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

In the Matter of Arbitration:

Between:

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

HEARING ON THE MERITS

Saturday, December 17, 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 9:05 a.m. before:

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

ELOISE OBADIA,
Secretary to the Tribunal

Court Reporter:

DAVID A. KASDAN, RDR-CRR
Miller Reporting Company, Inc.
735 8th Street, S.E.
Washington, D.C. 20003
(202) 546-6666

08:54:40 APPEARANCES:

On behalf of the Claimant/Investor:
Representing the Claimant/Investor United Parcel Service of America, Inc.:

ALAN GERSHENHORN
STEVE FLOWERS
NORM BROTHERS
ALIX APOLLON
ALICE LEE
CATHY HARPER
PAUL SMITH
DAVID BOLGER
NICK LEWIS
AMGAD SHEHATA

08:54:40 APPEARANCES: (Continued)

On behalf of the Respondent/Party:

IVAN G. WHITEHALL
Heenan Blaikie
55, rue Metcalfe
Bureau 300
Ottawa (Ontario)
08:54:40  APPEARANCES: (Continued)

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

KEITH BENES
RENEE GARDNER
CARRIELYN GUYMON
MARK MCNEILL
ANDREA MENAKER
HEATHER VAN SLOOTEN
JENNIFER TOOLE

On behalf of the U.S. Department of Justice:
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P R O C E E D I N G S

PRESIDENT KEITH: Well, good morning, everybody. As you all know, Maitre Fortier is unfortunately unable to be here. And I thought I should just read into the record the agreement that was signed yesterday by counsel for the two parties. "The parties agree that the Tribunal may on Saturday, December 17, 2005, complete the oral arguments on the merits stage of this case, although Mr. Yves Fortier, Arbitrator, will unavoidably be absent from the hearing room. The proceedings are being fully recorded, including by way of a video recording, and Mr. Fortier undertakes to read the written record and watch the video recording.

Mr. Willis--sorry, Mr. Conway.

CONTINUED CLOSING ARGUMENT BY RESPONDENT
MR. CONWAY: Thank you for calling me Mr. Willis. I take that as a very high compliment, indeed.

MR. APPLETON: Mr. Conway, excuse me. We have, of course, the administrative requirement we must do each day pursuant to your order.

But before we even turn to that, of course I'm sure that Mr. Whitehall and myself, and, we've of course, said this to Maitre Fortier, but, of course, our wishes are for Madame Fortier right now, but today again, our business representative for UPS States is Mr. Shehata, who is seated here on my right. And I know that we will need to have Canada's business representative identified as well, pursuant to the order.

MR. WHITEHALL: Mr. De Boer apparently is here but stepped out.

MR. CONWAY: Stephen de Boer for the record.

MR. WHITEHALL: Mr. de Boer is here, I understand, but he has stepped out, and we have the witnesses in the room as yesterday.

MR. APPLETON: Can you confirm, then, you only have one business representative today and not two?
MR. WHITEHALL: That is right.

Mr. Hergert has gone back to Ottawa.

Oh, I beg your pardon. Francine Conn is here, but she is a previous witness, and that's why I didn't compute it.

PRESIDENT KEITH: I thank you, and we'll will pass on your best wishes to the Fortier family. Thank you.

Please, Mr. Conway.

CONTINUED CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

PRESIDENT KEITH: Well, if we could resume.

Yes, Ms. Tabet.

MS. TABET: Thank you.

Before I move to the minimum standard of treatment allegations, I would like to briefly come back to a question that Professor Cass asked.

Pages 1465 - 1548: this portion of the hearing was held in camera and the pages have accordingly been redacted.
yesterday on the cultural exemption, and you asked, is there a test that we can make up here. And I would just like to draw your attention and contrast the text of GATT Article XX which is the exemption in the GATT agreement which contains a number of different elements to it and criteria that have to be applied in order to find that the exemption applies. For example, it talks about--it requires that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, and talks about the necessity test.

Now, there is specific language in GATT Article XX requiring a tribunal to apply those criteria in finding whether the exemption applies, and contrast that with the language of the cultural exemption in the NAFTA. So, just to come back to that point.

I will now address the allegations regarding the breaches of the minimum standard of treatment.

Before I get into this, I would just like to ask for the record whether Mr. Appleton or Mr. Wisner can confirm whether they're dropping the
allegations regarding the denial of collective
bargaining rights in relation to Canada Post
employees.

