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

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In the Matter of Arbitration
Between:

UNITED PARCEL SERVICE OF AMERICA, INC.,
Investor,
and
THE GOVERNMENT OF CANADA,
Party.

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HEARING ON THE MERITS

Thursday, December 15, 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 9:04 a.m. before:

KENNETH J. KEITH, President
L. YVES FORTIER, Arbitrator
RONALD A. CASS, Arbitrator
08:57:51 Also Present:

ELOISE OBADIA,
Secretary to the Tribunal

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2 President Keith: Mr. Wisner, are you

3 ready to resume?

4 continued closing argument by counsel for claimant

Pages 855 - 1115: this portion of the hearing was held in camera and the pages have accordingly been redacted.

17 Mr. Whitehall: Thank you, sir. We are

18 just going to put up to remind you that this part

19 of our presentation is going to be in a number of

20 pieces, and we are going to start off with the

21 Chapter 15 issue, and Mr. Willis is going to

22 address you; to be followed by Ms. Hillman, who
will deal with Article 1102, the law; followed by
myself dealing with the leveraging and the
arrangements with Purolator; to be followed by
Mr. Conway, who will deal with the Article 1102
application to the Customs treatment; to be
followed by Ms. Tabet, who will deal with the
Publications Assistance Program and, as I heard,
the two remaining 1105 issues. I noticed that the
labor issue was not addressed, so I expect we won't
have to address it; and Mr. Neufeld will give you a
short submission on 1103, again giving it the
weight that it deserves. I don't think that I will
be responding to any arguments at this moment, so
the bottom line can be removed.

So with that, if I may present Mr. Willis,
I think you have seen him before. Thank you.
PRESIDENT KEITH: Thank you, Mr.
Whitehall.
Yes, Mr. Willis. We have, indeed, seen
him before.
MR. WILLIS: Mr. President and Members of
the Tribunal, my topic today will be Chapter 15 and
related questions of state responsibility for the actions of Canada Post, and more specifically I will be dealing with two general areas. First, I will be discussing the concept of delegated governmental authority as set out in Articles 1502(3)(a) and 1503(2) with respect to monopolies and state enterprises respectively.

Our basic proposition here is that the concept denotes powers of an inherently sovereign nature, powers that private parties could not exercise in the absence of a specific act of delegation by governments. Commercial matters such as the so-called leveraging of the monopoly infrastructure and the Fritz Starber claim are therefore not included.

The second part of my argument deals with the relationship between Chapter 15 and the rules of attribution in the customary international law of state responsibility. And here, specifically I will be responding to the contention that Canada is responsible under Chapter 11 for the acts and omissions of Canada Post without with regard to the conditions spelled out in Chapter 15. And there are at least three independent contentions—considerations, rather, that refute
this contention. The first is that it nullifies
the practical effect of the two key provisions I
just referred to.
And the second is the concept of lex
specialis in the customary international law of
state responsibility, meaning that where a treaty
addresses the conditions and extent of the party's
responsibility, the general rules on attribution
cease to apply. That those rules have in effect a
residual application for cases where the Treaty
remains silent.
And finally, the notion that Canada Post
Corporation is a state organ within the meaning of
the state responsibility principles is erroneous.
As an independent legal entity, the Corporation is
properly regarded as a parastatal enterprise that
is subject to a distinct regime of attribution
under the international rules.
Now, the Tribunal is already familiar with

17:11:35  the central role in this disputed Chapter 15 which
is entitled "Competition Policy, Monopolies, and
State Enterprises." The dispute deals with the
Canada Post Corporation.
It is common ground between the parties
that the corporation is a state enterprise. It's a Crown corporation within the meaning of the Financial Administration Act, and Annex 1505 defines such corporations as state enterprises. And the parties also agree that it is a monopoly in some of its activities; namely, the letter mail operations as set out and limited in sections 14 and 15 of the Canada Post Corporation Act. Chapter 15 is where the parties have defined and set out their general undertakings with respect to both monopolies and state enterprises. In addition to its substantive importance, the jurisdiction of the Tribunal is limited to only two provisions of Chapter 15, paragraph 1502(3)(a) with respect to the exercise of delegated governmental authority by monopolies, and paragraph 1503(2) with respect to the exercise of such authority by state enterprises.

