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08:54:40

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

----- x
:
In the Matter of Arbitration :
Between: :
:
UNITED PARCEL SERVICE OF AMERICA, INC., :
:
Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Party. :
:
----- x Volume 6

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

08:54:40

Also Present:

ELOISE OBADIA,
Secretary to the Tribunal

Court Reporter:

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08:54:40

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08:54:40 1

P R O C E E D I N G S

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

16 Mr. Willis--sorry, Mr. Conway.

17 CONTINUED CLOSING ARGUMENT BY RESPONDENT

18 MR. CONWAY: Thank you for calling me
19 Mr. Willis. I take that as a very high compliment,
20 indeed.

21 MR. APPLETON: Mr. Conway, excuse me. We
22 have, of course, the administrative requirement we

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09:09:27 1 must do each day pursuant to your order.

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

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

13 MR. CONWAY: Stephen de Boer for the
14 record.

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

18 MR. APPLETON: Can you confirm, then, you
19 only have one business representative today and not
20 two?

21 MR. WHITEHALL: That is right.

22 Mr. Hergert has gone back to Ottawa.

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09:10:28 1 Oh, I beg your pardon. Francine Conn is
2 here, but she is a previous witness, and that's why
3 I didn't compute it.

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

7 Please, Mr. Conway.

8 CONTINUED CLOSING ARGUMENT BY COUNSEL FOR
9 RESPONDENT

Pages 1465 - 1548: this portion of the hearing was held in camera and the pages have accordingly been redacted.

10 PRESIDENT KEITH: Well, if we could
11 resume.

12 Yes, Ms. Tabet.

13 MS. TABET: Thank you.

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

17 yesterday on the cultural exemption, and you asked,
18 is there a test that we can make up here.

19 And I would just like to draw your
20 attention and contrast the text of GATT Article XX
21 which is the exemption in the GATT agreement which
22 contains a number of different elements to it and

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11:25:21 1 criteria that have to be applied in order to find
2 that the exemption applies.

3 For example, it talks about--it requires
4 that the measure not be applied in a manner which
5 would constitute a means of arbitrary or
6 unjustifiable discrimination, and talks about the
7 necessity test.

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

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

17 Before I get into this, I would just like
18 to ask for the record whether Mr. Appleton or
19 Mr. Wisner can confirm whether they're dropping the

20 allegations regarding the denial of collective
21 bargaining rights in relation to Canada Post
22 employees.

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11:26:25 1 MR. APPLETON: Ms. Tabet, we were very
2 clear on this matter when we came in. We haven't
3 dropped that matter. We said the materials are
4 covered in the pleadings, that is the material
5 before the Tribunal. The Tribunal can deal with
6 that matter as they see fit, and so since, if you
7 would like to rely on your pleadings, you could
8 save us time, but if you would like to speak about
9 it, that's up to you.

10 MS. TABET: Thank you for the
11 clarification.

12 So, I will therefore address that.

13 Now, the claimant has referred to fairness
14 many times in its opening statement without any
15 reference to the applicable legal standards. And
16 so I would like to spend a little time on this
17 today to talk about the legal standard. The legal
18 provision at issue is NAFTA Article 1105. Article
19 1105 is entitled Minimum Standard of Treatment, and
20 this provides a good indication of the nature of
21 the obligation.

11:27:33 1 written submissions and in the opening statement,
2 the claimant has attempted to relabel this
3 provision to avoid a reference to the minimum
4 standard. And I would like to invite you to read
5 the text of Article 1105. Which I'm sure you have
6 already read because it was at issue in the hearing
7 on jurisdiction, but again coming back to the text,
8 which is the starting point, each party shall
9 accord to investments of investors of another
10 party. So, according treatment to investors or
11 investments--sorry, of investments of investors,
12 treatment in accordance with international law,
13 including fair and equitable treatment and full
14 protection and security.

15 Canada's position is that none of the
16 alleged facts come close to a breach of the minimum
17 standard of treatment referred to in Article 1105.