MR. APPLETON: Ms. Tabet, we were very clear on this matter when we came in. We haven't dropped that matter. We said the materials are covered in the pleadings, that is the material before the Tribunal. The Tribunal can deal with that matter as they see fit, and so since, if you would like to rely on your pleadings, you could save us time, but if you would like to speak about it, that's up to you.

MS. TABET: Thank you for the clarification.

So, I will therefore address that.

Now, the claimant has referred to fairness many times in its opening statement without any reference to the applicable legal standards. And so I would like to spend a little time on this today to talk about the legal standard. The legal provision at issue is NAFTA Article 1105. Article 1105 is entitled Minimum Standard of Treatment, and this provides a good indication of the nature of the obligation.
Now, you may have noted that in its written submissions and in the opening statement, the claimant has attempted to relabel this provision to avoid a reference to the minimum standard. And I would like to invite you to read the text of Article 1105. Which I'm sure you have already read because it was at issue in the hearing on jurisdiction, but again coming back to the text, which is the starting point, each party shall accord to investments of investors of another party. So, according treatment to investors or investments—sorry, of investments of investors, treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Canada's position is that none of the alleged facts come close to a breach of the minimum standard of treatment referred to in Article 1105. So, in the first part of my presentation today, I will discuss the claimant's submissions in respect of the standard of treatment required by Article 1105. I will alert you that despite those references to fairness that you heard in the
opening statement, the claimant has never identified any specific rule of customary international law, part of the minimum standard of treatment of aliens that is applicable to the facts alleged. That is, essentially the claimant did not follow the approach dictated by the Tribunal in its Award on Jurisdiction.

In the second part of my presentation, I will discuss the evidence before the Tribunal and show that the facts at issue do not constitute a breach of the minimum standard.

The claimant's allegation of breaches of NAFTA Article 1105 arises out of three specific sets of facts. The first one relates to discussions that took place between Canada Post and Fritz Starber regarding a possible transportation contract to Latin America.

Now, the claimant has suggested that Fritz Starber submitted a bid to Canada Post that was not accepted because of the UPS subsequent acquisition of Fritz Starber. The second treatment at issue relates to what the claimant has qualified as
prejudicial customs treatment of UPS Canada. And
my colleague, Mr. Conway, has already talked about
that in the context of Article 1102, but I will
come back to it insofar as it may be applicable to
a breach of NAFTA Article 1105 and consider the
facts in relation to a legal standard there. And
what is at issue is whether Customs’ alleged
failure to enforce Customs-related obligations with
respect to Canada Post constitutes a breach of
1105, and the claimant here has alleged that this
lack of—alleged lack of enforcement provides a
competitive advantage to Canada Post over UPS
Canada, so I will talk about that.
And the third allegation concerns Canada's
denial of collective bargaining rights to Canada
Post rural route contractors. The claimant here
too suggests that this provides Canada Post an
unfair advantage.
So I will come back to each of these
allegations in turn in the second part of my
presentation, but let me make some initial comments
on the admissibility of these allegations.

My colleague, Mr. Willis, explained a few
days ago, I think yesterday, that Chapter 11
obligations are only applicable to the conduct of
Canada Post where it exercises governmental authority. When it comes to the treatment of Fritz Starber and Canada Post's dealing with Fritz Starber, no such authority is at issue. The matter concerns a potential contract to provide transportation services for Canada Post, and therefore, it involves a commercial activity.

As a result, because of this lack of delegated governmental authority, the minimum-standard-of-treatment obligation is not applicable to those actions by Canada Post, and you need not consider the matter further.

Canada has also objected to the introduction of this claim in the Revised Amended Statement of Claim on the basis that it's a new claim. I refer you to paragraphs 571 to 573 of the countermemorial, and I will not be discussing this further, but I draw your attention to that.

Now, Canada has also objected to the allegations that Customs treatment and denial of labor rights breach Article 1105, given that they were not raised with any degree of specificity in the pleadings.

And if I can just draw your attention to
paragraph 43 of the Revised Amended Statement of
Claim which contain essentially the basis for the
claimant's allegations today before you on Article
1105, that's all there is. All there is is an
allegation that the same facts that breach Article
1102 breach 1105, and so this lack of specificity
has not allowed Canada to have proper notice and
has prejudiced Canada's defense in this respect.

I will also mention coming back to my
admissibility and the objections on these claims.
I also mention that Canada's position is
that the labor allegations are time barred, and
without expanding on that, just so you know that
the legislative provision that was the basis of the
denial of collective bargaining rights dates back
from 1981, and therefore the claim is outside the
three-year time limit.