The two provisions are largely but not entirely identical. They require the parties to ensure, and I quote, "through regulatory control, administrative supervision, or the application of other measures that their monopolies and state enterprises do not breach certain NAFTA obligations
wherever they exercise a regulatory administrative or other governmental authority delegated to it by a party."

The obligations in the case of state enterprises under Article 1503 are limited to Chapter 11 and Chapter 14 on financial services, which is not relevant here. In the case of monopolies, on the other hand, the obligation extends to all provisions of the agreement, but with the important limitation that only breaches of Section A of Chapter 11 are made arbitrable under the terms of Article 1116. And this was the conclusion reached after considerable analysis by this Tribunal in paragraph 69 of the Award on jurisdiction.

Other similarities and differences between the two provisions were noted in paragraphs 16 and 17 of the Award on jurisdiction where the Tribunal described their function as follows, and I quote: "What is common to them is that if a party has delegated governmental authority to a monopoly or state enterprise, the party is to ensure, putting it broadly, that the monopoly acts consistently with the party's obligations under the agreement as a whole, and the state enterprise acts consistently
with the parties' obligations under Chapters 11 and 14. That is to say, a party cannot avoid its obligations by delegating its authority to bodies outside the core government."

The lynchpin of both provisions is the phrase "wherever the monopoly or the state enterprise exercises regulatory, administrative or other governmental authority that the party has delegated to it." In the case of both provisions, the meaning of this language is fleshed out and illustrated by a series of examples that are very similar, though not entirely identical.

The award on jurisdiction points to a contextual interpretation of the concept of delegated governmental authority. It explains in paragraph 18 that the other provisions of Articles 1502 and 1503 have a different field of operation. They focus on the actions of the monopolies and state enterprises in their commercial activities through a variety of stipulations prohibiting discriminatory or anticompetitive practices in the marketplace, and requiring conduct based on commercial considerations.

The pattern, therefore, begins to emerge.
On the one hand, we have provisions relating to governmental authority that are designed to ensure that the parties do not avoid their obligations by delegating authority to bodies outside the core government. And on the other hand, we have provisions relating to the commercial activities of monopolies and state enterprises. And the fundamental nature of the distinction between the two categories, governmental and commercial, is highlighted by the fact that the governmental category is made arbitrable under Chapter 11, and the commercial category is excluded from the dispute settlement process.

In any event, Mr. President, I suggest the Treaty language is clear. The two provisions, 1502(3)(a) and 1503(2), use the common phrase, "regulatory, administrative, or other governmental authority the party has delegated to it." The phrase should be read as a whole, and the individual words in it should be interpreted in their context. So, regulatory authority is invariably associated with government. In the context side by side with the references to regulatory authority and other governmental authority, the word administrative
suggests acts of public administration, matters
governed by Public Law. And at the risk of stating
the obvious, the reference here is to authorities
specially delegated by a government, one of the
three NAFTA parties. And notice also the similar
terminology, including the words "regulatory" and
"administrative" used to describe the governmental

obligations imposed by these provisions, and the
delegated governmental authority that triggers the
obligations.

The entire context, in other words, is one
of state authority and public administration, in
contra distinction to commercial and operational
matters that a corporation would be capable of
dealing with in the absence of any specific
delegation of governmental authority.

Note 45 to the NAFTA confirms this context
of state authority and public administration. It
refers once more to the central concept of
governmental authority, and it describes a
delegation under Article 1502 as including a
legislative grant, a Government Order, directive or
other act transferring to the monopoly or
authorizing the exercise by the monopoly of
governmental authority. No such special instrument of delegation would be needed to authorize an enterprise to carry out its ordinary commercial and managerial functions.

In most instances, Mr. President, a simple test will determine whether or not we are dealing with an exercise of delegated governmental authority. And the question is whether the act is something that in the ordinary course could and would be done by a private party carrying on a business of the same kind. If so, it is not an exercise of delegated governmental authority as contemplated by the Treaty, and the inquiry need go no farther.