18 So, in the first part of my presentation
19 today, I will discuss the claimant's submissions in
20 respect of the standard of treatment required by
21 Article 1105. I will alert you that despite those
22 references to fairness that you heard in the

11:28:51 1 opening statement, the claimant has never
2 identified any specific rule of customary
3 international law, part of the minimum standard of
4 treatment of aliens that is applicable to the facts
5 alleged. That is, essentially the claimant did not
6 follow the approach dictated by the Tribunal in its
7 Award on Jurisdiction.

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

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

18 Now, the claimant has suggested that Fritz
19 Starber submitted a bid to Canada Post that was not
20 accepted because of the UPS subsequent acquisition
21 of Fritz Starber. The second treatment at issue
22 relates to what the claimant has qualified as

11:30:17 1 prejudicial customs treatment of UPS Canada. And
2 my colleague, Mr. Conway, has already talked about
3 that in the context of Article 1102, but I will
4 come back to it insofar as it may be applicable to
5 a breach of NAFTA Article 1105 and consider the
6 facts in relation to a legal standard there. And
7 what is at issue is whether Customs' alleged
8 failure to enforce Customs-related obligations with
9 respect to Canada Post constitutes a breach of
10 1105, and the claimant here has alleged that this
11 lack of--alleged lack of enforcement provides a
12 competitive advantage to Canada Post over UPS
13 Canada, so I will talk about that.

14 And the third allegation concerns Canada's
15 denial of collective bargaining rights to Canada
16 Post rural route contractors. The claimant here
17 too suggests that this provides Canada Post an
18 unfair advantage.

19 So I will come back to each of these
20 allegations in turn in the second part of my
21 presentation, but let me make some initial comments
22 on the admissibility of these allegations.

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11:31:29 1 My colleague, Mr. Willis, explained a few
2 days ago, I think yesterday, that Chapter 11
3 obligations are only applicable to the conduct of

4 Canada Post where it exercises governmental
5 authority. When it comes to the treatment of Fritz
6 Starber and Canada Post's dealing with Fritz
7 Starber, no such authority is at issue. The matter
8 concerns a potential contract to provide
9 transportation services for Canada Post, and
10 therefore, it involves a commercial activity.

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

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

22 Now, Canada has also objected to the

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11:32:50 1 allegations that Customs treatment and denial of
2 labor rights breach Article 1105, given that they
3 were not raised with any degree of specificity in
4 the pleadings.

5 And if I can just draw your attention to

6 paragraph 43 of the Revised Amended Statement of
7 Claim which contain essentially the basis for the
8 claimant's allegations today before you on Article
9 1105, that's all there is. All there is is an
10 allegation that the same facts that breach Article
11 1102 breach 1105, and so this lack of specificity
12 has not allowed Canada to have proper notice and
13 has prejudiced Canada's defense in this respect.

14 I will also mention coming back to my
15 admissibility and the objections on these claims.

16 I also mention that Canada's position is
17 that the labor allegations are time barred, and
18 without expanding on that, just so you know that
19 the legislative provision that was the basis of the
20 denial of collective bargaining rights dates back
21 from 1981, and therefore the claim is outside the
22 three-year time limit.

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11:34:18 1 Now, the last point I want to make with
2 respect to these objections is that the allegations
3 that concern labor rights of Canada Post employees
4 and Customs treatment of Canada Post do not relate
5 to UPS Canada. They're in no way directed at UPS
6 Canada.

7 And as such, they don't fall within the

8 scope of Chapter 11 which covers measures relating
9 to investments. The Methanex Tribunal has dealt
10 with this issue, and it noted that Article 1101
11 requires, and I quote, "something more than the
12 mere effect of a measure on an investor or
13 investment, and it requires a legally significant
14 connection between them." And you can find that in
15 the Methanex award. It's in your compendium. I
16 won't try to cite it properly. The pagination of
17 the Methanex award is a bit of a puzzle to me.
18 It's actually divided in chapters and parts, and so
19 it's very difficult to refer to, but the relevant
20 passages are in your compendium.

21 So, my point here is that there is no
22 legal connection between enforcement of Customs law

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11:35:40 1 in the postal stream or labor rights of Canada Post
2 employees and UPS Canada. And I have drawn your
3 attention to Article 1101.

