08:22:01 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. :
:
- x Volume 5

HEARING ON THE MERITS

Friday, December 16, 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

08:22:01 Also Present:

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Secretary to the Tribunal

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08:22:01 C O N T E N T S

08:39:10 1 P R O C E E D I N G S

2 PRESIDENT KEITH: Good morning,

3 Mr. Willis.

4 CONTINUED CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

5 MR. WILLIS: Before I begin, I should

6 mention that our representatives here this morning

7 are Mr. de Boer and Francine Conn.

8 PRESIDENT KEITH: Mr. Appleton, do you

9 want to indicate?

10 MR. APPLETON: Sir Kenneth, do you want us

11 to identify again who our business representative

12 is for the record?

PRESIDENT KEITH: Yes.

MR. APPLETON: And again, it is Mr. Shehata beside me, and he is the sole business representative of UPS here today.

MR. WILLIS: And the other preliminary point is that our understanding is that this is a public hearing this morning.

When we broke off yesterday, I said I would be making some comments on Mr. Wisner's intervention yesterday, particularly his discussion

09:07:29 with Mr. Fortier on the scope of the various provisions of Chapter 15. And as a general--I will begin with a couple of general observations that the whole approach with the overlapping Venn diagrams and the use of the cumulative principle, and also the table we saw up on the screen with various nondiscrimination provisions in the NAFTA all put together, the thrust of all this is to jumble and blur distinctions that are critical to a proper interpretation.

The Venn diagram approach, as we heard it yesterday, takes overlap to the point where the coherence of the Treaty scheme simply breaks down. It has the drafters essentially saying the same

things over and over again, in successive clauses and subclauses, where it's obvious they meant to deal with different things and different situations.

Now, we have no quarrel with the cumulative principle properly applied. What it really means is that the same facts can have a double aspect. From one point of view, something

09:08:46 might be a tort. From another point of view it might be a breach of contract; or in a trade law context, somebody might be a service from one point of view, and it might also be a good from another point of view. And for that reason, it may well be subject to more than one legal rule. And that makes perfect sense. It's accepted.

But what the cumulative principle is not is a pretext for duplicative interpretation or redundancy because that would be inconsistent with the effectiveness principle in the interpretation of treaties, effet utile doctrine, and that's how the claimant is trying to apply and distort the principle.

And they're saying, for instance, that just because we have paragraph (d) in Article 1502 to cover competition issues and just because that's

not arbitrable, it doesn't mean that all these competition issues are not covered to exactly the same extent by paragraph (a) through Article 1102, and that everything a government monopoly does, according to the claimant's theory, is an exercise

09:09:59 of governmental authority.

So, we end up with a situation of complete duplication between paragraph (a) and paragraph (d).

But surely the reason behind all the boilerplate in paragraph (d) on competition has to be that these issues are not already covered in paragraph (a), because otherwise paragraph (d) would be redundant, and that's not good interpretation.

And in the case of a state enterprise that is also a monopoly, that would also be complete duplication on the claimant's theory between Article 1503(2) and 1503(3).

At bottom, the problem with the whole approach is that it depends on an interpretation of governmental authority that's so wide that it stretches the language beyond what it can reasonably bear and deprives it of any real

meaning. Obviously, if you remove the governmental proviso, the governmental authority proviso, as a meaningful boundary on the application of

09:11:11 1502(3)(a), the potential for overlap with the other paragraphs explodes, and this is what the Venn diagrams are all about. But, of course, even this would not make the case for UPS because they would still have to rely on fallacious interpretations of Articles 1102 and 1105, which my colleagues will be discussing later on.

Now, Mr. Wisner suggested an alternative argument, and it was that these dealings we're concerned with here are not garden variety transactions. He said this was so because the network was created by the government, and only the government could set up this kind of operation. But the fact that the postal operation may be unique or sui generis doesn't make the entire postal operation an exercise of delegated governmental authority. That really would not be a reasonable ordinary language interpretation of the Treaty language at all.

Now, he says only the government could do this. In other words, only the government could

22 establish a legal monopoly, as it has the

09:12:33 1 recognized right to do under paragraph one of
2 Article 1502, and that's true; only the government
3 can establish a legal monopoly. But of all the
4 transactions and operations of a legal monopoly or
5 a mixed monopoly in competitive enterprise are
6 automatically an exercise of delegated governmental
7 authority just because only the government could
8 establish this operation, then most of the wording
9 of 1502(3)(a) would be superfluous. And at the
10 risk of repetition, I will be coming back to this
11 point because it's fundamental.
12 I was talking yesterday about the argument
13 in the claimant's memorial based on what it calls
14 general and specific grants of authority to Canada
15 Post. And as it explains the position, the general
16 grant of authority to Canada Post is simply the
17 control over the right and terms of access to the
18 monopoly infrastructure through the general
19 provisions of the legislation. That's at 733.
20 But, Mr. President, decisions on access to the
21 postal network are commercial decisions, and
22 they're matters of corporate management. The

authority to manage the monopoly, as I said yesterday, is inherent in the grant of the monopoly, and otherwise the privilege could not be exercised.

The claimant's argument implies that everything a monopoly does is necessarily an exercise of delegated governmental authority; and as I just mentioned, that cannot be right because it would mean that most of the language in 1502(3)(a) would have no purpose.

And on Monday Mr. Appleton came back to the same theme in slightly different terms. He denied that we are dealing with purely commercial conduct because, he said, it involves conditions of access to a network that derives from governmental powers and governmental privileges. Again, this repeats the same point. Merely, because Canada Post has monopoly privileges, its operations all cease to be commercial; and that approach again would nullify the proviso in 1502(3)(a) by treating everything a monopoly does as governmental.

There is no delegation of governmental

09:15:16 1 authority in connection with the creation of the
2 monopoly. Parliament itself created the monopoly,
3 and it did so through sections 14 and 15 of the
4 Act, which provide for detailed inclusions and
5 exclusions. Parliament itself carved the courier
6 exemption, the principal courier exemption out of
7 the monopoly in section 15(e) by excluding urgent
8 letters of at least three times the ordinary postal
9 rate. There is authority to prescribe what is a
10 letter by regulations under section 19, but that
11 again is subject to the approval of the governing
12 council and is not something Canada Post could do
13 of its own volition.
14 Well, then the claimant's argument turns
15 to what it calls specific grants of authority.
16 There is a reference at paragraph 734 of the
17 memorial to the power to make regulations on
18 certain postal matters. There is no true
19 delegation here, I submit, because the regulations
20 entered into force only with the approval of the
21 Governor and council, in effect the executive
22 government. That approval is what brings them into

09:16:30 1 force.
2 In any event, the references to the

regulation-making section of the Act is really smoke and mirrors. None of the issues in this dispute turns on regulations made pursuant to section 19. There is no suggestion that any of the specific regulations referred to, such as regulations on postal meters and mailboxes, amounts to a breach of Chapter 11.

This part of the memorial also referred to statutory provisions such as Section 2 on locked postal boxes and section 57 on stamps, but again there was a complete failure to explain how these amount to a delegation of governmental authority or how their exercise can have breached Chapter 11.

So what, then, is the real import of all this recital of statutory and regulatory boilerplate? The message seems to be that because Canada Post is a statutory body and a public institution with powers and privileges derived from legislation, everything it does is sufficiently governmental to bring it within the terms of

09:17:46 1502(3)(a) and 1503(2). But everything that any statutory body does is ultimately based upon its legislation, and that would be true even of a private corporation. And if every act of a statutory body is necessarily an exercise of

delegated governmental authority, all of the limitations in these two provisions are absolutely meaningless and should have been left out. The arguments are overreaching and the conclusion is extravagant.

In the reply at paragraph 693 and the preceding heading, the claimant says Canada Post always acts under governmental authority, and in the next paragraph it says that none of Canada Post's acts are sufficiently commercial to lose their governmental nature.

In other words, we come back to the same circular point. The assertion the claimant puts before you is that everything Canada Post does is necessarily an exercise of governmental authority, and again if that were true, the limitations and conditions in both of these provisions could be

09:19:00 automatically and by definition fulfilled in every instance. They would be redundant and devoid of effect, and this cannot be right because it contradicts the basic principles of treaty interpretation.

ARBITRATOR CASS: Mr. Willis, I don't know if the microphone is picking this up. I might ask

just a couple of questions here.

When you say that essentially the alternative on the one hand is to treat everything that Canada Post does as governmental and on the other to have a very limited sphere, I wonder whether you would distinguish between a Canada Post decision on what to charge for delivery of a letter and a Canada Post decision on what terms to impose to allow access by another firm to its network.

Are those decisions in your view different sorts of decisions, or are they exactly the same sort?

MR. WILLIS: Well, I do see a difference. Of course, the all or nothing approach is really something that flows from the claimant's pleadings

09:20:17 rather than from our own approach, but the establishment of letter rates is something that's done by regulation, although with the approval of the governing council, so in that sense it's questionable whether there is a delegation of governmental authority there.

But what is certainly clear is that commercial decisions, management decisions on access to the network, those seem to me to be very clearly well to the commercial side of the line and

to be very definitely nongovernmental.

ARBITRATOR CASS: Let me ask for your help in reading the provision which you read yesterday about the delegation of governmental power where it says any regulatory exercise--"whenever such enterprise exercises any regulatory, administrative, or other governmental authority," and then it goes on to say, "such as the power to expropriate, grant licenses, approve commercial transaction or impose quotas, fees, or other charges."

And if I understood your argument

09:21:27 yesterday, we should import the word "regulatory" in front of the word "quota," in front of the word "fee," and in front of the word "charges." We should read this as if that word were implicit in each of those settings.

And I wanted to just make sure that I understood that argument correctly, and then, if possible, have you explain why that's the proper reading, why if they wanted to say that, the drafters could not have written that provision with those words included.

MR. WILLIS: Yes, that's a fair

interpretation of what I said. And the reasons are twofold. One is contextual interpretation, that the reference to quotas, fees, and other charges appears in as part of a group of examples, all of which involve regulatory authority, the kind of authority that only governments can impose on a coercive basis, if you like, a nonconsensual basis upon the private sector.

So, part of my answer why these references to fees and other charges don't refer to

09:22:50 contractual arrangements, to consensual arrangements, but rather to regulatory arrangements is the contextual, the setting in which these words appear.

And the other would be the use of the word impose. Again, this underlines that we're talking about something that's laid down by law, if you like, on the basis of state authority, rather than something that is a negotiated matter.

ARBITRATOR CASS: In trying to--I understand all of us sort of struggling with the language here and trying to make the best reading. In trying to make sense of that explanation of this all been examples of regulatory actions, why, then,

would they have the phrase "regulatory, administrative, or other" in describing this group of actions, if they're all examples of regulatory governmental behavior?

MR. WILLIS: Well, I think it's to--it's really--it's really a phrase that I think should be read as a whole rather than parsed and dissected into discrete elements, and I think it's the whole

09:24:23 phrase that conveys this idea of governmental authority of sovereign functions of the state, which alone and unlike private parties, can impose coercive requirements, exactions, taxes, things of the like.

So, I think the drafters meant to really not have this phrase dissected into or compartmentalized into different aspects, but wanted to convey a single idea through the aggregation of an entire phrase.

ARBITRATOR CASS: You see at least the reason why I'm struggling with this, because it does seem to me that if they wanted only to deal with the regulatory behaviors, that phrase would have been sufficient. When they add "regulatory, administrative, or other," it seems, at least to a first reading, to be a much broader set of

governmental authorities that they're referencing in these provisions both of 1503 and 1502.

MR. WILLIS: I think part of the reason they included more words is that regulatory alone might not have been understood. It might have been

09:25:47 understood to include only formal regulations, statutory regulations made by normally in Canada by the governor and council and really having the same status in law as the statute itself, whereas public administration involves various other forms of rulings and decrees. We saw that, for instance, when we were discussing yesterday the marketing board's decision, the agricultural marketing boards. Now, these were orders and fees and charges which they impose on a compulsory coercive basis, yet they didn't take the form of statutory regulations.

So, if they just used the word regulatory, it might have been misunderstood in some quarters and some contexts as referring only too narrowly to the promulgation of statutory regulations.

ARBITRATOR CASS: I may have a peculiar take on this. When I was active in the American Bar Association, I chaired administrative law and

regulatory practice, and over a period of about a decade we had repeated discussions about the right name for the section, so that there was a group

09:26:59 that wanted to emphasize the regulatory aspect. There was a group that wanted to exercise the administrative aspect. There was another group that wanted the word constitutional in the title.

And after--of course, like discussions of grading systems in school, discussions of the name of each section of the American Bar Association is a ritual that has to be done four times a year, so, over the periods of a decade I had 40 wonderful opportunities to hear people expound on the differences among these words, and they--at least most of them ascribe a serious difference between administrative and regulatory. They thought they connoted different sorts of activities, and the word "other" would seem to me to be yet broader and different from the other two.

MR. WILLIS: One of the points that's related to this is that I have talked and perhaps gone too far in adopting the terminology of the claimant, but talked about access to the network, but really this is not a magic formula or a magic

22 phrase. What at issue here is the sale of services

09:28:26 1 to other corporate actors.
2 ARBITRATOR CASS: Well, is it really the
3 sale of service? I mean, if Canada Post were
4 charging 50 cents for letters to some enterprises
5 and a dollar for letters for other enterprises,
6 that would be obviously a discrimination in the
7 sale of a good or service. If you're talking about
8 the ability of another enterprise to contract, to
9 use an entire network of services, isn't that
10 something different? I think earlier you said that
11 was a distinction, although not necessarily one you
12 would rest any decisional weight on.
13 MR. WILLIS: I'm not sure I really grasp
14 this because I think if there is an arrangement
15 to--contractual arrangement to make available the
16 facilities of the entire network on a continuing
17 basis, it's still a sale of services. It's
18 certainly a sale of something, and it's not goods.
19 ARBITRATOR CASS: Well, if Canada Post
20 were a government department, certainly the terms
21 on which it allowed other enterprises to use the
22 letter carriers, letter boxes, retail outlets, and

09:30:03 so on, if it adopted a regulation specifying which enterprises could and could not use those parts of the Canada Post network, that would seem to be a quintessential sort of governmental exercise of power, would it not?

