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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

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In the Matter of Arbitration :
Between: :
:
UNITED PARCEL SERVICE OF AMERICA, INC., :
:
Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Party. :
:
----- x Volume 5

HEARING ON THE MERITS

Friday, December 16, 2005

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

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:04 a.m. before:

KENNETH J. KEITH, President

L. YVES FORTIER, Arbitrator

RONALD A. CASS, Arbitrator

08:22:01

Also Present:

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Secretary to the Tribunal

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GRAHAM COOK

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C O N T E N T S

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P R O C E E D I N G S

2 PRESIDENT KEITH: Good morning,
3 Mr. Willis.

4 CONTINUED CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

5 MR. WILLIS: Before I begin, I should
6 mention that our representatives here this morning
7 are Mr. de Boer and Francine Conn.

8 PRESIDENT KEITH: Mr. Appleton, do you
9 want to indicate?

10 MR. APPLETON: Sir Kenneth, do you want us
11 to identify again who our business representative
12 is for the record?

13 PRESIDENT KEITH: Yes.

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

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

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

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09:07:29 1 with Mr. Fortier on the scope of the various
2 provisions of Chapter 15. And as a general--I will
3 begin with a couple of general observations that
4 the whole approach with the overlapping Venn
5 diagrams and the use of the cumulative principle,
6 and also the table we saw up on the screen with
7 various nondiscrimination provisions in the NAFTA
8 all put together, the thrust of all this is to
9 jumble and blur distinctions that are critical to a
10 proper interpretation.

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

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

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

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09:08:46 1 might be a tort. From another point of view it
2 might be a breach of contract; or in a trade law
3 context, somebody might be a service from one point
4 of view, and it might also be a good from another
5 point of view. And for that reason, it may well be
6 subject to more than one legal rule. And that
7 makes perfect sense. It's accepted.

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

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

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

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09:09:59 1 of governmental authority.

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

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

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

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

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

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09:11:11 1 1502(3) (a), the potential for overlap with the
2 other paragraphs explodes, and this is what the
3 Venn diagrams are all about. But, of course, even
4 this would not make the case for UPS because they
5 would still have to rely on fallacious
6 interpretations of Articles 1102 and 1105, which my
7 colleagues will be discussing later on.

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

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

22 establish a legal monopoly, as it has the

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09:12:33 1 recognized right to do under paragraph one of
2 Article 1502, and that's true; only the government
3 can establish a legal monopoly. But of all the
4 transactions and operations of a legal monopoly or
5 a mixed monopoly in competitive enterprise are
6 automatically an exercise of delegated governmental
7 authority just because only the government could
8 establish this operation, then most of the wording
9 of 1502(3)(a) would be superfluous. And at the
10 risk of repetition, I will be coming back to this
11 point because it's fundamental.

12 I was talking yesterday about the argument
13 in the claimant's memorial based on what it calls
14 general and specific grants of authority to Canada
15 Post. And as it explains the position, the general
16 grant of authority to Canada Post is simply the
17 control over the right and terms of access to the
18 monopoly infrastructure through the general
19 provisions of the legislation. That's at 733.
20 But, Mr. President, decisions on access to the
21 postal network are commercial decisions, and
22 they're matters of corporate management. The

09:14:02 1 authority to manage the monopoly, as I said
2 yesterday, is inherent in the grant of the
3 monopoly, and otherwise the privilege could not be
4 exercised.

5 The claimant's argument implies that
6 everything a monopoly does is necessarily an
7 exercise of delegated governmental authority; and
8 as I just mentioned, that cannot be right because
9 it would mean that most of the language in
10 1502(3) (a) would have no purpose.

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

22 There is no delegation of governmental

09:15:16 1 authority in connection with the creation of the
2 monopoly. Parliament itself created the monopoly,
3 and it did so through sections 14 and 15 of the
4 Act, which provide for detailed inclusions and
5 exclusions. Parliament itself carved the courier
6 exemption, the principal courier exemption out of
7 the monopoly in section 15(e) by excluding urgent
8 letters of at least three times the ordinary postal
9 rate. There is authority to prescribe what is a
10 letter by regulations under section 19, but that
11 again is subject to the approval of the governing
12 council and is not something Canada Post could do
13 of its own volition.

14 Well, then the claimant's argument turns
15 to what it calls specific grants of authority.
16 There is a reference at paragraph 734 of the
17 memorial to the power to make regulations on
18 certain postal matters. There is no true
19 delegation here, I submit, because the regulations
20 entered into force only with the approval of the
21 Governor and council, in effect the executive
22 government. That approval is what brings them into

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09:16:30 1 force.

2 In any event, the references to the

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

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

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

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09:17:46 1 1502(3) (a) and 1503(2). But everything that any
2 statutory body does is ultimately based upon its
3 legislation, and that would be true even of a
4 private corporation. And if every act of a
5 statutory body is necessarily an exercise of

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

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

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

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09:19:00 1 automatically and by definition fulfilled in every
2 instance. They would be redundant and devoid of
3 effect, and this cannot be right because it
4 contradicts the basic principles of treaty
5 interpretation.

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

8 just a couple of questions here.

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

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

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

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09:20:17 1 rather than from our own approach, but the
2 establishment of letter rates is something that's
3 done by regulation, although with the approval of
4 the governing council, so in that sense it's
5 questionable whether there is a delegation of
6 governmental authority there.

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

11 to be very definitely nongovernmental.

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

22 And if I understood your argument

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09:21:27 1 yesterday, we should import the word "regulatory"
2 in front of the word "quota," in front of the word
3 "fee," and in front of the word "charges." We
4 should read this as if that word were implicit in
5 each of those settings.

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

12 MR. WILLIS: Yes, that's a fair

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

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

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09:22:50 1 contractual arrangements, to consensual
2 arrangements, but rather to regulatory arrangements
3 is the contextual, the setting in which these words
4 appear.

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

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

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

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

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09:24:23 1 phrase that conveys this idea of governmental
2 authority of sovereign functions of the state,
3 which alone and unlike private parties, can impose
4 coercive requirements, exactions, taxes, things of
5 the like.

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

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

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

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

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09:25:47 1 understood to include only formal regulations,
2 statutory regulations made by normally in Canada by
3 the governor and council and really having the same
4 status in law as the statute itself, whereas public
5 administration involves various other forms of
6 rulings and decrees. We saw that, for instance,
7 when we were discussing yesterday the marketing
8 board's decision, the agricultural marketing
9 boards. Now, these were orders and fees and
10 charges which they impose on a compulsory coercive
11 basis, yet they didn't take the form of statutory
12 regulations.