Now, the last point I want to make with
respect to these objections is that the allegations
that concern labor rights of Canada Post employees
and Customs treatment of Canada Post do not relate
to UPS Canada. They're in no way directed at UPS
Canada.

And as such, they don't fall within the
scope of Chapter 11 which covers measures relating
to investments. The Methanex Tribunal has dealt
with this issue, and it noted that Article 1101
requires, and I quote, "something more than the
mere effect of a measure on an investor or
investment, and it requires a legally significant
connection between them." And you can find that in
the Methanex award. It's in your compendium. I
won't try to cite it properly. The pagination of
the Methanex award is a bit of a puzzle to me.
It's actually divided in chapters and parts, and so
it's very difficult to refer to, but the relevant
passages are in your compendium.
So, my point here is that there is no
legal connection between enforcement of Customs law
in the postal stream or labor rights of Canada Post
employees and UPS Canada. And I have drawn your
attention to Article 1101.
Now let's look at Article 1105, and the
words of Article 1105 that talk about treatment of
the investment. That's what is meant to be
protected by Article 1105.
But the claimant is not challenging the
treatment of its investment. What it is
challenging before you is clearly the treatment of 
Canada Post. The context may be a bit different in 
the context of an Article 1102 claim where you 
compare treatments, and Mr. Conway has made his 
submissions in that respect, but in Article 1105, 
really what is at issue is the treatment of the 
investment.

And here there is no treatment of UPS 
Canada that can be assessed against the 
international minimum standard of treatment that is 
owed to investments.

As the claimant has framed them, the labor 
and Customs claims are allegations that a

competitive advantage has been given to Canada 
Post, and in that sense there are new iterations of 
allegations regarding the breach of a competition 
law standard that this Tribunal has already found 
not to be part of the minimum standard of 
treatment.

So, this brings me to the content of the 
minimum standard of treatment in the NAFTA. The 
minimum standard of treatment in the NAFTA refers 
to the fundamental basic protections that are 
understood to form part of the customary 
international law obligations with respect to
13 treatment of aliens. As the text shows, this
14 includes providing investments with fair and
15 equitable treatment and full protection and
16 security in accordance with international law.
17 And this is clear from the title, from the
18 text of the provision, as well as from the Canadian
19 statement of implementation, which makes very clear
20 that it is intended to ensure a minimum standard of
21 treatment, and that it is an absolute standard
22 based on long-standing principles of customary

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11:38:08 1 international law, and you can find that in your
2 compendia as well.
3 Now, the Free Trade Commission note of
4 interpretation, which was discussed at the
5 jurisdictional phase, also clarifies that Article
6 1105 consists of the minimum standard at customary
7 international law. This is an extract from the
8 free trade note of interpretation.
9 So, it also confirms that fair and
10 equitable treatment and full protection and
11 security do not require treatment in addition or
12 beyond the customary international law minimum
13 standard of treatment of aliens, and that a breach
14 of another treaty or agreement does not establish
that there is a breach of Article 1105.

Now, I don't want to put words into
Mr. Appleton's mouth, but if I understood his
opening statement, he's referred to Article 1105 as
the customary international law minimum standard or
the treatment, the standard under international
law, so I understand there not to be any
disagreement about this, but in any event, my

colleague, Mr. Neufeld, will be later addressing
any potential confusion there is around that.

This Tribunal, in fact, has looked at, and
considered the customary international minimum
standard to determine what constitutes a breach of
Article 1105. In fact, many other Tribunals, and I
can cite a few, have also done the very same thing.
Just to name a few, the Loewen Tribunal has done
this, the Mondev Tribunal, ADF, Methanex, and Waste
Management. And I won't take you to each of them,
but in each case there has been a reference to or
an examination of the customary minimum standard of
treatment.

Therefore, given that the NAFTA points to
customary international law and the standard that
is provided there for the minimum standard of
treatment of aliens, this brings us to examining
In the context of the hearing on jurisdiction, Mr. Willis reviewed the history of the standard at customary international law and in the early work of the International Law Commission. I don't propose to go over this today, given that the claimant has not taken issue with it, but I just want to draw your attention to a few elements of the historical context that must be borne in mind when considering the claimant's assertions that certain rules are part of the minimum standard of treatment.

And I will make two brief points. First, the concept was advocated by capital exporting states like the United States to protect their nationals investing in less developed countries where nationals' treatment standard was not sufficient to meet and ensure those basic protections. So, the obligation for the host state to provide foreign investors the minimum standard
of treatment was included to provide the absolute
floor below which the state cannot go no matter how
it treated its nationals.

