact, been filed before
19 the Tribunal. You will find, in fact, that UPS has
20 filed nine volumes of compendiums, which we will be
21 referring to during the hearing. They have been
22 lodged with the Secretary, and I believe a set has

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13:20:13 1 been given to the Government of Canada.

2 In addition, you will find at the
3 beginning of the compendium a CD-ROM which has the
4 materials in the compendium all electronically
5 available.

6 In addition, given the authorization that
7 I take it that I had from the Tribunal, we will be

8 distributing later, perhaps at the break, copies of
9 the merits phase authorities, pleadings, awards,
10 and orders electronically, and a CD-ROM of all the
11 witness statements that have been filed, so that in
12 one place you will have the benefit. I know that
13 this is a case dealing with parcel and packages,
14 and it's in everybody's interest for you to have as
15 many boxes of materials as possible, but the fact
16 of the matter is I thought you might like to be
17 able to carry it yourself. No offense from our
18 friends from UPS, or from Canada Post and
19 Purolator. Very good.

20 In addition, we will be making reference
21 to a slide presentation, and I'm hopeful that the
22 slide presentation will be able to be operated.

18

13:21:25 1 I'm told that they're working out some technical
2 glitch so that it can be seen on the screen before
3 you, as Members of the Tribunal, and for everyone
4 else in this room, it will be projected on the
5 large screen behind the Tribunal at the same time,
6 so you will all be able to see it as well from
7 my friends from the governments of the non-disputing
8 NAFTA parties of the United States and from Mexico,
9 and the fact they have the best seats in the house,
10 I'm afraid, today.

11 Very good.

12 Fairness. This is a NAFTA claim that
13 focuses on the simple concept of fairness.

14 The NAFTA has made the promotion and
15 protection of fairness a central concept in its
16 investment protection. The NAFTA national
17 treatment obligation and NAFTA Article 1102 is a
18 fairness principle. It says that it is unfair to
19 treat one set of competing market players better
20 than ones from other NAFTA parties. This is the
21 principle of even-handedness.

22 Similarly, NAFTA Article 1105 enshrines

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13:22:37 1 protections for fair and equitable treatment within
2 the core meaning of international law standards.
3 This provides an absolute level of protection,
4 rather than the relative concept of fairness that
5 we find contained in national treatment.

6 The UPS claim is exactly the type of claim
7 for which the NAFTA was designed. It is a claim
8 about fairness and about the use of governmental
9 powers and prerogatives to empower and enrich some
10 while distorting the operation of free markets--at
11 its heart, we are dealing with an unfairness--a
12 lack of even-handedness that Canada has created,

13 has stood by, and has permitted to continue.

14 On January 1, 1994, the Governments of
15 Canada, the United States, and Mexico brought The
16 North American Free Trade Agreement, a copy of
17 which I believe all Members of the Tribunal have,
18 and if not, should be very familiar by now, into
19 force. This agreement created a continental free
20 trade area that liberalized cross-border movement
21 of goods, services, capital, and to some extent
22 labor mobility.

20

13:24:00 1 These three sovereign governments
2 recognized that protecting domestic firms from
3 foreign competition undermined their mutual
4 economic developments and their global
5 competitiveness by restricting consumer choice and
6 dampening innovation.

7 At the same time, these governments knew
8 that they were susceptible to political temptation
9 if these free market commitments were not
10 memorialized in international agreement. And it
11 was the NAFTA that memorialized these commitments
12 in a binding, powerful, and meaningful way.

13 National treatment is the bedrock
14 obligation of contemporaneous international

15 investment law. And this case requires us to
16 examine the basic elements of its meaning,
17 particularly where treatment less favorable is
18 given to a competing foreign investor.

19 The fairness guarantees of NAFTA are
20 violated when governments favor national champions
21 over foreign-owned firms, by giving them special
22 privileges not available to their competitors.

21

13:25:07 1 They are violated when governments grant their
2 national firms special access, special public
3 powers without ensuring that those powers are used
4 for public purposes and not for the improper
5 purchase of poaching market share from the
6 competition. And they are violated when there is a
7 lack of even-handedness.

8 The conduct of Canada with respect to UPS
9 fundamentally undermines the guarantees of equality
10 of competitive opportunities given to UPS in return
11 for establishing and maintaining its investments in
12 Canada. There is, in fact, a lack of
13 even-handedness.

14 Now, Canada has breached its investment
15 obligations to UPS just as if it had passed a law
16 that said that no American firm shall control more
17 than 10 percent of the domestic market for courier

18 services.

19 Such an overtly unfair law would breach
20 the fairness provisions of NAFTA Chapter 11. But,
21 Canada has achieved the very same result by
22 ensuring that Canada Post and its subsidiary,

22

13:26:20 1 Purolator Courier, control the courier market
2 through special access to the benefits of a
3 resource that is created, owned, and controlled by
4 the Government of Canada. This resource is the
5 vast network that Canada Post controls through its
6 monopoly on Lettermail and the special legal rights
7 that support that network.

8 Now, let's be specific. There are five
9 NAFTA violations raised by UPS. Each claim is
10 based on unfair treatment by the Government of
11 Canada or by its state enterprise, Lettermail
12 monopoly, Canada Post.

13 The five claims are as follows: One,
14 Canada's enforcement of its Customs laws is unfair
15 to UPS; two, Purolator's access to Canada Post's
16 infrastructure is unfair to UPS; three, Canada
17 permits Canada Post to misuse its monopoly
18 infrastructure in ways unfair to UPS; four,
19 Canada's use of the Publications Assistance Program

20 to only favor delivery by Canada Post is unfair to
21 UPS; and five, Canada Post's retaliation against
22 UPS for raising this NAFTA claim is unfair to UPS.

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13:28:02 1 I will now turn to each of these issues in
2 brief.

3 The first U.S. claim is that Canada has
4 unfairly enforced its Customs law. Canada Customs
5 ensures that courier companies, like UPS Canada,
6 strictly comply with Customs laws while parcels
7 imported through Canada Post's postal system are
8 not enforced.

9 Customers whose packages are imported by
10 UPS pay the proper amount of duties and taxes,
11 while customers whose imported packages are
12 imported through the postal stream apparently do
13 not. Canada's Customs' failure to enforce its own
14 Customs inspections laws fairly and evenly results
15 in a large unfair competitive advantage to Canada
16 Post.

17 Canada Customs also imposes fees and
18 administrative cost recovery charges on UPS for
19 administrative Customs functions that it provides
20 for free to Canada Post. In some cases Canada even
21 pays Canada Post to do administrative services, so
22 by contrast, UPS Canada has to pay Canada to have

13:29:21 1 these same services provided. Canada gets paid,
2 UPS has to pay.

3 Canada's measures with respect to these
4 Customs activities s are simply unfair and violate
5 the protections of NAFTA Chapter 11; namely, NAFTA
6 Article 1102 and NAFTA Article 1105. They are not
7 and could not ever be evenhanded.

8 Now, the second UPS claim is that
9 Purolator Courier receives unfair access to Canada
10 Post infrastructure. Canada Post is granted
11 special access to its network that allows Purolator
12 to compete in ways not available to other
13 competitors. This is a benefit of great size and
14 scope that has assisted Canada Post to distort the
15 operations of the Canadian package and parcel
16 market.

17 Three, the third UPS claim is that Canada
18 permits Canada Post to misuse its vast monopoly
19 infrastructure. Canada has permitted Canada Post
20 to use its public mail monopoly to unfairly compete
21 against private courier companies. All the
22 services of the network of Canada Post and the

13:30:52 1 services they have for its monopoly are given to
2 Canada Post's competitive services business below
3 their market price and, in fact, even below cost.

4 Canada fails also to require Canada Post
5 to account for the costs of its use of monopoly
6 infrastructure used to compete in the courier
7 market. Canada removes Canada Post from the
8 discipline of market cost and price mechanisms, and
9 to which--I'm sorry, which are essential to the
10 operation of competitive markets, and to which UPS
11 and other competitors of Canada Post are fully
12 subject.

13 In addition, Canada Post's annual cost
14 study is fundamentally flawed. It sets the
15 benchmark far too low for fair competition, and is
16 done entirely without any independent review.
17 Canada Post makes its own decisions and asks us
18 just to trust them, and it refuses to give us and
19 refuses to give this Tribunal the information
20 necessary to verify what it has done.

21 The fourth UPS claim is that Canada has
22 twisted the Publications Assistance Program so it

13:32:14 1 can only provide benefits to publishers who use

2 Canada Post. Canada's administrative requirements
3 restrict the choice of publishers the program
4 serves by requiring them to exclusively use Canada
5 Post for all of their postal and courier needs, if
6 they want to get the subsidy paid under the
7 program. What this program does is ensure that
8 Canada Post has a captive market, and it ensures
9 that UPS Canada cannot access this market at all.

10 Finally, Canada Post has retaliated
11 against UPS for raising this NAFTA claim by
12 disqualifying a bid from UPS's Fritz Starber
13 subsidiary. This retaliation for bringing this
14 NAFTA claim before this Tribunal violates the fair
15 and equitable treatment obligations of NAFTA
16 Article 1105.

17 In addition, there are additional claims
18 regarding two restrictions on the collective
19 bargaining rights of Canada Post employees, one for
20 its rural route workers, the other over the pension
21 rights.

22 Canada specifically enabled Canada Post by

13:33:35 1 law to reduce labor protection to its workers. The
2 lowering of these labor standards is a violation of
3 fundamental labor norms which are protected by

4 customary international law. Canada gave a
5 competitive benefit to Canada Post by reducing its
6 cost structure through lower labor standards while
7 not doing the same for others. Canada's action was
8 flagrantly wrongful. There was a lack of
9 even-handedness because UPS Canada cannot fairly
10 compete against a firm that benefits from unfairly
11 reduced labor standards. Canada's action is a
12 violation of international law standards of fair
13 and equitable treatment.

14 Now, in its response to these claims,
15 Canada has tried to justify the violation of its
16 NAFTA obligations to UPS in three ways: First,
17 Canada tries to avoid its international obligations
18 on the basis that Canada Post is a separate legal
19 entity. International law, however, prefers
20 substance over form. In substance, Canada Post is
21 a government department, even though it has the
22 form of a Crown corporation. Indeed, it is this

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13:35:06 1 combination of public powers and private purpose
2 that is the source of the mischief in this case.

3 Canada tries to suggest because the
4 conduct of Canada Post at issue here is commercial,
5 that it can be relieved from its governmental
6 mandate, but there is no basis for such a

7 distinction either in the law or in the facts.
8 Tribunals established under international treaties
9 routinely examine the conduct of separately
10 incorporated state entities that have commercial
11 features. They have done so under investment
12 treaties, they have done so under trade agreements,
13 and they have even done so in the area of
14 international human rights.

15 Nor is this purely commercial conduct.
16 Rather, it involves the conditions of access to a
17 network that derives from governmental powers and
18 governmental privileges. No private firm has a
19 comparable network, so no private firm can engage
20 in comparable transactions.

21 Now, the second of Canada's evasions is
22 that Canada tries to water down the meaning of

29

13:36:17 1 national treatment in NAFTA Article 1102, and we
2 say Canada demeans national treatment, to the point
3 where it can no longer be a meaningful building
4 block of the NAFTA and where it has no real
5 content.

6 Canada tries to excuse its national
7 treatment violations by claiming public policy
8 justifications. Canada asks this Tribunal to

9 conclude that any measure can be justified under
10 NAFTA Article 1102 because it just says so. Canada
11 wants you to believe that as long as the government
12 advances some plausible public policy rationale to
13 show that its measures are not an arbitrary,
14 malicious, or capricious anti-foreigner action,
15 then it does not have to be evenhanded to
16 foreigners. But, under this approach, NAFTA
17 Article 1102 has no meaning whatsoever, as
18 arbitrary or capricious conduct of that kind is
19 already prohibited by NAFTA Article 1105.

20 In essence, Canada wants international
21 tribunals to give them a blank check when it comes
22 to any question that it contends, on its own view,

30

13:37:34 1 is a matter of public policy. Since a government
2 will always be involved as a disputing party to an
3 investor-state claim, adopting Canada's
4 self-judging public policy exception is tantamount
5 to striking down the meaning of national treatment
6 in NAFTA Article 1102, because there could never be
7 a violation of national treatment if all that it
8 takes for a government to avoid responsibility is
9 merely contending that there is a public policy
10 reason. There will always be some public policy
11 reason somewhere somehow.

12 Thirdly, Canada's only answer is just
13 trust us. Canada Post is entrusted by Canada to
14 perform a public policy role of providing universal
15 postal service, and it is given special powers for
16 that purpose. Yet, Canada does not approve any
17 universal service requirements for Canada Post. It
18 just trusts Canada Post to set those requirements
19 for itself.

20 Now, Canada does not apply regulatory
21 control, administrative supervision, or any other
22 measure to ensure that the special powers it has

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13:38:54 1 given Canada Post, such as its monopoly, are
2 exercised in a fair manner. It delegates the
3 regulatory power to Canada Post to regulate itself,
4 and it just trusts Canada Post to define the nature
5 and extent of its postal service, and thereby to do
6 its own self-assessment of fair competition.

7 Now, Canada is just too busy to be careful
8 when it comes to supervising Canada Post, but now
9 Canada asks this Tribunal to just trust Canada Post
10 the very same way.

11 UPS is here before this Tribunal because
12 Canada's contentions are not good enough in the law
13 or in logic to avoid its NAFTA obligations to UPS.

14 Indeed, Canada refuses to support its contentions
15 on any objective basis that would enable this
16 Tribunal to verify through demonstrable facts,
17 documents, and the analysis that what Canada says
18 is correct and reasonably related to the disruption
19 caused to the NAFTA. Canada's assertions cannot be
20 accepted only on the basis that Canada says that it
21 is so. Canada must do more than simply say just
22 trust the veracity of these excuses.

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13:40:29 1 Now, Canada's invitation to just trust
2 them raises a problem of discovery. In 1859,
3 Charles Darwin published his book, the "Origin of
4 Species," and his key findings were based on a
5 logical thought he had used before when he went to
6 Galapagos on the HMS BEAGLE. He concluded that
7 where there is a bone, there is a body. And where
8 there was one bone, there is a good likelihood that
9 there were many bones connected to it once.

10 Now, I invite this Tribunal from the
11 outset to be mindful of this because Canada has
12 tried to hide all the bones. Canada has refused to
13 produce the evidence sought by UPS.

14 Now, we are not complaining about Canada's
15 proper refusals to produce evidence. Canada has

16 available to it a process to decline UPS
17 information requests on the basis of reasons
18 specified by this Tribunal, and indeed, Canada
19 relied on many of these reasons. But, in many
20 cases, Canada does not have any acceptable reason
21 permitted by this Tribunal to refuse disclosure.
22 Canada has the evidence or easily could have had

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13:41:46 1 this evidence. In some case it is appears that
2 Canada has produced the evidence required to its
3 experts who have relied upon it. So, clearly, it
4 is relevant. But Canada has refused to make it
5 available to UPS so that this evidence can be
6 properly assessed by this Tribunal in this NAFTA
7 claim. In particular, Canada refuses to produce
8 documents that independently verify Canada Post's
9 determinations. Just trust us, it asks. Instead
10 of documents, Canada relies on repetitive and
11 self-serving witness statements and secondhand
12 expert reports. This evidence repeatedly referred
13 to and rely on documents that haven't been
14 produced, and they just in this case they say just
15 trust us. But it is not good enough for Canada to
16 say just trust us. Canada must substantiate its
17 assertions to the satisfaction of this Tribunal in

18 an objectively verifiable manner.

19 The UNCITRAL Arbitration Rules which
20 govern this arbitration permit this Tribunal to
21 look at Canada's failure to produce important
22 evidence. Article 28(3) of the UNCITRAL

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13:43:11 1 Arbitration Rules explicitly confirms this
2 Tribunal's entitlement to draw adverse inferences
3 from a failure to produce documents. It provides
4 that, and I will just quote, "If one of the
5 parties, duly invited to produce documentary
6 evidence, fails to do so within the established
7 period of time, without showing sufficient cause
8 for such failure, the arbitral tribunal may make
9 the Award on the evidence before it."

10 International law permits this Tribunal to
11 take an adverse inference from Canada's failure to
12 produce.

13 Now, we know that there is relevant
14 evidence that relates directly to the investor's
15 claims that have been suppressed from this Tribunal
16 by the Government of Canada, and it is not only
17 reasonable but compelling that where Canada has
18 failed to produce relevant evidence that this
19 Tribunal conclude that the evidence be supportive
20 of the investor's claims.

13:45:45 1 has a mandate to carry out many governmental
2 objectives. However, unlike most government
3 departments, Canada Post is required to be
4 financially self-sufficient, and it seeks to obtain
5 a return on the government's investment. And to
6 this end, Canada Post aggressively competes against
7 many private sector companies.

8 In addition to Canada Post's own parcel
9 and courier operations, which are described as the
10 physical distribution business by Canada Post, but
11 which is largely we call Canada Post's courier
12 business--Canada Post has other investments in the
13 private courier business. These are, and in
14 particular I will refer to as Purolator Courier,
15 which is a subsidiary of Canada Post, but there are
16 other ones, too. There is also Prologistix, a
17 logistics service subsidiary of Canada Post. All
18 of these competitive operations are outside of the
19 scope of Canada's Lettermail monopoly that was
20 granted to Canada Post.

21 Canada acknowledges that Purolator is the
22 investment in like circumstances, as UPS Canada,

13:47:01 1 and attempts to distinguish it solely on the basis
2 of this ownership. Yet, although not separately
3 incorporated from Canada Post, Canada Post's own
4 courier business is just as much an investment as
5 Purolator Courier. All three of these are
6 businesses that are in like circumstances.

7 For example, if we look at the video
8 evidence put in by Mr. Meacham that was filed by
9 Canada as Exhibit C to Canada's witness statement
10 number 27, we can see how similar these three
11 businesses really are, and you will that we have
12 indicated where the still comes from, the minute of
13 the video is indicated on each spot, and the tab
14 number, so you can locate it if you'd like to find
15 it yourself.

16 Now, Canada Post supplies services that
17 are like those of UPS Canada and Purolator. It
18 performs the activities of induction, processing,
19 transportation, and delivery of parcels and
20 packages, like UPS Canada and Purolator.

21 As we see here in slide four, we can see
22 how Canada Post inducts a package. We see

13:48:17 1 Mr. Meacham himself taking a package to a Canada

2 Post facility for induction. This facility can
3 induct both Canada Post packages and Purolator
4 packages. Also, packages for Canada Post can be
5 inducted through these red Lettermail boxes that
6 you can see in front of you on the slide, and we
7 can see Mr. Meacham just doing that in the second
8 picture on the slide.

9 Now, if we look at next slide, slide five,
10 we can see how UPS Canada similarly inducts a
11 package. This picture taken from the video of the
12 UPS Chairman's message, located at Tab U 411, shows
13 a UPS employee going through the same process of
14 induction as the Canada Post employee. The only
15 difference is that the UPS package can only be
16 picked up by a UPS carrier, or be dropped off at
17 one of Canada's--sorry, UPS Canada's 54 retail
18 locations or at a UPS drop box.

19 Canada Post has 24,000 retail outlets
20 while UPS Canada only has 54. Canada Post has
21 950,000 drop boxes while UPS Canada only has 595.

22 If we look at slide six, we will see that

13:49:47 1 both Canada Post and UPS engage in processing. You
2 will see Canada Post's activity on the left side of
3 the slide, and that's taken from the Meacham video,
4 and you will see UPS's activity on the right.

5 Slide seven looks at the issue of
6 transportation delivery, and we see here, we see
7 Canada Post delivering a parcel. We see the red
8 Canada Post truck, the driver in the middle picture
9 is scanning a package for delivery, and then we see
10 a happy resident accepting the package at the door
11 in the third picture.