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

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

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

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09:26:59 1 that wanted to emphasize the regulatory aspect.

2 There was a group that wanted to exercise the
3 administrative aspect. There was another group
4 that wanted the word constitutional in the title.

5 And after--of course, like discussions of
6 grading systems in school, discussions of the name
7 of each section of the American Bar Association is
8 a ritual that has to be done four times a year, so,
9 over the periods of a decade I had 40 wonderful
10 opportunities to hear people expound on the
11 differences among these words, and they--at least
12 most of them ascribe a serious difference between

13 administrative and regulatory. They thought they
14 connoted different sorts of activities, and the
15 word "other" would seem to me to be yet broader and
16 different from the other two.

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

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

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09:28:26 1 to other corporate actors.

2 ARBITRATOR CASS: Well, is it really the
3 sale of service? I mean, if Canada Post were
4 charging 50 cents for letters to some enterprises
5 and a dollar for letters for other enterprises,
6 that would be obviously a discrimination in the
7 sale of a good or service. If you're talking about
8 the ability of another enterprise to contract, to
9 use an entire network of services, isn't that
10 something different? I think earlier you said that
11 was a distinction, although not necessarily one you
12 would rest any decisional weight on.

13 MR. WILLIS: I'm not sure I really grasp
14 this because I think if there is an arrangement
15 to--contractual arrangement to make available the
16 facilities of the entire network on a continuing
17 basis, it's still a sale of services. It's
18 certainly a sale of something, and it's not goods.

19 ARBITRATOR CASS: Well, if Canada Post
20 were a government department, certainly the terms
21 on which it allowed other enterprises to use the
22 letter carriers, letter boxes, retail outlets, and

09:30:03 1 so on, if it adopted a regulation specifying which
2 enterprises could and could not use those parts of
3 the Canada Post network, that would seem to be a
4 quintessential sort of governmental exercise of
5 power, would it not?

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

13 ARBITRATOR CASS: Thank you, Mr. Willis.

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

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

09:31:27 1 and 1502(3), in fact, involve delegated
2 governmental authority so as to bring them within
3 those provisions?

4 Now, the first and the most important of
5 these three claims is what the claimant calls the
6 discriminatory leveraging of the monopoly
7 infrastructure, and the language, of course, is
8 theirs and not ours. Other members of our team
9 will be dealing with facts. What is obvious is
10 that the entire matter falls on the commercial and
11 not the governmental side of the line, and is
12 therefore outside the scope of the two relevant
13 provisions of Chapter 15.

14 Costing is commercial. Pricing is
15 commercial. They are quintessentially commercial.
16 The management of the corporate assets, including
17 the so-called monopoly infrastructure is inherently
18 a matter of internal management, as it would be for
19 any corporation. There is nothing in these
20 functions that is by nature governmental or that
21 corresponds to any of the concrete examples of
22 governmental authority in the Treaty.

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

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

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

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

22 And finally, there is the claim about

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09:33:54 1 Canada Post's failure to collect duties and taxes
2 and to perform other Customs responsibilities under
3 the Postal Imports Agreement. Now, here, in
4 contrast to the other two claims, there is a formal
5 instrument of delegation such as note 45 would lead

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

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

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09:35:05 1 assessments, and the functions of inspection and
2 seizure, where necessary, are carried out by the
3 Customs authorities and not by Canada Post.

4 Finally, Mr. President and Members of the
5 Tribunal, I will add a word on the nature of the
6 obligation imposed on Canada in Articles 1502 and
7 1503 in cases where, in fact, it applies, where
8 delegated governmental authority is being

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

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

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09:36:21 1 is left entirely to its own devices.

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

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

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

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

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

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09:37:53 1 on contractual preferences in favor of Purolator.
2 Mr. Whitehall will deal with the substance of the
3 argument, including the facts. My point here is
4 that as a matter of law, the plain intent of the
5 NAFTA is to deal with this kind of claim under
6 specific clauses of 1502 and 1503 that are not
7 subject to Chapter 11 arbitration. And I'm
8 referring, of course, to the Articles 1502(3)(c)
9 and 1503(3) which provide for nondiscriminatory
10 treatment in the purchase and sale of goods and
11 services by monopolies and state enterprises.

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

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

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

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09:39:11 1 under the NAFTA for everything that Canada Post
2 does without with regard to the limitations of
3 Chapter 15; and those Articles, they say, do no
4 more than supplement the state responsibility of
5 Canada by superimposing an obligation of oversight
6 to ensure that breaches do not occur.

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

16 breach by supervising Canada Post.

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

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09:40:33 1 point. And that is simply inadmissible in the
2 interpretation and application of the Treaty, as it
3 would be in the case of domestic legislation.

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

18 I misunderstood his argument?

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

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09:42:05 1 agents of the Crown in the same situation as Canada
2 Post. Canada Post is not atypical. The Annex 1505
3 says that the state enterprises provisions as
4 related to Canada, essentially they deal with Crown
5 corporations. Most of those Crown corporations are
6 Crown agents; they're not much different from
7 Canada Post.

8 So, I think in effect, the arguments of
9 Mr. Wisner would eviscerate the language of Chapter
10 15 and leave it with very little effect.

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

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

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09:43:39 1 thought that was his argument.

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

10 Does that answer your question, sir?

11 ARBITRATOR CASS: Thank you.

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

09:44:53 1 lex specialis, and so I will begin with that.

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

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

09:46:14 1 even when the stipulated conditions are not met.

2 Now, it's no answer to say that Chapter 15
3 merely supplements the obligations of the parties
4 under the general law of state responsibility.
5 According to the claimant, in situations where
6 Canada Post is exercising governmental authority,
7 Canada would be responsible to ensure its
8 compliance as a matter of customary international
9 law, and it would be also responsible to ensure its
10 compliance on the basis of Articles 1502 and 1503.
11 This, I suggest, is redundancy, pure and simple.
12 It supplements nothing because it adds nothing.