MR. WILLIS: I wouldn't--I think in that event, it would, of course, be treated as a state organ, and these distinctions would not really be applicable. I'm not sure even in that event I would call that a quintessential exercise of governmental authority. It would still have a management and commercial flavor to it.

ARBITRATOR CASS: Thank you, Mr. Willis.

MR. WILLIS: And, of course, it is a difference that we should bear in mind throughout that CPC, through its incorporation and the details of it treatment under Canadian legislation is a commercial entity, and I will be coming back to that later on.

So, in a sense, we are reaching the bottom line. The question is, do any of the three claims that the claimant has based on Articles 1502(3)(a)

09:31:27 1 and 1502(3), in fact, involve delegated
2 governmental authority so as to bring them within
3 those provisions?
4 Now, the first and the most important of
5 these three claims is what the claimant calls the
6 discriminatory leveraging of the monopoly
7 infrastructure, and the language, of course, is
8 theirs and not ours. Other members of our team
9 will be dealing with facts. What is obvious is
10 that the entire matter falls on the commercial and
11 not the governmental side of the line, and is
12 therefore outside the scope of the two relevant
13 provisions of Chapter 15.
14 Costing is commercial. Pricing is
15 commercial. They are quintessentially commercial.
16 The management of the corporate assets, including
17 the so-called monopoly infrastructure is inherently
18 a matter of internal management, as it would be for
19 any corporation. There is nothing in these
20 functions that is by nature governmental or that
21 corresponds to any of the concrete examples of
22 governmental authority in the Treaty.

09:32:44 1 Now, the activities involved in the
2 so-called leveraging claim are the commercial
3 practices of Canada Post where it competes with

private sector couriers. I said early on that the test is whether the Act is something that in the ordinary course could be done by a private party without any special authorization by government, in which case it's not something done in the exercise of delegated governmental authority.

Not only could the competitive activities in this case be carried on by private parties, they are, in fact, carried on by the claimant itself; and if they were not, the dispute would not exist.

Now, the same is true of the Fritz Starber claim that a bid was unfairly denied. The subject matter of the claim is a decision not to pursue negotiations about a possible commercial contract. The nature of the act was managerial and commercial. It did not depend on delegated governmental authority within the meaning of the Treaty provisions.

And finally, there is the claim about

09:33:54 Canada Post's failure to collect duties and taxes and to perform other Customs responsibilities under the Postal Imports Agreement. Now, here, in contrast to the other two claims, there is a formal instrument of delegation such as note 45 would lead

one to expect. And the collection of duties and taxes under the Postal Imports Agreement is arguably an exercise of delegated governmental authority.

But with the claim with respect to the collection of duties and taxes fails on other grounds, as my colleagues will explain, as a procurement. In other words, the services under the agreement--in other respects, rather, aside from the collection of duties and taxes, the services under the agreement are purely administrative. Canada Post provides administrative services to Customs in the clearance process, but there is no delegation of legal powers or enforcement authority that would be characterized as governmental. They collect duties and taxes, but they're not responsible for the

09:35:05 assessments, and the functions of inspection and seizure, where necessary, are carried out by the Customs authorities and not by Canada Post.

Finally, Mr. President and Members of the Tribunal, I will add a word on the nature of the obligation imposed on Canada in Articles 1502 and 1503 in cases where, in fact, it applies, where delegated governmental authority is being

exercised. One of the themes of the claimant's case is that the supervision of Canada Post is deficient and fails to meet the standard required by the Treaty.

Now, first an observation about the shifting sands of the claimant's argument. There is a contradiction that runs through its pleadings on all this because when it's a matter of arguing that CPC or Canada Post exercises delegated governmental authority or as a state organ, we hear nothing of government control. But when it's a matter of arguing that Canada has not lived up to its obligations, all this disappears from view, and we are presented with a picture of Canada Post that

09:36:21 is left entirely to its own devices.

In any event, the requirement is that each party shall ensure through regulatory control, administrative supervision, and the application of other measures that its state enterprises and monopolies comply with the relevant provisions.

There are two main points about this wording. First, it's an obligation of result. It simply requires Canada to ensure that the relevant provisions are not violated. Second, the Treaty

language gives complete flexibility about how this result is achieved. It leaves the means entirely up to the discretion of each party.

And finally, a reminder, though the point may be obvious, the obligation on Canada under these provisions is subject to investor-state arbitration only where the alleged breach relates to section (a) of Chapter 11 given the findings in the Award on jurisdiction.

I have one additional point on Chapter 15 arising out of Mr. Wisner's argument a couple of days ago. Now, this point relates to the arguments

09:37:53 on contractual preferences in favor of Purolator. Mr. Whitehall will deal with the substance of the argument, including the facts. My point here is that as a matter of law, the plain intent of the NAFTA is to deal with this kind of claim under specific clauses of 1502 and 1503 that are not subject to Chapter 11 arbitration. And I'm referring, of course, to the Articles 1502(3)(c) and 1503(3) which provide for nondiscriminatory treatment in the purchase and sale of goods and services by monopolies and state enterprises.

I'm going to turn now, with your permission, from Chapter 15 to my second group of

arguments, and these concern the claimant's contention that all the conditions in Chapter 15 that I have just been discussing are ultimately irrelevant in the light of the general rules on attribution in the law of state responsibility.

The claimant says that Canada Post is a state organ within the meaning of Article 4 of the ILC Articles on State Responsibility, and that Canada is therefore unconditionally responsible

09:39:11 under the NAFTA for everything that Canada Post does without with regard to the limitations of Chapter 15; and those Articles, they say, do no more than supplement the state responsibility of Canada by superimposing an obligation of oversight to ensure that breaches do not occur.

I will begin and, in a sense, I will end by observing that this is an untenable theory because it leaves the key language of Chapter 15 with no practical meaning. If Canada Post acted in a manner inconsistent with Chapter 11, according to the claimant, Canada would automatically be liable independently of Chapter 15, and if that were so, it would add nothing to say that there's a second breach because Canada failed to prevent the first

breach by supervising Canada Post.

If Canada is responsible for Chapter 11 breaches by Canada Post, whether or not it was exercising delegated governmental authority as described in the detailed terms of Chapter 15, then those terms would be irrelevant and superfluous. Articles 1502(3)(a) and 1503(2) would be beside the

09:40:33 point. And that is simply inadmissible in the interpretation and application of the Treaty, as it would be in the case of domestic legislation.

ARBITRATOR CASS: Mr. Willis, correct me if I'm wrong, I thought I understood Mr. Wisner's argument to be that only if we found Canada Post to be a state organ, so unlike the usual state enterprise, that it had so much more authority delegated to it and so much less supervision from government, that we should treat it as if it were essentially still a government department, and that his argument that 1102 essentially applied directly depended on that, leaving Article 15 dealing with particular delegations for settings where other Crown corporations or other state entities or parastatal entities were an issue that had a less full set of government powers delegated to it. Did

I misunderstood his argument?

MR. WILLIS: I don't think so. The point really is that it comes to the same thing because, as recognized by the claimant yesterday, the majority of the Crown corporations are, in fact,

09:42:05 agents of the Crown in the same situation as Canada Post. Canada Post is not atypical. The Annex 1505 says that the state enterprises provisions as related to Canada, essentially they deal with Crown corporations. Most of those Crown corporations are Crown agents; they're not much different from Canada Post.

So, I think in effect, the arguments of Mr. Wisner would eviscerate the language of Chapter 15 and leave it with very little effect.

ARBITRATOR CASS: I appreciate that if all Crown corporations and all state enterprises that were dealt with under NAFTA were in the same situation as Canada Post that there would be very little left to deal with in Article 15. I thought I was hearing Mr. Wisner say yesterday, and again I might have misunderstood, I thought that he was saying that there was a series of distinctions in the amount of authority delegated not only in Canada, but elsewhere to entities that formally

were corporatized or formally were privatized and that Canada Post was at one extreme of this. I

09:43:39 thought that was his argument.

MR. WILLIS: Well, certainly if that was his argument, I would say that it's incorrect because Canada Post is actually at the commercial end of the spectrum. They have more independence and autonomy from government than most other Crown corporations, and I will be coming to the provisions of the Financial Administration Act that underline that autonomy.

Does that answer your question, sir?

ARBITRATOR CASS: Thank you.

MR. WILLIS: Now, beyond the principle of effectiveness in the interpretation of treaties, the ILC Articles on State Responsibility provide two answers to the claimant's argument. First and foremost, the Treaty takes precedence, and that's under the lex specialis principle, and this is a complete answer in itself. But to complete the picture, I will add a second consideration, that Canada Post is not, in fact, a state organ within the meaning of ILC Article 4.

The decisive answer is in the principle of

09:44:53 lex specialis, and so I will begin with that.

The lex specialis principle is set out in Article 55 of the ILC Articles, and it simply means that where the parties have dealt by Treaty with something covered in a treaty in the Articles it's the treaty that governs. Article 55 states, in part, these Articles do not apply where and to the extent that the content or implementation of the international responsibility of a state are governed by special rules of international law. And if, therefore, a treaty stipulates how and when its provisions apply to state enterprises and monopolies, it is the Treaty that governs and not the ILC Articles. And for this reason the ILC commentary points out that the present Articles operate in a residual way.

Chapter 15 spells out in detail the conditions under which the parties are responsible for ensuring that these entities comply with Chapter 11. It makes nonsense of these provisions to say that the parties are also responsible to ensure that these entities comply with Chapter 11,

09:46:14 1 even when the stipulated conditions are not met.
2 Now, it's no answer to say that Chapter 15
3 merely supplements the obligations of the parties
4 under the general law of state responsibility.
5 According to the claimant, in situations where
6 Canada Post is exercising governmental authority,
7 Canada would be responsible to ensure its
8 compliance as a matter of customary international
9 law, and it would be also responsible to ensure its
10 compliance on the basis of Articles 1502 and 1503.
11 This, I suggest, is redundancy, pure and simple.
12 It supplements nothing because it adds nothing.
13 Then what about situations where Canada
14 Post is not acting under delegated governmental
15 authority? Now, here the claimant's argument would
16 mean that the obligation to ensure compliance is as
17 strict and complete as when it is exercising
18 governmental authority. In other words, it would
19 make no difference at all whether Canada Post was
20 acting under delegated governmental authority or
21 not. Canada's responsibility under the Treaty
22 would be identical in each situation.

09:47:37 1 The language of Articles 1502(3)(a) and
2 1503(2), and the distinctions obviously intended by
3 that language would be deprived of any utility or
4 effect.
5 So, the claimant's state responsibility
6 theory leads to redundancy in one set of
7 situations, and to an outright conflict with the
8 Treaty in the other. The ILC Commentary says there
9 must be some actual inconsistency before the lex
10 specialis principle comes into effect. There is, I
11 submit, a fundamental inconsistency between the
12 provision that limits responsibility to a carefully
13 defined set of circumstances, and one that provides
14 for unlimited responsibility in any and all
15 circumstances. In the first case, a party will not
16 be responsible for compliance outside the specified
17 circumstances, and in the second case it will. And
18 that's about as direct a conflict as one could
19 find.
20 Now, the claimant's reply raises a cry of
21 alarm. It says that Canada's arguments on this
22 point amount to an attempt to reduce state

09:48:57 1 responsibility, whereas in their view, the purpose
2 of Chapter 15 is to enhance it. I suggest that the

real objective of Chapter 15 is neither. It's a pragmatic objective. The aim is to identify the situations where the compliance of state enterprises is essential and to require compliance in those cases.

And Chapter 15 does supplement the rest of the NAFTA for state enterprises and monopolies, but not by disregarding the ordinary meaning of the two provisions that refer to delegated governmental authority. Rather, it supplements the NAFTA through the specific rules in the remaining parts of 1502 and 1503, such as the provisions on commercial considerations and nondiscriminatory behavior and anticompetition.

Nothing is lost from a pragmatic perspective by defining exactly when and to what extent these entities are to be made subject to NAFTA, and then adding these additional rules of specific application. Nothing is lost, and a great deal is gained in terms of clarity and certainty of

09:50:19 application.

Now, the claimant says--that's in the reply at 481 and 2--that Canada had ample opportunity to specify reservations and exceptions

to the applicability of Chapter 11 to Canada Post by way of Article 1108 or the Annexes one and two to the NAFTA, and that we failed to use this opportunity. But there was no need to specify reservations or exceptions. Canada was satisfied with the extent of its NAFTA responsibility, as defined in Chapter 15.

And then the claimant asks, in effect, well, why did the parties specify exceptions to procurement and subsidies by state enterprises in Article 1108 if Chapter 11 does not apply in the first place? But the short answer to that clearly is that Chapter 11 does apply, but it applies through and subject to the limitations of Chapter 15.

The claimant sees an analogy in the GATT Liquor Boards case which is from the pre-WTO days, it's 1988. And it says the panel rejected a

09:51:46 Canadian contention that Article 17 of the GATT on state trading enterprises implicitly excluded Article III on national treatment, and they say further that Canada is making essentially the same point here. Well, this argument takes a considerable leap of faith or imagination or both. In fact, the panel determined at paragraph 426 that

it was not necessary to decide the Article III issue, and it then added an obiter dictum. It saw great force in the argument that Article III applied based on a specific reference to procurement for commercial purposes in Article--okay. I was looking for the slide. It didn't come up.

So, the panel determined at paragraph 426 that it was not necessary to decide the Article III issue. It then added an obiter dictum that it saw great force in the argument that Article III applied based on a specific reference to procurement for commercial purposes in Article III:8(b).

Now, the language in the situations are

09:53:16 worlds apart. There is no limiting language in GATT Article XVII which is comparable to the delegated authority proviso in Chapter 15. There is, in other words, a "wherever" clause in both the relevant provisions of Chapter 15, but there is none in GATT Article XVII. GATT Article XVII actually parallels Article 1503(3) in a loose way. It requires state enterprises to follow nondiscriminatory practices in the purchase and

sales in the relevant market.