There is nothing inherently governmental about the nature of the authority a corporation necessarily has to manage its affairs and carry on its ordinary business, and it follows that commercial activities, including the pricing and costing of corporate products or the management of corporate property and assets, such as the so-called infrastructure associated with the operation of the business, cannot be brought under the concept of delegated governmental authority.
And so, even before we get to the list of examples in both of these provisions, the general outline of what is contemplated is clear. The lists remove any possible ambiguity. They're largely identical, but I will read from both. In paragraph 1502(3), relating to monopolies, the words are such as the power to grant import and export licenses, approved commercial transactions or impose quotas, fees, or other charges. In paragraph 1503(2), relating to state enterprises, it is such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

So, the lists provide in a sense a definition by way of illustration, and they take us from the abstract to the concrete. It is difficult to give a complete exhaustive definition of governmental in the abstract, though it's clear enough, I suggest, that the commercial, operational, and management activities would be excluded, even in the absence of any examples. But the list of examples tell us more about the kind of authority at issue than any abstract definition could possibly do. They are
not exhaustive, but any type of governmental authority not specifically referred to would, I suggest, have to meet a test of substantial similarity. That is the meaning of the words, "such as," and the effect of ejusdem generis principle.

The most obvious point is that these are all matters that are necessarily based on state power. Only governments or their delegates can exercise an import and export licensing power or impose quotas or require that commercial transactions be approved. These are powers of a legal character. They control the activities of third parties on the basis of legal authority. Quotas, licenses, and approvals, presuppose the existence of legal sanctions if the requirement to comply is disregarded.

Now, fees and charges might, of course, be imposed by a private company on a transactional basis, but the context here implies references to regulatory charges and regulatory fees.

The basic framework of these two provisions on delegated governmental authority is
closely paralleled by Article 5 of the ILC Articles on State Responsibility. And this parallel with Article 5 is something that both parties have noted but to very different ends. And, clearly, we do read the commentaries completely differently.

The ILC commentary in paragraphs one and two explains that Article 5 is designed to take account of the increasing phenomenon of paristatal entities, including public corporations and agencies. It deals with state responsibility in connection with entities that are not state organs, but that are, and I quote, "empowered by the law of the state to exercise elements of governmental authority." And that phrase in the light of the commentaries is designed to capture essentially the same idea as that of delegated governmental authority in Chapter 15, and the significance of the distinction between state organs and paristatal entities is that in the case of Article 4 and state organs, it makes no difference that the conduct was commercial or private, as the commentaries under Article 4 explain, and, in fact, as the recent
Partial Award in Eureko versus Poland pointed out in connection with the Polish State Treasury.

But the distinction between commercial and governmental is not only relevant, but crucial in the case of Article 5, and the paristatal entities to which it applies.

There are a couple of points that emerge from the Article, Article 5, and the commentaries under it. The parallel is so close as to suggest that the drafters of the NAFTA were not thinking of state enterprises and monopolies as state organs, but rather in terms of paristatal entities of the kind dealt with in Article 5, and I will come back to that point later.

But the other point, and the one I want to emphasize here is that the commentaries confirm that the notion of governmental authority as reflected in Article 5 is exactly what we have been proposing as the correct interpretation of the Chapter 15 provisions, and the concept therefore excludes commercial activities.

The commentary refers to functions of a public character normally exercised by state organs, giving the example of a security firm empowered to exercise public powers pursuant to a
judicial sentence or to prison regulations. And it states that in order to attract state responsibility under this Article, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. And here again, the example given is enlightening, the exercise of policing powers by a railway company would be covered, but not the sale of tickets or the purchase of rolling stock. Now, the claimant has acknowledged-- ARBITRATOR CASS: Might I interrupt for just one moment. You said policing powers as opposed to police powers. In American legal terms, police powers refers to a broad set of powers of a state. Policing would be one very particular power and a very small subset of the very broad general power over other activities that we would refer to by that term. Did you mean something different here?

MR. WILLIS: Well, I believe the ILC was not using the expression police powers at all in the United States constitutional sense. It really refers to law enforcement by uniformed constables.
and the like.

PRESIDENT KEITH: For what it's worth, the commentary like the articles were probably written by an Australian, and I think you would have that narrow meaning in mind.

MR. WILLIS: Now, as I was saying, the claimant has referred to this important passage, but has failed to draw the obvious conclusions. And instead, it's built much of its argument around a single paragraph of the commentary under Article 5, which is paragraph six of the commentary. And here, the ILC explains that it has not defined precisely the scope of governmental authority, and that beyond a certain limit the concept varies according to national traditions, et cetera.