13 Then what about situations where Canada
14 Post is not acting under delegated governmental
15 authority? Now, here the claimant's argument would
16 mean that the obligation to ensure compliance is as
17 strict and complete as when it is exercising
18 governmental authority. In other words, it would
19 make no difference at all whether Canada Post was
20 acting under delegated governmental authority or
21 not. Canada's responsibility under the Treaty
22 would be identical in each situation.

09:47:37 1 The language of Articles 1502(3) (a) and
2 1503(2), and the distinctions obviously intended by
3 that language would be deprived of any utility or
4 effect.

5 So, the claimant's state responsibility
6 theory leads to redundancy in one set of
7 situations, and to an outright conflict with the
8 Treaty in the other. The ILC Commentary says there
9 must be some actual inconsistency before the lex
10 specialis principle comes into effect. There is, I
11 submit, a fundamental inconsistency between the
12 provision that limits responsibility to a carefully
13 defined set of circumstances, and one that provides
14 for unlimited responsibility in any and all
15 circumstances. In the first case, a party will not
16 be responsible for compliance outside the specified
17 circumstances, and in the second case it will. And
18 that's about as direct a conflict as one could
19 find.

20 Now, the claimant's reply raises a cry of
21 alarm. It says that Canada's arguments on this
22 point amount to an attempt to reduce state

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

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

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

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

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09:50:19 1 application.

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

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

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

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

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09:51:46 1 Canadian contention that Article 17 of the GATT on
2 state trading enterprises implicitly excluded
3 Article III on national treatment, and they say
4 further that Canada is making essentially the same
5 point here. Well, this argument takes a
6 considerable leap of faith or imagination or both.
7 In fact, the panel determined at paragraph 426 that

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

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

22 Now, the language in the situations are

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09:53:16 1 worlds apart. There is no limiting language in
2 GATT Article XVII which is comparable to the
3 delegated authority proviso in Chapter 15. There
4 is, in other words, a "wherever" clause in both the
5 relevant provisions of Chapter 15, but there is
6 none in GATT Article XVII. GATT Article XVII
7 actually parallels Article 1503(3) in a loose way.
8 It requires state enterprises to follow
9 nondiscriminatory practices in the purchase and

10 sales in the relevant market.

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

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09:54:58 1 And one of the problems with the state
2 organ argument is it effectively puts two hats on
3 Canada Post because, on the one hand, they're
4 treated as a competing investment, and on the other
5 hand they're treated as a party, and that leads to
6 a number of--a good deal of confusion and anomalous
7 results which will become apparent when Chapter 11
8 is discussed later on. But I will begin with a few
9 observations about the status of Canada Post under
10 Canadian legislation.

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

13 false impression by pointing to one side of the
14 ledger at the expense of the other, putting all the
15 emphasis on government control and none on the
16 respects in which the corporation is autonomous and
17 distinct from the core government. But, of course,
18 when the issue the alleged lack of supervision
19 under Chapter 15, the spin is exactly the opposite.
20 And yet, even with these contradictions,
21 the relatively independent status of the
22 corporation emerges in the description of

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09:56:16 1 paragraphs 48 and following of the claimant's
2 memorial, and this, of course, is why the old Post
3 Office Department was transformed into the
4 corporation which we have today. For example, the
5 memorial tells us that Canada Post exists outside
6 the administrative structure of government and is
7 organized and operated on a commercial basis. It
8 has the same corporate powers as those provided to
9 other Canadian corporations, and its structure
10 parallels that of private corporations.

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

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

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09:57:42 1 Most obvious of all, of course, as a Crown
2 corporation, Canada Post has its own independent
3 legal personality. But these provisions of the
4 Financial Administration Act show that Canada Post
5 actually is at the more independent, more
6 autonomous, and more commercially oriented end of
7 the spectrum of Crown corporations. It shows that
8 the change from a Post Office Department to a Crown
9 corporation is a real one. It's a substantive
10 change. Contrary to Mr. Appleton's remarks on
11 Monday, it is not a cloak. A commercial Crown
12 corporation operates in a different environment and
13 according to different rules. Its performance and
14 efficiency is measured--are measured by commercial
15 criteria quite unlike a government department.
16 Now, we do not disregard the other side of
17 the ledger. There is government ownership and

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

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09:59:06 1 Crown agent status--I put up on the screen
2 a list of federal Crown corporations, those which
3 are agents of the Crown and those which are not.
4 This is based on information available on the
5 Treasury Board Web site, some of which we saw
6 yesterday, and it is interesting to note first that
7 the majority are agents of the Crown in the
8 Canadian system, and that also many of the most
9 important ones are agents of the Crown, such as the
10 Canadian Broadcasting Corporation, the National
11 Capital Commission, Export Development Bank, Atomic
12 Energy of Canada Limited, et cetera.
13 Now, I referred to the other side of the
14 ledger, that it's subject to Financial
15 Administration Act controls, and it has Crown agent
16 status. Crown agent status is the reflection in
17 domestic law of state control, and, of course,
18 Canada Post is subject to extensive regulatory
19 controls.

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

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10:00:51 1 Tribunal chaired by Professor Crawford dealt with
2 the role of a development bank partly owned and
3 substantially controlled by Mexican Government
4 agencies. The Tribunal was prepared to assume for
5 the sake of argument--that's at paragraph 102--that
6 its acts were attributable to the state, but it
7 made this important observation at paragraph 75:
8 "The mere fact that a separate entity is
9 majority-owned or substantially controlled by the
10 state does not make it, ipso facto, an organ of the
11 state."

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

22 If anything, Crown agent status serves to

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10:02:17 1 show that a corporation is not an integral part of
2 the core government. A principal and an agent are
3 separate and distinct. It would not be meaningful
4 or even possible to speak of a government
5 department as an agent of the Crown because it is
6 the Crown. State enterprises can be Crown agents,
7 but the central departments of government cannot.

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

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

22 The claimant--and this is in the memorial

10:03:39 1 at paragraphs 416 and following--the claimant says
2 that Canada Post is an organ of the state by virtue
3 of paragraph two of Article 4 of the ILC Articles,
4 which provides that a state organ includes any
5 entity with that status in accordance with the
6 internal law of a state.

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

10:04:59 1 that it is not part of the core government and,
2 therefore, not an organ of the state.

3 The commentary in paragraph 11 under
4 Article 4 also makes the obvious point that the
5 internal law of a state may not classify
6 exhaustively or at all which entities have the
7 status of organs, in which case internal law will
8 not itself perform the task of classification. And
9 in those cases, of course, paragraph two of Article
10 4 has no application.