4 Now let's look at Article 1105, and the
5 words of Article 1105 that talk about treatment of
6 the investment. That's what is meant to be
7 protected by Article 1105.

8 But the claimant is not challenging the
9 treatment of its investment. What it is

10 challenging before you is clearly the treatment of
11 Canada Post. The context may be a bit different in
12 the context of an Article 1102 claim where you
13 compare treatments, and Mr. Conway has made his
14 submissions in that respect, but in Article 1105,
15 really what is at issue is the treatment of the
16 investment.

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

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

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11:36:46 1 competitive advantage has been given to Canada
2 Post, and in that sense there are new iterations of
3 allegations regarding the breach of a competition
4 law standard that this Tribunal has already found
5 not to be part of the minimum standard of
6 treatment.

7 So, this brings me to the content of the
8 minimum standard of treatment in the NAFTA. The
9 minimum standard of treatment in the NAFTA refers
10 to the fundamental basic protections that are
11 understood to form part of the customary
12 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

15 that there is a breach of Article 1105.

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

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11:39:27 1 colleague, Mr. Neufeld, will be later addressing
2 any potential confusion there is around that.

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

14 Therefore, given that the NAFTA points to
15 customary international law and the standard that
16 is provided there for the minimum standard of
17 treatment of aliens, this brings us to examining

18 the content of that standard at customary
19 international law. And I would submit that the
20 claimant has done nothing in these proceedings or
21 in its written submissions to define the standard
22 at international law.

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11:41:01 1 In the context of the hearing on
2 jurisdiction, Mr. Willis reviewed the history of
3 the standard at customary international law and in
4 the early work of the International Law Commission.
5 I don't propose to go over this today, given that
6 the claimant has not taken issue with it, but I
7 just want to draw your attention to a few elements
8 of the historical context that must be borne in
9 mind when considering the claimant's assertions
10 that certain rules are part of the minimum standard
11 of treatment.

12 And I will make two brief points.

13 First, the concept was advocated by
14 capital exporting states like the United States to
15 protect their nationals investing in less developed
16 countries where nationals' treatment standard was
17 not sufficient to meet and ensure those basic
18 protections. So, the obligation for the host state
19 to provide foreign investors the minimum standard

20 of treatment was included to provide the absolute
21 floor below which the state cannot go no matter how
22 it treated its nationals.

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11:42:09 1 The second point that can be taken from
2 the historical context is that it gives some
3 indications as to the types of rule that were
4 considered to be part of the minimum standard of
5 treatment, and that was at the time denial of
6 justice, expropriation, and negligence in the
7 protection of aliens.

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

15 The claimant has not put forward any
16 evidence regarding the rules of customary
17 international law that may be applicable, and you
18 heard earlier this week that, well, it's too
19 onerous to do this, to prove that new rules are
20 part of customary international law, and he
21 suggested that you need only look at arbitral

22 decisions.

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11:43:24 1 I will come back to the specific points in
2 a moment, but let's look first at the rules that
3 the claimant has relied on as being part of the
4 minimum standard of treatment owed to investments.

5 So, the first one is fairness and equity.
6 And again, Mr. Appleton has made many references to
7 treatment that he qualified as being unfair, and he
8 has, in a sense, invited the Tribunal to adopt or
9 assume an equitable jurisdiction which it does not
10 have. This approach has already been rejected by
11 this Tribunal, and including also by the ADF
12 Tribunal that specifically said that these
13 principles have to be disciplined by, and I quote,
14 "the objective legal framework of customary
15 international law."

16 So, it's not a subjective standard of
17 fairness as Mr. Appleton would invite you to apply,
18 and the claimant has never established what is
19 required by the obligation to provide fair
20 treatment at international law. Nor, and I will
21 get back to this in the second part of my
22 presentation, has he explained how the Customs

11:44:51 1 treatment or the Fritz Starber treatment amount to
2 a breach of the obligation to provide fair and
3 equitable treatment at customary international law.