12 Slide eight shows a UPS delivery truck.
13 You see the driver with a long package, perhaps
14 it's salami or something else destined for
15 delivery, and in the second picture we see delivery
16 of a package itself to an office. And as we can
17 see in slide nine, Canada Post's courier business,
18 Purolator, and UPS Canada all do the same thing for
19 the same kind of customers.

20 Canada Post and UPS Canada both handle
21 imported packages delivered to them by their
22 business partners in the United States,

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13:51:01 1 respectively the U.S. Postal Service and UPS
2 Canada--sorry, UPS of America. In so doing, they
3 both seem to attract the business of the same types
4 of shippers from the United States into Canada.
5 They both earn revenues for performing these
6 services. They both receive packages from their

7 partners and attend to the Customs clearance of
8 these packages. These packages contain similar
9 items whose importation is supposed to be subject
10 to the same duties and taxes.

11 Now, while there may be differences, there
12 are many essential similarities, and any of these
13 differences are not relevant to the differences in
14 treatment that UPS and Canada Post receive. The
15 fact that a courier package is delivered in a red
16 truck, or a white truck, or a brown truck is not
17 material. All three investments engage in similar
18 and competitive functions in Canada.

19 Now, I would like to turn to the issue of
20 international responsibility.

21 Canada's approach to the defense of the
22 UPS claim has been to deny that Chapter 11 of NAFTA

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13:52:26 1 applies to Canada Post. Now, this is analogous to
2 the old Peter Sellers Pink Panther defense that if
3 that a dog bites, it's not my dog. But
4 long-standing principles of international law make
5 it very clear beyond doubt that Canada Post is
6 Canada's dog.

7 Now, the ILC Articles on State
8 Responsibility confirm that NAFTA applies to Canada
9 Post. There is no doubt that Canada is a party,

10 and there is no dispute between the disputing
11 parties that the ILC Articles on State
12 Responsibility set up a customary international law
13 on state responsibility. The ILC articles help
14 answer the question of when a measure becomes a
15 government measure. If we look at slide 10, we
16 will see that ILC Article 4(1) makes it clear that
17 the conduct of any state organ is an act of the
18 state under international law. To use the language
19 of NAFTA, a policy or practice taken by a state
20 organ constitutes a government measure under the
21 NAFTA.

22 ILC Article 4(2), which you will see here

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13:53:47 1 in yellow explains that an organ includes any
2 entity which has that status in accordance with the
3 internal law of the state. The commentary to this
4 Article explains that the term "entity" is used in
5 a broad sense that covers separate legal persons
6 and that states are responsible for all conduct of
7 state organs, regardless of whether or not it is
8 commercial.

9 ILC Article 5 offers additional guidance
10 on what is a measure of a party, and that's on the
11 next slide, slide 11. Article 5 makes clear that

12 acts of state under international law include acts
13 of state agents. State agents are not organs, but
14 are empowered by internal law of the state to
15 exercise governmental authority.

16 Now, regardless of whether Canada Post's
17 conduct that is at issue here falls under Article 4
18 or under Article 5 of the ILC rules, there is clear
19 and undeniable state responsibility by Canada. To
20 go back to the analogy, Canada Post is Canada's
21 dog. Canada is responsible when that dog barks,
22 and Canada is responsible if that dog bites, and

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13:55:16 1 Canada is responsible to clean up after the dog.

2 There is no doubt that Canada Post is a
3 state enterprise, but it is much more than a simple
4 state enterprise. Canada's internal law gives
5 Canada Post special governmental powers and
6 characteristics that go well beyond those that
7 simply come from a controlling governmental
8 ownership interest. And we see this from the
9 following: A, that Canada Post Corporation Act
10 establishes Canada Post and delegates regulating
11 authority to it; B, from decisions of the federal
12 court of Canada; C, statements of Government of
13 Canada cabinet ministers; and D, Canada Post's
14 special tax-exempt status, amongst other factors.

15 If we turn to the Canada Post Corporation
16 Act that's in the materials Tab U 218, but I'll put
17 it up on slide 12, we can see that the Canada Post
18 Corporation Act does not merely create an
19 enterprise owned and controlled by the government.
20 It makes clear that this enterprise is part of the
21 government. And therefore we see in Section 5, we
22 will see that the Canada Post Corporation is an

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13:56:51 1 institution of the Government of Canada.

2 And in section 23, you will see that the
3 Canada Post is an agent of Her Majesty in right of
4 Canada.

5 Now, in section 19(1), which is not
6 reproduced here, Canada Post is given the power to
7 make regulations defining the scope of its
8 monopoly, its right to place street mailboxes in
9 public places, its right to access apartment,
10 condominium, and office mailboxes.

11 This regulation-making power in Section
12 19(1) of the Act gives Canada Post the power to
13 define the scope of its own Lettermail monopoly in
14 two ways: First, Canada Post has the power to
15 define the meaning of letter, including exceptions
16 that remove items from the exclusive Lettermail

17 privilege; second, Canada Post is able to set
18 Lettermail prices that in turn define the scope of
19 that exception to the exclusive mail privilege.
20 Now, this defines the permitted market for courier
21 companies which, under the Canada Post Corporation
22 Act, depend on the rate of postage. For example,

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13:58:12 1 increases in the rate of postage require couriers
2 to increase their prices to ensure that there
3 always be at least three times higher than the 50
4 gram Lettermail rate, because that's part of the
5 exclusive Lettermail monopoly that they are not
6 allowed to compete in.

7 These regulations regarding mailboxes in
8 public places or apartments serve the same function
9 as the monopoly. They enable Canada Post to create
10 and expand its vast network. Hence, the network
11 derives from Canada Post's regulation-making
12 powers.

13 Canada Post regulations are also deemed to
14 be approved by the Canadian cabinet within 60 days.
15 Canada's own expert, Robert Campbell, has called
16 this process a cabinet approval, a trivial ritual.

17 The Minister responsible for Canada Post has the
18 power to issue directives to the corporation. This

19 power has never been exercised. Instead, the
20 Minister has made many informal directives as
21 Canada's own witnesses repeatedly acknowledge.

22 Finally, Canada Post is given a mandate to

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13:59:38 1 provide basic customary postal service. Unlike
2 most postal authorities around the world, Canada
3 Post has complete discretion to decide what
4 constitutes customary postal service, including the
5 level of service, the frequency of service and
6 collection, the price of stamps, and ubiquity of
7 service. If Canada Post decides that basic
8 customary postal service no longer means delivery
9 to your door and that you will need to walk or
10 drive to a community mailbox just to pick up your
11 mail, that decision is entirely within its power.

12 The Universal Service Obligation is an
13 obligation of governments. Canada has delegated
14 this obligation to Canada Post, and Canada
15 acknowledges that the Universal Service Obligation
16 is implemented within any legislative additions to
17 the Canada Post Corporation Act, just through
18 Canada Post's internal policies, internal
19 practices, and internal regulations.

20 Only a government entity can define a
21 governmental obligation through its own rules,

22 through its own policies, and its own practices.

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14:01:05 1 And this Universal Postal Convention applies
2 directly to Canada Post.

3 It is not merely the broad powers
4 delegated to Canada Post in the Canada Post
5 Corporation Act that established its undeniable
6 status as a part of the Government of Canada, but
7 the history and purposes of its delegation show the
8 same thing. Canada Post is the successor of the
9 Post Office Department, a department of the
10 Government of Canada. The Canada Post Corporation
11 Act transformed this department into a corporation,
12 but it did not change the entity's function within
13 the government. That function is to meet the
14 policy objective of universal provision of basic
15 postal services.

16 Now, Canada Post's governmental status,
17 according to the internal law of Canada, has been
18 determinatively decided by the federal court of
19 Canada in two separate cases. Slide 13 shows that
20 in the Canadian Daily Newspaper case, the federal
21 court decided that Canada Post is part of the
22 Government decision-making machinery.

14:02:33 1 In slide 14, this is similarly in Rural
2 Dignity that the federal court came to the same
3 conclusion. Canada Post is a part of the
4 Government decision-making machinery. In both of
5 these cases, the federal court had to determine
6 whether it had jurisdiction to review Canada Post's
7 conduct. This question depended on whether Canada
8 Post was a part of the federal government. In both
9 cases, the federal court concluded that Canada Post
10 was part of the government's decision-making
11 machinery, and it did so even though the conduct at
12 issue had commercial features, such as delivering
13 unaddressed admail to locked apartment mailboxes,
14 or reducing basic postal services by eliminating
15 delivery to the addressee's door.

16 But there is more. If we look at slide
17 15, we will see that the Minister responsible for
18 Canada Post, Diane Marleau, made similar
19 pronouncements. As we see here on slide 15, we
20 have the response of the Minister on the release of
21 recommendations of the Canada Post Mandate Review,
22 and here she has confirmed that Canada Post is part

14:04:00 1 of the federal government.

2 Canada's own tax laws also reflect the
3 reality of Canada Post is part of the government.
4 Its services are exempt from sales tax as they are
5 considered to be government services. The
6 corporation's income and real estate is exempt from
7 provincial taxes. There is a simple reason to why.
8 Because constitutionally, provinces cannot tax the
9 federal government. The Canada Post Corporation
10 Act makes Canada Post an agent of Her Majesty the
11 Queen, and that designation entitles Canada Post to
12 very special immunities and privileges.

13 We can look at slide 16. The phrase
14 "Agent of her Majesty the Queen," which is used in
15 the Canada Post Corporation Act as explained by
16 Professor Peter Hogg in his treatise on Crown
17 agency. This treatise is set out at Tab 41 of our
18 authorities, and we put an excerpt here on the
19 slide. Professor Hogg is one of Canada's
20 preeminent experts on Canadian constitutional law.

21 Now, Professor Hogg explains that just as
22 government departments or ministries possess the

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14:05:22 1 attributes of the Crown, so too does a public

2 corporation that qualifies as a Crown agent. Crown

3 agency gives the corporation all the privileges and
4 immunities of the Crown. Only a very few public
5 corporations have the status of Crown agents.
6 Where there are state privileges, there also must
7 be state responsibility.

8 There is no dispute that all the actions
9 of Canada Post impugned by UPS are actions within
10 its statutory authority. These are all acts taken
11 by Canada Post in its capacity as a Crown agent.

12 And thus, in the plain words of NAFTA Chapter 15,
13 they are actions taken in the exercise of
14 governmental authority.

15 All of these factors demonstrate that we
16 are not dealing with an ordinary enterprise whose
17 shares just happen to be controlled by the
18 Government of Canada. We are dealing with an
19 entity that is by the internal law of Canada a part
20 of the government of Canada. Canada's own statutes
21 say so, Canada's own courts say so, and Canada's
22 own ministers say so.

14:06:54 1 And even if the existence of state
2 responsibility was not definitively established by
3 the Canada Post Corporation Act and the decision of
4 Canada's federal courts, this Tribunal would still

5 be compelled to come to the same conclusion. In
6 three recent international investment arbitrations,
7 tribunals have considered issues of state
8 responsibility for actions involving state
9 enterprises, or state enterprises and entities we
10 should call them. These tribunals did not have the
11 benefit of having statutes making them, these state
12 enterprises, institutions of that government or
13 statutory agents. These tribunals did not have
14 domestic court decisions declaring that these state
15 enterprises were part of the machinery of
16 government, and yet they were able to come to the
17 same type of conclusion.

18 So, in Salini and Morocco, which is at Tab
19 152 of our authorities, Eureko at Tab 1791, a case
20 that perhaps Mr. Fortier may be somewhat familiar
21 with, and the Noble Ventures decision, which is at
22 Tab 178 of the authorities, international tribunals

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14:08:08 1 sitting, just like this one, had no trouble
2 determining that state entities engaged in
3 commercial activities created state responsibility
4 under the ILC articles. No difficulty on that.
5 And in the area of International Trade
6 Law, the WTO Appellate Body has expressly
7 considered Canada Post's status under international

8 law. In Canada-Periodicals, which is set out in
9 our authorities at Tab 66, the WTO Appellate Body
10 considered Canada's differential pricing policy for
11 delivery of periodicals. Canada argued that the
12 decision was simply an exercise of commercial
13 conduct by a state enterprise. Canada said that it
14 could not be responsible for how Canada Post set
15 its prices.

16 The WTO Appellate Body disagreed, and
17 noted that Canada's Cabinet Minister had the power
18 to issue binding directives to Canada Post.

19 Now, we have discussed this case in our
20 memorial at paragraph 749, but I would like to
21 highlight very specific wording here at the outset
22 of this case from the WTO Appellate Body decision.

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14:09:35 1 The first point I will take you to will be
2 paragraph 5.35, and I will set that out in slide
3 17.

4 First, it is clear that Canada Post
5 generally operates under governmental instructions.
6 Canada Post has a mandate to operate on a
7 commercial basis in this particular sector of
8 periodical delivery, a mandate that was set by the
9 Canadian Government.

10 If we continue along in the same paragraph
11 which is on slide 18, second, Canada admits that if
12 the Canadian Government considers Canada Post's
13 pricing policy to be inappropriate, it can instruct
14 Canada Post to change the rates under its directive
15 power based on Section 22 of the Canada Post
16 Corporation Act. Thus, the Canadian Government can
17 effectively regulate the rates charged on the
18 delivery of periodicals.

19 Finally, slide 19 sets out the beginning
20 of paragraph 5.36, the next paragraph, which notes
21 that Canada Post's separate legal personality is
22 not relevant to this analysis. It was unaffected

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14:11:04 1 by that fact.

2 So, in this case, a binding directive was
3 not actually issued, but the WTO Appellate Body
4 found it sufficient that the Government of Canada
5 had a directive power. And since Canada Post
6 operated under governmental instructions, the WTO
7 Appellate Body concluded that Canada was
8 responsible for Canada Post's pricing policies that
9 violated national treatment.

10 But we do not need to go down that
11 international law functional analysis route.
12 International law is not really required here

13 because of Canada's statutes and Canada's domestic
14 court decisions which demonstrate beyond contention
15 that Canada Post is an organ of the Canadian state,
16 and because of these unusual powers and the close
17 connection between Canada and Canada Post, Canada
18 is responsible for the actions of Canada Post under
19 Article 4 of the ILC rules.

20 Now, the disputing parties agree that the
21 ILC articles are not primary obligations. The ILC
22 articles are secondary obligations. They do not

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14:12:34 1 define the Treaty obligation, but they set out who
2 is responsible for that obligation. The primary
3 obligations are set out in Section A of NAFTA
4 Chapter 11, for example. But the ILC articles
5 assist in understanding whose act constitutes a
6 governmental measure.

7 Now, Article 55 of the ILC articles
8 confirms that a treaty can only constitute a *lex*
9 *specialis* if there is an inconsistency or
10 discernible intent to oust the principles, and in
11 this case it would be Articles 4 and 5. NAFTA has
12 a very broad definition of state enterprise. This
13 definition in Article 201 of the NAFTA, for
14 example, defines a state enterprise as any

15 enterprise owned or controlled through ownership
16 interests by a party, and the NAFTA imposes
17 obligations on the parties for the actions of such
18 ordinary state enterprises.

19 Chapter 15 deals with state enterprises
20 and monopoly, and this Chapter also assists in
21 specifically addressing obligations imposed on a
22 wide variety of state enterprises, public and

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14:14:01 1 private monopolies. NAFTA Chapter 15, however,
2 does not replace the customary international law on
3 state responsibility in the area of state
4 enterprises and private monopolies. Most of
5 Chapter 15 does not address state enterprises that
6 may be either organs or agents of the state.

7 Chapter 15 applies to private firms that
8 enjoy a state-granted monopoly.

9 Now, you may want your NAFTA and I will
10 give you some NAFTA Articles here. NAFTA Articles
11 1502(3)(b), 1502(3)(c), 1502(3)(d), so (b), (c),
12 and (d), and 1503(3). These all broaden state
13 responsibility beyond customary international law
14 by covering all state enterprises and private
15 monopolies. And it is for these reasons that these
16 articles are not the subject of investor-state
17 arbitration.

18 At the same time, NAFTA parties ensured in
19 Articles 1502(3)(a) and 1503(2) that investor-state
20 arbitration remained available for actions of those
21 state enterprises and monopolies that were also
22 state agents, and that means a state enterprise and

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14:15:50 1 monopoly that exercises governmental authority.

2 These articles add additional obligations
3 on Canada to apply regulatory control,
4 administrative supervision, or other measures to
5 ensure that state agents comply with NAFTA Chapter
6 11. Obligations of Section A of NAFTA Chapter 11
7 to be precise.

8 These rules are like a bylaw that says not
9 only are owners responsible if their dogs bite, but
10 they must keep their dogs on a leash. NAFTA leaves
11 it to the parties to decide how long the leash
12 should be, whether they should use a muzzle or
13 whether they need just a big fence. The parties
14 are free to choose their measure as long as the
15 measure ensures that the dog does not bite. There
16 is the obligation.

17 The definitions in NAFTA Article 1505,
18 combined with articles 1502(3)(d) and 1503(3),
19 clearly confirm that the NAFTA extends the

20 fundamental principle of national treatment to
21 entities to whom it would not normally apply. It
22 does not remove national treatment obligation from

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14:17:14 1 entities who would otherwise be subjected to it.

2 It adds more, doesn't take away.

3 Take, for example, the obligation of
4 nondiscriminatory treatment in the sale of a good
5 or service. Now, nondiscriminatory treatment
6 simply means that there must be the better of
7 national treatment or most-favored-nation treatment
8 given. If we look at slide 20, we can look at the
9 relationship that we see as a result of this.

10 So, where a state organ discriminates in
11 the sale of a good or a service to an investment of
12 an investor of another party, this is a violation
13 of Article 1102. And that is the first line that
14 you will see here. So, there is an organ with
15 normal Chapter 11, Section A of Chapter 11
16 obligation applies.

17 Where a state agent does so, there is a
18 violation of NAFTA Chapter 11 or Section A of 1102
19 in this case, combined with 1503(2). The two work
20 together to define the violation.

21 If we have an ordinary state enterprise,
22 and that is a state enterprise that's majority

14:18:37 1 owned by a state, but that is not used as a state
2 vehicle for state policies, then it's a violation
3 of 1503(3).

4 ARBITRATOR FORTIER: What would be an
5 example of a state enterprise that would fit this
6 pigeonhole?

7 MR. APPLETON: Purolator is a perfect
8 example.

9 ARBITRATOR FORTIER: And a state agent?

10 MR. APPLETON: A state agent could be--we
11 believe actually that Canada Post is the state
12 organ, but if you were to find it was not part of
13 the government because of the agency, it is clearly
14 a state agent. It has that in the law. The law
15 makes it so. So, at a minimum it has to be a state
16 agent because it says so and it relies on them. So
17 that's why that operation would apply.

18 Thank you for the question.

19 The last part is where a private monopoly
20 engages in a similar practice of discriminatory
21 provision of a monopoly good or service, the
22 conduct would be covered by 1502(3)(d), a provision

14:19:46 1 that this Tribunal has determined is not covered
2 within the investor-state process.

3 In all cases, the nature of the act is the
4 same: Discrimination in the provision of a
5 service. And while the actor may be different, the
6 obligation of nondiscrimination is the same.
7 Hence, the NAFTA has different dispute resolution
8 processes to reflect the difference in actors, but
9 not necessarily the difference in actions.

10 And these differences also provide the
11 simple road map for navigating the UPS claims
12 against Canada through the NAFTA. If Canada Post
13 is an organ of the Government of Canada under ILC
14 Article 4, then Canada is responsible for Canada
15 Post's actions that violate the national treatment
16 obligations of NAFTA Article 1102, and the
17 international law standard of treatment of NAFTA
18 Article 1105.