11 And in reality, this is the situation in
12 Canada. We have no legislation that explicitly
13 identifies state organs in a way that would be
14 decisive for purposes of international law. I
15 would suggest, however, that in the Canadian
16 system, state organs would be limited to the
17 departments and central agencies in Schedule 1 to
18 the Financial Administration Act, in other words,
19 what has been referred to as the core government.

20 Now, when all this is put in the balance,
21 the question is whether Canada Post fits most
22 naturally into the ILC scheme under the heading of

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

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

11 This would make no sense at all if Article
12 5 were not the relevant ILC provision with respect
13 to state enterprises and monopolies covered by
14 Chapter 15, including Canada Post.

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

22 "Questions arise with respect to the

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10:07:52 1 conduct of companies or enterprises which are
2 state-owned and controlled." And then it goes on
3 to say, "International law acknowledges the general
4 separateness of corporate entities at the national
5 level, except in those cases where the corporate

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

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

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

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10:09:07 1 language. For instance, the Hyatt Award by the
2 Iran claims Tribunal is invoked in the memorial
3 paragraph. That's Tab 111. It's irrelevant, in
4 fact. On the one hand, it dealt with an entity,
5 the Foundation for the Oppressed that was set up to
6 manage confiscated properties for public purposes,
7 and endowed with investigative and prosecutorial
8 powers. That's at paragraph 97, and a critical

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

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

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10:10:30 1 question is simply without relevance to the issues
2 in this case.

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

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

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

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10:11:58 1 Now, the panel was plainly not concerned
2 with the delineation between state organs under
3 Article 4 and parastatal entities under Article 5,
4 which is the focal point of this debate. The
5 considerations it invokes, compliance, incentive,
6 direction and control, might point toward Article 8
7 of the ILC Articles dealing with conduct directed
8 or controlled by a state, but they do not support
9 the proposition that Canada Post is a state organ
10 under Article 4. Nor do they support the
11 proposition that Canada Post exercise a delegated
12 governmental authority either for the purposes of

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

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

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10:13:21 1 Now, the domestic Canadian case law and
2 the scope of judicial review is simply not
3 applicable to questions of state responsibility
4 under general international law. The more recent
5 of the cases he mentioned was the Canadian Daily
6 Newspaper Association case, tab 68, and here the
7 court pointed out that the relevant phrase defining
8 Federal Court jurisdiction in the Federal Court Act
9 is defined broadly and extends, *inter alia*, to
10 anybody exercising jurisdiction or powers conferred
11 by Parliament.

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

16 in Article 4.

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

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10:14:34 1 between decisions made in the context of commercial
2 operations or in the exercise of the general powers
3 of management and actions taken by virtue of
4 specific powers conferred by statutory regulation.
5 It was only and specifically because the decision
6 at issue was an exercise of authority deriving from
7 a regulation and not merely an exercise of the
8 general powers of management that the court
9 accepted jurisdiction.

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

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

17 Second, the concept of delegated

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

1207

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

21 specialis rule.

22 And finally, it fails to recognize that

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10:17:29 1 Canada Post is properly characterized for the
2 purpose of the ILC Rules not as a state organ, but
3 as a parastatal entity under Article 5.

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

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

10:19:13 1 You see the problem I'm having with the
2 language?

3 MR. WILLIS: Yes, and I think at the end
4 of the day my answer is what I gave, that this was
5 included for greater certainty and out of an
6 abundance of caution, just to be clear and
7 explicit. I don't think one should draw an au
8 contrario inference that these would--these matters
9 would otherwise be covered in Chapter 15.

10 And I think really when including this
11 what the drafters had their eye on in terms of
12 seeking this greater certainty was really Chapter
13 10 of the NAFTA.

14 ARBITRATOR CASS: Thank you.

15 PRESIDENT KEITH: I thank you, Mr. Willis.
16 Just as a matter of national pride, I was waiting
17 for another reference to that famous New Zealand
18 constitutional lawyer Peter Hogg, but we missed
19 out.

20 If I could add, he was born very near to
21 where Peter Jackson has just reinvented Manhattan.

22 Thank you, Mr. Willis. I think we have

10:20:34 1 Ms. Hillman, next.

2 (Brief recess.)

3 PRESIDENT KEITH: Yes, Ms. Hillman.

4 MS. HILLMAN: Thank you, Mr Chairman.

5 Mr. Chairman, Members of the Tribunal, my
6 presentation this morning is on Article 1102 of the
7 NAFTA. The majority of the claims brought by the
8 investor in this case are alleged violations of
9 1102, the national treatment obligation found in
10 Chapter 11.

11 Given the central role of this provision
12 in this dispute, Canada would like to take some
13 time this morning exploring the content of this
14 obligation and the legal test that it prescribes.

15 Canada and the investor have offered you
16 very different visions of this obligation, and the
17 test that arises out of it. On the one hand, the
18 investor's basic proposition is that national
19 treatment is a term of art that is not defined in
20 the NAFTA. And so, rather than deriving the
21 content and the scope of the national treatment
22 obligation from the text of Article 1102, the

10:34:08 1 investor draws selectively from cases decided by
2 the World Trade Organization and from its own view
3 of the NAFTA's overriding objectives to create a
4 test arising out of 1102 that bears no relation to
5 the language of that provision.

6 Canada submits that the national treatment
7 protection afforded in Chapter 11 is defined. It
8 is specifically defined, in fact, by the terms of
9 1102. In contrast to the investor's approach,
10 Canada presents the proper test, the test that is
11 true to the precise content of the national
12 treatment obligation articulated in Article 1102,
13 the test that also encapsulates the object and
14 purpose of Article 1102; namely, to prevent
15 nationality-based discrimination.

16 Article 1131 of the NAFTA sets out the law
17 governing this dispute. It requires this Tribunal
18 to decide the issues in this case in accordance
19 with the NAFTA and the applicable rules of
20 international law. The Vienna Convention on the
21 Law of Treaties sets out the customary
22 international law applicable in treaty

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

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

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

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

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10:36:25 1 relation to each alleged measure:

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

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

13 The investor's interpretation of Article
14 1102 is not derived from the text of that
15 provision, nor from the Article's context or the
16 object and purpose of the NAFTA. In fact, the test
17 that the investor proposes specifically avoids the
18 terms of Article 1102. Instead, the investor
19 attempts to support its interpretation by drawing
20 on statements made in unrelated cases decided by
21 panels charged with interpreting provisions of
22 other agreements that use different words and cover

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10:37:30 1 different subject matter. The investor performs
2 these contortions in order to justify comparing
3 itself with Canada Post. It seeks to make this
4 comparison, despite the fact that Canada Post is by
5 no means the entity that is in like circumstances
6 with respect to UPS in relation to the measures in
7 question.