4 So, if I understood correctly the
5 claimant's position, the requirement to provide
6 fair and equitable treatment has its origins in the
7 requirement--in the obligation of good faith, and
8 therefore includes a number of different
9 obligations, including the obligation to perform
10 undertakings, so pacta sunt servanda, not to abuse
11 rights, to provide treatment free of arbitrary and
12 discriminatory conduct, and to fulfill legitimate
13 expectations. Now, let me briefly comment on each
14 one.

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

22 Now, in the ADF case, the investor raised

11:46:19 1 a very similar argument and relied on good faith,
2 and said the United States breached its duty under
3 Article 1105 because it did not perform its
4 obligations in good faith, and what the ADF
5 Tribunal said there was that this argument really
6 added, and I quote, "only negligible assistance in
7 the task of determining or giving content to a
8 standard of fair and equitable treatment." I will
9 refer you to paragraph 191 of the ADF case. That
10 is in the investor's Book of Authorities at Tab 95.

11 The International Court of Justice has
12 also examined this concept, and the implications in
13 Nicaragua Armed Actions, it commented on the role
14 of good faith and international law, and is it
15 stated good faith was not in itself a source of
16 legal obligations, but rather a basic principle
17 that controls the creation and performance of legal
18 obligations.

19 You can find that case in your compendia,
20 as well as the boundary case between Cameroon and
21 Nigeria, where the court again reiterated the fact
22 that good faith was not a stand-alone obligation.

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11:47:52 1 So the claimant's argument that good faith
2 is a stand-alone obligation stands in contradiction

3 with the International Court of Justice findings.

4 I would just add that in any event, none
5 of the facts here show any evidence of the
6 existence of bad faith.

7 Now, very similar comments can be made
8 with respect to the principle of pacta sunt
9 servanda. The fact that as a general principle of
10 international law, the state has to respect and
11 comply with its Treaty obligations does not provide
12 any indication with respect to the substance of the
13 state's obligation.

14 Really, it only confirms that the state
15 must comply with its Treaty obligation to provide
16 the minimum standard of treatment, and that doesn't
17 really get us very far. Certainly it cannot be
18 used by the claimant to extend the Tribunal
19 jurisdiction to any breach of a treaty obligation.
20 I will come back to this a little bit more
21 specifically in the context of the labor
22 allegations where the claimant purports to do this.

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11:49:12 1 And as I said earlier, the free trade note
2 of interpretation--free trade Commission note of
3 interpretation, sorry addresses--disposes of this
4 question.

5 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

8 stand-alone obligations. They may be elements that
9 may be relevant in the application of a standard to
10 determine whether the conduct at issue is a breach
11 of the minimum standard of treatment, but again, I
12 submit that it depends on the context at issue.
13 For example, arbitrariness will certainly be a
14 relevant element in the context of a
15 denial-of-justice claim, but the claimant has not
16 established that they're part of the body of
17 customary international law that is applicable in
18 these circumstances.

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

22 And finally, the claimant relies on the

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11:52:01 1 obligation to provide full protection and security.
2 And with respect to that, our position is that the
3 claimant's interpretation of this obligation goes
4 well beyond what is understood at customary
5 international law by the standard. The American
6 Manufacturing Trading and Asian Agricultural
7 Products cases both illustrate the types of
8 situation where there can be a breach of the
9 obligation to provide full protection and security,
10 and both cases dealt with situations where the

11 property of the foreign investment was physically
12 invaded.

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

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

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11:53:16 1 case.

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

11 I just want to make three points before I
12 turn to the actual facts regarding the misuse of

13 arbitral decisions by the claimant. The claimant
14 has relied on comments from arbitral tribunals as
15 evidence that the rules on which he relies are part
16 of customary international law. And I would like
17 to indicate that there is certainly a certain
18 amount of caution that has to be--is called for in
19 this respect.

20 And so my first point is that the Treaty
21 provisions that are applied by the arbitral
22 decisions cited by the claimant defer or often at

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11:54:38 1 least defer from those in the NAFTA. They're not
2 all NAFTA cases, that often there's references to
3 cases that apply BIT provisions that have different
4 Treaty provisions than the NAFTA.