Now, Mr. President and Members of the Tribunal, I will turn now to my final point. The entire argument that Canada Post is subject to Chapter 11, apart from the conditions of Chapter 15 is based on a false premise, that Canada Post is properly considered as a state organ under the Article 4 of the ILC Articles rather than as a parastatal entity under Article 5. And the premise is not only false, but surprising in light of the parallels which the claimant itself has drawn between the principles of ILC Article 5 and those of Articles 1502(3)(a) and 1503(2).

09:54:58 And one of the problems with the state organ argument is it effectively puts two hats on Canada Post because, on the one hand, they're treated as a competing investment, and on the other hand they're treated as a party, and that leads to a number of--a good deal of confusion and anomalous results which will become apparent when Chapter 11 is discussed later on. But I will begin with a few observations about the status of Canada Post under Canadian legislation.

When arguing that the corporation is a state organ, the claimant has sometimes given a

false impression by pointing to one side of the ledger at the expense of the other, putting all the emphasis on government control and none on the respects in which the corporation is autonomous and distinct from the core government. But, of course, when the issue the alleged lack of supervision under Chapter 15, the spin is exactly the opposite.

And yet, even with these contradictions, the relatively independent status of the corporation emerges in the description of

09:56:16 paragraphs 48 and following of the claimant's memorial, and this, of course, is why the old Post Office Department was transformed into the corporation which we have today. For example, the memorial tells us that Canada Post exists outside the administrative structure of government and is organized and operated on a commercial basis. It has the same corporate powers as those provided to other Canadian corporations, and its structure parallels that of private corporations.

As well, it is controlled under the Financial Administration Act, the umbrella housekeeping legislation at the federal level, by its inclusion in Schedule III Part II which is the

vehicle for the control of the most independent commercial Crown corporations. According to Subsection 35 of the Act, this schedule is reserved to the corporations that operate in a competitive environment, are not ordinarily dependent on operating appropriations, ordinarily earn a return on equity, and have a reasonable expectation of paying dividends.

09:57:42 Most obvious of all, of course, as a Crown corporation, Canada Post has its own independent legal personality. But these provisions of the Financial Administration Act show that Canada Post actually is at the more independent, more autonomous, and more commercially oriented end of the spectrum of Crown corporations. It shows that the change from a Post Office Department to a Crown corporation is a real one. It's a substantive change. Contrary to Mr. Appleton's remarks on Monday, it is not a cloak. A commercial Crown corporation operates in a different environment and according to different rules. Its performance and efficiency is measured--are measured by commercial criteria quite unlike a government department.

Now, we do not disregard the other side of the ledger. There is government ownership and

control, there is potential for directive, there is public purposes. Like most other Crown corporations, it's an agent of the Crown, and this is a status that underpins the tax exemptions it enjoys, though no longer from federal income tax.

09:59:06 Crown agent status--I put up on the screen a list of federal Crown corporations, those which are agents of the Crown and those which are not. This is based on information available on the Treasury Board Web site, some if which we saw yesterday, and it is interesting to note first that the majority are agents of the Crown in the Canadian system, and that also many of the most important ones are agents of the Crown, such as the Canadian Broadcasting Corporation, the National Capital Commission, Export Development Bank, Atomic Energy of Canadia Limited, et cetera.

Now, I referred to the other side of the ledger, that it's subject to Financial Administration Act controls, and it has Crown agent status. Crown agent status is the reflection in domestic law of state control, and, of course, Canada Post is subject to extensive regulatory controls.

But this is not sufficient to make an independent legal entity a state organ. In the recent final award in Waste Management II, a

10:00:51 Tribunal chaired by Professor Crawford dealt with the role of a development bank partly owned and substantially controlled by Mexican Government agencies. The Tribunal was prepared to assume for the sake of argument--that's at paragraph 102--that its acts were attributable to the state, but it made this important observation at paragraph 75: "The mere fact that a separate entity is majority-owned or substantially controlled by the state does not make it, ipso facto, an organ of the state."

The legal basis of Crown agent status, in other words, is control, and even substantial control of a separate entity, according to this award, does not suffice to make it a state organ under general international law. The legal effect, the legal significance of Crown agent status is essentially immunity from domestic legislation that is not binding on the Crown. And this is equally irrelevant to the question of attribution under international law.

If anything, Crown agent status serves to

10:02:17 show that a corporation is not an integral part of the core government. A principal and an agent are separate and distinct. It would not be meaningful or even possible to speak of a government department as an agent of the Crown because it is the Crown. State enterprises can be Crown agents, but the central departments of government cannot.

The claimant also cites paragraph 5(2)(e) which requires Canada Post to maintain a corporate identity program reflecting its role as an institution of the Government of Canada. Well, of course, it is an institution of the Government of Canada. It's a federally-owned Crown corporation which is what makes it a state enterprise under Annex 1505 and brings it under Chapter 15.

And the description in Subsection 5(2)(e) must be understood in its context. The provision is not concerned with the legal status of Canada Post, but with a corporate identity program designed to project its character as the most pervasive federal presence throughout the country.

The claimant--and this is in the memorial

10:03:39 at paragraphs 416 and following--the claimant says that Canada Post is an organ of the state by virtue of paragraph two of Article 4 of the ILC Articles, which provides that a state organ includes any entity with that status in accordance with the internal law of a state.

Now, this argument is inconsistent with the ILC Commentary I will be reading in just a moment which provides unequivocally that when it comes to state enterprises, international law does generally recognize their separate status. Normally the internal law of the state would establish an entity as a state organ by making it an integral part of the core government, and it creates the opposite implication by not only giving it an independent legal personality, but also, and here I quote again from the UPS memorial: "Setting it up as a corporation outside the administrative structure of government and organized and operated on a commercial basis with a structure that parallels that of private corporations." These arrangements imply, as a matter of Canadian law,

10:04:59 1 that it is not part of the core government and,
2 therefore, not an organ of the state.
3 The commentary in paragraph 11 under
4 Article 4 also makes the obvious point that the
5 internal law of a state may not classify
6 exhaustively or at all which entities have the
7 status of organs, in which case internal law will
8 not itself perform the task of classification. And
9 in those cases, of course, paragraph two of Article
10 4 has no application.
11 And in reality, this is the situation in
12 Canada. We have no legislation that explicitly
13 identifies state organs in a way that would be
14 decisive for purposes of international law. I
15 would suggest, however, that in the Canadian
16 system, state organs would be limited to the
17 departments and central agencies in Schedule 1 to
18 the Financial Administration Act, in other words,
19 what has been referred to as the core government.
20 Now, when all this is put in the balance,
21 the question is whether Canada Post fits most
22 naturally into the ILC scheme under the heading of

10:06:27 1 Article 4 on state organs, or under Article 5 on
2 parastatal entities, and the claimant comes close
3 to answering this question itself. At paragraph

737 and following of the memorial, the claimant looks to the commentary under Article 5 and not Article 4 to explain the meaning of governmental authority in Chapter 15. Article 5, by its terms, does not deal with state organs. And they come back to the same point in paragraph 472 of the reply.

This would make no sense at all if Article 5 were not the relevant ILC provision with respect to state enterprises and monopolies covered by Chapter 15, including Canada Post.

In any event, Article 5 is the correct classification. The delineation between Articles 4 and 5 is brought into sharp relief by a passage in the commentary, in the ILC Commentary to Article 8, which deals with conduct directed or controlled by a state. I will quote from paragraph six of this commentary at length:

"Questions arise with respect to the

10:07:52 conduct of companies or enterprises which are state-owned and controlled." And then it goes on to say, "International law acknowledges the general separateness of corporate entities at the national level, except in those cases where the corporate

veil is a mere device or a vehicle for fraud or evasion. Since corporate entities, although owned by and in that sense subject to the control of the state, are considered to be separate, prima facie their conduct in carrying on their activities is not attributable to the state unless they are exercising elements of governmental authority within the meaning of Article 5."

And this is confirmed by the commentary under Article 5 itself, which refers to public corporations, semi-public entities, and public agencies of various kinds. It's clear that state corporations are included among the parastatal entities the Article is intended to cover.

Now, again and again on this topic of state organs, the claimant cites cases that dealt with different points and different Treaty

10:09:07 language. For instance, the Hyatt Award by the Iran claims Tribunal is invoked in the memorial paragraph. That's Tab 111. It's irrelevant, in fact. On the one hand, it dealt with an entity, the Foundation for the Oppressed that was set up to manage confiscated properties for public purposes, and endowed with investigative and prosecutorial powers. That's at paragraph 97, and a critical

distinction, the governing Treaty, the Algiers Accord defined Iran to include any entity controlled by the Government of Iran.

The ADF Final Award is invoked in the reply. That's at paragraphs 455 and 456, and this citation is even more puzzling. The Tribunal was referred to ILC Article 4 as a factor supporting its determination on the basis of specific NAFTA provisions that procurement obligations could extend to states and provinces, subject to their listing in the appropriate Chapter 10 Annex. No one disputes that the units of a federal state can engage the international responsibility of a state as indicated in Article 4. The federal/state

10:10:30 question is simply without relevance to the issues in this case.

The claimant also cites the decision in the WTO Periodicals case in this connection. And to clear up any confusion--this is Tab 66 in the investor's Book of Authorities. To clear up any confusion, I should point out that this is, in fact, a first instance panel decision and not an appellate body decision. In considering whether the rates for periodical delivery were regulations

or requirements under GATT Article III:4 on the treatment of imported products, the panel noted that Canada Post was subject to government control and directive.

And it also referred at paragraph 5.36 to the existence of incentives for Canada Post to comply with government policy. And it stated: "In view of the control exercised by the Canadian Government on noncommercial activities of Canada Post, we can reasonably assume that sufficient incentives exist for Canada Post to maintain the existing pricing policy on periodicals."

10:11:58 Now, the panel was plainly not concerned with the delineation between state organs under Article 4 and parastatal entities under Article 5, which is the focal point of this debate. The considerations it invokes, compliance, incentive, direction and control, might point toward Article 8 of the ILC Articles dealing with conduct directed or controlled by a state, but they do not support the proposition that Canada Post is a state organ under Article 4. Nor do they support the proposition that Canada Post exercise a delegated governmental authority either for the purposes of

ILC Article 5 or for the purpose of the relevant provisions of Chapter 15. It's one thing to be subject to the direction or control of the government, and quite another to exercise authority that has been delegated by the government.

And one final point, just to clear the decks. On Monday, Mr. Appleton referred to jurisprudence of the Federal Court of Canada to support his contention that Canada Post is a state organ.

10:13:21 Now, the domestic Canadian case law and the scope of judicial review is simply not applicable to questions of state responsibility under general international law. The more recent of the cases he mentioned was the Canadian Daily Newspaper Association case, tab 68, and here the court pointed out that the relevant phrase defining Federal Court jurisdiction in the Federal Court Act is defined broadly and extends, inter alia, to anybody exercising jurisdiction or powers conferred by Parliament.

So, quite apart from the fact that domestic law and international law are two different things, the broad definition bears no resemblance to the concept of state organs as used

in Article 4.

But, in fact, the case does warrant a closer look because, in fact, it undermines the very proposition it was cited to support. That Canada Post is part of the Government of Canada for any and all purposes. Citing a decision of the Federal Court of Appeal, the court distinguished

10:14:34 between decisions made in the context of commercial operations or in the exercise of the general powers of management and actions taken by virtue of specific powers conferred by statutory regulation. It was only and specifically because the decision at issue was an exercise of authority deriving from a regulation and not merely an exercise of the general powers of management that the court accepted jurisdiction.

Before concluding, Mr. President, I would like to sum up the basic points in my submission which have already been put before you in Mr. Whitehall's opening statement.

First, Articles 1502(3) and 1503(2) define the extent to which Chapter 11 of the NAFTA applies to state enterprises and monopolies.

Second, the concept of delegated

18 governmental authority in those provisions, taking
19 into account both the general language and the two
20 lists of examples, designates powers of an
21 inherently sovereign nature, powers that private
22 parties could not ordinarily exercise in the

10:16:07 1 absence of a specific act of delegation by
2 governments. They do not include activities of a
3 commercial nature, which are addressed by other
4 clauses in Articles 1502 and 1503.
5 Third, the specific claims made by the
6 claimant under these two provisions are either
7 inherently commercial or involve purely
8 administrative responsibilities. As such, they
9 fall almost entirely outside the ambit of
10 1502(3)(a) and 1503(2). The one exception is the
11 collection of taxes and customs duties under the
12 Postal Imports Agreement, but as my colleagues will
13 argue, this is expressly excluded from
14 consideration as a procurement.
15 Fourth, the claimant's contention that
16 Canada is responsible under Chapter 11 for acts or
17 omissions that do not fall within Articles
18 1502(3)(a) and 1503(2) is unfounded. It would
19 deprive most of language of those provisions of any
20 effect. It fails to take into account the lex

specialis rule.

And finally, it fails to recognize that

10:17:29 Canada Post is properly characterized for the purpose of the ILC Rules not as a state organ, but as a parastatal entity under Article 5.

Mr. President, and Members of the Tribunal, that concludes my submissions. I would welcome any questions, and I would also point out that we have for distribution hard copies of the slides used in this argument.

ARBITRATOR CASS: Let me ask one question, Mr. Willis, respecting your argument on 1108 number seven. As I'm trying to make sense of the terminology on delegated governmental authority in Article 15, if, as I read it, the drafters of the NAFTA thought that procurement activities of a state enterprise were within the coverage of the delegated authority, and therefore needed an exception written into 1108, can you help me understand what the line is in terms of the nature of governmental authority covered by 15, since obviously procurement wouldn't be regulatory in the same sense as I understood you to be using that term previously.