19 Even if Canada Post is only an agent of
20 the Government of Canada under ILC Article 5, the
21 question that Mr. Fortier just asked, Canada is
22 just as responsible for the actions of Canada Post

14:21:23 1 that are contrary to NAFTA Articles 1102 and 1105,
2 so long as those actions of Canada Post are the
3 exercise of a delegated governmental authority.

4 Indeed, the actions of Canada Post are the
5 exercise of governmental authority, and then Canada
6 is also responsible for the resulting violation of
7 its obligations under Articles 1502(3)(a) and
8 1503(2), in addition to these violations of 1102
9 and 1105.

10 And, of course--and this is an important
11 point--if Canada actually did the violation such as
12 the area of Customs or the area of the publications
13 assistance program, where Canada itself does the
14 act, then there is a direct violation of NAFTA. We
15 don't even have to look at this. That's directly
16 the Government of Canada, measures of the
17 government. So, this only deals with those issues
18 when we are talking about state responsibility for
19 state enterprises. And, of course, monopolies.

20 So, on the specific facts of this case,
21 the incontrovertible internal law of Canada, as
22 well as customary international law, establishes

14:22:52 1 that Canada Post is both an organ of the Government
2 of Canada within the meaning of ILC Article 4. It
3 proves that it could be an agent of the Government

4 of Canada within the meaning of ILC Article 5. So,
5 all roads lead directly to Ottawa, so to speak, and
6 there is no offramp for the Government of Canada in
7 this area.

8 Canada cannot use its Pink Panther it is
9 not my dog defense because Canada Post is Canada's
10 dog, and Canada has been told repeatedly that this
11 dog barks, it has been told repeatedly this dog
12 bites, but it refuses to put it on a leash, and it
13 has refused to take any responsibility to clean up
14 after its dog, and the Canada Post Corporation Act
15 says so, the federal court of Canada says so, the
16 regulatory power delegated to Canada Post to define
17 its postal service obligations says so, customary
18 international law says so, and every decision of
19 international law considering similar circumstances
20 also says so.

21 PRESIDENT KEITH: Mr. Appleton, could I
22 just ask you a question about that before you move

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14:24:18 1 on. In terms of 1502(3)(a), this isn't even a
2 private dog caught if it has governmental
3 authority? Because that provision is concerned,
4 isn't it, with privately owned monopolies as well
5 as government monopolies?

6 MR. APPLETON: I'm just going to turn to
7 the provision to make sure.

8 PRESIDENT KEITH: This comment may not be
9 all that relevant, but I think to the extent that
10 it's probably on your side, but--and I thought that
11 Article 5 of the ILC draft, which I don't have in
12 front of me, was concerned as well with the
13 situation where the government does say to a, say,
14 private letter carrier, that you have our
15 obligations to deliver foreign mail, and that
16 obligation can't be avoided by the state, say,
17 privatizing the carrying out of international
18 obligations, and I think some of the commentary to
19 Article 5 is to that effect as well, isn't it,
20 thinking of part of our shared or some of our
21 shared imperial inheritance.

22 And here I think there is something in the

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14:25:44 1 commentary that says that if the privy counsel
2 sitting on appeal from New Zealand once upon a time
3 or Canada much longer ago filled up and the
4 governments of Canada or New Zealand would be
5 responsible in that situation. We have got someone
6 else doing part of your government business, where
7 in this case you have got a private letter carrier
8 or Bell Telephone or whoever it might be actually

9 meeting part of your international obligations?

10 MR. APPLETON: Sir Kenneth, first of all,
11 I believe your understanding is absolutely correct.
12 You can't privatize away that obligation. If it's
13 a governmental function, the government is going to
14 be responsible. I sometimes call that off-balance
15 sheet delegation. You're not allowed to do that.

16 In addition, of course, there are other
17 decisions. There is that famous decision of the
18 U.K. House of Lords in British Gas which is in the
19 materials that also comes to the same conclusion,
20 although in that case British Gas was, in fact, a
21 private company. It took on a governmental type of
22 function to deliver gas. That was all it did, is

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14:26:59 1 delivering, just like here, delivering the mail,
2 delivering gas, and that was held to be subject to
3 the governmental obligations for international
4 human rights.

5 So, Article 5, though, is the minimum. In
6 this case, we are saying that this is so clear, and
7 Canada Post is so integrally a part of the process
8 that this is actually in Article 4 rather than
9 Article 5, but you're absolutely--you're absolutely
10 correct, and that's why we feel it is so clear and

11 why we feel that there is just no question here
12 that either Article 4 or Article 5 is going to
13 apply. But the critical element is that Canada's
14 own laws internally, its own courts, its own
15 Ministers have declared this to be part of the
16 government.

17 And what Article 4 says is where that
18 happens, then it is--that internal law is
19 determinative. You can find it as a fact by
20 international law, but if the internal law comes to
21 that conclusion, you don't even have to go there.
22 That was the point we were trying to tell you that

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14:28:08 1 we could save you that bother if you wanted, but
2 I'm happy if you would like to go down that route
3 as well because all roads lead to Ottawa, as we
4 say.

5 Do you have any other questions on this
6 point, or else I would like to turn to the area of
7 national treatment, if that's all right.

8 It is difficult to define fairness in the
9 abstract, but it is easy to apply it to specific
10 cases. Tribunals can look at a factual situation
11 and determine when it is not fair. It is a matter
12 of common sense and fair play, and tribunals do

13 this all the time.

14 Nonetheless, the NAFTA itself contains
15 some clear interpretive guides. If there is any
16 doubt about what a term means, the NAFTA gives us
17 some tools, and that is to say that the NAFTA
18 functionally defines itself. So, for example, when
19 NAFTA does not define the term national treatment,
20 but it is used in seven different NAFTA Chapters,
21 and it is stated to be an interpretive principle of
22 the NAFTA agreement in NAFTA Article 102. This is

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14:29:34 1 the guiding principle, like the glue that holds the
2 pages of the NAFTA together. And similarly, the
3 NAFTA did not define the term international law,
4 Article 1105, including its incorporated concepts
5 of fair and equitable treatment or full protection
6 and security.

7 But terms like "national treatment" or
8 "fair and equitable treatment" are used in more
9 than 2,000 bilateral investment treaties without
10 the need for any specific definition. And they are
11 used just in that way, and just in that format.

12 So, it's not surprising that the NAFTA
13 chose to rely on the living meaning of these
14 well-known, well used international law terms, and

15 a meaning that comes from a large host of
16 international tribunal decisions and international
17 customary law.

18 UPS and Canada both agree that the
19 interpretation of NAFTA must follow the
20 international rules of treaty interpretation that
21 are contained in the Vienna Convention on the Law
22 of Treaties, and such meaning must be based on the

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14:30:54 1 ordinary meaning of the words, in their context,
2 and in lighter of the Treaty's object and purpose
3 as mandated by the Vienna Convention.

4 Now, let's look specifically at the text
5 of NAFTA Article 1102, which I will set out here on
6 the next slide. We are looking here particularly
7 at paragraph two of Article 1102, and we can see
8 that from the text there are two simple criteria
9 that we really need to focus on. Are there
10 investors or investments of investors of another
11 NAFTA party in like circumstances? Two, is there
12 treatment less favorable provided to them? These
13 are our two tests, and that is all that UPS needs
14 to show to make its claim.

15 Now, we see that NAFTA Article 1102 is
16 entitled national treatment. Now, this directs
17 that the text is to be given an interpretation that

18 is consistent with the principle of national
19 treatment that is contained in Article 102 which is
20 identified as a fundamental rule and principle of
21 the NAFTA. So to that extent, and only to that
22 extent, the title is helpful.

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14:32:31 1 Now, we begin with the ordinary meaning of
2 the words "investment" and "investor." One issue
3 that is no longer in dispute between the parties is
4 that UPS Canada is an investment of an investor of
5 another NAFTA party. Canada now admits that UPS
6 Canada is an enterprise owned by the investor in
7 this arbitration. NAFTA Article 1139, which sets
8 out the definitions in Chapter 11 confirms that
9 investment means, amongst other things, an
10 enterprise.

11 Another issue that is not in dispute is
12 that both Canada Post and Purolator are investments
13 of Canada. So, like UPS Canada, these are both
14 enterprises as well. Like UPS Canada, these
15 enterprises both earn returns for their
16 shareholders.

17 Now, the NAFTA is very explicit that the
18 fact the government is the shareholder of Canada
19 Post does not render either Canada Post or

20 Purolator unlike. And we can see that in slide 22,
21 which has the definition of enterprise in Article
22 201. And it says that an enterprise, shows us, in

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14:34:01 1 fact, covers both private and public enterprises.

2 We see this right in the wording, "whether
3 privately owned or governmentally owned." NAFTA
4 simply would not have included the parties together
5 with private entities in this definition of
6 investor or enterprise if that was not so.

7 Now, the definitions in NAFTA Article 1139
8 also confirm that UPS Canada, Canada Post, and
9 Purolator are investments, and the simple fact that
10 Canada Post is owned by the Government of Canada is
11 not enough to make it unlike UPS Canada.

12 Similarly, the fact that Purolator, as a subsidiary
13 of Canada Post, is not enough to make it unlike UPS
14 Canada. And this is made clear by the definitions
15 in NAFTA Article 1505.

16 Now, the second element of NAFTA Article
17 1102 is the issue of likeness. I put the text of
18 1102(2) back up before you. The text that we see
19 uses the words "in like circumstances." But it
20 does not say that the comparison is to be made
21 between the foreign and domestic investments in
22 identical circumstances, nor in the most similar

14:35:45 1 circumstances. The circumstances only need to be
2 like. Once this threshold is met, a comparison of
3 treatment must be made. The text does not direct
4 us towards finding some other domestic investments
5 that are more like. The text contemplates numerous
6 differences in circumstances, as long as there is
7 likeness. That's the test.

8 So, the interpretive Tribunal--I'm sorry,
9 the interpretive task for this Tribunal--well, it
10 also may be an interpretive Tribunal as
11 well--begins with the text of Article 1102, but it
12 does not end until NAFTA Article 1102 is examined
13 in the context of the NAFTA as a whole. Where
14 Treaty parties use broad general language such as
15 "treatment no less favorable" or "like
16 circumstances," this language draws its meaning
17 from the context of the NAFTA and its Treaty
18 objectives, as set out in Article 102 of the NAFTA.

19 The context and objectives of the NAFTA
20 reveal that the Article 1102 national treatment
21 obligation requires the NAFTA parties to provide
22 equality of competitive opportunities. That is

14:37:19 1 what is meant by NAFTA Article 1102's reference to
2 treatment no less favorable. Equality of
3 competitive opportunities.

4 And the notion of equality of competitive
5 opportunities allows for different treatment that
6 is not less favorable treatment. It allows a
7 regulatory process to produce different outcomes as
8 long as the process itself allows for equal
9 opportunities. Treatment need not be identical to
10 be evenhanded.

11 A more textual guidance can be found in
12 the reservations to NAFTA 1102 which are contained
13 in Annexes one and two of the NAFTA. If you have
14 your NAFTA, I would invite to you pick it up. You
15 will see that there are hundreds of pages at the
16 back which compromise--you will see they are
17 indicated by a Roman numeral first, I, then there
18 is a dash, and it tells you the country. So, if
19 it's I-C, it is means Annex one-Canada, and there
20 is a number. We could look at II-C-11, which is
21 Canada's reservation about water transportation,
22 but you could look at any of them. They all are

14:38:55 1 set out in a similar way in Annexes one and two,

2 and these are all reservations that could be taken,
3 for example, it says they're spelled out in each
4 case, but generally they're taken against national
5 treatments. There may be other provisions as well,
6 but usually national treatment is in virtual every
7 one. I know I had the privilege of being able to
8 work on some these for some of the national
9 governments that are contained here somewhere else.

10 So, the fact is that if we look at any of
11 them, you will see that they're all set out the
12 same way, and in each case you will see that the
13 reservation starts by the indication of the word
14 sector and subsector. In every case and every
15 time. Hundreds and hundreds of publicity policy
16 types of issues.

17 These reservations all apply to economic
18 sectors that are specified. There is a simple
19 reason for this: The reservations apply to
20 specific economic sectors because that is where the
21 obligations reside, and this is yet a further
22 example of the analysis of like circumstances why

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14:40:11 1 it must begin with a definition of the relevant
2 economic sector.

3 Now, if we turn over to slide 25, the next

4 slide, we will see paragraph 249 from the NAFTA
5 Chapter 20 interpretive decision in U.S.-Trucking
6 Services. Now, we know from the representations of
7 all three NAFTA parties in U.S.-Trucking that the
8 term "like circumstances" was intended to be
9 like--was intended to be similar to the term "like
10 services" or "like service providers." The word
11 circumstances did not refer to anything more than a
12 consideration of the services or of the service
13 providers. Canada cannot contend before this

14 Tribunal for a meaning that is different than the
15 meaning it accepted as correct in the U.S.-Trucking
16 case. The U.S.-Trucking case dealt with both NAFTA
17 Articles 1202 and services, and 1102 in

18 investments. It found that the U.S. measure in
19 that case violated both Articles of the NAFTA.

20 And as we see from the GATS, the General
21 Agreement on Trades and Services, national
22 treatment obligation, the members of the WTO chose

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14:41:57 1 to use the language of like services and service
2 providers proposed by Canada and Mexico in the
3 NAFTA negotiations. All three NAFTA parties agree
4 that this language means similar to like
5 circumstances.

6 Now, the GATS gives us explicit guidance
7 that like service providers are competing service
8 providers. And there can be no doubt about this.
9 Because every reference to national treatment in
10 the WTO confirms to this approach. The WTO
11 Appellate Body has recognized the importance of a
12 common approach to national treatment, whether
13 we're dealing with discriminatory taxes on goods
14 and GATT Article III:2, discriminatory obligation
15 of goods in GATT Article III:4, or discriminatory
16 regulation of services in GATT Article 17. This is
17 because in all cases the objective remains the
18 same: the avoidance of protectionism. The
19 fundamental objective that we have here in all of
20 his obligations.

21 Now, of course, the determination of
22 likeness is not and should not be a mechanical

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14:43:36 1 exercise. As the WTO Appellate Body has also
2 recognized, some judgments may need to be applied.
3 And the specific factors that establish the
4 existence of likeness may need to be waived, and
5 thus, for example, a similar end use for a product
6 like asbestos may be important in some contexts,
7 but will not be determinative if asbestos carries

8 health risks that would make the end user liable to
9 its customers. That would disrupt what might
10 otherwise be a competitive relationship. So, those
11 are the types of factors that we would want to look
12 at.

13 So, while the WTO Appellate Body has been
14 well aware of the risks of a mechanistic approach
15 to likeness, it has also insisted that the
16 interpretation of likeness must further the
17 objectives of equality of competitive
18 opportunities. In other words, the analysis is
19 simply a matter of functional common sense.

20 And the same principle must also be true
21 under NAFTA Article 1102. While the determination
22 of investments in like circumstances must not be a

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14:45:01 1 mechanical exercise, it must further the same
2 objective of equality of competitive opportunities.
3 Thus, the determination must begin by examining a
4 group of firms in the same economic sector that are
5 competing for the same customers. UPS Canada,
6 Purolator, and Canada Post, are three such firms.

7 When NAFTA Article 1102 simplified the
8 national treatment language from the Canada-U.S.
9 Free Trade Agreement, the predecessor agreement to
10 the NAFTA, it kept the same basic approach to

11 policy justification. We look at slide 26, we will
12 see how this was acknowledged and considered by the
13 NAFTA Chapter 20 panel in U.S.-Trucking Services.
14 The NAFTA Chapter 20 panel noted that an expansive
15 broad reading of the term "like circumstances" for
16 public policy reasons would effectively render the
17 obligation meaningless. Unless the government
18 action is completely arbitrary, there will always
19 be some public policy reason that could have
20 motivated ex post facto even at the beginning.

21 But since arbitrary conduct is, in fact,
22 addressed in Article 1105, NAFTA Article 1102 must

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14:46:41 1 have some meaning when applied to conduct that does
2 not need to be arbitrary or in bad faith. And any
3 intrusion done to the NAFTA obligation for a public
4 policy reason must be no greater than necessary for
5 legitimate regulatory reasons as set out here by
6 that Tribunal.

7 Now, just as Canada asks you to ignore
8 customary international law, WTO law, and decisions
9 of the NAFTA Chapter 20 tribunals, so too does it
10 ask you to ignore nearly every NAFTA Chapter 11
11 decision that discusses Article 1102 extensively.
12 Instead, Canada asks you to follow some cases that

13 have only a passing reference to NAFTA
14 Article 1102.

15 The approach taken by NAFTA Chapter 11
16 tribunals has involved an exploit focus on the
17 identification of a group of firms competing in the
18 same economic sector. This has been the approach
19 taken by the NAFTA tribunals in *S.D. Myers, Pope &*
20 *Talbot, Feldman, and Group ADF.*

21 Now, however, where we have different
22 treatment of likes, the burden is on the respondent

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14:48:20 1 to show that the different treatment is not less
2 favorable, and the treatment of competing
3 investments can still be less favorable, if it is
4 shown to be reasonably necessary for securing an
5 overriding public policy objective. This burden on
6 Canada is to establish that the different treatment
7 of UPS is not less favorable, is a burden that
8 Canada refuses and fails to meet. And the shifting
9 of the burden to a government to justify less
10 favorable treatment on public policy grounds is
11 illustrated by the predecessor agreement to the
12 NAFTA, the Canada-U.S. Free Trade Agreement set out
13 in slide 27. And these provisions that are
14 replicated on the side explicitly placed the burden
15 on the government to justify that no less

16 burdensome means were available.

17 This is the normal approach, the approach
18 whether you buy it explicitly or follow it as
19 followed by the WTO and has been followed by other
20 NAFTA tribunals. It's the right approach, if you
21 are going to disrupt the competitive relationship.
22 It must be evenhanded, and if you are going to

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14:49:43 1 disrupt it, you need to be able to show why.

2 ARBITRATOR CASS: Mr. Appleton, what
3 language in 1102 would you point to as containing
4 the public policy exception you reference, if there
5 is a compelling public policy, and you have
6 deviated from national treatment, and the smallest
7 possible way to accommodate that, what language in
8 1102 allows that?

9 MR. APPLETON: The NAFTA did not put words
10 in per se. In fact, that's an excellent, excellent
11 question. So we look at architecture of the NAFTA.
12 We see that, in fact, the NAFTA did not intend for
13 there to be a public policy exception here.

14 If you look at Chapter 12, it permitted
15 there to be exceptions like in GATT Article XX, and
16 they're set out in the back of the NAFTA, and I
17 will find you the provision in a moment

18 specifically that permits for GATT-like public
19 policy exceptions.

20 In fact, in NAFTA Chapter 11, the idea was
21 that all the public policy exceptions were to be
22 done by a listing process by those Annexes I showed

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14:51:02 1 you earlier and that the purpose of that process
2 was in Annex 1, and Annex 2, one being bound
3 reservations and one being unbound. Bound being
4 those that were fixed on January 1, 1994, or for
5 subnationals January 1, 1996, and in the area of
6 unbound, it would have to be a policy that they
7 were doing at that time, a sector that they could
8 freeze, and then they continued to do that in that
9 sector. But there is, in fact, no language in
10 NAFTA Article 1102 that permits this. Instead,
11 tribunals wishing to find a way to take into
12 account public policy, in a way trying to interpret
13 this, to find a way, have tended to use the terms
14 likeness to look at that type of public policy,
15 because likeness can allow you to take factors into
16 account.