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

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

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

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10:38:37 1 Third, I will demonstrate that the
2 investor's proposition that the phrase "treatment
3 in like circumstances" means in the same business
4 sector or in a competitive relationship in addition
5 to not being supported by the text of the Article
6 is not supported by previous NAFTA Chapter 11
7 decisions.

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

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

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

22 Article 1102 is a national treatment

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10:39:41 1 obligation. The broad object and purpose of
2 national treatment obligations in international
3 trade and investment agreements is to protect
4 against discrimination based on nationality. There
5 are a multitude of trade and investment treaties
6 that contain some articulation of a national
7 treatment obligation. These agreements deal with
8 different subject matters. For example,
9 disciplines on tariff measures related to goods
10 usually contain a national treatment obligation.
11 The primary example of this is Article III,
12 paragraph four of the General Agreement on Tariffs

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

22 This provision calls for a comparison of

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10:40:45 1 the treatment of imported products and like
2 domestic products. There are also, of course,
3 disciplines on nontariff barriers to trade in
4 goods, and national treatment obligations can form
5 part of these commitments, such as in Article 2.1
6 of the WTO agreement on Technical Barriers to
7 Trade, the TBT agreement, and Article 904 of the
8 NAFTA. Article 2.1 of the TBT agreement provides
9 in part, "Members shall ensure that in respect of
10 technical regulations, products imported from the
11 territory of any member shall be accorded treatment
12 no less favorable than accorded to like products of
13 national origin."

14 Again, the treatment of imported products

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

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10:41:55 1 Services, and treatment no less favorable than it
2 accords to like goods, or in like circumstances to
3 service providers, of any other country."

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

17 The consideration of like circumstances in

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

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10:43:06 1 favorable than it accords, in like circumstances,
2 to its own service providers.

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

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

20 suppliers."

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

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10:44:11 1 only to the service sectors that are listed in the
2 member's schedule. It's a positive indication
3 system. Therefore, in order to apply this
4 provision, the interpreter must turn to the service
5 schedule to determine the service sector in which
6 the service falls, and whether a member has taken
7 any commitments with respect to the services in
8 that category. If it has, then the question would
9 be, is the treatment accorded to the domestic
10 service supplier in that category less favorable
11 than that accorded to the foreign service supplier
12 in that category?

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

22 intellectual property rights."

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10:45:16 1 Here, the comparison is different again.
2 The national treatment protection with respect to
3 intellectual property requires a comparison between
4 foreign and domestic nationals with respect to the
5 protection and enforcement of intellectual property
6 rights. This brief expose of various national
7 treatment provisions demonstrates that in each of
8 these agreements the parties have used different
9 words to articulate the manner by which they want
10 to prevent nationality-based discrimination. The
11 provisions operate within the particular structure
12 and context of each agreement. The words of each
13 national treatment provision reflect the bargain
14 that the parties have struck in relation to the
15 particular subject matter.

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

10:46:21 1 comparison between foreign and domestic that must
2 take place. And it defines the parties' intentions
3 with respect to the scope and the content of the
4 obligation.

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

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

14 ARBITRATOR FORTIER: A little slower,
15 please.

16 MS. HILLMAN: Certainly. Sorry.

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

10:47:26 1 of investments.

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

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

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

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

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

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

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

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10:49:47 1 Article 1102.

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

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

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

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

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

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10:51:13 1 case. In order for the investor to demonstrate a
2 breach, it must establish that Canada accorded
3 treatment to UPS Canada and to a domestic
4 investment.

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

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

13 And third, the investor must demonstrate
14 that UPS Canada received the less favorable of
15 these two treatments. It is the investor, of

16 course, who bears the burden of establishing each
17 of these three elements.

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

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10:52:27 1 we must recognize that in making the arguments that
2 it has made, the investor is governed by the same
3 language as is Canada; namely, the provision of
4 Article 1102, which is now before you again on the
5 slide.

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

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

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

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10:53:39 1 and the articulation of national treatment in
2 Article 1102 is by no means virtually identical to
3 GATT Article III or GATS Article XVII.

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

11 defined in a treaty.

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

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

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10:54:57 1 national treatment obligation under Article 1102
2 has been breached, but let us recall, as I stated
3 earlier, of course, the Vienna Convention requires
4 that a treaty be interpreted in good faith and in
5 accordance with the ordinary meaning to be given to
6 the terms. The interpretation advocated by the
7 investor doesn't arise out of the ordinary meaning
8 of the terms of Article 1102 interpreted in good
9 faith. The investor really makes no attempt to
10 relate its test to the text of that provision, and
11 I would say in fact specifically avoids the terms
12 of that provision.

13 In addition, contrary to what the investor

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

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

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10:56:13 1 therefore, the first place to look for context
2 within the text of a provision is within the
3 provision itself, its title, its surrounding
4 provisions. In addition to disregarding the plain
5 meaning of the text, the investor has not sought
6 context for its interpretation in the rest of
7 Article 1102, its title, or the surrounding
8 provisions of that Chapter.

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

16 principle. However, quite to the contrary, Article
17 102 tells us that national treatment is an
18 obligation that is elaborated more specifically in
19 the text of the NAFTA. Article 102 provides in
20 part, "The objectives of this agreement, as
21 elaborated more specifically through its principles
22 and rules, including national treatment,

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10:57:29 1 most-favored-nation treatment, and transparency,
2 are to eliminate barriers to trade," et cetera, "as
3 elaborated more specifically through its principles
4 and rules, including national treatment."

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

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

18 GATT Article III is concerned with the

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

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10:59:00 1 directly competitive or substitutable products, not
2 treatment in like circumstances.