10:19:13 1 You see the problem I'm having with the
2 language?
3 MR. WILLIS: Yes, and I think at the end
4 of the day my answer is what I gave, that this was
5 included for greater certainty and out of an
6 abundance of caution, just to be clear and
7 explicit. I don't think one should draw an au
8 contrario inference that these would--these matters
9 would otherwise be covered in Chapter 15.
10 And I think really when including this
11 what the drafters had their eye on in terms of
12 seeking this greater certainty was really Chapter
13 10 of the NAFTA.
14 ARBITRATOR CASS: Thank you.
15 PRESIDENT KEITH: I thank you, Mr. Willis.
16 Just as a matter of national pride, I was waiting
17 for another reference to that famous New Zealand
18 constitutional lawyer Peter Hogg, but we missed
19 out.
20 If I could add, he was born very near to
21 where Peter Jackson has just reinvented Manhattan.
22 Thank you, Mr. Willis. I think we have

10:20:34 1 Ms. Hillman, next.
2 (Brief recess.)
3 PRESIDENT KEITH: Yes, Ms. Hillman.
4 MS. HILLMAN: Thank you, Mr Chairman.
5 Mr. Chairman, Members of the Tribunal, my
6 presentation this morning is on Article 1102 of the
7 NAFTA. The majority of the claims brought by the
8 investor in this case are alleged violations of
9 1102, the national treatment obligation found in
10 Chapter 11.
11 Given the central role of this provision
12 in this dispute, Canada would like to take some
13 time this morning exploring the content of this
14 obligation and the legal test that it prescribes.
15 Canada and the investor have offered you
16 very different visions of this obligation, and the
17 test that arises out of it. On the one hand, the
18 investor's basic proposition is that national
19 treatment is a term of art that is not defined in
20 the NAFTA. And so, rather than deriving the
21 content and the scope of the national treatment
22 obligation from the text of Article 1102, the

10:34:08 1 investor draws selectively from cases decided by
2 the World Trade Organization and from its own view
3 of the NAFTA's overriding objectives to create a
4 test arising out of 1102 that bears no relation to
5 the language of that provision.
6 Canada submits that the national treatment
7 protection afforded in Chapter 11 is defined. It
8 is specifically defined, in fact, by the terms of
9 1102. In contrast to the investor's approach,
10 Canada presents the proper test, the test that is
11 true to the precise content of the national
12 treatment obligation articulated in Article 1102,
13 the test that also encapsulates the object and
14 purpose of Article 1102; namely, to prevent
15 nationality-based discrimination.
16 Article 1131 of the NAFTA sets out the law
17 governing this dispute. It requires this Tribunal
18 to decide the issues in this case in accordance
19 with the NAFTA and the applicable rules of
20 international law. The Vienna Convention on the
21 Law of Treaties sets out the customary
22 international law applicable in treaty

10:35:19 1 interpretation. Article 31 embodies the general
2 rule of treaty interpretation, and as we all know,
3 provides, in part, that a treaty shall be

interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose.

It is indisputable that Article 1102 must be interpreted in accordance with Article 31 of the Vienna Convention.

It is also indisputable that this interpretation--this requires an interpretation of the specific text or of the terms of that provision. The ordinary meaning of the terms of the obligation in Article 1102 establish that a party must accord investors and investments of investors of another party treatment no less favorable than it accords in like circumstances to its domestic investors or their investments. In my presentation today, I will explain how in this case in order for the investor to demonstrate a breach of Article 1102, it must establish three things in

10:36:25 relation to each alleged measure:

One, that Canada accorded treatment to UPS Canada and to a domestic investment; two, that the circumstances in which the treatments are accorded are like. In the context of a national treatment

obligation, this means that after a consideration of the circumstances surrounding the treatment, the investor must show the only material difference between the two investments is that one is domestic and one is foreign. And three, the investor must show that UPS receives the less favorable of the two treatments.

The investor's interpretation of Article 1102 is not derived from the text of that provision, nor from the Article's context or the object and purpose of the NAFTA. In fact, the test that the investor proposes specifically avoids the terms of Article 1102. Instead, the investor attempts to support its interpretation by drawing on statements made in unrelated cases decided by panels charged with interpreting provisions of other agreements that use different words and cover

10:37:30 different subject matter. The investor performs these contortions in order to justify comparing itself with Canada Post. It seeks to make this comparison, despite the fact that Canada Post is by no means the entity that is in like circumstances with respect to UPS in relation to the measures in question.

There are entities that are in like circumstances with UPS Canada with respect to the alleged measures. These are Canadian-owned courier companies, not Canada's postal authority.

My presentation this morning will proceed as follows: First, I will rebut the investor's argument that the national treatment obligation is a term of art that is not defined in the NAFTA. I will present the obligation that is defined in Article 1102 and the legal test that it prescribes.

Second, I will demonstrate how the investor's interpretation of Article 1102 and the test that it proposes under that obligation are not supported by the text of the Treaty or its context and object and purpose.

10:38:37 Third, I will demonstrate that the investor's proposition that the phrase "treatment in like circumstances" means in the same business sector or in a competitive relationship in addition to not being supported by the text of the Article is not supported by previous NAFTA Chapter 11 decisions.

Fourth, I will demonstrate that the investor has misinterpreted and misapplied the concept of equality of competitive opportunities.

And finally, I will conclude by underlining the fundamental point that in this case the investor has not demonstrated nor has it even claimed that its investment would have been treated differently were it owned or controlled by a Canadian investor. Indeed, the facts show that Canadian-owned courier companies receive identical treatment to UPS Canada with respect to the measures at issue.

Turning now to the proper interpretation of Article 1102 and the test that it mandates.

Article 1102 is a national treatment

10:39:41 obligation. The broad object and purpose of national treatment obligations in international trade and investment agreements is to protect against discrimination based on nationality. There are a multitude of trade and investment treaties that contain some articulation of a national treatment obligation. These agreements deal with different subject matters. For example, disciplines on tariff measures related to goods usually contain a national treatment obligation. The primary example of this is Article III, paragraph four of the General Agreement on Tariffs

and Trade under the WTO, which provides in part that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

This provision calls for a comparison of

10:40:45 the treatment of imported products and like domestic products. There are also, of course, disciplines on nontariff barriers to trade in goods, and national treatment obligations can form part of these commitments, such as in Article 2.1 of the WTO agreement on Technical Barriers to Trade, the TBT agreement, and Article 904 of the NAFTA. Article 2.1 of the TBT agreement provides in part, "Members shall ensure that in respect of technical regulations, products imported from the territory of any member shall be accorded treatment no less favorable than accorded to like products of national origin."

Again, the treatment of imported products

is being compared to that of like products of domestic origin in the analysis of measures affecting goods. Article 904.3 of the NAFTA provides, "Each party shall, in respect of its standards-related measures, accord to goods and service providers of another party national treatment in accordance with Article 301, Market Access, or Article 1202, Cross-Border Trade in

10:41:55 Services, and treatment no less favorable than it accords to like goods, or in like circumstances to service providers, of any other country."

The language of subparagraph B is particularly interesting. It contrasts the national treatment approach for goods in the NAFTA with the national treatment approach for services. With respect to goods, this provision demonstrates, as seen in the TBT agreement and in the GATT, the national treatment protection for goods requires a comparison of like products. In contrast, the second clause of subparagraph B demonstrates that the analysis for service providers does not call for a comparison of the services and whether they are like, but rather whether or not they are receiving treatment in like circumstances.

The consideration of like circumstances in

the services context in Article 904 reflects the national treatment protection for services that is found in Article 1202 of the NAFTA. That Article provides that each party shall accord to service providers of another party treatment no less

10:43:06 favorable than it accords, in like circumstances, to its own service providers.

Therefore, what we see is that the national treatment analysis that must be undertaken under Article 1202 requires an assessment of the treatment in like circumstances according to foreign service providers on the one hand and domestic service providers on the other.

In the WTO General Agreement on Trade in Services, the GATS, the national treatment obligation is not the same as in Article 1202 of the NAFTA. Article XVII of the GATS provides in part, "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of another Member, in respect of all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and service

suppliers."

Market access obligations in the GATS, including the national treatment obligation, apply

10:44:11 only to the service sectors that are listed in the member's schedule. It's a positive indication system. Therefore, in order to apply this provision, the interpreter must turn to the service schedule to determine the service sector in which the service falls, and whether a member has taken any commitments with respect to the services in that category. If it has, then the question would be, is the treatment accorded to the domestic service supplier in that category less favorable than that accorded to the foreign service supplier in that category?

By way of final example of the particularities of national treatment obligations, we see that intellectual property disciplines also often contain national treatment obligations such as the one found in 1703 of the NAFTA, which provides in part that, "Each Party shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection and enforcement of all

intellectual property rights."

10:45:16 Here, the comparison is different again. The national treatment protection with respect to intellectual property requires a comparison between foreign and domestic nationals with respect to the protection and enforcement of intellectual property rights. This brief expose of various national treatment provisions demonstrates that in each of these agreements the parties have used different words to articulate the manner by which they want to prevent nationality-based discrimination. The provisions operate within the particular structure and context of each agreement. The words of each national treatment provision reflect the bargain that the parties have struck in relation to the particular subject matter.

So, while the underlying purpose of a national treatment provision in each of these treaties is to prevent discrimination against foreign nationals or their investments or their products or their goods or their intellectual property rights, it is the specific words of the obligation in each Treaty that defines the type of

10:46:21 comparison between foreign and domestic that must take place. And it defines the parties' intentions with respect to the scope and the content of the obligation.

This basic proposition was recognized by the WTO Appellate Body in the EC Asbestos case where it held because of textual difference, the term "like" could not be compared even as between two paragraphs of one provision in that case, GATT Article III:2 and GATT Article III:4.

Now, let's turn to the specific words of Article 1102 of the NAFTA. And if you'll permit me--

ARBITRATOR FORTIER: A little slower, please.

MS. HILLMAN: Certainly. Sorry.

They provide that each party shall accord to investors of another party treatment no less favorable than it accords in like circumstances to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale, or other disposition

10:47:26 1 of investments.

2 And the second paragraph provides roughly
3 the same, but with respect to investments of
4 investors.

5 And so the specific national treatment
6 protection agreed to by the parties to the NAFTA in
7 Chapter 11 as articulated by the language that they
8 negotiated is a commitment by each NAFTA party to
9 accord investors and investments of another party
10 treatment no less favorable than it accords in like
11 circumstances to its own investors and their
12 investments. The NAFTA Chapter 11 formulation of
13 the national treatment obligation calls for the
14 comparison of the treatment in like circumstances
15 afforded to, on the one hand, a foreign investor
16 investment, and on the other hand, a domestic
17 investor or investment. It calls for a comparison
18 of treatments. It does not call for a comparison
19 or an assessment of whether or not the foreign
20 investment and the domestic investment are like.

21 Therefore, to properly assess a claim
22 under Article 1102, a tribunal must determine

10:48:37 1 whether the measure at issue, de jure or de facto,

results in less favorable treatment of the foreign investor or its investment. To make such a finding, a tribunal must determine whether the alleged less favorable treatment accorded to the foreign investor or investment was accorded in like circumstances to the treatment accorded to the domestic investor or investment.

The use of the phrase "in like circumstances" in Article 1102 makes it clear that the negotiators contemplated a broad consideration of all of the facts and the conditions and the general environment surrounding the treatment. A tribunal should therefore take account of the entire context of the operation and activities of the respective investments or investors in relation to that treatment.

By the terms of this provision, we see that if a treatment accorded to the foreign investor on the one hand and the domestic investor on the other are not accorded in like circumstances, then there can be no violation of

10:49:47 Article 1102.

In conducting this comparison, a tribunal must keep in the forefront of its mind the fact that the object and purpose of this provision is to

weed out treatments that discriminate against foreign investors. That is the mischief that this Article is designed to address.

Moving now from the content of the obligation to the test that it prescribes.

The application of Article 1102 begins by considering the treatment accorded by a party to a foreign investment. Consideration is then given to the treatment accorded to a second investment, a domestic investment, where all the circumstances of according the treatment are like, the material circumstances, but the domestic, the second investment, is domestic. There is a breach of Article 1102 if, and only if, the foreign entity receives the less favorable of the two treatments.

And so now returning to the text of Article 1102, we see that three critical elements emerge from the language for the purposes of this

10:51:13 case. In order for the investor to demonstrate a breach, it must establish that Canada accorded treatment to UPS Canada and to a domestic investment.

It must establish that the circumstances in which the treatments are accorded are like, and

given, as I said, that the objective fundamentally of this provision is to weed out measures that discriminate against foreign investments. The circumstances will be like where the material facts surrounding the treatment are the same but for the second investment being a domestic investment.

And third, the investor must demonstrate that UPS Canada received the less favorable of these two treatments. It is the investor, of course, who bears the burden of establishing each of these three elements.

I would like to turn now to the investor's interpretation of Article 1102. In this section, I will demonstrate how the investor's interpretation and its proposed test are not supported by the text of that provision. At a starting point, of course,

10:52:27 we must recognize that in making the arguments that it has made, the investor is governed by the same language as is Canada; namely, the provision of Article 1102, which is now before you again on the slide.

Rather than turning to the text of this provision, which as we have seen has defined the scope and content of the obligation, the investor

asserts three things. It asserts that national treatment is a term of art, that national treatment is not defined in the NAFTA, and that the main influences on NAFTA Article 1102 are the identical--pardon me, equivalent and virtually identical provisions in Article III of the GATT governing goods and Article XVII of the GATS governing trad-in services, both of which, of course, are found under the WTO.

As I just demonstrated in my expose of various national treatment provisions, national treatment is defined differently in different agreements. It is not a term of art. It is defined in Article 1102 in the NAFTA Chapter 11,

10:53:39 and the articulation of national treatment in Article 1102 is by no means virtually identical to GATT Article III or GATS Article XVII.

Nonetheless, with these three basic propositions, the investor draws on WTO cases principally in the area of goods, and constructs an interpretation of Article 1102. The investor argues that the essence of Article 1102 is the protection of equality of competitive opportunities between domestic and foreign economic interests

defined in a treaty.