The second point that can be taken from
the historical context is that it gives some
indications as to the types of rule that were
considered to be part of the minimum standard of
treatment, and that was at the time denial of
justice, expropriation, and negligence in the
protection of aliens.

Now, this effort of codification dates
back from the 1960s, but as we said before, it may
have evolved, but the claimant has not established
that new rules or the new rules he purports to rely
on are now accepted as being binding on the
international community and part of the minimum,
minimum standard at customary international law.

The claimant has not put forward any
evidence regarding the rules of customary
international law that may be applicable, and you
heard earlier this week that, well, it's too
onerous to do this, to prove that new rules are
part of customary international law, and he
suggested that you need only look at arbitral
I will come back to the specific points in a moment, but let's look first at the rules that the claimant has relied on as being part of the minimum standard of treatment owed to investments. So, the first one is fairness and equity. And again, Mr. Appleton has made many references to treatment that he qualified as being unfair, and he has, in a sense, invited the Tribunal to adopt or assume an equitable jurisdiction which it does not have. This approach has already been rejected by this Tribunal, and including also by the ADF Tribunal that specifically said that these principles have to be disciplined by, and I quote, "the objective legal framework of customary international law."

So, it's not a subjective standard of fairness as Mr. Appleton would invite you to apply, and the claimant has never established what is required by the obligation to provide fair treatment at international law. Nor, and I will get back to this in the second part of my presentation, has he explained how the Customs
So, if I understood correctly the claimant's position, the requirement to provide fair and equitable treatment has its origins in the requirement—in the obligation of good faith, and therefore includes a number of different obligations, including the obligation to perform undertakings, so pacta sunt servanda, not to abuse rights, to provide treatment free of arbitrary and discriminatory conduct, and to fulfill legitimate expectations. Now, let me briefly comment on each one.

On good faith, certainly Canada does not take an issue with good faith as a general principle of international law. It may be relevant in considering whether there has been a breach of the minimum standard of treatment. However, it does not define the content of the standard owed to an investor in any given situation.

Now, in the ADF case, the investor raised
a very similar argument and relied on good faith, and said the United States breached its duty under Article 1105 because it did not perform its obligations in good faith, and what the ADF Tribunal said there was that this argument really added, and I quote, "only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment." I will refer you to paragraph 191 of the ADF case. That is in the investor's Book of Authorities at Tab 95. The International Court of Justice has also examined this concept, and the implications in Nicaragua Armed Actions, it commented on the role of good faith and international law, and it stated good faith was not in itself a source of legal obligations, but rather a basic principle that controls the creation and performance of legal obligations. You can find that case in your compendia, as well as the boundary case between Cameroon and Nigeria, where the court again reiterated the fact that good faith was not a stand-alone obligation.

So the claimant's argument that good faith is a stand-alone obligation stands in contradiction
I would just add that in any event, none of the facts here show any evidence of the existence of bad faith.

Now, very similar comments can be made with respect to the principle of pacta sunt servanda. The fact that as a general principle of international law, the state has to respect and comply with its Treaty obligations does not provide any indication with respect to the substance of the state's obligation. Really, it only confirms that the state must comply with its Treaty obligation to provide the minimum standard of treatment, and that doesn't really get us very far. Certainly it cannot be used by the claimant to extend the Tribunal jurisdiction to any breach of a treaty obligation. I will come back to this a little bit more specifically in the context of the labor allegations where the claimant purports to do this.

And as I said earlier, the free trade note of interpretation--free trade Commission note of interpretation, sorry addresses--disposes of this question. Now, the claimant also argues that the
6 concept of abusive right is part of the customary
7 minimum standard of treatment, and he invokes this
8 concept in connection with the Fritz Starber claim
9 without any explanation as to whether it defines
10 the minimum standard in relation to these
11 commercial discussions.
12 The only explanation that's provided or
13 relied on is the references to abuse of right by
14 Bin Cheng that refers to a fictitious exercise of a
15 right to evade a legal obligation. And a reference
16 by Sir Lauterpacht that says that there would be an
17 abuse of rights where there was an expulsion of an
18 alien without just reason.
19 None of the two situations are present
20 here and certainly what is also evident is that the
21 abuse of right relates to the exercise of the right
22 by the state, but it doesn't really dictate the

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11:50:45 1 standard of treatment in any particular
2 circumstance. So, this brings us back to customary
3 international law in terms of dictating exactly
4 what the standard is in any given circumstance.
5 With respect to arbitrariness,
6 discriminatory conduct, and legitimate
7 expectations, like good faith, they're not
stand-alone obligations. They may be elements that may be relevant in the application of a standard to determine whether the conduct at issue is a breach of the minimum standard of treatment, but again, I submit that it depends on the context at issue. For example, arbitrariness will certainly be a relevant element in the context of a denial-of-justice claim, but the claimant has not established that they're part of the body of customary international law that is applicable in these circumstances.