3 The NAFTA corollary of GATT Article III is
4 NAFTA Article 301 governing treatment for trade in
5 goods, not Article 1102. This difference of
6 language and subject matter clearly demonstrate
7 that GATT Article III is not relevant context for
8 interpreting Article 1102. And, indeed, this is
9 exactly what the Tribunal in the Methanex case
10 concluded when it rejected the investor in that
11 case, Methanex's, attempt to interpret Article 1102
12 using jurisprudence decided under GATT Article III.
13 The Tribunal noted that the term "like products,"
14 which plays a critical role in the application of
15 GATT Article III, appears nowhere in Article 1102.
16 Nowhere in Chapter 11, in fact.

17 The Tribunal held that, "International law
18 directs this Tribunal, first and foremost, to the
19 text. Here, the text and the drafters' intentions
20 which it manifests, show that trade provisions were

21 not to be transported into investment provisions."

22 Likewise, as we have seen, GATS Article

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11:00:30 1 XVII does not resemble Article 1102. It uses
2 different language and operates within a different
3 structure and context.

4 In terms of context, it's important to
5 note that services disciplines under the GATS and
6 the NAFTA are structured very differently. The
7 GATS covers matters that are found in Chapters 11,
8 12, 13, 14, 15, and 16 of the NAFTA. In addition,
9 each agreement has its own particular set of
10 obligations. In some respects the NAFTA goes
11 further; in other respects the GATS goes further.

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

11:01:56 1 step.

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

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

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

11:03:01 1 Canada. Indeed, there is no reference to the GATS
2 at all.

3 Second, what the Tribunal said, in fact,
4 was that the parties do not, and I quote, "The
5 parties do not dispute that the term 'in like
6 circumstances' was intended to have a meaning that
7 was similar to like services and like service
8 providers."

9 But as I have explained, the term "like
10 circumstances" under the GATS is really only half
11 the story because Article XVII operates in
12 conjunction, of course, with the schedules.

13 Again, in his opening statement,
14 Mr. Appleton said that the GATS, and here I quote,
15 "The GATS gives us explicit guidance that like
16 service providers are competing service providers."
17 This is at page 75, line six of Monday's
18 transcript.

19 Under the GATS, WTO members, including all
20 three NAFTA parties, have included one
21 classification for postal services and a separate
22 classification for courier services. This, as I

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

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

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

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

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

22 So if I could be permitted to not put too

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11:05:34 1 fine a point on this question, if the United States
2 were to bring a GATS case against Canada in
3 relation to a comparison of postal services and
4 courier services, if this case was brought before

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

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

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

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11:06:48 1 tribunals.

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

7 less favorable for the claimant than for a domestic
8 investor.

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

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

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

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11:08:02 1 part, by reference to sectors. As an aside,
2 however, I would note that the term sector in these
3 Annexes, and you can see this if you turn to them,
4 is used very broadly and more akin to the notion of
5 subject matter, and this is clearly demonstrated by
6 the fact that minority affairs and aboriginal
7 affairs are both listed as sectors.

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

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

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

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11:09:22 1 are necessarily in like circumstances is grossly
2 simplistic, and it relieves the claimant, in fact,
3 of its burden of proof. According to the investor,
4 it must simply demonstrate some competition between
5 UPS Canada and Canada Post, and then the burden
6 shifts to Canada to demonstrate or to justify some
7 sort of reason why there may be a difference in
8 treatment. But there is no support for such an
9 interpretation in the text, nor is there any
10 support for this immediate shifting of the burden
11 of proof.

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

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

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11:10:39 1 enough for companies to compete in order to prove
2 that they are receiving treatment in like
3 circumstances. For instance, in the Loewen case,
4 Loewen versus the United States, the Tribunal
5 rejected the claimant's comparison of its funeral
6 home business investment with a Mississippi-based
7 funeral home business. They were both embroiled in
8 litigation together.

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

14 Although both funeral businesses involved

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

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11:11:54 1 same business sector could not be compared for the
2 purposes of like circumstances analysis.

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

16 Consequently, only resellers of

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

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

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11:13:17 1 case--claim, pardon me--in light of a buy America
2 requirement, which was a domestic supply source
3 requirement in the context of a federal aid state
4 construction project. The investor was excluded
5 from the project on the basis that it did not
6 supply U.S. steel and claimed that it was
7 discriminated against as compared with the U.S.
8 steel manufacturer and fabricator, who are
9 operating in the same sector, selling the same
10 product, and competing for the same customers as
11 the ADF group.

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

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

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11:14:31 1 didn't relate to economic sector. Rather, it
2 related to the origin of the steel supplied, U.S.
3 on the one hand, Canadian on the other.

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

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

22 element in Article 1102 protection.

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11:16:03 1 So, what do we see? We see that both the
2 language of Article 1102 and previous Tribunal
3 decisions demonstrate that the like circumstances
4 analysis must be completed on a case-by-case basis,
5 taking various factors into account, factors that
6 are related to the treatment being afforded, and
7 these factors may include, but are certainly not
8 limited to, business sector and competition. In
9 fact, if we stop and think about it for a minute,
10 the investor's interpretation of like circumstances
11 would certainly lead to a narrowing of the
12 protection under 1102, and this is because if like
13 circumstances equals business sector or competitive
14 relationship, then I suppose it would follow that
15 two businesses that are in wholly different
16 business sectors and do not compete in the
17 marketplace at all could never be compared for the
18 purposes of Article 1102.

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

22 Let's consider a factual situation whereby

11:17:23 1 a party, let's say Canada, imposes an environmental
2 regulation governing the release of a certain
3 effluent into a river. On this river, there are
4 only two kinds of investors, enterprises,
5 Canadian-owned shoe manufacturers and
6 American-owned car manufacturers. Both groups of
7 manufacturers release the effluent in question into
8 the river.

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

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

11:18:37 1 relation to that treatment must take into account
2 the purpose of the treatment, the object of the
3 treatment.

4 In that scenario, the Canadian investors
5 and the U.S. investors would, I say, and given it's
6 a simple scenario, but would, in fact, be in like
7 circumstances with respect to that treatment, with
8 respect to that regulation. This example
9 illustrates why previous Chapter 11 tribunals held
10 that the entire context of the measure in question
11 must be examined on a case-by-case basis. This
12 contextual analysis requires consideration of the
13 circumstances that led to the treatment in
14 question. Some of these circumstances may relate,
15 in fact, to operational imperatives that informed
16 the treatment.

17 To take a concrete example from the case
18 in front of us, in the case of Customs treatment by
19 Canada, the operational realities dictate that
20 where a shipper can provide reliable, detailed,
21 advance information about the shipment that it is
22 sending, Customs processing will be faster and more

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11:20:01 1 efficient than if this information is not provided.