But this appears in the narrative of the commentaries as a qualification with respect to the main thrust of the analysis of the ILC, which points to a decisive dividing line between private and commercial activity which could be carried out by any private person, and public authority which only governments or their delegates can exercise. And there is no suggestion here in the commentary that the governmental concept is...
9 infinitely variable or subjective.
10 The ILC refers to paristatal entities as
11 an increasing phenomenon, and this helps explain
12 the underlying purpose of the delegated
13 governmental authority provisions in Chapter 15
14 because there has been a trend over the years for
15 governments either to privatize their operational
16 and commercial functions or at least to move them
17 outside the core government to state enterprises
18 which are modeled on the private sector. And
19 airport management might be an example, at least in
20 the Canadian context.
21 The policy of Chapter 15 is that if any
22 truly governmental authority is transferred out

along with the operational functions, that

authority should not escape NAFTA disciplines. But

conversely, it would defeat the purpose of the

transfer to treat the operational and commercial

activities that have been transferred out as if

they were still an integral part of the core

government.

The commercial governmental distinction

has been applied by arbitral tribunals in a wide

variety of situations. In the Maffezini
jurisdictional award, which dealt with a regional
developmental agency in Spain, the Tribunal
referred to an earlier version of what is now ILC
Article 5, and it noted that the agency carried out
functions which are by their very nature typically
governmental tasks that could not normally be
considered to have a commercial nature. And the
same distinction was applied in the award on the
merits which found that in some respects the agency
was carrying out public functions not normally open
to commercial companies, and those functions could
not be considered commercial in nature and could be
attributed therefore to the Government of Spain.

Now, the Maffezini awards do help to
illustrate the distinction, but I would hesitate
to--I would hasten, rather, to add a qualification.
Maffezini talks about governmental functions, but
Chapter 15, in common with ILC Article 5, talks
about governmental authority which is not
necessarily the same thing.

And the same qualification applies to
Salini versus Morocco which characterizes the main
object of a state company responsible for highway
building and operation as the performance of tasks
under state control.
But authority, governmental authority, as I will be explaining, is a somewhat different concept than functions or even tasks. It's narrower and more precise, and it's authority that we have to consider here.

I come back to the way in which the governmental commercial distinction has been reflected in arbitral awards in various situations and for various purposes. A recent jurisdictional decision Impreglio versus Pakistan notes that the same set of facts can give rise to both contract claims, private contract claims, and Treaty based claims, and that only the Treaty based claims could be arbitrable under a Bilateral Investment Treaty.

And the Tribunal, without making final determinations because this was a jurisdictional award, characterized the dividing line in terms of the conduct of the state in the exercise of its sovereign power or puissance publique going beyond that of an ordinary contracting party. The same test was applied in Salini versus Jordan in an award on jurisdiction given last year. Again, the context here is different, but the language reflects the same pervasive distinction in
international law between what is commercial on the one hand or private and what is governmental in character.

There is another parallel and perhaps more familiar, the law on state immunity or sovereign immunity distinguishes between governmental acts and private and commercial acts and it restricts immunity to the governmental category.

A 1999 ILC Working Group on the jurisdictional immunities of states after an overview of the case law concluded that, and I quote: "Sovereign and governmental acts which only a state could perform and which are core government functions have been found not to be commercial acts. By contrast, acts that may be and often are performed by private actors and which are detached from any exercise of governmental authority are likely to be found commercial acts."

The claimant's reply to the Mexican Article 1128 intervention at paragraph 95 cites the Eureko Partial Award and another recent arbitral award, Noble Ventures versus Romania, and it says they reject any idea of an absolute distinction between governmental and commercial acts.