And I will come back to the cases cited by the claimant in support of its proposition in a moment.

And finally, the claimant relies on the obligation to provide full protection and security. And with respect to that, our position is that the claimant's interpretation of this obligation goes well beyond what is understood at customary international law by the standard. The American Manufacturing Trading and Asian Agricultural Products cases both illustrate the types of situation where there can be a breach of the obligation to provide full protection and security, and both cases dealt with situations where the
property of the foreign investment was physically invaded.

In those cases, the standard was found to be to provide a minimum level of police protection against criminal conduct.

The claimant has now relied on the CME case, CME versus Czech Republic case to argue that legal security of the investment is also protected. But even if we accept the claimant's position, the situation here has really nothing to do with putting at risk the legal security of UPS Canada, and it's very different from the facts in the CME case.

Just to put in context, in that case, what was at issue was the Media Council, which was an organ of the state interfered with the legal position of the license holder, and that position, the legal position was critical to the investment and to--and there was interference with the legal structure of the joint venture. None of the three situations here have nothing to do with legal security of UPS Canada.

I just want to make three points before I turn to the actual facts regarding the misuse of
arbitral decisions by the claimant. The claimant has relied on comments from arbitral tribunals as evidence that the rules on which he relies are part of customary international law. And I would like to indicate that there is certainly a certain amount of caution that has to be--is called for in this respect.

And so my first point is that the Treaty provisions that are applied by the arbitral decisions cited by the claimant defer or often at least defer from those in the NAFTA. They're not all NAFTA cases, that often there's references to cases that apply BIT provisions that have different Treaty provisions than the NAFTA.

And so, in considering the relevance of those cases to determining whether there is arbitrariness, for example, is part of customary international law, or whether they were applying a specific treaty provision, we have to look at the exact wording of the Treaty that was applied in those cases. And the best example of that is the Lauder case, which was applying the U.S.-Czech BIT, and it contained a provision prohibiting arbitrary and discriminatory measures. That provision was in addition to the provision extending to investments
the treatment required by international law.

So, when the Tribunal considered whether these provisions had been breached by the state's media counsel, it found that there was a breach of the specific provision prohibiting arbitrary and discriminatory conduct, but not of the—any of the other standards provided in the Treaty. And so, this finding cannot be—we cannot extrapolate from this finding of a breach of arbitrariness to say arbitrariness is part of customary international law.

This was also the case in the ELSI case. There was a specific treaty provision in the U.S.-Italy BIT which provided protection against arbitrary and discriminatory measures.

And the same thing can be said about discrimination, is discrimination part of customary international law, and as I said, in those two cases there was a specific prohibition. I would also add that Sir Robert Jennings has said, and we have referred to that in our countermemorial, that there is no rule against discrimination at customary international law and the recent Methanex decision also confirmed this at paragraphs 25 and
26. It went into considering whether discrimination is part of 1105, and it was found that it wasn't, that there was no discrimination standard at customary international law.

PRESIDENT KEITH: Ms. Tabet, that's a very broad proposition, isn't it? Would you really say there is no international law standard prohibiting racial discrimination or sexual discrimination?

MS. TABET: My proposition is that there is no general prohibition against discrimination between a foreign investment and a domestic investment. That is specifically addressed in Article 1102, so there may be in different circumstances a standard of discrimination, but certainly it doesn't relate to the facts here, and it may relate to intentional discrimination or as you said racial discrimination, but that's not what we have at issue here.

PRESIDENT KEITH: Thank you.

MS. TABET: Now, my second point in terms of the caution I have called for is whether arbitral decisions can constitute proof of customary international law, and I would submit that the rules of formation of customary
international law have not been displaced by the
NAFTA. It is still necessary to show consistent
state practice that the states accept as legally
binding--this is the approach that the
International Court of Justice follows and as well
the approach that this Tribunal has followed in the
Award on Jurisdiction.

Now, the other arbitral awards may have
some useful analysis in terms of what is part of
the customary international minimum standard, but
they're not determinative.

My final point with respect to quotations
from other arbitral awards is, there is a danger in
relying on certain comments taken out of context to
establish the minimum standard of treatment, and
this is what the claimant does. And that ignores
the factual context in which that standard was
described, and so we can't just take little
extracts and quotations that relate to a completely
different factual context.