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

16 the treatment required by international law.

17 So, when the Tribunal considered whether
18 these provisions had been breached by the state's
19 media counsel, it found that there was a breach of
20 the specific provision prohibiting arbitrary and
21 discriminatory conduct, but not of the--any of the
22 other standards provided in the Treaty. And so,

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11:56:03 1 this finding cannot be--we cannot extrapolate from
2 this finding of a breach of arbitrariness to say
3 arbitrariness is part of customary international
4 law.

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

9 And the same thing can be said about
10 discrimination, is discrimination part of customary
11 international law, and as I said, in those two
12 cases there was a specific prohibition. I would
13 also add that Sir Robert Jennings has said, and we
14 have referred to that in our countermemorial, that
15 there is no rule against discrimination at
16 customary international law and the recent Methanex
17 decision also confirmed this at paragraphs 25 and

18 26. It went into considering whether
19 discrimination is part of 1105, and it was found
20 that it wasn't, that there was no discrimination
21 standard at customary international law.

22 PRESIDENT KEITH: Ms. Tabet, that's a very

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11:57:26 1 broad proposition, isn't it? Would you really say
2 there is no international law standard prohibiting
3 racial discrimination or sexual discrimination?

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

14 PRESIDENT KEITH: Thank you.

15 MS. TABET: Now, my second point in terms
16 of the caution I have called for is whether
17 arbitral decisions can constitute proof of
18 customary international law, and I would submit
19 that the rules of formation of customary

20 international law have not been displaced by the
21 NAFTA. It is still necessary to show consistent
22 state practice that the states accept as legally

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11:58:42 1 binding--this is the approach that the
2 International Court of Justice follows and as well
3 the approach that this Tribunal has followed in the
4 Award on Jurisdiction.

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

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

18 The claimant himself has recognized the
19 importance of facts in determination of minimum
20 standard of treatment; however, many of the cases
21 cited relate, for example, to breaches of contract,
22 and those will require different application than

11:59:56 1 in the present case.

2 Let me just illustrate that.

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

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

20 And so, obviously the concept of
21 legitimate expectation referred to in those cases
22 cannot just be transposed in the context of a

12:01:23 1 request for pricing information from Fritz Starber
2 by Canada Post.

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

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

Pages 1577 - 1609: this portion of the hearing was held in camera and the pages have accordingly been redacted.

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

16 MR. NEUFELD: Thank you very much,
17 Mr. President and Member of the Tribunal. It's
18 quite an honor for me to be here before you today,
19 even if I have the unenviable task of arguing

20 Canada's defense on Article 1103. I say
21 "unenviable" because this is one of the arguments
22 that sort of bobs along and disappears and bobs up

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12:52:00 1 for a little while and disappears. And it was
2 during the opening argument during an apparent
3 disappearance that you asked the question, and I
4 believe it was actually Professor Cass that asked
5 the question, although the transcript says it was
6 the President that asked the question, and in any
7 event, you wanted to know whether this Article 1103
8 argument was still afloat. And my friend
9 responded, and he responded as follows, after
10 stating that, "The 1103 argument is really about
11 this controversial," his words, controversial free
12 trade Commission interpretation on Article 1105,
13 and then he said at page 93, and this is the first
14 day's transcript at line 15, page 93, he says, "So
15 the real question is does that interpretation limit
16 the meaning? In fact, most tribunals have now come
17 to the conclusion that it doesn't really limit the
18 meaning. That meaning was always there, and so, as
19 a result, if you come that conclusion, there is no
20 need to get to the 1103 issue. But to the extent
21 that you determine that somehow you are bound

22 because of the NAFTA free trade interpretation, and

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12:53:16 1 then to that extent we could point out that there
2 are other parts of Canada's obligation that could
3 go further and could be broader." And then again
4 he continues on later, "but that is basically in
5 the hands of this Tribunal because we don't know
6 where you might want to go on this issue, and that
7 is the difficulty with it."