Based on this proposed interpretation, and not as we see on the text, the investor proposes the following test. The investor says that as a first step, the Tribunal must determine whether there is a competitive relationship between the two interests; and second, the Tribunal must determine whether there is equality of competitive opportunities within this relationship.

The investor argues that if there is a competitive relationship and if there isn't equality of competitive opportunities, then the

10:54:57 national treatment obligation under Article 1102 has been breached, but let us recall, as I stated earlier, of course, the Vienna Convention requires that a treaty be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms. The interpretation advocated by the investor doesn't arise out of the ordinary meaning of the terms of Article 1102 interpreted in good faith. The investor really makes no attempt to relate its test to the text of that provision, and I would say in fact specifically avoids the terms of that provision.

In addition, contrary to what the investor

argues, national treatment is defined in the NAFTA. It's defined every time a national treatment obligation arises. It's defined differently from Chapter to Chapter, and in Chapter 11 it's defined in Article 1102.

The Vienna Convention also stipulates that the context for the purpose of treaty interpretation shall comprise in addition to the text the Treaty's preamble and its Annex;

10:56:13 therefore, the first place to look for context within the text of a provision is within the provision itself, its title, its surrounding provisions. In addition to disregarding the plain meaning of the text, the investor has not sought context for its interpretation in the rest of Article 1102, its title, or the surrounding provisions of that Chapter.

The investor does make some effort to bring the NAFTA's object and purpose into its interpretation. In its written submissions and in Mr. Appleton's statements this week, they have pointed to Article 102 of the NAFTA, the objectives provision of the NAFTA, and have asserted that it establishes national treatment as an interpretive

principle. However, quite to the contrary, Article 102 tells us that national treatment is an obligation that is elaborated more specifically in the text of the NAFTA. Article 102 provides in part, "The objectives of this agreement, as elaborated more specifically through its principles and rules, including national treatment,

10:57:29 most-favored-nation treatment, and transparency, are to eliminate barriers to trade," et cetera, "as elaborated more specifically through its principles and rules, including national treatment."

So, rather than looking to the specific elaboration of national treatment in Article 1102 as contemplated by the objectives provision of the NAFTA, the investor has attempted to construct a meaning based on what it characterizes as the virtually identical provisions of GATT Article III and GATS Article XVII.

As we have seen, GATT Article III and GATS Article XVII use different terms, cover different subject matter. They operate in conjunction with the particular regimes set out in those agreements. GATT Article III is the national treatment obligation in agreement governing goods.

GATT Article III is concerned with the

19 importation of goods, their sale, offering for
20 sale, purchase, transportation, distribution, and
21 use. GATT Article III does not resemble Article
22 1102. It governs like products and relates to

10:59:00 1 directly competitive or substitutable products, not
2 treatment in like circumstances.
3 The NAFTA corollary of GATT Article III is
4 NAFTA Article 301 governing treatment for trade in
5 goods, not Article 1102. This difference of
6 language and subject matter clearly demonstrate
7 that GATT Article III is not relevant context for
8 interpreting Article 1102. And, indeed, this is
9 exactly what the Tribunal in the Methanex case
10 concluded when it rejected the investor in that
11 case, Methanex's, attempt to interpret Article 1102
12 using jurisprudence decided under GATT Article III.
13 The Tribunal noted that the term "like products,"
14 which plays a critical role in the application of
15 GATT Article III, appears nowhere in Article 1102.
16 Nowhere in Chapter 11, in fact.
17 The Tribunal held that, "International law
18 directs this Tribunal, first and foremost, to the
19 text. Here, the text and the drafters' intentions
20 which it manifests, show that trade provisions were

not to be transported into investment provisions."

Likewise, as we have seen, GATS Article

11:00:30 XVII does not resemble Article 1102. It uses different language and operates within a different structure and context.

In terms of context, it's important to note that services disciplines under the GATS and the NAFTA are structured very differently. The GATS covers matters that are found in Chapters 11, 12, 13, 14, 15, and 16 of the NAFTA. In addition, each agreement has its own particular set of obligations. In some respects the NAFTA goes further; in other respects the GATS goes further.

Specifically with regard to national treatment, the obligation itself which is set out in Article XVII of the GATS, operates in conjunction with each member's schedule. In these schedules, services are classified according to their nature, and this provides a preliminary indication of likeness. In other words, in order to be providing like services under the GATS, at a minimum, the services should fall within the same categorization. Services in different categories are presumed to be unlike a prime abord as a first

11:01:56 step.

Mr. Appleton has made repeated reference this week to a decision by the NAFTA Chapter 20 Tribunal in the Mexican cross-border trucking dispute. He has claimed that in that case the three NAFTA parties agreed that like circumstances in Chapter 12 of the NAFTA means the same thing as like services or like service providers in the GATS. He uses this alleged admission to that argue that if like circumstances means the same thing as like services, it presumably also means the same thing as like goods, and therefore, we can import the case law from the GATT, from the GATS, and have it directly applicable to our interpretation here under Article 1102.

And without spending too much time on this case, I would just like to say that the characterization of that case and the arguments that were made under it, I think, requires a bit of clarification.

First, we have filed Canada's submission in that case. There is no such statement by

11:03:01 1 Canada. Indeed, there is no reference to the GATS
2 at all.
3 Second, what the Tribunal said, in fact,
4 was that the parties do not, and I quote, "The
5 parties do not dispute that the term 'in like
6 circumstances' was intended to have a meaning that
7 was similar to like services and like service
8 providers."
9 But as I have explained, the term "like
10 circumstances" under the GATS is really only half
11 the story because Article XVII operates in
12 conjunction, of course, with the schedules.
13 Again, in his opening statement,
14 Mr. Appleton said that the GATS, and here I quote,
15 "The GATS gives us explicit guidance that like
16 service providers are competing service providers."
17 This is at page 75, line six of Monday's
18 transcript.
19 Under the GATS, WTO members, including all
20 three NAFTA parties, have included one
21 classification for postal services and a separate
22 classification for courier services. This, as I

11:04:13 1 said, is an indication that WTO members considered

these two categories of services to be unlike for the purposes of national treatment under the GATS.

So, if Mr. Appleton is correct, and the GATS gives us explicit guidance that like service providers are competing service providers, well, then, according to the GATS, not only are postal services and courier services unlike, but they're also not in competition.

The investor argues that GATS Article XVII is relevant for developing interpretation or an understanding of the national treatment obligation in Chapter 11. However, the GATS and the NAFTA use very different language. They operate within different structures. They operate within a different context. So, clearly, the GATS is of limited interpretive value.

In addition, to the extent that the GATS has any interpretive value to this dispute at all, it's, in fact, to demonstrate that the parties deem courier and postal services to be unlike.

So if I could be permitted to not put too

11:05:34 fine a point on this question, if the United States were to bring a GATS case against Canada in relation to a comparison of postal services and courier services, if this case was brought before

the WTO under GATS, UPS, U.S.--UPS via the U.S. would lose this case.

In summary, reliance on other provisions of other agreements that have been concluded by other parties and that deal with other subject matters, rather than looking to the plain meaning and context of the text at hand, is clearly contrary to the rule of interpretation under the Vienna Convention of the Law of Treaties. It's therefore Canada's submission that the interpretation of Article 1102 proposed by the investor should be rejected, as it bears no resemblance to the plain meaning of the terms of that provision read in good faith and in their context.

Next, I will explain how the test the investor proposes for determining like circumstances is not supported by previous NAFTA

11:06:48 tribunals.

As I discussed earlier, the words of Article 1102 are clear. The phrase "treatment no less favorable than it accords in like circumstances" calls for contextual analysis to determine whether the treatments in question were

less favorable for the claimant than for a domestic investor.

In other words, the Tribunal must look at the totality of the circumstances in which the treatment is accorded. The investor asserts that the Tribunal need only look at whether the two investments are in the same business sector or in a competitive relationship.

As a starting point, Canada notes that if the words "in like circumstances" were meant to mean in a competitive relationship, the drafters could have chosen words that indicate that, but they didn't.

To support its argument, the investor points to the fact that in Annex 2 of the NAFTA, the parties have set out their reservations, in

part, by reference to sectors. As an aside, however, I would note that the term sector in these Annexes, and you can see this if you turn to them, is used very broadly and more akin to the notion of subject matter, and this is clearly demonstrated by the fact that minority affairs and aboriginal affairs are both listed as sectors.

In any case, the investor argues that if the nonapplication of certain obligations is

defined in terms of economic subsectors, then the application or, pardon me, the applicable economic sector is also critical to the determination of like circumstances. As Canada has stated throughout its written submissions the fact that two investments operate in the same business sector, the fact they are in competition will be or may well be part of the analysis as to whether or not they are in like circumstances. Canada does not dispute that fact.

However, it's Canada's position that the investor's argument that if two businesses are in the same business sector, if they do compete, they

11:09:22 are necessarily in like circumstances is grossly simplistic, and it relieves the claimant, in fact, of its burden of proof. According to the investor, it must simply demonstrate some competition between UPS Canada and Canada Post, and then the burden shifts to Canada to demonstrate or to justify some sort of reason why there may be a difference in treatment. But there is no support for such an interpretation in the text, nor is there any support for this immediate shifting of the burden of proof.

Article 1102 requires the Tribunal to examine all of the factors surrounding the treatment, including, where relevant, such things as the nature of the two businesses, whether they share any characteristics beyond perhaps being in the same business sector, perhaps geographical characteristics, the purposes that those businesses serve within the community, and the policy context in which the treatments were accorded.

Indeed, previous cases interpreting Article 1102 have consistently ruled that it is not

enough for companies to compete in order to prove that they are receiving treatment in like circumstances. For instance, in the Loewen case, Loewen versus the United States, the Tribunal rejected the claimant's comparison of its funeral home business investment with a Mississippi-based funeral home business. They were both embroiled in litigation together.

In that case, the Canadian investor complained of discriminatory treatment within the Mississippi court system on the basis of a very high security for costs fee, and it was only required of foreign litigants in that case.

Although both funeral businesses involved

in litigation were in the same economic sector, they competed for the same market share, the Tribunal determined that Article 1102 required a comparison between the standard of treatment accorded to a claimant in the Mississippi courts and the standard of treatment accorded to a person in like situation to the claimant. In other words, a claimant and a respondent both equally in the

11:11:54 same business sector could not be compared for the purposes of like circumstances analysis.

In Feldman versus Mexico, the Tribunal rejected the argument that all resellers of cigarettes are relevant investors to compare, in spite of their competition in the same economic sector. This case concerns the tax refunds issued to exporters of cigarettes. The Tribunal held there are rationale bases for treating producers of cigarettes and resellers of cigarettes differently. These bases in that case included such things as better control over tax revenues, the discouragement of smuggling, the protection of intellectual property rights, and the prohibition of gray market sales.

Consequently, only resellers of

cigarettes, in spite of the fact that they compete directly with producers of cigarettes in the export market, were held to be the appropriate comparison in that case.

In a third case, ADF versus the United States, the Tribunal reviewed an Article 1102

11:13:17 case--claim, pardon me--in light of a buy America requirement, which was a domestic supply source requirement in the context of a federal aid state construction project. The investor was excluded from the project on the basis that it did not supply U.S. steel and claimed that it was discriminated against as compared with the U.S. steel manufacturer and fabricator, who are operating in the same sector, selling the same product, and competing for the same customers as the ADF group.

The Tribunal rejected this argument on the basis that the investor provided an improper comparator. In the Tribunal's view, the investor did not identify a U.S. steel manufacturer or fabricator which, by virtue of its nationality, had been exempted from the requirements of the buy America program.

So, the like circumstances in relation to this measure didn't relate to the competition between the two investors regarding supply of steel for the project, didn't relate to competition,

didn't relate to economic sector. Rather, it related to the origin of the steel supplied, U.S. on the one hand, Canadian on the other.

Most recently, in the case of Methanex versus the United States, the Tribunal clearly stated that the existence of a competitive relationship between investors is not dispositive when establishing the proper comparator for the purposes of Article 1102. In that case, the investor's position, like that of UPS in this case, was that if two businesses compete for the same business, they're in like circumstances for the purposes of Article 1102. The investor, Methanex, claimed that it was in like circumstances with domestic ethanol producers because they both compete for customers in the oxygenate market.

The Tribunal rejected the investor's 1102 claim on the basis that the measure in question did not differentiate between foreign and domestic investors. In the Tribunal's view, the mere competition between producers was not a dispositive

element in Article 1102 protection.

11:16:03 So, what do we see? We see that both the language of Article 1102 and previous Tribunal decisions demonstrate that the like circumstances analysis must be completed on a case-by-case basis, taking various factors into account, factors that are related to the treatment being afforded, and these factors may include, but are certainly not limited to, business sector and competition. In fact, if we stop and think about it for a minute, the investor's interpretation of like circumstances would certainly lead to a narrowing of the protection under 1102, and this is because if like circumstances equals business sector or competitive relationship, then I suppose it would follow that two businesses that are in wholly different business sectors and do not compete in the marketplace at all could never be compared for the purposes of Article 1102.

And I think that a simple example might illustrate how the investor's interpretation would narrow Article 1102.

Let's consider a factual situation whereby

11:17:23 a party, let's say Canada, imposes an environmental regulation governing the release of a certain effluent into a river. On this river, there are only two kinds of investors, enterprises, Canadian-owned shoe manufacturers and American-owned car manufacturers. Both groups of manufacturers release the effluent in question into the river.

Now, let's say Canada has passed this regulation with respect to effluent control, but Canada decides to exempt all shoe manufacturers from this regulation. According to the investor, given that the shoe manufacturers and the car manufacturers are not in the same business sector and do not compete, this regulation could never be considered a breach of Article 1102.