2 In addition, it's impossible to ignore the

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

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

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

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11:21:17 1 reserve for the USO under Chapter 11 in order for
2 it to be taken into account in this case.

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

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

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

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

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11:22:42 1 agreements, efforts to control tax revenues and
2 discourage smuggling, and the protection of
3 intellectual property.

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

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

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

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

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11:24:04 1 It is not for the investor to second-guess
2 the policy objectives of the Government of Canada,
3 nor is it for the investor to argue that there is a
4 better way for us to achieve these objectives.
5 Likewise, and with the greatest of respect, it's
6 not the role of this Tribunal to judge a state's
7 policy choices or its means of implementing them in
8 the abstract. And I think this is what I took from

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

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

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11:25:33 1 circumstances of surrounding that treatment are
2 like. A consideration of like circumstances
3 involves more than just an examination of whether
4 the two businesses compete. It requires an
5 examination of the totality of the factors
6 surrounding the treatment.

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

12 treatment.

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

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11:27:01 1 case to be about disciplining competition between
2 UPS and Canada Post, but this is not the question
3 that national treatment provisions deal with. This
4 Tribunal has already ruled on that. This Tribunal
5 has ruled that disciplines on competition of
6 monopolies and state enterprises articulated in
7 Article 1502(3)(d) are not before this Tribunal.
8 What is before this Tribunal is a question of
9 national treatment.

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

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

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11:28:28 1 In addition, the investor ignores
2 investments that are in like circumstances,
3 investments that are identical comparators.
4 Canadian-owned courier companies receive identical
5 treatment to that accorded to UPS Canada. They are
6 identical comparators. As the Tribunal in Methanex
7 concluded, the identification of a proper
8 comparator is critical to the success of an Article
9 1102 claim. It stated: "It would be forced into
10 application of Article 1102 if a tribunal were to
11 ignore the identical comparator and try to lever
12 in, and at best approximate an arguably
13 inappropriate comparator."

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

16 investor has failed to identify the appropriate
17 domestic comparator. These identical comparators,
18 Canadian-owned courier companies, are right there
19 for everyone to see; but they haven't been
20 identified by the investor, and its claim under
21 1102 must fail on that basis.

22 I would now like to turn to the second

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11:30:04 1 prong of the investor's proposed test under Article
2 1102; namely, that no less favorable treatment
3 means that Canada must ensure quality of
4 competitive opportunities. The investor argues
5 that once it has been established that the foreign
6 and domestic investment are in a competitive
7 relationship, if there is not equality of
8 competitive opportunities, then Article 1102 has
9 been breached.

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

18 evidence of less favorable treatment.

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

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11:31:23 1 one has to first determine that the treatment was
2 accorded in like circumstances.

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

20 circumstances.

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

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11:32:39 1 identification of the relevant language in the
2 NAFTA itself, which is the subject of
3 interpretation, and here I quote, "The mere
4 invocation"--the investor says, "The mere
5 invocation of GATT/WTO jurisprudence does not and
6 cannot excuse the imperative of fidelity to the
7 NAFTA text."

8 So, the investor goes to great lengths to
9 cite provisions and authorities that demonstrate
10 that equality of competitive opportunities as a
11 concept, as an objective, is relevant under Chapter
12 11, and specifically is relevant under Article
13 1102. As I have said, Canada does not deny that a
14 demonstration that a foreign investor has been
15 denied the ability to compete on an equal basis
16 with a domestic investor may be a consideration in
17 assessing whether the treatment accorded is less
18 favorable.

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

11:33:50 1 circumstances.

2 There is a second reason why this Tribunal
3 should reject the investor's arguments regarding
4 equality of competitive opportunities, and that is
5 because the investor mischaracterizes the case law
6 or draws perhaps undue conclusions from the case
7 law on the concept of equality of competitive
8 opportunities. The WTO has not ruled that
9 treatment no less favorable requires a state to
10 ensure equality of competitive opportunities.

11 And, in fact, what the WTO has said in
12 this regard, I think, we can learn from some
13 comments that were made earlier this week by
14 Mr. Appleton when he cited two WTO cases in
15 relation to this concept. The first one was the
16 GATT 337 case, and Mr. Appleton cited this case as
17 standing for the proposition that not all
18 differences in treatment are less favorable.
19 Canada agrees with that proposition. And, for
20 example, as my colleague Mr. Conway will explain,
21 while there are differences in treatment in the
22 Customs programs for mail and for courier, these

11:35:24 1 differences in treatment reflect the needs and the
2 requirements and the imperatives of those two
3 different groups of importers, and by no means lead
4 to less favorable treatment.

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

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

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

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

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

20 ARBITRATOR FORTIER: Yes.

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

11:36:25 1 ARBITRATOR FORTIER: No, but you're on

2 your feet.

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

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

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

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11:37:26 1 MS. HILLMAN: Mr. Jones's affidavit, I
2 believe, has an entire section setting out the
3 public policy of Customs, so I would also refer you

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

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

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

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11:38:50 1 So, the WTO cases that the claimant cites
2 in support of its claim are all at the panel level,
3 and, in fact, simply to underline the point or the
4 use with which the concept of equality of
5 competitive opportunities is put in the WTO, I

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

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

22 The Appellate Body indicated in Korea

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11:40:11 1 various measures on beef that imported products are
2 treated less favorably than like products if a
3 measure modifies the conditions of competition in
4 the relevant market to the detriment of the
5 imported products. And this is what the Appellate
6 Body held. "However, the existence of a
7 detrimental effect on a given imported product

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

14 So, according to the appellate body, lack
15 of equality of competitive opportunities does not
16 necessarily imply less favorable treatment. The
17 investor's concept of equality of competitive
18 opportunities is not supported by the WTO Appellate
19 Body. It's equally clear, of course, that it's not
20 supported by the language and context of Article
21 1102. As such, the arguments that the investor has
22 put forward on equality of competitive

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11:41:26 1 opportunities really must fail.

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

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

18 Now, when proceeding with this analysis,
19 the Tribunal must keep in mind the object and
20 purpose of national treatment obligations. Article
21 1102 is designed to prevent discrimination, de
22 facto and de jure, against foreign investors. This

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11:42:55 1 is the mischief that it seeks to address.

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

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

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

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

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11:44:12 1 no national treatment violation.