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

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

21 So, if I understand my friend's argument
22 properly, it runs something like this. Article

12:54:17 1 1103 by offering a level of treatment that is
2 higher than what is--sorry. Article 1103,
3 referring to other agreements out there, offer a
4 level of treatment that's higher than the level of
5 treatment that's otherwise found in NAFTA, allows
6 us that better level of treatment. That seems to
7 be their claim, and those other agreements are
8 Canada's, we call them FIPAs, Foreign Investment
9 Protection Agreements. You may more commonly know
10 them as BITs, bilateral investment treaties, but
11 I'm going to be calling them FIPAs here. That's
12 our jargon in Canada.

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

20 And he claims, he argues that that
21 guarantees everything that is required by
22 international law, not just customary international

12:55:31 1 law, but all sources of international law. That's
2 why it's a better level of treatment.

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

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

17 As you know, Canada's obligation to accord
18 most-favored-nation treatment is found in Article
19 1103, and it's crucial to start there with the text
20 of that provision. My friend would prefer to
21 ignore the text altogether on the basis that an MFN
22 provision is an MFN provision is an MFN provision.

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12:56:52 1 But in what's turning out to be the theme in our
2 oral proceedings, Article 1103 is what it is, and

3 if we don't turn to the text of Article 1103, we
4 will never know what it is.

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

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

18 And as in the interpretation of Article
19 1102, the claimant bears the burden to satisfy all
20 of these elements.

21 I like to think of an argument as an
22 elastic band, and for them to convince you they

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12:58:05 1 have to stretch that band and reach you with it,
2 but in stretching it you would see all the weak
3 points along the way, and in stretching it to that
4 extent, it may even snap.

5 Well, if we do that job because they

6 certainly haven't, but if we take that elastic band
7 and we stretch it out, I will point to you the weak
8 spots in the argument I'll take you to the
9 different elements that they haven't even tried to
10 show.

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

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12:59:17 1 protection treaties.

2 I can also state their entire case, I
3 think I said summarizer earlier. I didn't mean
4 "summarize it." I'm stating the entirety of their
5 case right now on less favorable treatment. Again,
6 I'm stating everything they have ever had to say on

7 less favorable treatment throughout three
8 statements of claim, a memorial, a reply, and three
9 days of oral argument, and this is what they had to
10 say.

11 Canada provides less favorable treatment
12 by adopting measures identified up above in Article
13 1105 against the investor and its investments with
14 impunity, but promising not to provide them against
15 the investors and their investments from parties to
16 the specific 16 BITs. I already said to you there
17 are only 14 BITs that provide that same treatment,
18 but nonetheless.

19 Then the third weak point on the elastic
20 band is that of damages. Article 1116 requires
21 them to show damages, but they haven't set out any
22 case on damages. It's clear from my entire

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13:00:30 1 restatement of their claim that the issues before
2 this Tribunal have not been adequately presented.
3 They have not raised a prima facie case. The
4 equivalent would be to photocopy Chapter 11,
5 scribble in front of each paragraph Canada has
6 breached and submit it to the Tribunal. That's
7 essentially what they have done, and that can't be
8 good enough.

9 Now, let me turn to the second argument
10 that I would like to make, the merits point, if you
11 would like. The substantive element. The claimant
12 has failed to show that the treatment is less
13 favorable, so even if they're allowed to proceed,
14 and even if you think they have made a prima facie
15 case, the claimant still couldn't show that the
16 investment treaties more favorable treatment.
17 These other FIPA provisions provide more favorable
18 treatment. To remind you that's what they're
19 saying. There are 14 provisions out there that
20 give you a higher level of treatment than what
21 Article 1105 of NAFTA gives.

22 Well, the NAFTA guarantees--I would like

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13:01:44 1 this one up on the slide as well, you can check it
2 out in our compendium or materials. It's at 16 and
3 17 of our compendium--we will start with NAFTA and
4 then we'll go to the other provisions. NAFTA
5 guarantees treatment in accordance with
6 international law, including fair and equitable
7 treatment and full protection and security.

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

12 law, or in the other way they're framed as follows.
13 In accordance with international law, they
14 guaranteed fair and equitable treatment and full
15 protection and security.