But this isn't right. With respect to my very, very simple hypothetical example, the treatment in question is designed to regulate effluent control. That's its purpose. That's the context of the treatment in question. Therefore, the circumstances that must be considered in

11:18:37 1 relation to that treatment must take into account
2 the purpose of the treatment, the object of the
3 treatment.
4 In that scenario, the Canadian investors
5 and the U.S. investors would, I say, and given it's
6 a simple scenario, but would, in fact, be in like
7 circumstances with respect to that treatment, with
8 respect to that regulation. This example
9 illustrates why previous Chapter 11 tribunals held
10 that the entire context of the measure in question
11 must be examined on a case-by-case basis. This
12 contextual analysis requires consideration of the
13 circumstances that led to the treatment in
14 question. Some of these circumstances may relate,
15 in fact, to operational imperatives that informed
16 the treatment.
17 To take a concrete example from the case
18 in front of us, in the case of Customs treatment by
19 Canada, the operational realities dictate that
20 where a shipper can provide reliable, detailed,
21 advance information about the shipment that it is
22 sending, Customs processing will be faster and more

11:20:01 1 efficient than if this information is not provided.
2 In addition, it's impossible to ignore the

policy considerations of the government in enacting the measures that are the subject matter of the complaint. And I think my effluent example puts that into real terms.

The investor agrees that the Tribunal should examine the public policy considerations that are at play in this case. The investor argued in its written pleadings that public policy considerations serve as an excuse or an affirmative defense for what would otherwise be a violation.

In addition, Mr. Appleton's submission in his closing yesterday, he pointed to the fact that there is no general public policy exception in Chapter 11. Presumably the implication of this comment was that without a public policy general exception, there is no room for public policy considerations here. And, in fact, I believe it was in response to a question that was put forward by Maitre Fortier, Mr. Appleton indicated that Canada would have had to specifically exclude or

11:21:17 reserve for the USO under Chapter 11 in order for it to be taken into account in this case.

Well, this is at odds with the recognition that counsel made on the first day of these

proceedings where it recognized that Chapter 11 tribunals have, in fact, considered public policy considerations as a part of the totality of the circumstances when assessing a treatment.

However, Mr. Appleton asserted that the tribunals took this into account without any real textual basis for doing so. I put to you, though, that there is a very clear textual basis for doing so in Article 1102. A consideration of public policy motivations and objectives are part of the context of the treatment and one of the factors that necessarily comprises a contextual analysis of like circumstances.

NAFTA Chapter 11 tribunals have consistently, in fact, referred to parties' public policy considerations. Some of these considerations have included environmental protection, compliance with other international

11:22:42 agreements, efforts to control tax revenues and discourage smuggling, and the protection of intellectual property.

In this case, the public policy context at play in assessing the circumstances include the funding of the Universal Service Obligation for the

delivery of basic postal services at reasonable rates, and the policy imperative to perform Customs functions so as to collect duties and taxes, and stop importation of prohibited goods into Canada.

As will be discussed more fully by my colleagues, Canada has chosen to fulfill these policy objectives by, one, creating a Crown corporation that has a social and policy mandate, including the Universal Service Obligation, and a mandate to be self-sustaining.

We have also chosen to fulfill our Customs policy objective by developing distinct processing regimes for international postal items on the one hand and private courier items on the other hand, based on the particular characteristics of those two groups.

11:24:04 It is not for the investor to second-guess the policy objectives of the Government of Canada, nor is it for the investor to argue that there is a better way for us to achieve these objectives. Likewise, and with the greatest of respect, it's not the role of this Tribunal to judge a state's policy choices or its means of implementing them in the abstract. And I think this is what I took from

Maitre Fortier's comment yesterday quoting Shaw and Kennedy, that the Tribunal must take Canada's policies as they are. They are what they are. And given that they are what they are, it's the role of this Tribunal to apply the specific legal standards in the Treaties to the facts before them.

So, with respect to like circumstance, the legal standard under Article 1102 based on the language of that provision and the cases decided to date, calls on the Tribunal to consider all of the circumstances surrounding the treatment afforded to the investor with respect to the measures in question. The Tribunal must then consider the treatment of a domestic investor, where the

11:25:33 circumstances of surrounding that treatment are like. A consideration of like circumstances involves more than just an examination of whether the two businesses compete. It requires an examination of the totality of the factors surrounding the treatment.

In this case, the investor claims a breach of Article 1102 in relation to four specific measures: The pricing of Canada Post's competitive products, access to the postal infrastructure, the Publications Assistance Program, and Customs

treatment.

I think that time has come to stop and ask the question: Why is the investor urging this Tribunal not to examine all of the circumstances surrounding the treatment? Why is the investor, in fact, trying to focus your attention exclusively on whether the two entities compete? I think the answer is clear. This case is about the objectives of UPS to tie the hands of Canada Post, to impose additional disciplines on Canada Post, and to drive up the cost of its products. UPS would like this

11:27:01 case to be about disciplining competition between UPS and Canada Post, but this is not the question that national treatment provisions deal with. This Tribunal has already ruled on that. This Tribunal has ruled that disciplines on competition of monopolies and state enterprises articulated in Article 1502(3)(d) are not before this Tribunal. What is before this Tribunal is a question of national treatment.

The investor is trying to use Article 1102 to achieve its goals of tying the hands of Canada Post, and in so doing is forcing a comparison of

itself and Canada Post Corporation. So, the investor has identified Canada Post, Canada's postal authority, as the domestic investment that receives treatment in like circumstances to UPS Canada with respect to customs treatment, the Publications Assistance Program, and Canada Post's pricing of its own internal products. In order to make this comparison, the investor is forced to contort Article 1102, to ignore its plain meaning, and to disregard previous Chapter 11 cases.

11:28:28 In addition, the investor ignores investments that are in like circumstances, investments that are identical comparators. Canadian-owned courier companies receive identical treatment to that accorded to UPS Canada. They are identical comparators. As the Tribunal in Methanex concluded, the identification of a proper comparator is critical to the success of an Article 1102 claim. It stated: "It would be forced into application of Article 1102 if a tribunal were to ignore the identical comparator and try to lever in, and at best approximate an arguably inappropriate comparator."

In this case, in an attempt to make its arguments against Canada's postal authority, the

investor has failed to identify the appropriate domestic comparator. These identical comparators, Canadian-owned courier companies, are right there for everyone to see; but they haven't been identified by the investor, and its claim under 1102 must fail on that basis.

I would now like to turn to the second

prong of the investor's proposed test under Article 1102; namely, that no less favorable treatment means that Canada must ensure quality of competitive opportunities. The investor argues that once it has been established that the foreign and domestic investment are in a competitive relationship, if there is not equality of competitive opportunities, then Article 1102 has been breached.

This second element of the investor's test must also be rejected for two reasons. First Canada does not deny that equality of competitive opportunities is an appropriate consideration. However, it is only possible to consider whether there has been a denial of competitive opportunities, as an indicator of less favorable treatment. That's what it's designed to do. It's

evidence of less favorable treatment.

Therefore, in order to get to a consideration of whether or not equality of competitive opportunities have been denied, whether or not less favorable treatment has been granted,

11:31:23 one has to first determine that the treatment was accorded in like circumstances.

The investor must first undertake the proper like circumstances comparison, and compare itself to Canadian-owned courier companies. Then, if the investor is able to demonstrate a denial of competitive opportunities, this may well be evidence of less favorable treatment. The question would be, is UPS Canada being accorded unequal competitive opportunities in relation to or as compared to Canadian-owned courier companies? The answer, of course, is no, and my friends will explain to you why that's the case, but as we have seen up until now in my presentation, the investor is seeking to have this Tribunal avoid the proper like circumstances analysis. The investor seeks to import a concept of equality of competitive opportunities into Article 1102 while ignoring the equally and, I would say, first principle of like

circumstances.

The investor itself states that the usefulness of GATT and WTO cases depends on an

11:32:39 identification of the relevant language in the NAFTA itself, which is the subject of interpretation, and here I quote, "The mere invocation"--the investor says, "The mere invocation of GATT/WTO jurisprudence does not and cannot excuse the imperative of fidelity to the NAFTA text."

So, the investor goes to great lengths to cite provisions and authorities that demonstrate that equality of competitive opportunities as a concept, as an objective, is relevant under Chapter 11, and specifically is relevant under Article 1102. As I have said, Canada does not deny that a demonstration that a foreign investor has been denied the ability to compete on an equal basis with a domestic investor may be a consideration in assessing whether the treatment accorded is less favorable.

But this determination, if we are faithful to the NAFTA's text, as the investor tells us we must be, can only take place once it's been determined that the treatment was accorded in like

11:33:50 1 circumstances.
2 There is a second reason why this Tribunal
3 should reject the investor's arguments regarding
4 equality of competitive opportunities, and that is
5 because the investor mischaracterizes the case law
6 or draws perhaps undue conclusions from the case
7 law on the concept of equality of competitive
8 opportunities. The WTO has not ruled that
9 treatment no less favorable requires a state to
10 ensure equality of competitive opportunities.
11 And, in fact, what the WTO has said in
12 this regard, I think, we can learn from some
13 comments that were made earlier this week by
14 Mr. Appleton when he cited two WTO cases in
15 relation to this concept. The first one was the
16 GATT 337 case, and Mr. Appleton cited this case as
17 standing for the proposition that not all
18 differences in treatment are less favorable.
19 Canada agrees with that proposition. And, for
20 example, as my colleague Mr. Conway will explain,
21 while there are differences in treatment in the
22 Customs programs for mail and for courier, these

11:35:24 differences in treatment reflect the needs and the requirements and the imperatives of those two different groups of importers, and by no means lead to less favorable treatment.

He will also, of course, demonstrate that the treatment is not accorded in like circumstances, but I digress.

ARBITRATOR FORTIER: You're not going to deal with that.

MS. HILLMAN: I'm not going to deal with that.

ARBITRATOR FORTIER: But earlier, you did say that in referring to the public policy objectives of Canada that the treatment of the Customs facet was part of Canada's national objectives. Where do you find that in the legislation?

MS. HILLMAN: Where do I find that Customs treatment is part of our national objectives?

ARBITRATOR FORTIER: Yes.

MS. HILLMAN: Well, I'm probably not the best person to speak to you on the Customs.

11:36:25 ARBITRATOR FORTIER: No, but you're on

your feet.

MS. HILLMAN: But I'm on my feet. So, without making a specific reference to the Customs Act itself, unless somebody can pass me a note, I won't able to do for you. What I can say is that the fundamental objective of the two components of a Customs authority, which are a national security component ensuring that goods, products, people that cross the border into our country are questioned, examined for national security purposes. That's the one policy objective of the Customs authority.

And the second policy objective of a Customs authority specifically with respect to the entry of goods into a territory has to do with the proper assessment, collection of duties and taxes. So, those are the two public policy underlining objectives.

ARBITRATOR FORTIER: For my purposes, that will do for the moment. We will wait for your friend, Mr. Conway.

11:37:26 MS. HILLMAN: Mr. Jones's affidavit, I believe, has an entire section setting out the public policy of Customs, so I would also refer you

to that, but I'm sure Mr. Conway can take you through it.

Returning now to the cases cited by Mr. Appleton, in addition to the 337 case, he cited the Canada-Beer case to support the proposition that equally fair treatment does not necessarily arise when the treatment is the same. Again, Canada doesn't disagree with this proposition.

However, in its written pleadings, the investor implies and argues, in fact, that once it's established that there is a competitive relationship, the NAFTA party must ensure equality of competitive opportunities, and in the WTO context, the analysis of the concept of equality of competitive opportunities does not operate as an affirmative obligation on a party to ensure equality of competitive opportunities. It operates, as I have said, as evidence of less favorable treatment.

11:38:50 So, the WTO cases that the claimant cites in support of its claim are all at the panel level, and, in fact, simply to underline the point or the use with which the concept of equality of competitive opportunities is put in the WTO, I

would like to draw your attention to the WTO Appellate Body decisions in Korea Beef cited in the Dominican Republic cigarettes, and I will quote from those, which tell us that, in fact, where a measure has a negative effect on a company's competitive position, that doesn't even necessarily result in less favorable treatment. It's a factor. It's a piece of evidence. It's something to be taken into account, but it is not co-extensive with the concept of less favorable treatment. I will read this for you, if I may.

Now, this is the Appellate Body citing the Korea beef case in the cigarettes case, so it's a bit of a convoluted and I will give you my slides afterwards which I hope will keep this clear. This quotation is also found in Canada's rejoinder.

The Appellate Body indicated in Korea

11:40:11 various measures on beef that imported products are treated less favorably than like products if a measure modifies the conditions of competition in the relevant market to the detriment of the imported products. And this is what the Appellate Body held. "However, the existence of a detrimental effect on a given imported product

resulting from a measure does not necessarily imply that this measure accords less favorable treatment to importers, if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case."

So, according to the appellate body, lack of equality of competitive opportunities does not necessarily imply less favorable treatment. The investor's concept of equality of competitive opportunities is not supported by the WTO Appellate Body. It's equally clear, of course, that it's not supported by the language and context of Article 1102. As such, the arguments that the investor has put forward on equality of competitive

11:41:26 opportunities really must fail.

Now, to finish my presentation for you today, I would like to take a step back and recall the purpose of Article 1102. As Canada has stated, the test that arises out of the text and context of that provision has three elements. In order to find a violation in this case, the investor must demonstrate that Canada accorded treatment to UPS Canada and to a domestic investment, that the circumstances in which the treatments are accorded

are like. In the context of a national treatment obligation, like means that the only material difference in circumstances between the two investments is that one is domestic and one is foreign. And third, the investor must demonstrate that UPS receives the less favorable of the two treatments.

Now, when proceeding with this analysis, the Tribunal must keep in mind the object and purpose of national treatment obligations. Article 1102 is designed to prevent discrimination, de facto and de jure, against foreign investors. This

11:42:55 is the mischief that it seeks to address.

In this case, the investor has not claimed that its investment would have been treated differently were it owned or controlled by a Canadian investor. Indeed, Canadian-owned courier companies receive identical treatment to UPS Canada with respect to access to the postal infrastructure, Customs treatment, and the Publications Assistance Program.

And to the extent that the manner in which Canada Post prices its own internal products can be considered a treatment of anyone outside of Canada

Post, can be considered a treatment of any third party, then UPS and Canadian-owned courier companies are also receiving identical treatment.