Well, this is true, but the reference to
the governmental and commercial distinction in Eureko is in the context of ILC Article 4 rather than Article 5. And I refer to paragraphs 128 and 130 which first quote out and set out the text of Article 4 and then bring in the Article 4 commentary that I just referred to. And the Award does go on to say that the same result could have been reached by other routes, but it's fair to say that the primary focus is on Article 4 and the Article 4 commentary. Now, Noble Ventures is less explicit and less clear on this point, but it implies that the Romanian agency at issue was also being treated as a state organ under Article 4, and not as a paristatal entity exercising elements of governmental authority under Article 5. And this follows from its determination in paragraph 79 that no relevant legal distinction could be drawn between the agency and the government Ministry. In practice, as the Noble Ventures award observes, the governmental versus commercial distinction can sometimes be difficult to apply. This is a gray area. But not, I suggest, in terms of the issues in this case, and not above all with
the illustrative examples that Chapter 15 provides. The costing and pricing of services and the

management of corporate assets, the so-called infrastructure, lack any inherently sovereign character or governmental character. There can be a gray area, but I suggest we are well clear of it here.

Delegated governmental authority typically implies the exercise of a power to control the acts of third parties or affect their rights and interests. This is a common feature of all of the examples in the two lists. What is contemplated then is authority that's associated with the sovereignty of the state.

Now, the claimant says the power to control the activities of others is irrelevant, and we heard that today and in the reply at paragraph 698 and following. And they cite one of the follow-up proceedings in the WTO Canada Dairy decision where the appellate body affirms that, yes, the expression "governmental action" in the agreement on agriculture can extend to situations where no compulsion is involved. But governmental action is one thing and governmental authority is
another, especially authority of the kind illustrated in the Chapter 15 lists.

But more to the point, I suggest, are the passages in the main appellate body report of 1999 which focused on the nature of governmental--of government and governmental authority in the context of provincial marketing boards. The appellate body said at paragraph 97, "The essence of government is, therefore, that it enjoys the effective power to regulate, control, or supervise individuals or otherwise restrain their conduct through the exercise of lawful authority."

The appellate body discussed the powers of the provincial boards to regulate the dairy industry, controlling producers at every stage of the process, setting quotas, calculating prices, pulling returns, and doing this through orders and regulations enforceable in courts of law. These regulatory powers, the report says at paragraph 100 are, and I quote, "augmented by the machinery of the state itself with the public force to enforce that the regulatory functions and decisions are
So, these were the factors that led the appellate body to affirm that the boards are governmental agencies taking governmental action, and this helps give some of the flavor of what is governmental and what is commercial.

Our opponents point to a number of apparent exceptions that don't seem to fit the description. Governments procure goods and services and they pay grants and subsidies, and that's true enough. And Article 1108 provides that certain provisions of Chapter 11 do not apply to procurement or subsidies and grants by a party or a state enterprise.

But the objection, I suggest, carries no real weight. The exceptions don't prove the rule. The provisos in Article 1108 were presumably added for greater certainty and out of an abundance of caution. For example, to assure the procurement by state enterprises would only be subject to national treatment obligations to the extent set out in Chapter 10. The general pattern is what counts,

and it is generally if not always the case that voluntary and consensual dealings would fall on the
3 commercial side of the line, and the coercive or
4 regulatory powers would fall on the governmental
5 side of the line.
6 And unquestionably, in the examples in
7 Articles 1502(3)(a) and 1503(2), the common feature
8 is the imposition of nonconsensual forms of
9 authority over private sector undertakings.
10 There are many points of detail in the
11 pleadings, but above all there is a complete
12 difference in orientation in the approach of the
13 parties to these two provisions on delegated
14 governmental authority. The question is whether
15 you look at the nature of the authority or whether
16 you look at the nature of the entity, and clearly
17 the first option is the right one. You look at the
18 nature of the authority being exercised.
19 The claimant in contrast approaches the
20 matter very largely in terms of the nature of the
21 state enterprise or the nature of the monopoly, and
22 thus, for example, in the reply at paragraphs 696

17:41:56 1 and 7, the claimant argues that Canada Post acts
2 under governmental authority because it is owned
3 and controlled by the government. The board is
4 appointed by the government, and it inherited
authority from the old Post Office Department and it is subject to directives, et cetera. I suggest, Mr. President, that this line of argument is completely misconceived. What counts as the Treaty language makes clear, is not the nature or status of the enterprise, but the nature of the specific authority under which it's acting.

In the memorial at paragraph 730 and following, under the heading Canada Post acted under delegated authority, the claimant argues the issue in terms of what it calls general and specific grants of authority to Canada Post. As it explains its position, the general grant of authority to CPC is simply the, and I quote here: "The control over the right in terms of access to the Monopoly Infrastructure through the general provisions of the legislation." That's at paragraph 733.