17 But their general rule of exceptions and
18 reservations in international law is that you must
19 interpret reservations narrowly, and they must be
20 proportional. They must--in as limited a way as

21 possible, do injustice to the underlying NAFTA
22 obligation. And so, the difficulty that we have is

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14:52:26 1 that some tribunals have been trying to find it,
2 they haven't been consistent, but mostly it comes
3 from the area of likeness, but there is no
4 provision, and the NAFTA was very specific that the
5 way that this was to have taken place was in that
6 way.

7 Furthermore, if we look at the issue of
8 financial service, Chapter 14, you will see that
9 there is a prudential carve-out. I believe it's
10 Article 1410. It's been a few years since I had to
11 work on that area, but in that specific spot, and I
12 will just bring it to your attention, 1410 permits
13 the parties to engage in prudential regulation, in
14 the very hotly contested area of financial service
15 regulation, an area that is quite significant and
16 where it's been difficult to get agreement.

17 And so, the NAFTA tried to give as much
18 guidance to the general national treatment
19 obligation, for example, which is in 1405, to give
20 some more text to help that, and also had a very,
21 very broad reservation where governments could
22 decide for themselves, where self-judging was

14:53:37 1 permitted, and we call that the prudential
2 carve-outs, similar also to what happens in the
3 WTO. And so as a result, there were a number of
4 mechanisms that NAFTA used specifically to permit
5 public policy exception, and there did not do this
6 here. This was not the choice of how the parties
7 to NAFTA drafted the agreement.

8 And so, all that we see now is some
9 creative, after the fact fancy moves to try to
10 justify policies that were otherwise violated, and
11 that's the issue that we deal with.

12 A similar issue, by the way,
13 happened--well, it happens for the whole Chapter,
14 not just for national treatment.

15 ARBITRATOR CASS: Do I understand you
16 correctly, then, saying that it would be incorrect
17 for us to read 1102's like circumstances provision
18 as allowing consideration of public policy, if
19 there has been no reservation taken?

20 MR. APPLETON: Well, they say sometimes
21 that the horse has left the barn. And by that I
22 mean if enough tribunals have come to the

14:54:58 1 determination, even though there is no textual
2 basis for finding anywhere other than in likeness
3 and in likeness it's probably a stretch, so on a
4 textual basis there is no way to be able to come to
5 that finding.

6 However, in essence, a case law has
7 started to develop here, and so if, in fact, you
8 are going to change the clear wording of the NAFTA
9 through your determination--and you're entitled to
10 do that--then you should do as little injustice as
11 possible to the text and the obligations of NAFTA
12 because there are objectives of NAFTA in Article
13 102 that are important to be able to try to
14 address.

15 But is there a textual spot to do that?
16 The only one could possibly in likeness and
17 likeness, as we know, means something else. It is
18 clear that likeness came for a different reason,
19 and that's why I hesitate to encourage you to go
20 down that route because that's not what that route
21 was intended to do clearly from what we have been
22 able to see here, and from what we have seen on the

14:56:11 1 record has been agreed to by the various NAFTA

2 parties before other tribunals.

3 No doubt we will have an opportunity to
4 come back to this later on in the hearing. But
5 does that answer you for now?

6 ARBITRATOR CASS: Thank you.

7 MR. APPLETON: If any of your colleagues
8 has a question about national treatment, I'm going
9 to turn to the international law standard, and I
10 should be able to complete my remarks fairly soon.

11 The final legal answer--final legal
12 issue--I'd like to have a legal answer too--I would
13 like to introduce is the international law standard
14 of treatment. If we look at slide 28, we will put
15 the obligation up on the screen. This is, of
16 course, contained in Article 1105 of NAFTA, and it
17 requires Canada to provide international law
18 standards of treatment to investments of investors
19 of other NAFTA parties. It's required to give
20 treatment in accordance with international law,
21 including fair and equitable treatment and full
22 protection and security.

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14:57:22 1 Now, there are two particular violations
2 of this standard of treatment involved in this
3 case. The first is that Canada Customs does not

4 equally and adequately enforce its Customs laws on
5 imports into Canada. Customs ensures that courier
6 companies, like UPS Canada, strictly comply with
7 Customs laws, while parcels imported through Canada
8 Post's postal stream are not strictly enforced.

9 Canada's arbitrary and inequitable
10 measures with respect to these Customs activities
11 are patently unfair and violate the protections
12 contained in NAFTA Article 1105.

13 The second is that Canada has retaliated
14 against UPS for raising this NAFTA claim. Canada
15 Post did this by disqualifying a bid made by
16 subsidiary of UPS, Fritz Starber.

17 Now, Canada Post made it clear why it was
18 taking this action in an E-mail to the company, and
19 it was doing so because Canada Post learned that
20 Fritz Starber was affiliated to UPS, and that there
21 was a NAFTA claim brought by UPS against the
22 Government of Canada. It was clear that Canada

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14:59:01 1 Post was retaliating against UPS for bringing this
2 NAFTA claim. Such actions taken by government
3 organs fundamentally violate Canada's obligation of
4 fair and equitable treatment.

5 The international obligations set out in

6 NAFTA Article 1105 are well-known. Like national
7 treatment or expropriation in Article 1110 of
8 NAFTA, the terms international law standard, full
9 protection and security, fair and equitable
10 treatment, are not defined in a NAFTA by having
11 well-known international law meaning. That was
12 clearly intended to be carried forth and imported
13 into the NAFTA by reference.

14 There is a long established body of
15 international law dealing with the obligation of
16 governments to provide fair and equitable
17 treatment. This body of law requires governments
18 to provide foreign investors with fairness in the
19 administration of their domestic laws, and not to
20 harm them through arbitrary and discriminatory
21 acts.

22 Canada's intentional punishment of UPS for

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15:00:28 1 bringing this NAFTA claim through Canada Post is
2 the essence of discrimination and retaliation. It
3 failed to protect Canada's legal--sorry, Canada
4 failed to protect UPS's legal security, and failed
5 to fulfill UPS's most basic expectations.

6 Canada's failure to enforce its Customs
7 laws against Canada Post is just as discriminatory

8 and completely arbitrary. The failure also amounts
9 to a failure to protect UPS's basic expectation
10 that Canada will apply its own law to Canadian
11 companies just as it is applied to UPS.

12 Finally, Canada abused its right to
13 enforce its laws by choosing not to enforce its
14 laws against its national champion, Canada Post.
15 That's abusive. All of these actions are
16 fundamentally wrong and demonstrably unfair, and
17 thus are in violation of NAFTA Article 1105.

18 So, in conclusion, let me summarize the
19 undeniable basis of the UPS claims.

20 First, Canada Post is an organ of the
21 Government of Canada. As an organ of the
22 government, it exercises governmental authority.

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15:02:18 1 Now, we are not dealing with an ordinary
2 enterprise whose shares just happen to be
3 controlled by the Government of Canada. We are
4 dealing with an entity, Canada Post, that is in
5 controvertibly a part of the Government of Canada
6 by its own statute, by decisions of Canada's own
7 courts, by decisions of Canada's own ministers, by
8 a host of related Canadian laws.

9 Furthermore, the Tribunal would be
10 compelled to the same conclusion using the

11 functional approach taken by international
12 arbitration tribunals in Salini/Jordan, in Eureko
13 and Noble Ventures. And, of course, there is the
14 WTO Appellate Body decision about Canada Post
15 itself in Canada-Periodicals.

16 The ILC Articles say that Canada is
17 required to be responsible for its government
18 organs. Canada Post is undeniably under Canada's
19 internal law such an organ, and so Canada is
20 responsible.

21 Second, Canada has violated its national
22 treatment obligation to UPS. Canada Post,

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15:03:52 1 Purolator, and UPS Canada are all in the same
2 business. They do the same types of jobs and
3 compete for the same types of customers. They are
4 in every functional way in like circumstances.

5 The NAFTA investment chapter national
6 treatment obligation, that is, NAFTA Article 1102,
7 says each business in like circumstances needs to
8 be treated in the same way. These simple words of
9 NAFTA in their plain meaning, are consistent with
10 the international precedents and other
11 international treaties.

12 Now, Canada's treatment of UPS is

13 manifestly unfair. Canada Post treats its own
14 competitive service business and its own
15 subsidiary, Purolator, differently and better than
16 UPS. Although there is nothing that exempts Canada
17 from having to meet its NAFTA obligation to treat
18 UPS fairly, Canada treats UPS much less favorably
19 than Canada Post's business operations and
20 Purolator. And this unfair treatment occurs
21 through unfair Customs practices, through
22 preferential access to customers in the

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15:05:27 1 Publications Assistance Program, through special
2 access granted by Canada Post to Purolator
3 surrounding Canada Post's monopoly network.

4 But, under the NAFTA, these three
5 competing investments in the private sector cannot
6 be treated any differently from each other. That's
7 the key point here.

8 And finally, national treatments and
9 international law standards of treatment require
10 Canada to protect UPS from unfair treatment against
11 its investments in Canada, which Canada has
12 manifestly failed to do.

13 The long established body of international
14 law dealing with fair and equitable treatment
15 obliges Canada to provide foreign investors like

16 UPS with fairness in the administration of their
17 laws and freedom from arbitrary and discriminatory
18 acts.

19 And when there is unfairness, whether
20 based on the relative standard protected by
21 national treatment in Article 1102, or whether an
22 absolute standard protected by the international

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15:06:48 1 law standard of treatment and NAFTA Article 1105,
2 the NAFTA investment chapter provides a remedy, and
3 it is this remedy that UPS requests from this
4 Tribunal.

5 Thank you.

6 PRESIDENT KEITH: Mr. Appleton, could I
7 just ask you one question for clarification from my
8 point of view. I don't think I have heard you
9 mention the most favored nation argument, the 1103
10 argument; is that right? And if so, what is the
11 significance of that?

12 MR. APPLETON: Sir Kenneth, we will
13 address to the extent that there are issues about
14 the most-favored-nation treatment issue with
15 respect to our closing, but the issue, and I will
16 just--if you allow me a moment just to go through
17 this.

18 PRESIDENT KEITH: Yes.

19 MR. APPLETON: The fundamental issue about
20 most-favored-nation treatment is that it is there
21 is a belts and suspenders so to speak in NAFTA.
22 If, in fact, the meaning of an obligation is

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15:07:56 1 changed in the NAFTA or is lower in the NAFTA than
2 in another treaty to which Canada has with its
3 trading partners, then the better treatment is
4 provided.

5 Now, the case fundamentally about Article
6 1103, where it really comes up, comes again from
7 the meaning of that rather controversial
8 interpretation done by the NAFTA pre-trade
9 Commission, and the issue there, of course, is, is
10 there a difference between international law
11 standard of treatment in NAFTA and everywhere else
12 in the world? Because Canada has international law
13 standards of treatment that have not been affected
14 by interpretation.

15 So, the real question is, does that
16 interpretation limit the meaning? In fact, most
17 tribunals have now come to the conclusion that it
18 doesn't really limit the meaning. That meaning was
19 always there, and so as a result, if you come to

20 that conclusion, there is no need to really get to
21 the 1103 issue.

22 However, to the extent that you may decide

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15:09:09 1 that that could be relevant, and at this point we
2 don't see how that could be, because what we are
3 talking about are fundamental egregious types of
4 breaches of the most long-standing customary
5 elements, retaliation against a company for having
6 its legal process, or failure to enforce your own
7 laws, it doesn't get any more basic than that.

8 But, to the extent that you determine that
9 somehow you are bound because of the NAFTA Free
10 Trade Commission interpretation, then and to that
11 extent we could point out where there are other
12 parts of Canada's obligation that could go further
13 and could be broader.

14 But our sense is in light of what the
15 issues are here, you probably do not need to go
16 there, but we would be remiss if we didn't point
17 that out, if we didn't address that in some way,
18 but that is basically entirely in the hands of this
19 Tribunal because we don't know where you might want
20 to go on that issue, and that is the difficulty
21 with it.

22 But if you would like, I could have

15:10:14 1 some--your comments, we will certainly wish to
2 address that if you're interested later as well.

3 PRESIDENT KEITH: Thank you very much. I
4 thank you for that opening, Mr. Appleton.

5 I think it's probably sensible that we now
6 suspend the hearing for 15 minutes. Thank you.

7 (Brief recess.)

8 PRESIDENT KEITH: Yes, Mr. Whitehall, if
9 we could hear from you now, thank you.

10 OPENING STATEMENT BY COUNSEL FOR RESPONDENT/PARTY

11 MR. WHITEHALL: Mr. President, Members of
12 the Tribunal, there will be two recurring themes
13 that you will hear in my submission, and, indeed,
14 all of the submissions of the Government of Canada.

15 The first theme is going to be that the
16 investor has created a legal framework for NAFTA
17 that is not based on the actual agreement between
18 the parties. He is arguing a case that the parties
19 did not write.

20 The second theme that we are going to urge
21 upon you is, although the investor has made a
22 series of factual assertions, he failed to prove

15:38:46 1 them. So, every time you come to a material fact
2 that is a constituent element of a finding, we ask
3 you: Has this point been proved?

4 And I'm not going to open the bracket
5 about adverse inferences just now, but I do remind
6 you that the rule my friend has cited says that you
7 are to decide the case on the evidence before you,
8 not on the evidence that he hasn't managed to
9 acquire through a fishing expedition.

10 So, the question will be: Has he proved
11 his case? And as I will demonstrate this
12 afternoon, and as it will be demonstrated in the
13 days to come, that he is very large on Darwinian
14 bones and suspenders and belts, but short on proof.

15 And I say that he didn't prove these facts
16 because frankly for the most part, they are not
17 profferable. They are not correct. They're
18 assertions.

19 Now, Canada has consistently argued
20 throughout this process that this is not really an
21 investment dispute, and therefore, the claim is not
22 properly before the Tribunal. Through its various

15:40:31 1 iterations before and after jurisdiction award, the
2 claim remains what it has always been: An attempt
3 by the claimant to use the provisions of the
4 investment chapter to curtail control and
5 circumscribe the actions of Canada Post. This is a
6 marketing effort.

7 We submit that on the whole the claim
8 before you is nothing else than an artful attempt,
9 and I do give my friend credit for it being artful,
10 to use the provisions of the NAFTA to achieve a
11 purpose never intended by the parties; namely, to
12 establish a tribunal with an equitable jurisdiction
13 in respect of alleged anticompetitive behavior.

14 And indeed, I go a step further. In
15 respect to a situation that is described where
16 there are, for one reason or another, different
17 opportunities for competition, and what the
18 investor would like you to do in the name of
19 fairness to come in and force one party or another;
20 some day may be the shoe on the other foot, but
21 normally it would be the government, to equalize
22 what may otherwise be perfectly natural inequities

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15:42:14 1 in competition. One company may be large, the
2 other company may be small. So, does that mean
3 that the government is to come in to make sure that

4 the larger company cannot take advantage of
5 whatever advantage it may have by reason of its
6 size by reason of its size?

7 My friend would say that's only fair, and
8 ask this Tribunal to come in and equalize matters.
9 And we say NAFTA has never intended to give you the
10 Chancellor's foot. This is not an equitable
11 Tribunal. This is a Tribunal that is to be
12 governed by the provisions of the NAFTA.

13 Now, the investor, recognizing from time
14 to time that it has to fit its claims somehow
15 within the NAFTA, he made a wide range of
16 allegations which kind of bob up and disappear, bob
17 up and disappear, depending on the nature of
18 Canada's answer to the allegations. I will remind
19 you later on in our submissions that we started,
20 the Notice of Arbitration started, for example, and
21 this is just an example, with an allegation of
22 cross subsidy. And then I will remind you that by

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15:44:05 1 the time we got to that Revised Amended Statement
2 of Claim, we were talking about Canada Post's
3 strange accounting practices. And then now the
4 role has unfolded, and it appears that the

5 proposition is that whenever there is a perceived
6 inequality of competition between a foreign and a
7 domestic investor who are loosely in the same
8 business sector--and I will say more about
9 that--the state or the state enterprise or the
10 government monopoly must intervene and remove this
11 alleged source of inequality.

12 So then, what are the complaints currently
13 framed by the claimant? They are broad, and I
14 think it would be of assistance, if you would take
15 a look at what the memorial or reply actually says
16 they are.

17 At paragraph 447 of the memorial, the
18 claimant summarizes its Article 1102 complaint as
19 follows: Canada has failed to provide UPS Canada
20 national treatment through its discriminatory
21 leveraging of the monopoly infrastructure without
22 appropriate allocation of costs; Customs

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15:45:40 1 treatments; and implementation of the Publications
2 Assistance Program.

3 In addition, Article 1105, the claimant
4 alleges that Canada Post's reliance on this
5 arbitration to refuse a bid to Fritz Starber, a
6 subsidiary, Canada breached NAFTA Article 1105

7 through its prejudicial Customs system, Canada
8 breached Article 1105 by denying Canada Post's
9 workers collective bargaining rights.

10 Just to note, and I will come back to
11 that, it's not UPS workers. It's Canada Post
12 workers.

13 Finally, the claimant asserts, and
14 Mr. President, you referenced to that, that Canada
15 failed to provide the most-favored-nation treatment
16 pursuant to Article 1103.

17 Now, we are going to--in our opening I'm
18 going to accomplish or attempt to accomplish four
19 objectives. First, I would like to give the
20 Tribunal some context for the case as a whole.
21 Second, I would like to scope out for the Tribunal
22 the principal legal areas where the parties

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15:47:14 1 disagree.

2 Third, we will touch upon some of the
3 underlying facts that the Tribunal should take into
4 account when it applies the various legal tests.
5 And finally, I would like to introduce the legal
6 team that will address you on the various parts of
7 the claim both as to the law and as to the facts.
8 So, I will not necessarily argue the case this
9 afternoon, but I do want to give you a preview of

10 what the argument is going to be all about.

11 Now, let me also give you a road map for
12 this afternoon, and these are some of the topics
13 that I will cover this afternoon, and the first
14 one, we say that you need to understand the postal
15 context in order to properly appreciate this case.
16 We have as my learned friend has already referred
17 you to, an affidavit and an accompanying video from
18 Mr. Meacham. There's also a second video from
19 Mr. Jones, and they describe the physical postal
20 system, if you will, infrastructure, and the
21 Customs process, respectively.

22 I submit it would also assist the Tribunal

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15:48:53 1 if you had a view, if you actually came out and
2 looked at the operations as they are, and I say not
3 just ours, of course, but UPS's as well, and take a
4 look at both the operations, what kinds of items
5 being moved as well as the Customs process, if you
6 feel that that is necessary. Certainly, I make the
7 invitation, will make the necessary accommodations,
8 as you wish, and I'm certain that UPS would do
9 likewise.

10 Now, Canada has, and has had, a single
11 integrated postal service for the delivery of mail

12 from its earliest beginnings as a nation. Indeed,
13 the Post was integral to Canada's development as a
14 nation. The Post was assigned the responsibility
15 of assisting in the economic expansion of the
16 country through its provision of an accessible,
17 effective, and inexpensive system of national
18 communication.

19 The Post carried out this function through
20 creating a national postal network, and they are of
21 routes, postal offices, and they advance the
22 frontier and accelerated the economic development

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15:50:29 1 of Canada.

2 There are, the Canada Post, the Post is as
3 integral to Canada as is the RCMP. It is part of,
4 and make no mistake about it, it is an essential
5 part of our national development, and any attempt
6 to destabilize it will be to the disadvantage of
7 Canada.

8 The Canada Post, or that is the Post, I
9 should say, was also assigned a social
10 responsibility of assisting in the development of a
11 literate, educated, and aware citizenry, providing
12 inexpensive, reliable, and timely delivery of
13 newspapers, books, and information.