The claimant himself has recognized the
importance of facts in determination of minimum
standard of treatment; however, many of the cases
cited relate, for example, to breaches of contract,
and those will require different application than
Let me just illustrate that.

The claimant relies on a number of awards to argue that the protection of legitimate expectations is included in the minimum standard of treatment. For example, the claimant cites a number of BIT cases like Tecmed versus Mexico, MTD versus Chile, Occidental versus Ecuador, and CMS Argentina, as well as citing the Metalclad case under NAFTA Chapter 11.

In all these cases, specific guarantees and assurances that were critical to the investor's decision to make long-term investment in the country, for example in the energy, the water or the waste management sector, those assurances were provided by the government to the investors, and they were subsequently not respected, or the legal framework in which the investment operated was significantly altered.

And so, obviously the concept of legitimate expectation referred to in those cases cannot just be transposed in the context of a
request for pricing information from Fritz Starber by Canada Post.

So, I conclude the discussion of the content of the minimum standard of treatment by recalling that in order to establish the breach of the minimum standard of treatment, the investor must do two things: First, identify the applicable rule of customary international law, part of the minimum standard of treatment owed to aliens; and establish that the conduct at issue breaches this rule.

So, I've discussed the claimant's failure to identify the applicable rule of customary international law in relation to the facts alleged, and I will now come to the second part of my presentation. If I can just ask you, this will be in camera.

PRESIDENT KEITH: I ask if we could resume, please. Mr. Neufeld.

MR. NEUFELD: Thank you very much, Mr. President and Member of the Tribunal. It's quite an honor for me to be here before you today, even if I have the unenviable task of arguing
Canada's defense on Article 1103. I say "unenviable" because this is one of the arguments that sort of bobs along and disappears and bobs up for a little while and disappears. And it was during the opening argument during an apparent disappearance that you asked the question, and I believe it was actually Professor Cass that asked the question, although the transcript says it was the President that asked the question, and in any event, you wanted to know whether this Article 1103 argument was still afloat. And my friend responded, and he responded as follows, after stating that, "The 1103 argument is really about this controversial," his words, controversial free trade Commission interpretation on Article 1105, and then he said at page 93, and this is the first day's transcript at line 15, page 93, he says, "So the real question is does that interpretation limit the meaning? In fact, most tribunals have now come to the conclusion that it doesn't really limit the meaning. That meaning was always there, and so, as a result, if you come that conclusion, there is no need to get to the 1103 issue. But to the extent that you determine that somehow you are bound
because of the NAFTA free trade interpretation, and then to that extent we could point out that there are other parts of Canada's obligation that could go further and could be broader." And then again he continues on later, "but that is basically in the hands of this Tribunal because we don't know where you might want to go on this issue, and that is the difficulty with it."

Well, it really isn't that difficult in Canada's submission. The claimant sets forth its case, and the defendant defends its case. If you would like to tell me today that they haven't set forth their case, I will be happy to sit down and be done and we could all go home. Unfortunately, they haven't said that. The claimant is still there, so we have an obligation to defend against it.

We also have an obligation because, indeed, with all due respect, you are bound by that FTC interpretation. Article 1131 of the NAFTA says as much.

So, if I understand my friend's argument properly, it runs something like this. Article
Article 1103, referring to other agreements out there, offer a level of treatment that's higher than the level of treatment that's otherwise found in NAFTA, allows us that better level of treatment. That seems to be their claim, and those other agreements are Canada's, we call them FIPAs, Foreign Investment Protection Agreements. You may more commonly know them as BITs, bilateral investment treaties, but I'm going to be calling them FIPAs here. That's our jargon in Canada.

The claimant points to one particular provision in these other treaties. He cites 16 of them; in fact, there are only 14 with a similar type of fair and equitable treatment provision. He points to that provision which calls for fair and equitable treatment in accordance with the principles of international law.

And he claims, he argues that that guarantees everything that is required by international law, not just customary international
law, but all sources of international law. That's why it's a better level of treatment.

In response, I'm going to argue very simply two things, and it shouldn't take me more than 10 or 15 minutes to do so. One, they haven't raised a prima facie case. And two, even if they had adequately presented their claim, the minimum standard of treatment provisions that exist in these other treaties in these FIPAs don't accord any higher standard of treatment than what we already have in Article 1105. In fact, the wording of the similar FIPA provisions mirrors the wording in Article 1105 and is equally limited to the guarantees found in customary international law.

So let me turn first to the argument that they haven't raised a prima facie case.