But decisions on access to the postal network are commercial decisions. They're matters of corporate management. The authority—the authority to manage the monopoly is inherent in the grant of the monopoly, and of course that's something that's explicitly legitimized and recognized by the NAFTA. And if the authority to
manage the monopoly were not inherent in the grant of the monopoly, the privilege could simply not be exercised.

The claimant's argument implies, and we heard this again today, that everything a monopoly does is necessarily an exercise of delegated governmental authority. And that, of course, could not be right because it would mean that most of the language in Article 1502(3)(a) would have no purpose at all.

ARBITRATOR CASS: If I might, Mr. Willis, if we were dealing with Canada Post as an actual department—if we were dealing with Canada Post as a department of government, had it not been corporatized, would its activities all be subject to 1102, apart from the specific exemptions of procurement and the like?

MR. WILLIS: I believe that by creating Canada Post as a state enterprise, indeed, the legal situation was altered. That means that creation of that designation of Canada Post as a parastatal entity, if you like, means that it is not, and I will be coming to this later. It is not a state organ, and that its objection to treaty law
and the question of attribution is circumscribed, circumscribed in this case by treaty and circumscribed by general international law by the terms and commentary of Article 5.

On the other hand, what we do get through Chapter 15 is certainty of application and additional rules that impose additional disciplines and achieve the NAFTA objectives by imposing just additional disciplines with respect to state enterprises and monopoly through the additional rules such as paragraphs (b), (c), and (d) of 1502(3), 1502(3) and paragraph three of 1503.

ARBITRATOR CASS: If, and I just to want

make sure I follow where you're going here, if as in Noble Ventures we said that it looks like the change they change in name only effectively or in form only and not a serious change in the operation from a government department to a state enterprise, then you would say that we wouldn't need to parse the particular activities to see which is subject to 1102 and which is not; is that accurate?

MR. WILLIS: Indeed, the ILC referred to situations where the corporate veil is used merely as a sham, and that would not alter the substance of the rules of attribution. But where the
establishment of the entity is not a sham and where it is given an independent legal personality, it does have—the legal regime is altered, and it becomes a matter that's subject to the limitations of Chapter 15 or if we are looking at general international law, it becomes subject to the limitations inherent in the Article 5 scenario.

PRESIDENT KEITH: While you were interrupted, Mr. Willis, this is not a final figure, but you have tonight another seven or eight minutes to go, if you just want to take that into account, but obviously you can proceed again in the morning. I just thought in terms of the timing.

(Pause.)

MR. WILLIS: Mr. President, I could conclude right now.

PRESIDENT KEITH: It's up to you.

MR. WILLIS: This is a convenient place to interrupt and resume tomorrow morning.

PRESIDENT KEITH: Thank you. I didn't mean to suggest that you should stop then, but if you have completed--

MR. WILLIS: I think it's a convenient point.
PRESIDENT KEITH: Could I actually just ask one question about the point you were making, and I think you've already made it really, and it goes to some of the words that were used in some of those decisions you referred us to. One thing I hadn't really focused on until we were being taken to the words again of 1502(3)(a) and so on, because we did look at them closely sometime back, is just the verbs because they are coercive verbs, aren't they? Ground, expropriate, approve, and pose. They're words that relate much more as you say to, on the face of it, the sovereign powers than to management or commercial or consensual activities.

MR. WILLIS: Yes, they are words that would be definitely associated with the exercise of public authority, state power.

PRESIDENT KEITH: Well, I sort of focused on it earlier today when I was reading out approved commercial transactions because obviously Canada Post enters into a lot of commercial transactions, but you would say that approving commercial transactions is a quite different kind of thing. It is the functions of competition or Securities Commission or something of that sort.
MR. WILLIS: Yes, Mr. President, and I will be coming back to this tomorrow, and I will be responding to some of the other comments made today by Mr. Wisner, but certainly one of the points I will be making is that the approval of commercial transactions and the conclusion of commercial contribution transactions are definitely two different things.

PRESIDENT KEITH: Well, if that is a convenient time, we will start again at nine in the morning. Thank you.

(Whereupon, at 5:50 p.m., the hearing was adjourned.)
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