Therefore, I would like to conclude my presentation today with a question that I would ask you to employ as you consider the facts and the allegations of the investor, and the question is this: Would the claimant's investment have been treated differently if it were owned or controlled by a Canadian investor? If not, then there can be

11:44:12 no national treatment violation.

So, with that, Mr. President, Members of the Tribunal, I thank you for your attention. I would be happy to answer any questions that you have.

PRESIDENT KEITH: Could I just ask one, Ms. Hillman, arising out of your very last comments about the investment being owned by Canadian investors. I was really going back to your very helpful effluent example because, in terms of your question, you're really looking at two people in the courier business, aren't you? And I thought one of the significant things you were bringing to

our attention by the effluent example was people who weren't in the same business, but which were being affected in a discriminatory way.

MS. HILLMAN: Yes.

PRESIDENT KEITH: And I know we will come to it with Mr. Conway, but just taking the Customs issue, for instance, isn't it possible for UPS to say the like circumstance is exactly the same item as coming across the border in terms of all of that

11:45:26 blind testing that was done by Mr. Nelems, was it? The identical things are happening, the identical effluent is going out, the identical items are coming across the border. Isn't that the like circumstance rather than your two courier companies owned by Americans on one hand and Canadians on the other? I'm just taking advantage of your very excellent hypothetical.

MS. HILLMAN: Absolutely. I think that there is no one like circumstance. There are a group of like circumstances. And so, the fact that, let's say, my grandmother in San Francisco, if I had a grandmother in San Francisco, is sending a book across the border via the post, or a book is being sent via UPS across to Canada is one factor. It's a book, it's being sent from the United States

to Canada.

But perhaps my grandmother didn't attach the sticker, didn't say what's in it. Perhaps she didn't give the information that's required. Perhaps she--I guess that's probably the main example I can draw to your attention.

That will create different operational requirements for a Customs authority at the border. UPS Canada, as I understand it, operates such that with its clients they have advance information on what's in the parcels that are being sent across the border. There is a manifest that's drawn up. The manifest, before the actual product gets to the border will indicate and will be sent to the Customs authority in Canada electronically, and it will say we have a truckload of items coming across the border, one of course being Kirstin Hillman's grandmother's book. And it will say it's the book, it will say how much it cost, it will say who it's coming from and where it's going, as I understand it. And I can be corrected on the facts if I got that wrong. But there is reliable, precise, accurate information that depends on the relationship between UPS and its client when they

drop the parcel off at a UPS counter.

My grandmother may choose just to put stamps on that that she has in the drawer of her vestibule, and figures it's likely enough, doesn't

11:47:55 put a Customs declaration on it, throws it in the mail box, and off it goes.

And so, operationally, Canada Customs is faced with circumstances, physical, identifiable circumstances, surrounding those two books that are markedly different. And if you multiply that by the volume of mail that comes across, that leads to a different circumstance.

PRESIDENT KEITH: Thank you, but you are accepting the point that if the documentation was the same, the fact that one is coming through the post and the other is coming through a courier service may indicate that it's like circumstances. That is your effluent example, I think, that I was trying to press. But we'll deal with it more when Mr. Conway argues.

MS. HILLMAN: It is one of the factors in the circumstances.

PRESIDENT KEITH: Thank you very much.

MS. HILLMAN: Thank you.

MR. WHITEHALL: While Ms. Hillman was

22 speaking to this last question, I had the benefit

11:49:04 1 of sitting back and kind of cogitating about it,
2 and another example struck me. If I may, we're at
3 an airport. You have got two people going through
4 security so take your analogy they are both people
5 that are both going through security. One is a
6 pilot, and he's got a badge. The other one is me,
7 no badge, no nothing.
8 I am stopped because I don't have the
9 outside indicia that I'm safe and secure. The
10 pilot is allowed to go through, but there are two
11 packages going through at the same time, but with
12 one you have a reasonable confidence of security,
13 and therefore you can put in place different
14 operational measures for that particular package
15 than you would put for another package, and therein
16 lies the difference. It's one of the factors, but
17 not the end of the--it's the beginning of the
18 answer, but not the end of it.
19 PRESIDENT KEITH: Thank you. Mr. Conway
20 will have nothing to say shortly.
21 MR. WHITEHALL: Mr. Conway always will
22 have lots to say.

11:50:32 Now, I have a logistical problem. I have a presentation. The slides are being put together as we speak. And I wonder if I could have a few minutes. I've got two options. It's 12:00, I note. To be candid, my preference would be, well, more or less--actually, mine actually says five, but would it be convenient to take a lunch break at this time? It would also serve me, frankly, not to break up my presentation, which is going to be a few hours.

PRESIDENT KEITH: Yes, that seems okay. If there is no problem on your side.

Could we just actually have a quick talk to you, Mr. Whitehall, and to Mr. Appleton as well?

MS. HILLMAN: I have my slide presentation in hard copy, if you would be interested.

PRESIDENT KEITH: Absolutely.

(Discussion off the record.)

(Whereupon, at 11:55 a.m., the hearing was adjourned until 1:00 p.m., the same day.)

Pages 1272 - 1425: this portion of the hearing was held in camera and the pages have accordingly been redacted.

MR. WHITEHALL: And this is in public.

MS. TABET: So, at issue here is a program of the Government of Canada, the Department of Canadian Heritage that provides distribution assistance to eligible publishers through Canada Post. And the essence of the investor's argument is that Canada Post receives preferential treatment because publishers are required to use Canada Post in order to receive the subsidy under the program, instead of being allowed to choose who they want to

17:54:45 use.

Canada's submission is that the investor's claim must be rejected on the basis of the cultural interpretation exemption. Now, we have talked in the past about the cultural exemptions at the jurisdictional phase, but I will be coming back to that today because the evidence now before you establishes that the Publications Assistance Program is a measure with respect to cultural industry, and as such, that it falls squarely within the scope of the cultural exemption.

The effect of this is to render therefore

NAFTA inapplicable and Chapter 11 inapplicable. This should be sufficient to end the Tribunal's examination. However, I will argue also that the investor has failed to bring the claim within the three-year time limit for investor claims under NAFTA Chapter 11.

Should the Tribunal nonetheless decide to consider the national treatment claim, Canada's position is that the program at issue is a subsidy, and therefore the national treatment obligation is

17:55:50 not applicable.

In any event, I will discuss why the investor's allegations do not amount to a breach of national treatment, even assuming that Canada's choice of delivery of service providers under the program was subject to this obligation.

And my last point that I will be making today will be about the investor's failure to prove the existence of damages arising out of the alleged national treatment breach.

Now, the scope and the operation of the cultural exemption were discussed at some length at the jurisdictional hearing. I have put up on the slide Article 2106 and Annex 2106 that are the key

operative provisions which exempt measures with respect to cultural industries. And cultural industries is defined more specifically in Article 2107 of the NAFTA.

The effect of Article 2106 is investment obligations and investor-state settlement procedures contained in Chapter 11 will not be applicable to such measures. In the Award on

17:57:14 Jurisdiction, the Tribunal was of the view that there was not sufficient evidence on the record to decide that question, and my friend alluded to that in his earlier comments. I would suggest the evidence is now before this Tribunal to decide this issue. There is evidence regarding the design and operation and the objectives of the Publications Assistance Program.

You heard earlier this week testimony from William Fizet, the director responsible of periodical publishing programs at the Department of Canadian Heritage. He explained how the program fits in Canada's broader cultural policy framework that was aimed at supporting the Canadian publishing industry.

He also described how the program provides

assistance for the distribution of eligible publications, and how the program achieves these goals that he's talked about.

I invite you to examine his affidavit which you can find in the respondent's book of expert reports and affidavits at Tab 12 which

17:58:15 describes in some detail the policy context and the operation of the program, and particularly at paragraph six of his affidavit where he describes the context.

This evidence establishes that the program is a measure of support with respect to publishing industry, and therefore that it is a measure with respect to cultural industry, which is--which brings it squarely within the scope and the terms of the NAFTA cultural exemption.

Now, the claimant has admitted that the program at least insofar as assistance to publishers is concerned is subject to the cultural exemption, and I bring your attention to paragraph 601 of the investor's memorial.

I submit that the investor's submission should be sufficient to conclude that the measure falls within the scope of the cultural exemption. However, the investor has now raised a number of

arguments to suggest that part of the program--that is, the distribution of assistance through Canada Post--is not subject to the cultural exemption, and

17:59:30 he has done this in two ways. First, the claimant has argued that the exemption only covers certain aspects of the program, and then it has suggested that a particular aspect of the measure with respect to cultural industries will only be subject to the exemption if it meets a cultural objective or, and I quote from the transcript at page 771, "If it is connected to the purpose of helping the people for whom the program is designed to help.

Now, these arguments to limit the scope of the cultural exemption--have it apply only to certain aspects of the measure have no basis in the text of Annex 2106, and if you look at the provision of Annex--and the words of Annex 2106, it removes from the scope of the NAFTA any measure adopted or maintained with respect to cultural industries.

Now, the key words here are "with respect to cultural industries." It does not contain any limitation regarding the objective of the measure or the type of measure beyond requiring that the

22 measure be in connection with the cultural

18:00:48 1 industries.
2 Now, in considering how to apply this
3 provision, it is important to keep those words in
4 mind, and it is also important to keep in mind why
5 the parties introduced such an apparently broad
6 exemption.
7 And if we look back at the conclusion of
8 the NAFTA and the Canada-U.S. FTA, you will recall
9 that Canada insisted on maintaining its ability to
10 pursue its cultural policies and to assure that
11 that ability was not affected by the trade
12 agreements, and this is actually spelled out very
13 clearly in the Canadian statement of
14 implementation, and if we can bring that slide up.
15 And you will recall that this was a very
16 political charged issue for Canada, and it was a
17 key issue. If there had not been agreement on this
18 point, I'm not sure necessarily there would have
19 been a NAFTA, but certainly this was hotly debated.
20 This is the statement of implementation.
21 You see very clearly what was in mind of the
22 drafters or certainly of the Canadian negotiators

18:02:03 and the agreement that was reflected was that NAFTA would leave unimpaired Canada's ability to pursue cultural objectives.

Now, as a quid pro quo for this broad exemption, other NAFTA parties were granted a unilateral right to retaliation, and you can see Article 2005 of the Canada-U.S. Free Trade Agreement that specifically allows other parties to take measures of equivalent commercial effect in response to actions that would have been inconsistent but for that provision.

Now, for the Tribunal to now introduce limitations to the scope of this cultural exemption would disturb the balance that was agreed to by the party, and that is reflected in the NAFTA and in the FTA before it.

I also submit that in addition that the facts that are now before the Tribunal do not provide any basis to conclude that the requirement to use Canada Post should be considered separately from the rest of the program. I will explain this in a little bit more detail in a moment.

18:03:32 What the claimant alleges is not that Canada Post's participation in the program is completely unconnected to the program. What it alleges is that publishers should be allowed to choose other service providers for the distribution of their publications.

Now, again referring to the testimony of Mr. Fizet, it establishes clearly that the measure as a whole is a measure is with respect to cultural industries, and Canada Post's involvement in the program is really intrinsically linked to providing the support for the distribution of the publications. He pointed, for example, to the fact that there was a long history of mail subsidies for publications in Canada, and that this confirmed the central role that the Post has always had in supporting wide distribution and access to publications.

Now, does the program's requirement to use Canada Post respond to a cultural objective? As we have seen, there is no reference in the text of Annex 2106 to cultural objectives. The only test

18:04:54 is whether the measure relates to cultural industries, and that makes sense because the NAFTA drafters, the NAFTA parties, or certainly Canada

who is the subject of this exception didn't want tribunals to consider whether there is--the cultural objective was being met. They didn't want the Tribunals to put themselves in the place of the NAFTA parties, so instead they choose an objective measure. As long as the measure is in connection with the cultural industry as defined in the NAFTA, it is sufficient to remove it from the scope.

And there is no question that this is the case here. Mr. Fizet has described the cultural objectives of the program here as three-fold, and I will get into why even if you're looking at cultural objectives, and if the Canada Post involvement in the program, whether that's connected to the program, I submit that it's clear when you look at the objectives of the program and what Canada Post does that there is that connection.

Mr. Fizet has talked about three

18:06:08 objectives, and certainly in his affidavit at paragraph seven and eight, he describes them in more detail, but he's put a lot of emphasis on the wide distribution of Canadian content to Canadian readers at accessible prices, uniform prices,

across the country. And he explained that the provision of the distribution assistance through Canada Post is in line with the objectives of the program as it does this. It ensures the widest possible distribution of these publications throughout the country.

Now, he also explained the choice of Canada Post as a partner in delivering the program. He referred to the fact that Canada Post had a Universal Service Obligation. He referred to the fact that it contributes money to the program. And he also said that, in his view in his 10 years of experience in managing such programs, that this was one of the most efficient government programs there was. There was low overhead costs, and it made sense administratively to use Canada Post as a partner.

18:07:25 Now, my friend has referred you to documents U231, which was an internal memo of the Department of Canadian Heritage summarizing the view of the industry pursuant to a consultation they undertook. And the document contained the view of some stakeholders who indicated that only Canada Post was prepared to deliver publications in rural regions. Well, that's precisely the point,

isn't it? That is why the Department of Canadian Heritage partners with Canada Post, because it goes everywhere throughout the country.

Now, the claimant is suggesting that other alternatives to Canada Post would be preferable or better to achieve the government's cultural objectives, and, for example, he has suggested that publishers should be given subsidies and allowed to choose their service provider. Mr. Fizet addressed this in his testimony, and he specifically talked about the kinds of program where the department and they have those kinds of programs in other contexts where they give a subsidy and then a set of criteria, and that is implemented, and then they

18:08:43 have verification in place. And he's referred to that as grants and contribution-types program. But he also said that those programs are more costly and not as efficient as the current program, and therefore less money would be going to the publishers if they chose that route.