As you know, Canada's obligation to accord most-favored-nation treatment is found in Article 1103, and it's crucial to start there with the text of that provision. My friend would prefer to ignore the text altogether on the basis that an MFN provision is an MFN provision is an MFN provision.

But in what's turning out to be the theme in our oral proceedings, Article 1103 is what it is, and
if we don't turn to the text of Article 1103, we will never know what it is.

You have 1103 before you here on the screen, but feel free to look at your NAFTA instead. Article 1103 requires each party to accord to investors or their investments treatment that is no less favorable than that it accords in like circumstances to investors of any other party or nonparty.

The three elements that you see there are one, the treatment, two, the treatment that is in like circumstances, and three, the treatment that is no less favorable. You're probably pretty familiar with them by now because they mirror the language that's found in Article 1102.

And as in the interpretation of Article 1102, the claimant bears the burden to satisfy all of these elements.

I like to think of an argument as an elastic band, and for them to convince you they have to stretch that band and reach you with it, but in stretching it you would see all the weak points along the way, and in stretching it to that extent, it may even snap.

Well, if we do that job because they
certainly haven't, but if we take that elastic band and we stretch it out, I will point to you the weak spots in the argument I'll take you to the different elements that they haven't even tried to show.

First, let's talk about the element of in like circumstances. The claimant never provides an explanation as to whether the treatment was accorded in like circumstances. I can summarize the claimant's argument in its entirety right here, so that's in its entirety through three statements of claim, a memorial, a reply, and three days of oral argument. I can give you the entirety of its case on in like circumstances here. They said the investor and investments are in like circumstances with BIT party investors and their investments because they're offered protection under investment protection treaties.

I can also state their entire case, I think I said summarizer earlier. I didn't mean "summarize it." I'm stating the entirety of their case right now on less favorable treatment. Again, I'm stating everything they have ever had to say on
less favorable treatment throughout three
statements of claim, a memorial, a reply, and three
days of oral argument, and this is what they had to
say.

Canada provides less favorable treatment
by adopting measures identified up above in Article
1105 against the investor and its investments with
impunity, but promising not to provide them against
the investors and their investments from parties to
the specific 16 BITs. I already said to you there
are only 14 BITs that provide that same treatment,
but nonetheless.

Then the third weak point on the elastic
band is that of damages. Article 1116 requires
them to show damages, but they haven't set out any
case on damages. It's clear from my entire
restatement of their claim that the issues before
this Tribunal have not been adequately presented.
They have not raised a prima facie case. The
equivalent would be to photocopy Chapter 11,
scribble in front of each paragraph Canada has
breached and submit it to the Tribunal. That's
essentially what they have done, and that can't be
good enough.
Now, let me turn to the second argument that I would like to make, the merits point, if you would like. The substantive element. The claimant has failed to show that the treatment is less favorable, so even if they're allowed to proceed, and even if you think they have made a prima facie case, the claimant still couldn't show that the investment treaties more favorable treatment. These other FIPA provisions provide more favorable treatment. To remind you that's what they're saying. There are 14 provisions out there that give you a higher level of treatment than what Article 1105 of NAFTA gives.

Well, the NAFTA guarantees—I would like this one up on the slide as well, you can check it out in our compendium or materials. It's at 16 and 17 of our compendium—we will start with NAFTA and then we'll go to the other provisions. NAFTA guarantees treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The other treaties are framed in one of two ways. One way, they afford fair and equitable treatment and full protection and security in accordance with the principles of international
In accordance with international law, they guaranteed fair and equitable treatment and full protection and security.

I'm not getting the difference here. They are exactly the same. There is no difference between these Treaty provisions. They're worded exactly the same way.

There is no need to contort words like Humpty-Dumpty suggested, and there is no need to refer to meaningless dictionary definitions as the claimant accused us of doing in their written pleadings. All we have to do is look at the provision and see that the language is the same.

And my colleague, Sylvie Tabet, has already brought you to the statement of implementation that Canada drafted upon its entry into NAFTA. She already told you that that statement of implementation was Canada's view, so you have looked at all of this at the jurisdictional phase.

The statement of implementation, if we could just turn to it quickly, says with respect to Article 1105, this Article provides for a minimum
absolute standard of treatment, based on long-standing principles of customary international law. That has always been Canada's view. And on top of that, the investor admits that all of these FIPA provisions, they're all post-NAFTA, and all of these FIPA provisions are based on the NAFTA model. They admit that. They admit that at paragraph 701 of their memorial. They're based on the NAFTA model and they're worded the same way as what we have in Article 1105, how are they affording any greater level of treatment? It doesn't make sense. It doesn't add up. So, in the end there is no possibility that a measure would breach a minimum standard of treatment clause in one of Canada's FIPAs that wouldn't also breach Article 1105 of NAFTA. They afford the same guarantee. And with that, I can conclude my statement, unless you have any other questions.