14 So, programs such as the publication

15 assistance system, the PAP, Publication Assistance
16 Program, find their history in the mists of time.
17 They're not a new development with the creation of
18 Canada Post in one form or another. They were
19 always there.

20 The evolution of the Canadian postal
21 reality was shaped by the various features of
22 Canada's existence, our vast territory, relatively

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15:52:08 1 low and largely urban population, and its extreme
2 climate. You know, listening the other day to the
3 weather radio set, we are going to get some weather
4 from Canada. It was to be cold.

5 The Post Office, gentlemen, was one of the
6 first principal departments created in 1867 at the
7 time of our confederation. It continued to provide
8 and, in fact, expanded the wide range of services
9 that had already been provided by the various
10 provincial authorities prior to confederation.
11 These services had always included both letter and
12 parcel service within a single integrated
13 collection and delivery network.

14 Post offices had a pervasive presence in
15 all communities right across Canada, including
16 remote rural locations, from a total of 25 post

17 offices in 1817, the number grew to 14,000 by 1913.
18 As a result of demand for postal services, the Post
19 had to be present in virtually every community
20 across the country.

21 My friend referred to the section of the
22 Canada Post Act which refers to Canada Post being

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15:53:48 1 an institution of the Government of Canada. You
2 know, there was no need to say that. The fact of
3 the matter is that oftentimes, Canada Post is the
4 only Canadian federal presence in remote
5 communities. That is the only place that you will
6 see the Canadian flag.

7 So, it is an institution of the Government
8 of Canada, but that has a significance in terms of
9 its presence, and for the purpose of continuity.

10 A variety of postal services were
11 introduced prior to 1900, services such as money
12 orders, parcel post service, street mailboxes in
13 Toronto, postcards, postal savings banks, and soon
14 after the turn of the previous century, I now have
15 to say, we also saw the commencement of rural route
16 delivery.

17 This trend continued to the point where by
18 the time Canada Post Corporation was created in
19 1981, the Post Office Department provided a full

20 service postal service delivering both letters and
21 parcels and providing both normal and express
22 service on a universal basis.

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15:55:16 1 Let me repeat that because it's important.
2 The Post Office Department provided a full
3 service postal service. It included letters. It
4 included parcels. It was both regular mail and
5 express mail.
6 Now, the names have changed for branding
7 purposes. You may recall we used to refer to first
8 class mail and second class mail and so on. Now we
9 refer to Priority Courier or XpressPost or what
10 have you. Those are the marketing people. But
11 essentially the services remained the same.
12 So, what you see today in one iteration or
13 another has been present for the longest of time.
14 So, you may safely conclude, I suggest, at
15 the end of the day, that Canada has always, Canada
16 Post or the Post before it, always performed a
17 Universal Service Obligation. It also performed
18 important social services for Canada. It was not
19 with the creation of Canada Post Corporation in
20 1981 that it transmorphed into something new. It
21 was indeed a continuation, for reasons that I will

22 explain, of the postal service that has always

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15:56:46 1 existed since 1867 and prior.

2 Now, we say that in all of its claim, the
3 claimant ignores the most fundamental of realities.
4 Canada Post is Canada's postal service. It is not
5 a courier company. It is the postal service. And
6 its responsibility goes well beyond, well beyond,
7 of a firm that is a purely commercial courier
8 company.

9 I do not mean to denigrate courier
10 companies. They do a fine job. They do a
11 necessary job. If I want to get my letter there
12 yesterday, I probably would call a courier company.
13 So, it's a fine job, but they are not Canada's
14 postal service, and as much as they want to be,
15 they will never be, for reasons that I will
16 demonstrate.

17 Now, the Post has a USO, a Universal
18 Service Obligation. The parties throughout these
19 proceedings have referred to the Universal Service
20 Obligation, or in short, the USO. And let's just
21 take a look at Section 5 of the Canada Post Act.
22 And you may need a pair of binoculars, but it says,

15:58:25 1 establish and operate a postal service for the
2 collection, transmission, and delivery of messages,
3 information, funds, and goods both within Canada
4 and between Canada and places outside of Canada.

5 And then when you go to 5(2) (a)--(2) (b), I
6 beg your pardon, the need to conduct its operations
7 in a self-sustaining financial basis while
8 providing a standard of service that will meet the
9 needs of the people of Canada and that is similar
10 in respect to communities of the same size.

11 You will see in (c) the need to conduct
12 operation in such matter as best provide the
13 security the mail, and then the one my friend
14 identified, the need to maintain a corporate
15 identity program. It's not just being--but it's
16 just a need to maintain a corporate identity
17 program approved by the governing council that
18 reflects the role of the corporation as an
19 institution of the Government of Canada, and the
20 reasons are clear, as I have explained to you about
21 a minute ago.

22 Now, while the Canadian legislation

16:00:07 1 creating Canada Post Corporation does not use the
2 term USO, as you will see, it does use the term
3 that there is a requirement to provide a basic
4 customary postal service, and the evidence that you
5 will hear will demonstrate that the words
6 "maintaining basic, customary postal service" would
7 be generally recognized as the basic USO.

8 So, although one must not ignore Canada
9 Post's other social obligations, such as being the
10 face of the Government of Canada in many small
11 communities, the existence of the USO distinguished
12 Canada Post from other possible comparators,
13 including the claimant.

14 Now, the source of the USO in Canada is
15 twofold: First, as I just referred to, it's part
16 of the legislative mandate of Canada Post to
17 provide a basic customary postal service, and to
18 provide a standard of service that will meet the
19 needs of the people of Canada, and that is similar
20 with respect to communities of the same size.

21 The second source resides within the
22 international community. Its home is in the

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16:01:44 1 concept of a single postal territory, and this
2 through the UPU, the Universal Postal Union, has

3 been one of the elements that has been promoted and
4 accepted in the industrial world since before the
5 1900s. 1887, if my memory serves me.

6 Canada has undertaken an obligation to
7 deliver inbound international letters and parcels
8 to their Canadian destination on behalf of foreign
9 postal administrations.

10 In order to do that, of course, you also
11 have to maintain a ubiquitous postal system. You
12 cannot say to Australia or France or Germany, New
13 Zealand, USA, well, we will deliver your mail, but
14 we are not going to have a system at home that
15 makes sure that the mail gets to where it is
16 intended to go. So if you agree to deliver, you
17 must also have the infrastructure that is present
18 in every single community in Canada in order to
19 meet your international obligations. This
20 obligation was codified in 1999 through a UPU
21 Convention, and you will hear more about that later
22 in our presentation.

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16:03:26 1 So, the basic customary postal service
2 included a universal delivery and pickup of
3 Lettermail, the delivery of the mail, according to
4 a variety of speed standards, delivery of

5 registered mail, addressed and unaddressed
6 advertising and periodicals, and delivery of
7 parcels and packets. The Postal Service was to be
8 universal to all Canadians, wherever they lived.
9 It included the expectation that the Post was to be
10 a full service provider at an affordable rate.
11 That's part of the social obligation, affordable
12 rate.

13 Most importantly, as I've said, the USO
14 requires a ubiquitous access by Canadians to the
15 Post. You will hear a great deal about we can
16 deliver to every address in Canada, but there is
17 another very important question: Does every person
18 in Canada have access to a mail office or a mailbox
19 to be able to post his or her mail? Because that's
20 part of the USO. It's not just a question of
21 delivery. It is also a question of access by
22 Canadians to their Post.

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16:04:58 1 Now, Canada Post must somehow pay for that
2 obligation. It is a burden. These services do not
3 come free. And anybody who knows anything about
4 Canada will know that prior to 1981, the Post was
5 dealt year after year by serious financial
6 problems.

7 So, there is a choice, isn't there? You

8 provide a subsidy to maintain the USO, or do you
9 require the corporation to be financially
10 self-sufficient? That's your choice, because you
11 must have the Post, so you either pay for it
12 essentially, or you create a system that ensures
13 that it pays for itself.

14 In 1981, Canada chose the latter route and
15 said to the Post that it is to be financially
16 self-sufficient. Paragraph (b), 5(2)(b), the need
17 to conduct its operations on a self-sustaining
18 financial basis while providing, et cetera. So,
19 it's written in the statute in 5(2)(b) that it is
20 to be financially self-sufficient.

21 Now, how are you going to pay for the
22 Post? As I have said, we can provide a subsidy,

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16:06:44 1 but that was not the way we wanted to go. You can
2 provide, as I say, financial self-sufficiency, and
3 Canada chose that it is to be paid from two
4 sources. It gave the Post a limited monopoly in
5 respect of Lettermail; and it is, as my friend
6 already indicated, a limited monopoly, the monopoly
7 is essentially 500 grams, and then there are
8 exceptions, and they are all listed in the Act.
9 There are exceptions to the 500 grams, one of the

10 exceptions being that if the item is three times
11 the price of the basic Lettermail, and is of an
12 urgent nature, then the monopoly doesn't apply.

13 The other way, or the second form of
14 payment is to say to the corporation, you may go
15 into the market and conduct yourself like any other
16 red-blooded Canadian company. Compete. See if you
17 can get some business. Those products are not
18 protected by the monopoly clause. They are
19 intended to make money and defray the expense of
20 maintaining a post office, a postal infrastructure.
21 So, they are the two sources, a very limited
22 monopoly power and whatever revenue they can

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16:08:41 1 generate from the rest of their operations. That's
2 what leveraging is all about. That's what taking
3 advantage of economies of scale and scope is all
4 about. Use your infrastructure to generate some
5 money in order to pay for the post office.

6 Canada Post has many, many post offices.
7 It has, as my friend said, many thousands of
8 mailboxes. Now, if it were purely commercially
9 motivated, many of these post offices would have
10 been closed. In fact, some may recall, and there
11 is evidence in the record, that at one point there
12 was an attempt in Canada to close some of the rural

13 post offices. There was a howl and cry. There was
14 a stop put to it. They couldn't close post
15 offices, even though economically they were not
16 viable. They cannot remove access to the postal
17 system. They may change the format, and instead of
18 house-to-house delivery, in new communities they
19 may have mailboxes, and we do, but the underlying
20 proposition remains: Every Canadian has the right
21 to a five-day delivery, and they have the right to
22 have a convenient access to the Post.

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16:10:29 1 So, Canada Post is a commercial
2 corporation, but a commercial corporation with a
3 difference. It has a constant burden, and it has
4 to meet that burden, and it is a corporation with
5 also a public mandate.
6 So, the monopoly is limited. It does not
7 in itself pay for the infrastructure required to
8 meet the USO. The price of the monopoly product
9 may only increase two thirds of the rate of
10 inflation. So the price of the monopoly product
11 doesn't even keep up with inflation. It can only
12 go up two-thirds.
13 Canada Post is required to be financially
14 self-sufficient. It is a Crown corporation; and as

15 such, it is expected to operate in a competitive
16 environment. It is not ordinarily dependent on
17 appropriations for operating purposes; in other
18 words, no subsidy. And it is expected to make a
19 return on its equity.

20 In order to give a bit of extra
21 encouragement to the executives to run a profitable
22 corporation, their salary, their bonuses, are

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16:12:01 1 dependent on the performance of the corporation.

2 So, therefore, you may conclude, and for
3 various legal reasons, I don't know if you have to
4 go there, but you may conclude if you find it's
5 necessary, that this was a corporation with a
6 social mandate, with a social burden, but at the
7 same time with also the discipline of having to act
8 in a responsible commercial manner, and balancing
9 the two so as to ensure that Peter, in fact, pays
10 Paul.

11 Now, let me move from Canada Post for a
12 minute to the Customs context. And perhaps I don't
13 even need to say this, but the role of the Customs
14 agency is to protect the country's national
15 security and economic interests through regulation
16 of the nation's borders. And obviously borders
17 includes however goods or persons come into Canada.

18 Canada Customs mandate is to control the movement
19 of people and goods into Canada and, wherever
20 applicable, to assess and collect duties and taxes
21 on those goods.

22 Now, being in Washington, D.C., post 9/11,

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16:13:44 1 I hardly have to remind ourselves that it is not
2 just about money. When packages and packets
3 arrived to Canada, it is also a question of
4 security. In fact, increasingly it's a question of
5 security.

6 Now, in respect of mail, the processes of
7 inbound international mail into Canada has always
8 reflected the tradition of the sanctity of the mail
9 and the need to move it with the least possible
10 delay.

11 The history of the Customs processing of
12 courier shipments is by definition more recent as
13 the industry itself in its present form is a
14 relatively modern innovation. I believe the
15 evidence shows, for example, that UPS came into
16 Canada in the 1970s.

17 The courier program in Canada has been one
18 of constant evolution and streamlining as a result
19 of a collaborative effort between Customs and the

20 courier industry, in order to respond to the needs
21 of this fast growing industry. In both the
22 processing of inbound international mail and of

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16:15:25 1 courier shipments, however, Canada Customs' role
2 remains the same: To prevent the importation of
3 prohibited goods and the assessment and collection
4 of duties and taxes where applicable.

5 Now, in this context, you must recall that
6 Canada Customs must process mail from 189 different
7 countries, often with very little indicia of what
8 may be contained in the package. A number of
9 different postal administrations may handle the
10 package on its way to Canada. There is an enormous
11 amount of mail that goes through the system.

12 Now, this may be compared to the courier
13 process, where there is end-to-end control. Just
14 think about it. Somebody in Nigeria sends a
15 package to Canada. The form may not be completed
16 or it may not be completed in English or French.
17 We have no idea what's in that package. We don't
18 know who the originator of the package is, and we
19 may not know who the recipient might be. It's a
20 puzzle.

21 ARBITRATOR FORTIER: It sounds like an
22 E-mail.

16:17:03 1 MR. WHITEHALL: Yes, but at least you know
2 that you are getting it.

3 In the case of a package coming from any
4 one of the 189 postal countries, you have no idea
5 what you might have in that package.

6 As I say, when you deal with the courier
7 product, there is tight and precise control. In
8 fact, they have a contractual relationship with the
9 sender. They have a tracking system, so they know
10 how the package is moving through the system. They
11 know what's in it because they want to account for
12 it. And they are the same people who are
13 responsible ultimately for the delivery of the
14 package.

15 Also, not to denigrate the Post, there is
16 also an element in the courier industry that is not
17 necessarily present in the postal stream, and
18 that's time sensitivity. That's why you send
19 something by courier because you want to make sure
20 that it gets there and it gets there quickly.

21 So, the two systems from the Customs
22 perspective, from a security perspective, are

16:18:39 1 entirely different.

2 Now, Canada Post, as Canada's postal
3 administration, delivers international inbound mail
4 in accordance with Canada's UPU obligations. The
5 unique attributes of international postal traffic
6 have led the world Customs organization through the
7 Kyoto conventions to encourage Customs authorities
8 around the world to accord international postal

9 items a treatment that is different than accorded
10 to commercial traffic, whether by commercial
11 importers or through courier companies such as UPS.

12 Customs authorities recognize the
13 difference between goods moving between foreign
14 postal administrations for delivery by a domestic
15 postal administration in goods carried by
16 commercial carrier, including couriers whose
17 business require time-sensitive and time-specific
18 delivery of goods across international borders.

19 In summary, to repeat again, even in the
20 Customs context, the mail stream and the courier
21 stream are just simply two different operations,
22 and if for no other purpose, for no other reason,

16:20:20 1 you must design a particular system for mail that
2 may not be applicable for Customs, and similarly,
3 you would want to design a system for Customs that
4 would not be applicable for mail.

5 Indeed, you will hear evidence that in
6 1992, the Canadian Customs Courier Association
7 negotiated a deal with Customs called the Courier
8 Low Value Shipment Program, and the goods we're
9 dealing with here are all within that value range,
10 under \$1,600. And they have asked for a particular
11 form of accommodation, and effectively the
12 treatment they receive is the treatment they
13 negotiated. That's what they are getting. They
14 negotiated the very thing they now seem to be
15 complaining about.

16 UPS was a major player in the Courier
17 Association and, in fact, arguably its leader.

18 Now, we'll argue that they would like to
19 cherry pick, but what they have is what they asked
20 for.

21 Now, let me turn from this factual context
22 to the legal disagreement between the parties. In

16:22:14 1 listening to counsel for the investor, at times
2 it's not clear whether he is complaining, other

3 than the Customs issue which is directly Canada,
4 whether he is complaining about Canada's conduct,
5 Canada Post's conduct, or he simply assigns a
6 vicarious liability through the principle of state
7 responsibility to Canada for Canada Post's conduct.
8 It's not very clear, frankly, but let me say this:
9 To the extent we are dealing with question of
10 leveraging, Canada Post's infrastructure, that is
11 something Canada Post is doing.

12 So, we say that there are only two routes
13 for the investor to complain about that particular
14 conduct. They may go through Chapter 15, or they
15 may attempt to go through the concept of state
16 responsibility. Let me deal with Chapter 15 first.

17 We say that in order to decide whether the
18 actions of a state enterprise or government
19 monopoly are subject to arbitration under Chapter
20 11 of the NAFTA, the Tribunal must start its
21 examination with the self-contained provisions of
22 Articles 1502 and 1503 of the NAFTA. And these

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16:24:23 1 articles limit the jurisdiction of the Tribunal to
2 two instances, where the state enterprise or
3 government monopoly has transferred--I'm sorry,
4 where the state transferred to the state enterprise
5 or government monopoly a regulatory,

6 administrative, or other governmental authority.

7 And there is a breach of Section A of Article

8 11--1102 of the NAFTA.

9 So we say you have to find, if it is the

10 Canada Post you are dealing with, you must find two

11 factors, if I can put it that way. One, that there

12 is exercise of a delegated governmental authority,

13 and assuming that to be the case, whether or not

14 that exercise of a delegated governmental authority

15 is a breach of Chapter 11.

16 So, we have to consider what is the scope

17 of Chapter 15.

18 And just to state the obvious, should you

19 find that the particular treatment does not

20 constitute an exercise of a delegated governmental

21 authority, that's the end of the matter. You don't

22 need to go any further. So, that's the gate, we

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16:26:02 1 say, that the investor must enter through in order

2 to get to Chapter 11.

3 The investor argues that everything the

4 state enterprise or government monopoly does is a

5 delegated governmental authority. With the

6 greatest of respect, that's nonsense. Why would

7 the parties set up a very elaborate form,

8 stipulating when a government monopoly or state
9 enterprise actions may come within Chapter 11, if
10 everything the state enterprise or government
11 monopoly does comes within Chapter 11? What's the
12 purpose for Article 1502(3)(a) or 1503(2)? It
13 would be surplage. It would not be necessary. And
14 with respect, we say that is not to be presumed.
15 Now, Article 1502(3)(a) and 1503(2)
16 provide, and I just highlighted some of the
17 portions that the party has delegated to it in
18 connection with the monopoly good or service, such
19 as the power to grant import or export licenses,
20 approve commercial transactions, or impose quotas,
21 fees, or other charges. And then 1503 kind of
22 mirrors the same language. There are some

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16:27:51 1 differences. Firstly, there is, of course, you
2 don't have in connection with the monopoly good or
3 service. So, to the extent we are dealing with a
4 monopoly, there is this qualification in connection
5 with a monopoly good or service.

6 When we are dealing with a state
7 enterprise, the only question is whether the
8 enterprise exercises any regulatory,
9 administrative, or other governmental authority.

10 But the drafters did not just leave it
11 there. They gave you examples of what might
12 constitute a delegated, regulatory, administrative,
13 or other governmental authority. And the examples
14 make it clear that what is intended was the
15 transfer of a sovereign power, a governmental
16 power, to the government monopoly or state
17 enterprise. And I submit that generally what is
18 involved is an instrument of delegation, and the
19 nature of the delegation is that it delegates a
20 governmental authority which generally is the
21 regulation or control or the licensing of a third
22 person. It's not the internal behavior of the

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16:29:19 1 state enterprise or government monopoly, but it is
2 a regulatory power.