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

20 There is no need to contort words like
21 Humpty-Dumpty suggested, and there is no need to
22 refer to meaningless dictionary definitions as the

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13:02:48 1 claimant accused us of doing in their written
2 pleadings. All we have to do is look at the
3 provision and see that the language is the same.

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

11 The statement of implementation, if we
12 could just turn to it quickly, says with respect to
13 Article 1105, this Article provides for a minimum

14 absolute standard of treatment, based on
15 long-standing principles of customary international
16 law. That has always been Canada's view.

17 And on top of that, the investor admits
18 that all of these FIPA provisions, they're all
19 post-NAFTA, and all of these FIPA provisions are
20 based on the NAFTA model. They admit that. They
21 admit that at paragraph 701 of their memorial.
22 They're based on the NAFTA model and they're worded

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13:03:59 1 the same way as what we have in Article 1105, how
2 are they affording any greater level of treatment?
3 It doesn't make sense. It doesn't add up.

4 So, in the end there is no possibility
5 that a measure would breach a minimum standard of
6 treatment clause in one of Canada's FIPAs that
7 wouldn't also breach Article 1105 of NAFTA. They
8 afford the same guarantee. And with that, I can
9 conclude my statement, unless you have any other
10 questions.

11 PRESIDENT KEITH: Thank you, Mr. Neufeld.

12 No questions.

13 Mr. Whitehall.

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

17 concluding statements.

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

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13:05:20 1 I also believe that we haven't raised any
2 new matters in our submissions. We simply
3 responded to the investor. So, I would be
4 delighted if my friend advised you that really
5 there will be no reply and we can, indeed, go back
6 to snow in Canada. Thank you.

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

9 MR. APPLETON: Sir Kenneth, of course I
10 wish we could all take back time, but that's not
11 within our power. The fact of the matter is, we
12 would anticipate having a need for some type of a
13 rebuttal. The rebuttal will, of course, deal with
14 new matters or where there are new cases that have
15 been brought my friends or where there has been a
16 gross distortion of the record, or things like
17 that. I'm sure that you will govern us accordingly
18 to make sure we are responsive in that way.

19 PRESIDENT KEITH: Thank you. The
20 suggestion is that we adjourn for an
21 hour-and-a-half to enable people to get out and buy
22 some lunch and so on, so we will resume at 2:30 for

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13:06:26 1 UPS's reply. Thank you, Mr. Appleton.

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

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

7 PRESIDENT KEITH: Thank you. Back at
8 2:30, then. Thank you.

9 (Whereupon, at 1:06 p.m., the hearing was
10 adjourned until 2:30 p.m., the same day.)

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AFTERNOON SESSION

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PRESIDENT KEITH: Mr. Appleton, we are

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ready to go.

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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.

3

PRESIDENT KEITH: Thank you very much,

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Mr. Appleton, and thank you to all involved in this

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case.

6

I just had two or three matters to mention

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before we concluded today. The first is the

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question of taking a view which Mr. Whitehall

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mentioned right at the beginning of the hearing,

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and that's something that we will think about. If

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we were to do that, we would obviously want to have

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a view both of UPS's procedures and of Canada Post.

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So, that's one issue.

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Secondly, as discussed with counsel, we

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should make provision for the possibility of

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submissions from Mexico and the United States under

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Article 1128. And as I mentioned, the dates we

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would propose for that are 27 January for those two

19 governments, with replies by the 24th of February
20 for the parties to this particular proceeding.

21 A third matter which I'm sorry I should
22 have mentioned--well, maybe I should have

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15:21:46 1 mentioned, if the parties wished to make a brief
2 submission on any matters that, after further
3 reflection, they would like to make to the
4 Tribunal, you would have 25 pages, and I suppose we
5 should say of the appropriate size print and with a
6 certain amount of white paper, but we would leave
7 that to your good sense.

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

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

22 help of their colleagues within the ICSID

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15:23:23 1 Secretariat.

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

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

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

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

21 PRESIDENT KEITH: Thank you.

22 (Whereupon, at 3:23 p.m., the hearing was

15:24:18 1 adjourned.)

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CERTIFICATE OF REPORTER