PRESIDENT KEITH: Thank you, Mr. Neufeld. No questions.

Mr. Whitehall.

MR. WHITEHALL: I believe that everything that ought to be said by either side has been said, and therefore I decided not to make any final
concluding statements.

I do note, and Madam Obadia can confirm the time, but my rought estimation that at this, moment the investor has two hours on Canada. That is to say, they spent just over 17 hours, and I think we are in the neighborhood of 15.

I also believe that we haven't raised any new matters in our submissions. We simply responded to the investor. So, I would be delighted if my friend advised you that really there will be no reply and we can, indeed, go back to snow in Canada. Thank you.

PRESIDENT KEITH: Mr. Appleton, are you provoked to respond?

MR. APPLETION: Sir Kenneth, of course I wish we could all take back time, but that's not within our power. The fact of the matter is, we would anticipate having a need for some type of a rebuttal. The rebuttal will, of course, deal with new matters or where there are new cases that have been brought my friends or where there has been a gross distortion of the record, or things like that. I'm sure that you will govern us accordingly to make sure we are responsive in that way.
PRESIDENT KEITH: Thank you. The suggestion is that we adjourn for an hour-and-a-half to enable people to get out and buy some lunch and so on, so we will resume at 2:30 for UPS's reply. Thank you, Mr. Appleton.

Mr. Appleton, would you like to estimate how long you might need?

MR. APPLETON: I would expect we need about an hour. For those of you who wish to make plans, I think that would be very safe.

PRESIDENT KEITH: Thank you. Back at 2:30, then. Thank you.

(Whereupon, at 1:06 p.m., the hearing was adjourned until 2:30 p.m., the same day.)
PRESIDENT KEITH: Mr. Appleton, we are ready to go.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

Pages 1623 - 1656: this portion of the hearing was held in camera and the pages have accordingly been redacted.

PRESIDENT KEITH: Thank you very much, Mr. Appleton, and thank you to all involved in this case.

I just had two or three matters to mention before we concluded today. The first is the question of taking a view which Mr. Whitehall mentioned right at the beginning of the hearing, and that's something that we will think about. If we were to do that, we would obviously want to have a view both of UPS's procedures and of Canada Post. So, that's one issue.

Secondly, as discussed with counsel, we should make provision for the possibility of submissions from Mexico and the United States under Article 1128. And as I mentioned, the dates we would propose for that are 27 January for those two
governments, with replies by the 24th of February for the parties to this particular proceeding.

A third matter which I'm sorry I should have mentioned--well, maybe I should have mentioned, if the parties wished to make a brief submission on any matters that, after further reflection, they would like to make to the Tribunal, you would have 25 pages, and I suppose we should say of the appropriate size print and with a certain amount of white paper, but we would leave that to your good sense.

And I suppose a sensible date for that, if the parties were to take that up, would be 24 February date as well, the date for the reply to any submissions that come in from the other state parties. So, we make that offer. That's not compulsory. That's an offer.

Otherwise, I think I'm really in the thank-you business, and we particularly thank counsel and the representatives and so on for their cooperation through this week. I thank again David Kasdan for his amazing facility and skill in producing text in which he's got to take account of the range of different accents. And thanks as well to Eloise Obadia and Ashley for their help and the
help of their colleagues within the ICSID Secretariat.

And as was said earlier today, too, I'm sure that our thoughts and prayers are with the Fortier family for the moment.

So, unless there is anything else to be said—and I'm not encouraging it—I wish you happy travels, and I hope that the snow in the north doesn't interfere with our Canadian friends. Thank you.

MR. WHITEHALL: And on behalf of Canada, Sir Kenneth and Dean Cass, I would like to thank you for your attention and for the last six days we have spent together.

MR. APPLETON: Of course, we want to put on the record, and we want to thank you for your patience as well, of course, the excellent services from the Secretariat, and we also want to echo, of course, our thoughts are with the Fortier family right now, and we know that Maitre Fortier will, in the appropriate time, see this transcript.

PRESIDENT KEITH: Thank you.

(Whereupon, at 3:23 p.m., the hearing was
15:24:18 1 adjourned.)

15:24:18 1 CERTIFICATE OF REPORTER
I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby testify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true record and accurate record of the proceedings.

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

DAVID A. KASDAN, RDR-CRR