3 And there is some importance and if you
4 apply to use them generally or other governmental
5 authority, so even regulatory administrative is
6 qualified by the words "other governmental
7 authority," not any authority, governmental
8 authority, so what you have then is that there is
9 some kind of an instrument that transfers a
10 governmental authority to a state enterprise, and
11 generally what you would expect that therefore the

12 state enterprise is able to exercise some kind of
13 control to vis-a-vis third parties. It would have
14 to be a triangular relationship.

15 So, if the government transferred to
16 Canada Post, say, the power to issue licenses, and
17 Canada Post failed to issue a license to one
18 domestic investment--I'm sorry, did issue a license
19 to a domestic investment, but failed to issue a
20 License to a foreign investment, then you would
21 have a breach of NAFTA, and then you would move to
22 Chapter 11.

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16:30:49 1 Now, there is another clue that there is
2 some form of transferring is involved, and that's
3 at note 45 to Article 1502. And note 45 stipulates
4 that a delegation includes a legislative grant, a
5 government order, directive, or other act
6 transferring to the monopoly, or authorizing the
7 exercise by the monopoly of governmental authority.

8 So again, what is underscored is that
9 there is a transfer of powers from the state to the
10 government monopoly or, in case of 1503, state
11 enterprise.

12 Now--and the reason is obvious: The
13 framers obviously didn't want state enterprise of
14 government monopolies to become an agent of

15 avoidance. They didn't want a state enterprise or
16 government monopoly to be able to do indirectly
17 what the state couldn't do directly.

18 So, that's the reason for Article
19 1502(3) (a) and 1503(2). But obviously the essence
20 that it is to be a governmental power that is being
21 transferred.

22 ARBITRATOR CASS: Mr. Whitehall.

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16:32:40 1 MR. WHITEHALL: Yes, sir.

2 ARBITRATOR CASS: May I ask, if Canada
3 Post were formerly a department of the government
4 as opposed to a Crown corporation, would we engage
5 in a different form of analysis here?

6 MR. WHITEHALL: We wouldn't be here. If
7 Canada Post was simply doing what it always did and
8 didn't treat anyone, but was simply delivering
9 mail, some of it being subject to a monopoly
10 clause, but the rest of it is just being a regular
11 post office, there would be no treatment of anyone.

12 ARBITRATOR CASS: Would the analysis, skip
13 looking at Chapter 15 and simply under Chapter 11,
14 look at whether there was a difference in the
15 treatment given for investors and investments of
16 others outside Canada from the treatment given,

17 say, to Purolator?

18 MR. WHITEHALL: Yes, and indeed I will
19 come to that when I analyze 1102, but you would ask
20 the question, firstly, is there a treatment? What
21 Chapter 1102 is about is treatment of a foreign
22 investment and a domestic investment. So, you

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16:33:56 1 would ask: Is Canada Post, the Post Office
2 Department, treating a domestic investment?

3 ARBITRATOR CASS: I understand that
4 argument. I was just asking inartfully whether the
5 question of governmental power, governmental
6 action, would need to be addressed at all, whether
7 you would distinguish commercial activity from
8 other activity, if it were taking place within a
9 government department.

10 MR. WHITEHALL: No, because--and that's
11 the point of the submission. Obviously, there is a
12 fairly narrow window for government departments,
13 and that is precisely the purpose of the framers,
14 that you are to consider the actions of state
15 enterprises only if they exercise a delegated
16 governmental authority. If they don't, they can
17 carry on, so therefore, the question wouldn't arise
18 because the nature of the activity--it is not a
19 power that you are dealing with, in case of a

20 government department, it is just a behavior of the
21 government department.

22 ARBITRATOR CASS: Thank you.

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16:35:27 1 MR. WHITEHALL: Am I answering your
2 question?

3 ARBITRATOR CASS: You were answering my
4 question. I was curious as to whether if the
5 government took an action, and it was clearly the
6 government's action, whether you would distinguish
7 between the types of activity it engaged in in that
8 context or only in the Chapter 15.

9 MR. WHITEHALL: The answer is no, because
10 there is no similar limitation when we are dealing
11 with a party. When you look at the definition of
12 measures, the measure is a very broad definition,
13 including practices and so on.

14 So, if you are dealing with a treatment by
15 a party, then you would simply ask, are we dealing
16 with a measure, and is the measure a treatment that
17 is accorded in like circumstances? So, therefore,
18 the analysis is entirely different when you are
19 dealing with a party. When you are dealing with a
20 state enterprise harbor, then not all practices are
21 included, but only practices that are of a

22 particular nature, and that is the distinction

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16:36:36 1 between when a party is behaving under 1102 and
2 when a state enterprise or monopoly is behaving
3 under 1502 or 1503.

4 ARBITRATOR CASS: Thank you.

5 PRESIDENT KEITH: Could I, Mr. Whitehall,
6 just ask a follow-up to that, and it relates to a
7 point that I raised with your friend, and it
8 relates to the fact that 1502, is concerned with
9 private monopolies as well, isn't it, whereas 1503
10 is concerned only with state enterprises.

11 MR. WHITEHALL: I have a somewhat tattered
12 copy. You and I have the street version of NAFTA.

13 PRESIDENT KEITH: Yes. 1502(3) is
14 concerned with privately owned monopolies as well
15 as government monopolies, while 1503 is only
16 concerned only with state enterprises. And it was
17 really just to relate that double application of
18 1502(3) to the point you were just making to my
19 friend, my colleague, because obviously in the case
20 of a private monopoly, the limitation to delegate
21 regulatory, administrative, or other governmental
22 authority is highly significant, isn't it, because

16:38:15 1 otherwise the regular commercial activity of a
2 monopoly, if that phrase wasn't there, would be
3 caught by 1502(3)(a) of the private monopoly.

4 MR. WHITEHALL: Right. 1502(3)(a)
5 addresses a very specific situation, whereas the
6 rest of the Article deals with all activities, as I
7 say, whether public or private. But in respect of
8 delegated governmental authority, it only
9 addresses--and there are two conditions, you will
10 note. One, that there is a delegated--in
11 connection with--sorry, that the party has
12 delegated to it in connection with the monopoly,
13 good, or service, such as the power.

14 So, it is not only a delegated
15 governmental authority, but it's also a delegated
16 governmental authority in connection with. So,
17 it's a very, very specific set of code that deals
18 with government monopolies.

19 PRESIDENT KEITH: Well, private monopolies
20 because just thinking of a situation where there is
21 a private letter carrier that is operating within
22 the previous or maybe has taken over the whole of

16:39:35 1 the monopoly, if Canada Post was to be completely
2 privatized and if, say, it had the power to fix the
3 stamp price, fix that fee, then that would be
4 covered by the language of subparagraph A, I think,
5 wouldn't it? Because that would be a privately
6 owned monopoly that had delegated to it by
7 Parliament the power to fix fees by ordering
8 counsel, say.

9 MR. WHITEHALL: A is acts in a manner that
10 is not inconsistent with the party's obligation
11 under this agreement whenever such a monopoly, and
12 you have to come back to the introductory words,
13 2(a), and it says, "each party shall ensure through
14 regulatory control, administrative," or, et cetera,
15 that any privately owned monopoly that it
16 designates and any government monopoly that it
17 maintains or designates, and then A, B, C, and D
18 deal with what they may or may not do.

19 PRESIDENT KEITH: Yes.

20 MR. WHITEHALL: So, I think the short
21 answer to you is in respect of A, if there is a
22 delegated governmental authority to completely

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16:41:03 1 private enterprise, where the government owns no
2 shares, it still meets the condition in 3(a) that
3 is in three, but it has to be the second condition;

4 namely that there is a delegated governmental
5 authority. I don't think it makes any difference
6 whether it's private or public.

7 PRESIDENT KEITH: Yes. Thank you.

8 MR. WHITEHALL: Sorry, that was a long
9 answer to a short question. But often short
10 questions require a long answer.

11 But really the point of the discussion is
12 there's a fundamental difference between a statute
13 that delegates a governmental authority and a
14 statute that creates a commercial enterprise, and
15 sets up the necessary framework to operate such an
16 enterprise. And that's the essential difference we
17 draw. The fact that this particular corporation
18 was created by statute, frankly, is neither here
19 nor there.

20 The real issue is: Is there--having
21 created this enterprise, we then find that there is
22 a delegation of governmental authority, and I will

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16:42:29 1 concede that that delegation can be right in the
2 statute creating the enterprise or subsequent, but
3 there are two separate acts.

4 Now, we say that, with one exception, none
5 of the impugned actions of Canada Post constitute a

6 delegated governmental authority, and the burden of
7 the investor's argument is that Canada Post
8 leverages its infrastructure, they say leverages
9 its monopoly infrastructure, and I will want to say
10 a word about that, and prices its products in a
11 manner that competitors don't like. So, what it's
12 about is leveraging, costing, and pricing.

13 Now, those are things that every
14 commercial corporation does every day of the week.
15 They all try to leverage their infrastructure. If
16 they are competently run, they all try to cost the
17 products so as to make responsible financial
18 decisions, and they all decide at what price the
19 product should be sold. What is governmental about
20 that? That's just what corporations do.

21 So, we say that none of that constitutes
22 the exercise of delegated governmental authority.

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16:44:29 1 Similarly, to whom a corporation grants access and
2 on what terms, what kind of contract you enter into
3 with a third party is again a commercial decision.
4 Companies do this every day. They don't need
5 governmental authority to do that. They just do it
6 because they are a company. So, there is nothing
7 governmental about the terms on which Canada Post
8 grants access to Purolator, for example, or to any

9 other courier company.

10 Now, we are going to tell you that the
11 terms are commercial terms based on arm's length
12 negotiations, but I'm anticipating myself. I do
13 want to make an aside just to demonstrate how at
14 times, with respect, the arguments get convoluted.
15 There is even a complaint about Canada Post having
16 access to Purolator's infrastructure.

17 Now, consider this: Purolator is not an
18 investment of the Government of Canada. It's owned
19 by Canada Post, not Canada. It is not a state
20 enterprise. It has no monopoly. It happens to be
21 owned, the majority shareholder is Canada Post, but
22 it is neither a party, therefore, state enterprise,

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16:46:10 1 or government monopoly. So, anything Purolator
2 does shouldn't even be before you, under any
3 definition.

4 Now, I then move--and my friend--let me
5 just say this--has spent a great deal of time this
6 afternoon demonstrating what I submit I'm quite
7 prepared to concede: Canada Post is a Crown
8 corporation. So, when the Minister talks about
9 Canada Post, refers to the fact that it is an
10 institution of the Government of Canada, or the

11 federal court analyzes for the purpose, I think, of
12 Section 2 of the Federal Court Act, whether the
13 decision of the corporation is within their
14 jurisdiction, they're a statutory court, and
15 therefore they have a defined jurisdiction, it all
16 comes to the statute scheme.

17 So, if my friend wants me to admit that
18 Canada Post is a Crown corporation, I'm quite
19 prepared to concede that. It's obvious. But I
20 don't think, I submit, it gets you anywhere. It
21 only gets to the door of 1502(3)(a) or 1503(2).

22 Now, the investor argues in the

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16:47:49 1 alternative that because Canada Post is a state
2 enterprise, everything Canada Post does pursuant to
3 its establishing legislation is an exercise of
4 delegated governmental authority. And as I have
5 already indicated, there would have been no need
6 for 1502(3)(a) or 1503(2), if everything that a
7 state enterprise or a government monopoly does is
8 to be considered as the action of the party. All
9 you needed to do is to provide in the definitions
10 section that a party includes a state enterprise or
11 a government monopoly.

12 Why get into this elaborate smoke game of
13 having two very, very specific sections showing

14 when you may have jurisdiction when a much more
15 simpler route would have sufficed. And we submit
16 that you are not to take that the drafters of the
17 NAFTA wasted their words. They put in 1502(3) (a)
18 and 1503(2) for a reason: Because they wanted to
19 ensure that this Tribunal will only have
20 jurisdiction in the narrow circumstances set out in
21 those two Articles.

22 So, we say that this Tribunal should reach

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16:49:54 1 four conclusions: First, Articles 1502(3) (a) and
2 1503(2) define the extent to which Chapter 11 of
3 the NAFTA applies to state enterprises and
4 monopolies. Second, the concept of delegated
5 governmental authority in those provisions, taking
6 into account both the general language and the
7 lists of examples demonstrates that what it was
8 intended was a delegation of powers of an
9 inherently sovereign nature, powers that private
10 parties could not ordinarily exercise, in the
11 absence of a specific act of delegation by
12 government.

13 They do not, we submit, include activities
14 of a commercial nature that are capable of being
15 exercised without any governmental authority, other

16 than the statute creating the corporation, creating
17 the legal person.

18 Third, the specific claims made by the
19 claimants under these two provisions are either
20 inherently commercial or purely administrative
21 responsibilities, and as such, they fall almost
22 entirely outside the ambit of 1502(3)(a) and

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16:51:41 1 1503(2).

2 There is one exception, and the one
3 exception is the collection of Customs duties under
4 the Postal Imports Agreement. Now, we will argue
5 that that is a procurement, so therefore another
6 issue arises, but it is a good example of what was
7 meant by delegated governmental authority. Canada
8 Post could not collect custom duties but for the
9 enabling instrument that allowed it to do so. When
10 Canada Post comes to my door and says you have got
11 a package, sir, from the United States, but it will
12 cost you \$75 before I give it to you, they act
13 pursuant to a delegated governmental authority.
14 They couldn't withhold that package but for the
15 authority. They cannot collect my money for
16 Customs purposes but for that authority.

17 So, it's a good example of the kind of

18 power that is contemplated, I say, within
19 1502(3) (a). Fourth, the complainants' contention
20 that Canada is responsible under Chapter 11 for
21 acts or omissions that do not fall within Articles
22 1502(3) (a) and 1503(2) is unfounded. It would

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16:53:24 1 deprive most of the language of those provisions of
2 any effect. It fails to take account of the lex
3 specialis rule, and it fails to recognize that
4 Canada Post is properly characterized for the
5 purposes of the ILC rule, not as a state organ
6 under Article 4, but as a parastatal entity under
7 Article 5. And we submit that this type of entity
8 is considered to be parastatal, and its conduct
9 only attributable to the state when it exercises
10 governmental authority.

11 So, in a way, we come to full circle.
12 Mr. Willis is going to be addressing you on that
13 issue much more fully than I can or will.

14 Let me then move, if I may, to Article
15 1102, and we submit that Article 1102, firstly,
16 it's an alternative argument certainly in respect
17 of the actions of Canada Post. We submit that
18 apart from that one exception, we don't need to get
19 there because they do not exercise a delegated
20 governmental authority. But assuming you get

21 there, we need to consider the Article, and there
22 are a number of items that I will be dealing with.

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16:55:16 1 Let me just go to the reply of the
2 investor where he sets out the essence in paragraph
3 488 of its memorial, or its reply, the nature of
4 its complaint. "The essence of national treatment
5 is the protection of equality of competitive
6 opportunities between the domestic and foreign
7 economic interest defined in the Treaty. These
8 interests are typically defined by the products,
9 services, intellectual property rights, or
10 investments. The analysis requires, as a first
11 step, a determination of a competitive relationship
12 between the interests, and then a determination of
13 whether there is equality of competitive
14 opportunities within this relationship."

15 If you turn to the next slide, 501 of the
16 reply, it says, "Equality of competitive
17 opportunities requires a judgment as to how the
18 measures complained of affect the competitive
19 relationship in the marketplace. Therefore, the
20 first step in the analysis is to determine the
21 existence of a competitive relationship. The next
22 step is to determine whether the parties' measures

16:56:51 1 had a systematically less favorable"--effect, I
2 think it is. It seems to be missing the last word.
3 Now, the claimant further defined or
4 stated its test in its reply to CUPW, and it says
5 this. "UPS has never required arm's length pricing
6 between all Crown corporations divisions. The
7 equality of competitive opportunity test only
8 requires a Crown corporation to arm's length
9 pricing under narrow circumstances; namely, the
10 Crown corporation is an organ of the state or as an
11 agent acting under delegated governmental
12 authority; B, the Crown corporation operates in
13 both monopoly and competitive markets; C, the
14 competitive services divisions use the
15 infrastructure--the Crown corporation controls
16 through the Crown corporation's position as a state
17 monopoly; four, or D, the competitive service
18 divisions enjoy economies of scale and scope
19 through the use of their monopoly infrastructure;
20 and E, the monopoly is not regulated; and F, the
21 Crown corporation does not provide a service
22 subject to Canada's reservations from the NAFTA

16:58:28 1 national treatment obligation."

2 Now, I have got a little problem with that
3 because this appears to contemplate that 1102 has
4 two different rules: One for a domestic and
5 private investment when they are not state
6 enterprises or government monopolies, and they are
7 to be treated--and the difference in treatment is
8 of a one kind, but when one of them is a government
9 monopoly, then it is to behave differently than if
10 it is if it is not a government monopoly. There
11 appears to be by this very limitation in this
12 answer, we seem to be creating a very, very unique
13 test that is applicable in one case and one case
14 only. This one.

15 Now, we submit that the test adopted by
16 the investor is not the correct test. We don't
17 accept that you start with the question, are two
18 enterprises in the same business sector. How is
19 that meaningful until you know what the treatment
20 is, for example?

21 So, we say that the appropriate test may
22 be summarized as follows: We accept that the

17:00:20 1 overarching purpose is to prevent in Article 1102,

2 is to prevent nationality-based discrimination.

3 Second, we say that 1102 requires the
4 parties, the claimant, to establish the following
5 elements: Firstly, they have to identify the
6 measure of the Government of Canada that accords
7 treatment or alternatively, the measure of Canada
8 Post that is in exercise of a delegated
9 governmental authority that accords treatment to
10 the claimant or its investment. So, we start our
11 analysis by asking what's the complaint? Why are
12 we here? What's the complaint? Let's identify the
13 treatment.

14 The next question is, following the
15 language of NAFTA, is to determine whether the
16 treatment is accorded in like circumstances. So,
17 the like circumstances analysis is not a first
18 step. It is not just a random comparison of two
19 entities, but it is a consideration whether the
20 treatment is accorded in like circumstances. Now,
21 that's a wholly different analysis because you may
22 have reasons to afford treatment A in this

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17:02:06 1 particular circumstance and treatment B in another.
2 And, Professor Cass, you asked, whether the public
3 policy exception was within 1102. Absolutely. My

4 friend equivocated, but he need not have done so,
5 but he equivocated because he introduced an
6 artificial interpretation of the NAFTA.

7 If you ask the proper question, are these
8 circumstances, is the treatment accorded in like
9 circumstances, and you perform a contextual
10 analysis, then the one of the factors that you may
11 well take into account is the public policy reason
12 for the different treatment.

13 So, why it's not expressed, it's what's
14 stated, because it doesn't have to be. And
15 previous panels of NAFTA were not trying to torture
16 NAFTA or write a new agreement for the parties.
17 They interpreted the NAFTA as it was meant to be
18 interpreted, and they included, and rightly so, the
19 public policy considerations because that forms
20 part of the contextual element.

21 There are other elements such as, and we
22 accept, whether or not two businesses are in the

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17:03:37 1 same business sector may well be a factor in that
2 contextual analysis, but there are other factors as
3 well. It's not the end of the road. It may be the
4 beginning of the road, but not the end.

5 So, yes, in answer to your question, it is

6 there, but you have to read it.