Now, there is no doubt that the Department of Canadian Heritage has in the past, and certainly continues to considerable alternatives to using Canada Post, but he also said that, in his view, at

the present time, the current partnership with Canada Post was the best way to achieve the program's objective. And at the end of the day, whether these alternatives are preferable requiring publishers to use Canada Post is really not relevant to whether the measure is with respect to cultural industries. I would submit that how Canada chooses to design or implement its measures with respect to cultural industries is exactly what was meant to be protected from review by the cultural exemption.

Let me turn to the time limitation point

18:10:05 that I raised earlier.

ARBITRATOR CASS: Before we turn to time limitation, I'm assuming the time limitation arguments are going to be fairly similar to those we have already discussed with Mr. Whitehall and Mr. Conway.

I understand that one of the things the provision was designed to avoid, the cultural exemption, was having some other entity tell Canada this is the right way to protect your Heritage, so that if Canada wants to subsidize books by Canadian authors, there shouldn't be a tribunal saying, well, you ought to make sure they're living in

Canada, that they're writing about Canadian topics, that they are engaged in a voice that is distinctly Canadian. If Canada decides it wants to support Canadian authors, that should be the end of it.

But I wonder whether the same could be said of some alternative hypothetical subsidies. If, for instance, there were a subsidy to Canadian authors but solely if their books are displayed in Canadian bookstores and not in any bookstores owned

18:11:35 by foreigners, would that be within the cultural exemption?

Let me just give you a series, and you could respond to all of them.

What about a subsidy to Canadian authors available only if their books are sold exclusively in buildings owned by Canadians, or in buildings that are constructed by Canadian-owned construction firms, or in buildings that are served solely by Canadian-owned enterprises? You can see that each hypothetical gets further and further away from having the subsidy have anything to do with the authoring of books, and more and more to do with preventing competition in some other arena.

Is there some point at which you would be

willing to say that a particular subsidy falls outside of the cultural exemption?

MS. TABET: Well, the answer to that is simply that, I think the issue you're struggling with is, does there have to be a relation to the cultural objective that is said to be--that the measure is trying to--purporting to address,

18:13:08 and--but the NAFTA text doesn't talk about that, is the simple answer. It talks about measures with respect to cultural industries.

Now, taking your examples, yes, there would be violations of the NAFTA, and it would be trade-distorting. What could the NAFTA parties do about it? Well, the simple answer is they could retaliate, and there is discipline there that would make--that forces the government to consider the potential violations of the NAFTA and potential consequences that could follow.

So, that imposes discipline on the government to say, well, you know, really is that--is our cultural objective important, and are we doing it in the own NAFTA party's mind, are we doing it in a way that is essential to the cultural objective?

But again, that's not for the Tribunal to

decide. It's the government's decision to how it will implement its objective, its cultural objective.

ARBITRATOR CASS: Your submission is there

18:14:12 is no point at which the cultural connection is sufficiently tangential, that a tribunal could say this is outside the cultural exemption?

MS. TABET: I think as long as you conclude that the measure is with respect to cultural industries, then that would be my submission. However, I would say that, you know, if obviously the measure is a sham, that the measure is not really with respect to selling books, then there would be a point where it might be difficult to say it's still a measure with respect to cultural industries.

But, in any event, I submit that this is not the case here because, as I have referred to the use of Canada Post, there is certainly a rational connection with the cultural objectives that are being protected.

ARBITRATOR CASS: The last question on this. If we were to say that it is insufficient to have Canada say, we consider this a measure

connected to a cultural industry, how would you frame the appropriate test to use, to have a

18:15:32 tribunal judge whether the measure really is connected to, related to serving a purpose of advancing a cultural industry? I understand the assertion that here it is, here it's rationally related, connected. I understand the assertion. I'm asking for help with a test.

And again, what I'm trying to distinguish is between a test that says in order to support Canadian authors you must require them to be educated in Canada, living in Canada, writing about Canada, any of those sorts of requirements I would put into the category of considerations that obviously should not be examined by a tribunal such as this.

On the other hand, when you get to the example of a subsidy to Canadian authors or books tied to Canadian-served buildings, we have moved fairly far afield, and I would like some help in separating those two.

MS. TABET: I submit that you cannot go further than looking at the Vienna Convention interpretation of what "with respect to cultural

18:17:01 industry" means, and "with respect to" must mean in connection with or something similar.

Now, if you conclude that the measure here is in connection with, I think that's your test. I don't think you can impose an additional test or something beyond this rational connection between measure and the cultural industry.

And if you look at the definition of cultural industries, which includes distribution of publishing, that gives you another indication of the types of measures that are meant to be covered here.

ARBITRATOR FORTIER: Of course, I guess it's a moot point as to whether it is within the remit of this Tribunal to devise or design a test. What we are dealing with, I think that's what I heard you say, what we are dealing with here is a specific situation, and you say that the cultural exemption defeats the claim in this particular instance.

Are you asking the Tribunal to come up with a general test as to when the line may be

18:18:39 crossed? Because I agree, as I generally do with my colleague Dr. Cass, that what was implied in his question, there can be colorable schemes, and I think the example that he gave, in my view, would fall, you know. It must be sold in buildings owned by Canadians. I think that falls on the wrong side of the line.

But what you're saying is, in this particular case, the path falls on the right side of the line, and the Tribunal doesn't need to come up with a test if it otherwise finds that the cultural industry exception applies in this case.

MS. TABET: That's correct. We are not asking the Tribunal to make up a test that would be applicable in other circumstances.

I will make a few brief points on time limitation, although I'm conscious of the fact that my colleagues have already raised it, but just to bring your attention to a few points here. Again, keeping in mind the three-year time limitation, you heard Mr. Fizet say postal subsidies have been in place since confederation, and he's referred to

this in his affidavit. And he's also referred to the fact that this particular program has been in place since 1996, and that really the only change that occurred as a result of the WTO decision was the money being paid to the--into the accounts of publishers at Canada Post instead of being paid directly at Canada Post, but really nothing else in the program changed, and the 1997 events are not a basis for the investor to say something changed, even if it has nothing to do with what we are complaining of, and therefore the three year only starts ticking as a result of these changes.

I will briefly mention the subsidy argument, although I will not spend too much time here with you on it, and I do refer you to our memorial on this, but there is a specific exemption in the NAFTA for subsidies, and the investor here does not--exempting subsidies from national treatment--and the investor here does not challenge the fact that the program is a subsidy to publishers for the distribution of publications.

Now, the key differences between the

parties is whether the requirement to use Canada Post in order to receive the subsidy is covered by this provision, and that's Article 1108(7)(b),

which is on the screen before you.

Now, I will make two brief points. The first is that you can't separate again here. The claimant tries to separate certain aspects of the program and say we are not really challenging the subsidy part. We are challenging Canada Post's involvement. And our position here is that Canada Post's involvement cannot be separated from the distribution assistance. So from the subsidy it's really a requirement on using the subsidy.

And the second argument that the claimant has made is that, well, the subsidy is not really paid to Canada Post, so it doesn't fall within the terms of 1108. But 1108 does not contain a limitation on the beneficiaries or the types of subsidies that are exempted. And contrast that with GATT Article III:4 of--Article III:8, sorry--which says only subsidies to producers are exempt. You don't have the same limitation here.

18:22:55 But in any event, I would like to briefly address the question of whether there is a national treatment violation if everything I have said in the previous 20 minutes doesn't convince you.

And our position is that in any event, there is nothing that breaches national treatment here. The requirement to use Canada Post is not a violation of national treatment.

My colleague, Ms. Hillman, has described to you the test that must be followed in applying Article 1102, and she's talked about nationality-based discrimination as one of the questions that you must ask yourself, and certainly here there is no evidence of this. There is no nationality-based discrimination. There were alternatives to Canada Post that were considered by the Department, but Canada Post was retained. The option to continue requiring the use of Canada Post was retained because the Department believes that this is the best option, not because it's a Canadian company.

Now, it is telling here that the

18:24:15 publishers will not receive any assistance under the program if they use the delivery method other than Canada Post. For example, if they use Purolator or any other Canadian courier company like Purolator, or any U.S. company, there is no difference here, any--if they use anyone else than

Canada Post, they will not receive the subsidy.

Now, the applicable test that Ms. Hillman has talked about is first to look at the treatment that is at issue here, and then consider whether UPS Canada and Canada Post are in like circumstances, and here we are talking about the Publications Assistance Program, and I have described to you the policy objectives of the program.

And so, what are the like circumstances at issue here in light of those objectives?

And finally, then, you can ask yourself is there is less favorable treatment, if you are satisfied they are in like circumstance.

Now, again, recalling the objectives of the program as Mr. Fizet has said in his testimony,

18:25:29 it is to ensure the widest possible distribution of publications to individual consumers at affordable and uniform prices throughout the country. Now, in light of the program's objective and Canada Post's Universal Service Obligation, it is clear that Canada Post and UPS are not in like circumstances. The best evidence of that, in fact, is the fact that UPS Canada is not interested in doing exactly the same thing as Canada Post. Really, what it's

looking for is cream-skimming, if I may refer to that. They're looking at--they're interested in doing part of what Canada Post is doing.

The claimant has never said that it could or would be willing to deliver all eligible publications to every address in Canada under the same conditions as Canada Post under the Memorandum of Agreement. Again, it's very clear that it's not what they want, and I will take you to the affidavits of Messrs. Rosen and Gershenhorn in a few minutes.

What UPS says is we can deliver to newsstands in urban centers. That's not what the

18:26:58 Department of Heritage wants. What it wants is to get magazines to as many households as possible throughout the country. And, in fact, Mr. Fizet in his testimony has referred to the fact that, and you find this again in his affidavit, he's referred to the fact that in Canada most Canadians receive their magazines through subscriptions and not by going to newsstands, so really what UPS is saying would not be helpful to achieving the objectives of the program to delivering Canadian content to Canadian readers throughout the country.

Now, again, you have to look at what national treatment means. And here what it means is not that Canada would have to restructure the program or allow publishers to choose who delivers their publications. Even assuming that the Department has a national treatment obligation with respect to this program, what it would mean here is that the Department could not allow publishers to choose a courier company to deliver their publications, but require that they only use a Canadian courier company as opposed to a U.S.

company. That's what national treatment means here.

And so at most, in order to extend no less favorable treatment to UPS Canada in like circumstances, it would mean offering it the same arrangement that the Department has with Canada Post this. This means that UPS would have to take on the same responsibilities as Canada Post on the same financial terms and conditions.

And again, I said that's not what UPS Canada wants. It's not interested in doing the same service, including providing the contribution that Canada Post pays into the program. So, UPS

Canada is not in like circumstance, and it's not--the program doesn't provide it with less favorable treatment than it provides Canada Post here. And even assuming that the Tribunal has jurisdiction to hear the claimant's complaints with respect to the program, our submission is that the measure is fully compliant with Article 1102.

But let me just raise a final point, which is the issue of damage which really highlights and

18:29:35 referred to the affidavits of Mr. Rosen and Gershenhorn which really highlight very well what UPS is complaining about and the fact that they're neither in like circumstance or that they're receiving less favorable treatment.

Again, when we look at damages, we have to look at damages in the light of the obligation at issue, and here it's national treatment. So, the issue is not whether the requirement to use Canada Post has caused harm to UPS Canada as the investor suggests. What must be established is whether the breach of national treatment, so in this case the fact that UPS Canada has not--does not have the same obligations and does not have the same arrangement as Canada Post, whether that has resulted in loss to UPS Canada. And if you look at

those two reports, none of the evidence that is contained in there provides--addresses the issue, and they don't address the question that I have just put before you.

What Mr. Gershenhorn in his affidavit, and I refer you specifically to paragraphs 47 and 48 of

18:30:55 his affidavit, and what they do is to calculate or to say, well, we can get some of the business, and then they say, well, on the basis that we are not getting any of the business because there's this requirement, we've suffered damage. But again, as I've said earlier, national treatment doesn't oblige Canada to restructure its program.

And Mr. Rosen does the very same thing, when he--in his affidavit he calculates the damage on the basis of delivery of magazines to such customer locations as shopping malls.

Now, I submit that it is apparent and certainly UPS Canada has not established that it has suffered any harm from the national treatment violation.

So, in conclusion, while Canada's position is that the program is exempt from Chapter 11 because of the cultural exemption, there are a

number of other bases on which the Tribunal should reject the claimant's allegation that there is a breach of national treatment.

If you have any other questions, I would

18:32:15 be happy to respond to them.

ARBITRATOR CASS: I just have one question. I think I know the answer to this, but I want to make sure.

On the subsidy argument, I take it that the UPS claim is that they can't challenge the subsidy to the publishers, but what they are challenging is the tying of that subsidy to a certain delivery form, and they're saying that that is separate from the subsidy itself. I take it that your argument is you can't separate it out. It's all integrated, and therefore anything that's connected to the subsidy comes within the subsidy exemption.

MS. TABET: I wouldn't say anything that's connected, but certainly here, first of all, the starting point is Article 1108(7)(b) which only talks about subsidy. There is no other limitation. Subsidy by a party or state enterprise is exempt, and so here I submit that the requirement to use

Canada Post is connected, is intrinsically connected to the program, to the subsidy, and

without using Canada Post there is no subsidy, so that's why I say you can't separate them in this case. I'm not saying everything else could.

ARBITRATOR CASS: Thank you.

PRESIDENT KEITH: Thank you very much, Ms. Tabet. I think that brings us to the end of today. We will resume at nine tomorrow.

And could Mr. Appleton and Mr. Whitehall just come up briefly, please.

(Whereupon, at 6:33 p.m., the hearing was adjourned until 9:00 a.m. the following day.)

18:33:59 1 CERTIFICATE OF REPORTER

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3 I, David A. Kasdan, RDR-CRR, Court
4 Reporter, do hereby testify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by
7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true record and accurate record of the
10 proceedings.
11 I further certify that I am neither
12 counsel for, related to, nor employed by any of the
13 parties to this action in this proceeding, nor
14 financially or otherwise interested in the outcome
15 of this litigation.

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17 _____
DAVID A. KASDAN, RDR-CRR

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