7 Assuming that the treatment is accorded in
8 like circumstance, and that's the language of
9 NAFTA, the Tribunal must then determine whether it
10 affords less favorable treatment to the foreign
11 investor that it accords to the domestic investor.
12 It is only at that stage that you may consider
13 whether the treatment adversely affects
14 competition. So, equality of competitive
15 opportunity adversely affect competition may come
16 into the analysis, but it comes at the third stage.
17 It comes after you have determined what is the
18 treatment, was the treatment accorded in like
19 circumstance, and what is the effect? And at that
20 stage you may take into account that it adversely
21 affects competition.

22 We submit that in respect of each of these

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17:05:11 1 steps, the burden rests with the claimant, and I
2 will deal with the application of the legal test
3 later in these submissions.

4 Now, in addition--and this is a separate
5 hurdle--the claimant must establish the fact of
6 damages under Article 1116(1). This Tribunal held,
7 and to repeat, and I quote, "To repeat at the
8 merits stage, UPS will have to establish on the

9 evidence how and to what extent within those limits
10 (the jurisdictional limits of Chapter 11) it has
11 suffered damage or losses."

12 So, while they don't have to establish a
13 quantum of damage, they do have to establish at
14 this stage the fact of damage. Now, that's
15 significant that you have both less favorable
16 treatment and fact of damage in two different
17 sections. Under 1102, they have to demonstrate
18 less favorable treatment, but obviously we are not
19 into a tautological exercise. The fact that they
20 have demonstrated less favorable treatment does not
21 in and of itself prove damage. That's an
22 additional step that they have to take, and if they

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17:07:01 1 fail to do that, you have no jurisdiction. It's a
2 jurisdictional requirement.

3 Finally, you will have to consider whether
4 the claim is brought within time. Now, and then
5 again demonstrate just how very important the
6 identification of the treatment is, particularly in
7 a case such as this one where you have everything
8 but the kitchen sink. So, you have to take it
9 apart and ask yourself what is the specific
10 treatment? Was that treatment within time within

11 the meaning of 1116(2)? And in our submission,
12 1116(2) fixes the point of time at which--the point
13 at which time starts running, and the words of the
14 Article are significant. It provides--sorry, it
15 just fell apart--it provides the investor may not
16 make a claim if more than three years have elapsed
17 from the date on which the investor first acquired
18 knowledge, first acquired or should have first
19 acquired knowledge of the alleged breach and
20 knowledge that the investor has incurred loss or
21 damage. By putting in the word "first acquired,"
22 clearly the drafters fixed a point of time when the

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17:09:28 1 clock starts running, and whether or not you are
2 dealing with a continuing breach or not, it doesn't
3 matter. The point of time is fixed.

4 Now, it provides for two clocks. One is
5 actual knowledge, and the other ought to have no.
6 So, you may find on the evidence that clearly they
7 knew. For example, we submit that in this case, in
8 1989, the investor actually complained that Canada
9 Post was leveraging its infrastructure. So, that
10 would indicate actual knowledge well beyond the
11 three-year period. Or you may conclude on the
12 evidence that even if they didn't know, they ought
13 to have known.

14 Now, the Canada Post Act came into being
15 in 1981. All of the elements of the claimant's
16 complaints were that in a public statute. So, at
17 that stage, we don't have to demonstrate actual
18 knowledge. Mens rea is attributed from the fact
19 that it was there for everybody to see. So, even
20 if the 1989 document is not sufficient, to find
21 actual knowledge, clearly they ought to have known
22 as of 1981 all of the elements that constitute

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17:11:47 1 their complaint some 25, 24 years later today.

2 Similarly, another example, the rural
3 route contractors not being able to unionize. That
4 was on the books in 1981. That's not a new event.
5 Actually by now they are able to unionize, but they
6 ought to have known. It was in the statute.

7 The Customs treatment, the claimant
8 impugns elements of three distinct Customs
9 measures, the Customs international mail processing
10 system which has been in existence in one form or
11 another over a hundred years; the Courier/LVS
12 program introduced in 1992. Which was negotiated
13 by their association; the Postal Imports Agreement,
14 a contract entered into between Customs and Canada
15 in 1993. The material facts were well-known in

16 1993, and we say that you can--and we will argue
17 that you can make a finding that in respect of all
18 of these, their claim is simply out of time.

19 Now, I will promise you that I will come
20 back to the facts regarding the application of 1102
21 and so on to the facts, and let me do that now. In
22 paragraph 622 of the reply, the investor says, "Our

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17:14:04 1 complaint is Canada's policy and practice of not
2 charging its competitive products the equivalent of
3 what a third party would be willing to pay for the
4 use of the network." And you will hear a lot of
5 evidence about this, but it all relates to pricing.
6 All costing is about pricing. The issue is not how
7 much--how you cost the competitive product, but
8 whether or not the cost establishes a particular
9 floor so as to ensure that you're making money,
10 that you're making a contribution to your
11 enterprise.

12 And the goal in all of this, we say, is to
13 ensure that Canada Post's prices are bumped up with
14 a result that Canada Post would either have to exit
15 the market or UPS can charge more to Canadians for
16 the service they render. That's the name of the
17 game.

18 Now, there are four preliminary matters

19 that I want to put to you. The first is, and we
20 are now dealing with the leveraging issue, that we
21 are dealing with Canada Post treating itself.
22 There is no suggestion that Canada is leveraging

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17:15:33 1 Canada Post's infrastructure. So, we have the
2 issue of the delegated governmental authority.

3 Secondly, there is no treatment of the
4 claimant. This is Canada Post doing something the
5 way it prices its products. Canada Post is not
6 asking the claimant to price above, below, or
7 beside. The claimant will determine its pricing
8 policy based on a host of factors which may or may
9 not be related to how Canada Post prices some of
10 its products. So, there is no treatment, there's
11 no nationality-based discrimination. There is no
12 indication here that Canada Post is treating one
13 domestic investor differently than one foreign
14 investment.

15 When you deal with Article 1102, you would
16 expect a triangular relationship, the party or
17 state enterprise giving one treatment to a domestic
18 investment and another treatment to a foreign
19 investment. What you have in this case is a
20 horizontal relationship. There is no treatment of

21 two parties or two investments.

22 Third, the claim is based on a fundamental

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17:17:26 1 error. There is no monopoly infrastructure.

2 Fourth, as I said before, the actions of
3 Canada Post were known to the claimant since 1989,
4 and they ought to have been known since 1981.

5 Let me deal with the fallacy of the
6 monopoly infrastructure. The assumption that
7 Canada Post has created a monopoly infrastructure
8 or an infrastructure derived from the monopoly is
9 not proved by the investor. And that's one of the
10 assertions that you have to ask, well, have they
11 demonstrated, have they brought proof that Canada
12 Post is leveraging a monopoly infrastructure?
13 Well, they haven't. And I say they have not
14 because there is no such infrastructure. There is
15 a postal infrastructure, and as I said before, it's
16 in part paid for by monopoly products, but that's a
17 whole lot different than saying that there is a
18 postal infrastructure that is a monopoly
19 infrastructure, and that the beginning of this
20 claim, and it evolved, you know, the claimant tried
21 to make it appear as if they were two corporations
22 within the bosom of the one Canada Post. There was

17:19:29 1 the monopoly corporation, and there was the
2 competitive. But there is no such thing. There is
3 only one Canada Post. There is only one
4 infrastructure. There is only one integrated
5 postal service.

6 So, the monopoly is simply a method of
7 financing the infrastructure. What is being
8 leveraged, if at all, well, it is, and I make no
9 bones about it, we take advantage of the economies
10 of scale and scope inherent in the postal
11 infrastructure, just like any other large
12 corporation would take advantage of the economies
13 of scale and scope inherent in their
14 infrastructure, just like UPS takes advantage of
15 the economies of scale and scope inherent in its
16 infrastructure, not only Canadian, but worldwide.

17 But the monopoly simply pays part of the
18 freight. It is just one of the means to defray the
19 costs and, I might say, an ever increasing weight
20 and ever decreasing way of paying with the
21 monopoly, a point being that a number of addresses
22 grow every day, but if you think about it, you

17:21:11 1 referred to E-mail, Mr. Fortier, and there are
2 other forms of communication, they all form another
3 form of competition to the monopoly, so the
4 monopoly is actually--we don't write as many
5 letters nowadays as we used to. Just think about
6 your own practices. How many letters do you write
7 a week as opposed to E-mails or faxes?

8 And then think about--I think we are, all
9 of us here, at least on this part of an age that we
10 can think back a few years. Think about it. I
11 often say when I started practicing law some 40
12 years ago, all of my communication was by way of
13 mail. It also had the benefit that I could
14 probably wait two or three days before I deal with
15 the matter once again. Nowadays, I send out an
16 E-mail, and I get an answer within five minutes.
17 Why didn't you answer me?

18 So, the E-mail, the fax has become a fact
19 of life, is a form of competition to even the
20 monopoly part, so effectively what you have is an
21 ever decreasing ability to pay for the postal
22 infrastructure from the monopoly, but the number of

17:22:42 1 people in Canada, of course, keep increasing. We

2 have more and more addresses, so the infrastructure
3 has to grow. So, the burden increases, and the
4 money in the bank decreases.

5 Now, the monopoly, I might say, was a fact
6 of life in Canada for--since 1867. But what was
7 also a fact of life that the monopoly never covered
8 all of the mail. It always only covered Lettermail
9 and Addressed Admail, which is a form of letter.

10 What is different that in 1981 the
11 monopoly was further narrowed. So, actually the
12 monopoly shrunk in 1981, and ironically, the very
13 statute that allowed UPS to enter into the market
14 that used to be the monopoly market prior to 1981
15 in the express area, it's the same statute that
16 they are now complaining about.

17 In any event, we submit that you will have
18 no difficulty concluding that there is no such
19 thing as monopoly infrastructure. There is no such
20 thing as leveraging the monopoly infrastructure,
21 and therefore, the only question that you will have
22 to consider is, is it wrong to leverage your

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17:24:57 1 infrastructure. Is it wrong to take advantage of
2 the economies of scale and scope. Should
3 Government of Canada or, let me rephrase it, should
4 Canada Post refrain from taking advantage of its

5 economies of scale and scope? Should it price
6 above market to make sure that nobody complains
7 about it in order to neutralize whatever benefit it
8 may gain?

9 You know, the fact is that it's cheaper to
10 have one waiter take two meals to one table than
11 for two waiters to take two meals to that table.
12 Now, what the restaurant is doing by serving with
13 one waiter is taking advantage of economies of
14 scale and scope, making sure that both hands are
15 occupied. The UPS argument is, you know what we
16 should do is price the meal as if two waiters
17 brought out the meal. That's what we have to do.
18 When one waiter would do, make sure--we will still
19 use one waiter, but make sure that when you price
20 your food, make believe that there are two waiters,
21 because to do it otherwise creates a competitive
22 advantage. We say that's economic nonsense. And

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17:27:01 1 not only we say that, economists say that.

2 Moving then from the treatment, and we say
3 there is no treatment, so what I'm going to say now
4 is about in the third or fourth alternative. I
5 lost count.

6 Is the treatment accorded, is the

7 leveraging accorded in like circumstance? And the
8 like circumstance here is as obvious this can be,
9 or the lack thereof. Canada Post must take
10 advantage of its economies of scale and scope
11 because it has to pay for a postal infrastructure.
12 It has to maintain a postal system. It has to
13 maintain a postal system that is capable of
14 delivering the mail and giving access to Canadians
15 to the Post. And doing so at an affordable rate.
16 And doing so without a subsidy.

17 So, there is a reason for the leveraging,
18 a reason that doesn't exist when you analyze the
19 rules of UPS. Their sole raison d'etre--and again,
20 nothing, I don't mean to be negative--but to make
21 profit for their shareholders. Perfectly correct.
22 But that is not the raison d'etre of Canada Post.

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17:28:56 1 They have to leverage their infrastructure not
2 simply to make a profit for Canada, but in order to
3 ensure that Canadians have an affordable postal
4 service. So, the treatment, if leveraging is a
5 treatment, is not in like circumstances at all, and
6 any artifice trying to create similarities at the
7 product level completely divorced from the
8 treatment and say, well, you know, we proved that
9 there are three trucks, one is white and another

10 one is red, the other one is blue, so they must be
11 all alike, or they all deliver, so therefore we are
12 dealing with like entities, and that's the end of
13 the question. Forget about the treatment. Just
14 take a look at the three trucks, and that's good
15 enough.

16 With the greatest of respect, that is a
17 rather simplistic approach to NAFTA. The language
18 of NAFTA requires that you determine whether the
19 treatment is accorded in like circumstance. That's
20 the question. So, therefore, you have to look for
21 the reason for the treatment.

22 Further, we say that in this case there is

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17:30:35 1 no less favorable treatment, so as I indicated
2 before, NAFTA contemplates that there will be a
3 monopoly--that enterprises have both monopoly and
4 commercial arms. If you look at Article 1502(3),
5 it deals, as you pointed out, Mr. Chairman, that
6 monopolies have also commercial arms. That is,
7 even a firm that has some monopoly protection may
8 also operate in the commercial market. So, NAFTA
9 itself contemplates this mix.

10 Now, very interestingly, if you look at
11 note 46, and I don't believe I have it on a slide,

12 it provides that even in case of cross subsidy,
13 it's not necessarily bad. It's only bad if it is
14 anticompetitive cross-subsidy.

15 Now, cross-subsidies, you've already held,
16 are not within your jurisdiction. It belongs to
17 another Tribunal, a Chapter 20 Tribunal, but it's a
18 point to remember that even cross-subsidies are not
19 in and of themselves bad, only if do you it for an
20 anticompetitive purpose. And that, of course,
21 involves a whole range of competition of law
22 issues, none of which have been present before,

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17:32:33 1 including market analysis, market strength,
2 predatory pricing and so forth. None of that is
3 before you.

4 But UPS says, but you know, because they
5 take advantage of the economies of scale and scope,
6 they are able to maximize--they don't maximize
7 their prices. We don't like that.

8 The difficulty they have with that
9 argument is that the evidence is that Canada Post
10 does maximize its prices. You will hear from
11 Ms. Francine Conn. She filed an affidavit, and the
12 evidence is that that's what Canada Post does.
13 They cannot maximize on the monopoly side because,

14 as I've told you, they can only raise their prices
15 by two thirds of inflation. But they can and do
16 maximize on the competitive side, and I won't go
17 into details now. So even if you get through all
18 of the hurdles, when you look at the essence of
19 their complaint, we actually do what they say we
20 should do, so, where is the beef?

21 Now, I told you that we do not think that
22 simply taking the two entities and asking whether

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17:34:25 1 they belong to the same loosely defined business
2 community, if you will, is sufficient to establish
3 likeness, but we say that even there, even there
4 the investor has failed.

5 Now, they have tried--they're very, very
6 clever by half, and they tried to create
7 similarities by saying well, what you need to
8 consider is not Canada Post, because, you know, I
9 mean, when you look at the Canada Post products,
10 you will actually see some real significant
11 differences, not the least being time, time
12 sensitivity and so on.

13 So, they have a bright idea. Why don't we
14 bring in the Canada Post group of companies?
15 Because, if we do that, then we can bring in
16 Purolator. Now, Purolator happens to be in the

17 courier business, and lo and behold, they find
18 similarities. It is a preordained kind of result.
19 Obviously, if you bring in Purolator that is in the
20 courier business, then you are going to find
21 similarities.

22 But again, remember, they have done so

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17:35:56 1 without regard for the treatment that they are
2 complaining about.

3 So, they have two problems. One, if you
4 look at the treatment, namely leveraging of the
5 infrastructure in order to get a better price for
6 Canada Post's competitive products, Purolator is
7 irrelevant because there is no allegation that
8 Purolator's prices get any benefit from Canada
9 Post's infrastructure, so it's completely
10 artificial for--if you think about the treatment,
11 it's completely artificial to bring Purolator into
12 the picture.

13 Secondly, it ignores the corporate veil.
14 Purolator is 97 percent, I think, owned by Canada
15 Post, but it is a separate corporation run by a
16 separate set of executives, and maintains an arm's
17 length relationship with Canada Post. And you will
18 have the affidavit of Mr. Henderson, who is one of

19 the Vice Presidents of Purolator, on that point.

20 So we submit that even on their own test,
21 just trying to create likenesses, comparators on
22 the basis that they are in the same business, when

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17:37:39 1 you start peeling away the layers of onion, they
2 haven't met the case.

3 Further, we'll submit that they suffered
4 no damages. They proved no damages. I will come
5 into the statement of Mr. Rosen in due course, but
6 for the moment let me just say that all we have is
7 a one liner which is really a tautological
8 statement that all other things that the other
9 experts have said I was right, that in my opinion
10 there must be damages. There is no market
11 analysis, there is no price analysis. There is no
12 analysis, so they did not prove damages.

13 Next, there is the question of improper
14 access to the postal infrastructure by Purolator.
15 I think I'm correct in saying that my friend said
16 that Purolator is an investment of Canada. It is
17 not. Purolator is an investment within the
18 definition of investment in NAFTA, but it's not an
19 investment of Canada. Canada doesn't own any
20 shares in Purolator. It is not one of the
21 corporations that could come under the Financial

22 Administration Act of Canada. It is certainly not

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17:39:32 1 a state enterprise, and certain has no government
2 or any other monopoly powers.

3 Nevertheless, the investor suggests that
4 Purolator may have improper access to Canada Post
5 infrastructure. There are three problems with that
6 argument.

7 Firstly, factually the argument is not
8 correct. Purolator's access to Canada Post
9 infrastructure is an arm's length commercial basis,
10 which is also available to UPS Canada, so therefore
11 there is no differential treatment.

12 Second, to the extent Purolator--the
13 investor complains that Purolator has greater
14 access, that is greater access to Canada Post's
15 infrastructure on any basis, well, 97 percent of
16 Purolator is owned by Canada Post, and it's not
17 unusual for two related companies to attempt to
18 explore synergies between them.

19 And finally, any access, any decision how
20 Canada Post should price access by Purolator is
21 again not a delegated governmental authority. It's
22 a pricing decision.

17:41:25 1 I next want to turn to the Customs
2 treatment. And--yes, sir?

3 PRESIDENT KEITH: Maybe if we stop in a
4 couple of minutes? To take a pause?

5 MR. WHITEHALL: Yes.

6 PRESIDENT KEITH: Would it be convenient
7 to do it now?

8 MR. WHITEHALL: Yes, this is a perfect
9 time.

10 (Brief recess.)

11 PRESIDENT KEITH: Ladies and gentlemen, if
12 we could make a start, please.

13 Mr. Whitehall.

14 MR. WHITEHALL: Thank you, Mr. Appleton.

15 Mr. Chairman, I would like to turn to the
16 next series of allegations, alleged allegations, of
17 Article 1102, and focusing particularly on the
18 Customs regime. And under this heading the
19 claimant identifies the impugned measure as the
20 design and operation of Canada's custom stream for
21 courier and postal items that results in
22 systemically less favorable treatment of UPS Canada

18:01:04 1 with respect to the imports of packages and parcels
2 in competition with Canada Post. So, the treatment
3 is the design and operation of Canada Customs
4 stream for courier and postal items and in
5 competition with Canada Post.

6 Now, as I already indicated, it's some
7 significance that the treatment the claimant
8 actually receives is called the Courier Low Value
9 Shipment Program. And we are not dealing with
10 commercial products. What we are dealing with are
11 products that fall within that category. Both
12 Canada Post and couriers, when they are bringing
13 commercial products over that amount, receive
14 exactly identical treatment, as I understand. So,
15 as the Courier Low Value Shipment, the under
16 1600-dollar value that is at play.

17 ARBITRATOR FORTIER: Would you repeat
18 that.

19 MR. WHITEHALL: The value has to be below
20 \$1600.

21 Now, the evidence is that this program was
22 negotiated and devised by Customs and the courier

18:02:48 1 industry together, and it was devised--it was

2 designed to meet the specific needs of the courier
3 industry. Using Mr. Appleton's analogy, talk about
4 the dog that bites your hand.

5 The evidence will also show that the
6 claimant was a major player--a major player--in
7 establishing this program. Now, Canada submits
8 that there is no violation of Article 1102 with
9 respect to Customs processing of goods as imported
10 by the mail as opposed to the courier stream. And
11 do note, we are not talking here about delegated
12 governmental authority directly because this is a
13 program by Canada, so we are at that particular
14 stage.

15 Firstly, we say there is no treatment of
16 Canada Post. The treatment is that of the mail
17 originating in 189 different countries, and
18 originating with foreign postal administrations.
19 So, the mail receives a particular treatment, but
20 that is not a treatment of Canada Post.

21 So again, we are lacking the triangular
22 situation. There is no domestic investment that is

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18:05:12 1 treated differently than UPS. In fact, if you are
2 a Canadian courier company, you receive identically
3 the same treatment as UPS. So, Canpar or Purolator
4 or any Canadian courier company, if they bring in

5 goods from the United States, they receive exactly
6 the same treatment as UPS.

7 So, if you want to compare couriers to
8 couriers, we have absolutely no difficulty with
9 that, because there is no difference.

10 Secondly, the claimant's allegations are
11 predicated on a number of factual either
12 misunderstandings, to be charitable--and this
13 evening I'm not going to be uncharitable, but it
14 represents a total misunderstanding of the roles
15 that is carried out by a postal administrator in
16 the mail stream, and that is carried on by a
17 courier company.

18 UPS Canada performs a number of functions,
19 and undertakes a number of obligations that are not
20 borne by Canada Post, and would not be appropriate
21 for Canada Post to undertake. For example, Canada
22 Post does not, and cannot, act as a Customs broker.

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18:07:09 1 UPS does. And I won't give any evidence, but I
2 think they do it for profit. Canada Post doesn't
3 operate as a sufferance warehouse operation.

4 So, the rules of couriers with their entry
5 and control under contract of goods coming in to
6 Canada, and Canada Post just simply delivers mail

7 on behalf of a foreign postal administration.

8 Completely different.

9 Thirdly, Canada Post and the claimant are
10 not in like circumstances in respect of the Customs
11 treatment accorded because the design and operation
12 of Canada's Customs stream for courier and postal
13 products properly takes into account the
14 differences between the manner which mail items and
15 the manner courier items arrive to Canada.

16 And, in fact, these differences are
17 recognized internationally, and I have already
18 referred to the Kyoto Conventions, and they
19 recognize that mail ought to be treated differently
20 than courier products, because they are different.
21 For example, couriers, as I already said, have
22 entry and control of the goods. The customer goes

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18:09:34 1 to UPS's American correspondent, says, "Here is the
2 package I want to send," there is a contract, and
3 then that product is going through the courier
4 system, and they have a complete control over those
5 goods from beginning to the end.

6 Now, you have gone to the airport from
7 time to time, haven't you? I know you have. What
8 are the three questions they ask you when you check
9 in your luggage? "Do you know what's in it? Have

10 you left it anywhere? Have you maintained control
11 of it throughout?" For security purposes, in other
12 words, it's important to know that the same
13 institution maintains control over the package
14 throughout its route to Canada. Canada Post gets
15 mail from 180 different nations. Well, I don't
16 want to be disparaging of any particular nation,
17 but you don't necessarily know what you are going
18 to get. You have no information. There is a small
19 Customs form, you may recall, a little green thing
20 that you are supposed to attach to the package, and
21 some of them are filled out more correctly and more
22 fully than in other cases, but you really don't

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18:11:08 1 know what you're getting.

2 So, from a security perspective, you have
3 to have different systems in place. In the case of
4 couriers, clearly security considerations are much
5 lower than would be the case with mail items.
6 Couriers can provide notice--advanced information
7 about the shipments, particularly what will happen.
8 And if you do go to one of these Customs places,
9 you will find that there is an advanced list of
10 what's coming in.

11 So, the Customs folk can say, "Yeah, I

12 want to see this, this, and this. The rest can
13 go." They make a risk assessment based on the
14 advanced information, and they make a decision.
15 Impossible to do that in case of the thousands and
16 thousands of packages coming from 189 different
17 places on any given day. So, again, you have to
18 have a different treatment to meet the exigencies
19 of the situation.

20 The mail, yeah, they want to deliver it
21 fast, but think about how quickly you will get your
22 package from Aunt Marta during Christmas. It may

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18:13:06 1 not be the next morning. It's not that my clients
2 don't do a first-class job, but they work within
3 parameters. They do the best they can within the
4 resources they are given. If you want to get it
5 there on a particular time next morning, you will
6 go to a courier company. Their business is time
7 sensitivity.

8 So, again that's yet another example of
9 why different treatment is appropriate for the
10 courier stream than it is for the Customs
11 stream--for the postal stream. Indeed, even the
12 claimant acknowledges, and I quote, "the legitimate
13 reasons for distinguishing between postal and
14 courier imports." And we say it is these

15 legitimate reasons that treatment is accorded--is
16 not accorded in like circumstances.

17 Now, the next issue is, of course--of
18 course, again we have this strange situation where
19 the claimant has ignored NAFTA and said, "Well, all
20 I need to establish is that both of them delivered
21 their things in trucks. We are in like
22 circumstances." Well, Canada Post doesn't deliver

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18:15:04 1 anything from the United States. It's the USPS
2 that delivers to Canada. Canada Post only delivers
3 after the good has cleared Customs. It presents on
4 behalf of USPS the goods to Customs. So, it is
5 either the mail or, if you want to put an
6 institution to it, it's USPS, or the products of
7 USPS, that get the treatment.

8 The investor recognizes there are
9 problems, so they say, "Yeah, but you know what?
10 USPS and Canada Post are in partnership. The fact
11 is they are two different postal administrations.
12 Canada Post has an international obligation to
13 deliver goods on behalf of any of the foreign
14 postal administrations who belong to the UPU, but
15 that doesn't create a partnership relationship.

16 And as I have already said, in any event,

17 there is no nationality-based discrimination
18 because courier companies, all courier companies,
19 receive identical treatment.

20 Finally, on this point--well, on this
21 narrow point--the different treatment is not less
22 favorable; it's just different. Nor have they

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18:17:24 1 established--and I won't spend any time on that
2 because I think time is running--that they have
3 suffered any damages.

4 Now, another aspect of the Customs
5 treatment that they complain of is the so-called
6 Postal Imports Agreement. And my friend,
7 Mr. Conway, is going to spend a great deal of time
8 on that, so I won't for this afternoon, but the
9 principle that I would like to leave with you is
10 that it is not a Customs treatment. It is an
11 agreement between Customs and Canada Post for the
12 performance of certain functions, Customs
13 functions.

14 And yes, my friend is right. Canada Post
15 is getting paid for it, but it's a procurement and,
16 therefore, not subject to NAFTA. And essentially,
17 the functions that have been contracted out are
18 material handling, data entry, and as agent of

19 Customs, the collection of funds.

20 And finally, on this--again, I already
21 indicated this, but to just remind ourselves--the
22 claim is out of time. Both the Postal Imports

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18:19:04 1 Agreement and the Courier Low Value Shipment

2 Program were well-known to UPS well beyond the
3 three-year limit.

4 Now, let me change topics and talk about
5 the Publications Assistance Program, and I can be
6 very, very brief. The program is essentially to
7 ensure--is in place to ensure that Canadian
8 magazines receive as broad a distribution as
9 possible; and to that end, Canadian
10 publishers--there is a program, the PAP program,
11 and Canadian publishers receive a subsidy, but a
12 condition of the subsidy is that they use Canada
13 Post. We say that that is simply part of the way
14 we ensure that we have a viable cultural program.

15 In one form or another, as I have
16 indicated, this program has been in place for a
17 hundred years. It is not new. It has changed as a
18 result of the WTO decision my friend referred to in
19 order to accommodate the WTO decision. But the
20 underlying principle remained the same for the past
21 century; and, therefore, it comes within the

22 cultural exemption.

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18:21:01 1 But, in any event, even if it did not,
2 Canada Post and UPS are not in like circumstance to
3 deserve this treatment. UPS says, You know, we
4 could deliver to many places just like Canada Post
5 does, but there is a difference. Canada Post has a
6 statutory obligation to deliver to every address in
7 Canada, so Heritage Canada can rely on the
8 statutory obligation and can be comfortable that
9 irrespective of the vicissitudes of time, Canada
10 Post will deliver to every address. There is no
11 such assurance with a private corporation. They
12 have no obligation to deliver a basic customary
13 Postal Service.

14 So, they may decide, yes, we will do it
15 today because it's profitable, but we will change
16 our mind next year because it's no longer
17 profitable or because we have different business
18 interests. So, the certitude of making sure that
19 Canadian magazines are delivered is present in the
20 one case and is simply not present in the other.

21 Let me then completely shift topics and
22 talk about the 1105 test. I think I should be

18:23:14 1 getting a slide 23.

2 There are essentially three allegations
3 under 1105--or four, I beg your pardon. Now, we
4 have a number of positions in respect of each.
5 Firstly, with the exception of the third, they were
6 not--I'm sorry, with the exception of the fourth,
7 they were not made with any degree of specificity
8 in the Revised Amended Statement of Claim. So,
9 they evolved, and the allegations were made in the
10 memorial and the reply. But if you look at the
11 Revised Amended Statement of Claim, they are not
12 there, so we object.

13 The claim in respect of Fritz Starber was
14 made, but it is unconnected to the claimant's
15 original case, and we will develop the
16 jurisdictional points a bit more later on.

17 On the merits of the case, we argue that
18 the claimant has completely misunderstood the scope
19 of Article 1105. And just like in the case of
20 1102, the claimant attempts to establish a general
21 equitable jurisdiction for NAFTA tribunals. We say
22 that this is inconsistent both with the meaning of

18:25:34 1 1105 and this Tribunal's previous decision on the
2 jurisdictional ruling. So, the point has been
3 decided.

4 We say that the
5 minimum-standard-of-treatment obligation protects
6 investment against serious breaches of customary
7 international obligations with respect to the
8 treatment of aliens, such as denial of justice. It
9 is not, as the claimant would have it, the basis of
10 an equitable jurisdiction for Chapter 11 tribunals
11 to review of any and all measures that the investor
12 feels is unfair. We submit that the claimant has
13 not identified any customary legal standard with
14 respect to the treatment of aliens as anticipated
15 by Article 1105.

16 Now, the claimant does make a number of
17 assertions. For example, it relies on good faith.
18 We argue that good faith, in and of itself, is not
19 the source if none would otherwise exist. We say
20 that the claimant wrongly construes Article 1105 as
21 a general prohibition against arbitrary and
22 discriminatory conduct, whether or not it reaches

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18:27:24 1 that additional level. The claimant improperly
2 attempts to create an obligation upon Canada in

3 respect of the claimant's legitimate expectations.

4 We say the claimant improperly invokes
5 human rights and core labor standards in relation
6 to someone else. As I have said before, if there
7 was a breach of ILO Convention 87, that had nothing
8 to do with the claimant. It had to do with another
9 party who is actually before you as amicus, or may
10 be before you as an amicus, but not the claimant.
11 So, it's not in relation to the claimant.

12 We submit that the correct legal test
13 involves the following propositions: Firstly,
14 Article 1105 applies to measures that relate to an
15 investor or its investment. Second, Article 1105
16 requires a breach of customary law related to a
17 subject area applicable to aliens; in other words,
18 not every intentionally wrongful act amounts to a
19 breach of Article 1105. Internationally wrongful
20 act, I'm sorry.

21 Customary international law must be proved
22 by showing the state practice and opinio juris. In

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18:29:14 1 other words, you have to find proof that the
2 alleged practice by Canada is contrary to state
3 practice and opinio juris. It's a matter of proof.
4 We submit you have no proof before you.

5 We say that the breach of minimum-standard
6 treatment requires a high threshold showing conduct
7 that is arbitrary, grossly unfair, unjust, or
8 idiosyncratic, discriminatory, and exposes the
9 claimant to sexual or racial prejudice in a manner
10 that offends the sense of judicial propriety. None
11 of that is present in any of the allegations relied
12 on by the claimant.

13 Start with Customs treatment. The
14 investor alleges that Customs' actions breached the
15 minimum standard of treatment because they result
16 in a competitive advantage of Canada Post over UPS
17 Canada. As pleaded by the claimant, this claim
18 calls on the Tribunal to consider the treatment
19 that Canada gives to Canada Post. This treatment
20 is not directed at the investor or its investment,
21 and therefore it's outside the purview of Article
22 1105. To the extent that the investor can show

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18:31:11 1 that Canada has not properly enforced its laws with
2 respect to Canada Post, or has given favorable
3 treatment to Canada Post, it's complaining about
4 treatment that is not directed at a foreign
5 investment. Insofar as the investor argues that
6 Customs' treatment of Canada Post allows it to
7 lower its costs, it amounts to a request for the

8 Tribunal to apply a standard prohibiting
9 anticompetitive behavior which was found in the
10 jurisdictional phase not to be governed by 1105.

11 In a nutshell, there is really nothing in
12 its allegations, even if it's accepted on the fact
13 that is analogous to a maladministration amounting
14 to outright and unjustified repudiation of the
15 relevant laws and regulations. So, we say dealing
16 with the Customs issue that they just simply don't
17 meet the threshold.

18 The ILO Convention, I have already
19 indicated it has the fatal flaw that is not related
20 to UPS. Further, to the extent that it relates to,
21 "Well, you know, it doesn't relate to us, but
22 because it gives you, Canada Post, a competitive

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18:33:04 1 edge because they didn't have to renegotiate
2 pensions" or what have you, well, that's a matter
3 of competition, and you have already ruled that
4 broad questions of competition are not within your
5 jurisdiction, and you may want to have reference to
6 paragraph 99 of your jurisdictional ruling.

7 Next, I turn to Fritz Starber. The
8 investor argues that Canada Post's decision not to
9 award the contract to Fritz Starber for

10 transportation services to Latin America was a
11 retaliation measure.

12 Now, there are a number of problems for
13 that. Firstly, as I already indicated, it is a new
14 claim not related to anything in the Statement of
15 Claim. Secondly, it's yet another example of a
16 commercial decision and therefore not a delegated
17 governmental authority. Whether or not Canada Post
18 decided to enter into a contract with Fritz Starber
19 is not in any meaning a delegated governmental
20 authority.

21 Further, on the substance we say of
22 Article 1105, there is no requirement to enter into

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18:35:03 1 a contract with every company that Canada Post may
2 have had some preliminary discussions with. UPS
3 says that the reason Canada Post didn't enter a
4 contract was because there was litigation between
5 the parties.

6 Now, I don't know if that's a breach of
7 some international standard. If you sue me, I'm
8 not going to enter into a contract with you,
9 whether there is an international standard that you
10 must enter into a contract, irrespective of the
11 fact that you are being sued, but in this
12 particular case that was not the reason. The fact

13 is that Canada Post decided not to proceed with
14 these contracts. It did explore possibilities as
15 alternatives to its current transportation services
16 for a supplier to mail destined to the Caribbean,
17 Central, and South America, but ultimately decided
18 not to award the contract to anyone. They just
19 decided to do it themselves.

20 And finally, how can there be any damages
21 since nobody received the contract? So, again the
22 fatal flaw of no damages raises what may prove for

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18:36:53 1 the claimant to be its ugly head.

2 You haven't had a great deal of discussion
3 about 1103, so I don't think I'm going to spend
4 that much time on it, either. If necessary, we
5 will address it more extensively.

6 But let me say this by way of conclusion
7 on the substantive area, in Canada's submission,
8 this Tribunal will have to keep in mind that, with
9 the greatest of respect, this Tribunal isn't here
10 to create postal policy or Customs policy. You
11 will also have to keep in mind that even obiter
12 dictum from this Tribunal will be used by the
13 claimant in its relentless effort to change the
14 Canadian postal regime, and will be used as part of

15 political leveraging and as part of its ongoing
16 lobbying activities.

17 So, we say, with the greatest of respect,
18 that your reasons are as dangerous as the result.

19 Finally, let me just tell you, if I may,
20 who is going to present on behalf of Canada after
21 we have heard the investor's cross-examination and
22 their submissions.

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18:38:54 1 Mr. Willis will address you on the Chapter
2 15 and state responsibility matters.

3 Ms. Hillman will address you on Article
4 1102 and 1116.

5 I will address you on 1102 specifically
6 dealing with the issue of leveraging by Canada
7 Post, and Canada Post's arrangements with
8 Purolator.

9 Mr. Conway will address you in respect of
10 Article 1102 and Customs treatment.

11 Ms. Tabet will deal with the Publications
12 Assistance Program and Article 1105.

13 And Mr. Neufeld will be dealing with 1103.

14 And if there is any new matter, as you
15 have indicated, Mr. Chairman, that requires a reply
16 to the claimant's reply which we assumed--and I

17 assume that this case will not be split--and the
18 claimant will argue its case immediately after the
19 closing of his evidence, the cross-examination, so
20 if the claimant does what he is supposed to do,
21 namely, not to raise any new matters but simply
22 respond to Canada, then I think we could have a

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18:40:47 1 very short, if at all, final reply.

2 Thank you very much.

3 PRESIDENT KEITH: Thank you,
4 Mr. Whitehall.

5 There were just a couple of matters that I
6 need to mention. The Members of the Tribunal have
7 further considered the question that I raised right
8 at the outset about the presence of UPS official
9 representatives during the hearing. We have taken
10 note of Mr. Whitehall's statement about the
11 position he took in October when he said he went
12 out on a limb. We remain of the view expressed
13 this morning, and that is that UPS official
14 representatives may be present. And as in the
15 terms proposed in Mr. Appleton's letter of 7
16 December, I think, to Mr. Whitehall, and that, of
17 course, involves the business representatives
18 attending will be bound by the confidentiality
19 agreement and that they had to execute a

20 confidentiality agreement which is to be filed in
21 the manner required under the order, and that they
22 are to be identified by counsel to the Tribunal and

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18:42:09 1 to counsel for the other party at the beginning or
2 when they were placed. So, we so direct in respect
3 of that matter.

4 (Tribunal conferring.)

5 PRESIDENT KEITH: My colleagues have just
6 pointed out that I was using the plural, and the
7 proposal that came from Mr. Appleton was for a
8 single representative, wasn't it, at any particular
9 time, and we shouldn't go beyond what he sought in
10 that letter. So, if you would modify what I have
11 just said by reference to that, and the sensible
12 thing is, I think, for people just to keep to the
13 terms of that letter that I mentioned earlier, the
14 December 7th letter. Thank you.

15 Mr. Whitehall?

16 MR. WHITEHALL: I suppose, Mr. President,
17 Canada, too, can have Canada's representative in as
18 well on the same terms?

19 PRESIDENT KEITH: Mr. Appleton, I take it
20 you have no objection to that?

21 MR. APPLETON: Of course. We have

22 absolutely no objection to the Government of Canada

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18:43:43 1 having a representative.

2 PRESIDENT KEITH: Thank you. Very well,
3 that's so decided.

4 And the other matter was that we thought
5 we should begin at nine tomorrow. We will then
6 assess how we are going in terms of the time we
7 begin each day. And just, I think, as a matter of
8 logistics, the room is going to be locked at some
9 point about two hours' time, and it will be opened
10 again at eight in the morning. So, if you want to
11 remove papers, remember those constraints.

12 And if I could thank counsel for their
13 cooperation today, we wish you all a good evening.
14 Thank you.

15 (Whereupon, at 6:46 p.m., the hearing was
16 adjourned until 9:00 a.m. the following day.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby testify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true record and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN, RDR-CRR