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

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

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

17 MS. HILLMAN: Yes.

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

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11:45:26 1 blind testing that was done by Mr. Nelems, was it?
2 The identical things are happening, the identical
3 effluent is going out, the identical items are
4 coming across the border. Isn't that the like
5 circumstance rather than your two courier companies
6 owned by Americans on one hand and Canadians on the
7 other? I'm just taking advantage of your very
8 excellent hypothetical.

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

17 to Canada.

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

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11:46:45 1 That will create different operational
2 requirements for a Customs authority at the border.
3 UPS Canada, as I understand it, operates such that
4 with its clients they have advance information on
5 what's in the parcels that are being sent across
6 the border. There is a manifest that's drawn up.
7 The manifest, before the actual product gets to the
8 border will indicate and will be sent to the
9 Customs authority in Canada electronically, and it
10 will say we have a truckload of items coming across
11 the border, one of course being Kirstin Hillman's
12 grandmother's book. And it will say it's the book,
13 it will say how much it cost, it will say who it's
14 coming from and where it's going, as I understand
15 it. And I can be corrected on the facts if I got
16 that wrong. But there is reliable, precise,
17 accurate information that depends on the
18 relationship between UPS and its client when they

19 drop the parcel off at a UPS counter.

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

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11:47:55 1 put a Customs declaration on it, throws it in the
2 mail box, and off it goes.

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

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

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

19 PRESIDENT KEITH: Thank you very much.

20 MS. HILLMAN: Thank you.

21 MR. WHITEHALL: While Ms. Hillman was

22 speaking to this last question, I had the benefit

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11:49:04 1 of sitting back and kind of cogitating about it,
2 and another example struck me. If I may, we're at
3 an airport. You have got two people going through
4 security so take your analogy they are both people
5 that are both going through security. One is a
6 pilot, and he's got a badge. The other one is me,
7 no badge, no nothing.

8 I am stopped because I don't have the
9 outside indicia that I'm safe and secure. The
10 pilot is allowed to go through, but there are two
11 packages going through at the same time, but with
12 one you have a reasonable confidence of security,
13 and therefore you can put in place different
14 operational measures for that particular package
15 than you would put for another package, and therein
16 lies the difference. It's one of the factors, but
17 not the end of the--it's the beginning of the
18 answer, but not the end of it.

19 PRESIDENT KEITH: Thank you. Mr. Conway
20 will have nothing to say shortly.

21 MR. WHITEHALL: Mr. Conway always will
22 have lots to say.

11:50:32 1 Now, I have a logistical problem. I have
2 a presentation. The slides are being put together
3 as we speak. And I wonder if I could have a few
4 minutes. I've got two options. It's 12:00, I
5 note. To be candid, my preference would be, well,
6 more or less--actually, mine actually says five,
7 but would it be convenient to take a lunch break at
8 this time? It would also serve me, frankly, not to
9 break up my presentation, which is going to be a
10 few hours.

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

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

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

17 PRESIDENT KEITH: Absolutely.

18 (Discussion off the record.)

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

21

22

13 MR. WHITEHALL: And this is in public.

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

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17:54:45 1 use.

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

12 The effect of this is to render therefore

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

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

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17:55:50 1 not applicable.

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

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

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

15 operative provisions which exempt measures with
16 respect to cultural industries. And cultural
17 industries is defined more specifically in Article
18 2107 of the NAFTA.

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

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17:57:14 1 Jurisdiction, the Tribunal was of the view that
2 there was not sufficient evidence on the record to
3 decide that question, and my friend alluded to that
4 in his earlier comments. I would suggest the
5 evidence is now before this Tribunal to decide this
6 issue. There is evidence regarding the design and
7 operation and the objectives of the Publications
8 Assistance Program.

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

16 He also described how the program provides

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

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

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17:58:15 1 describes in some detail the policy context and the
2 operation of the program, and particularly at
3 paragraph six of his affidavit where he describes
4 the context.

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

11 Now, the claimant has admitted that the
12 program at least insofar as assistance to
13 publishers is concerned is subject to the cultural
14 exemption, and I bring your attention to paragraph
15 601 of the investor's memorial.

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

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

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17:59:30 1 he has done this in two ways. First, the claimant
2 has argued that the exemption only covers certain
3 aspects of the program, and then it has suggested
4 that a particular aspect of the measure with
5 respect to cultural industries will only be subject
6 to the exemption if it meets a cultural objective
7 or, and I quote from the transcript at page 771,
8 "If it is connected to the purpose of helping the
9 people for whom the program is designed to help.

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

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

22 measure be in connection with the cultural

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18:00:48 1 industries.

2 Now, in considering how to apply this
3 provision, it is important to keep those words in
4 mind, and it is also important to keep in mind why
5 the parties introduced such an apparently broad
6 exemption.

7 And if we look back at the conclusion of
8 the NAFTA and the Canada-U.S. FTA, you will recall
9 that Canada insisted on maintaining its ability to
10 pursue its cultural policies and to assure that
11 that ability was not affected by the trade
12 agreements, and this is actually spelled out very
13 clearly in the Canadian statement of
14 implementation, and if we can bring that slide up.

15 And you will recall that this was a very
16 political charged issue for Canada, and it was a
17 key issue. If there had not been agreement on this
18 point, I'm not sure necessarily there would have
19 been a NAFTA, but certainly this was hotly debated.

20 This is the statement of implementation.
21 You see very clearly what was in mind of the
22 drafters or certainly of the Canadian negotiators

18:02:03 1 and the agreement that was reflected was that NAFTA
2 would leave unimpaired Canada's ability to pursue
3 cultural objectives.

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

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

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

18:03:32 1 What the claimant alleges is not that
2 Canada Post's participation in the program is
3 completely unconnected to the program. What it
4 alleges is that publishers should be allowed to
5 choose other service providers for the distribution
6 of their publications.

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

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

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18:04:54 1 is whether the measure relates to cultural
2 industries, and that makes sense because the NAFTA
3 drafters, the NAFTA parties, or certainly Canada

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

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

22 Mr. Fiset has talked about three

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18:06:08 1 objectives, and certainly in his affidavit at
2 paragraph seven and eight, he describes them in
3 more detail, but he's put a lot of emphasis on the
4 wide distribution of Canadian content to Canadian
5 readers at accessible prices, uniform prices,

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

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

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18:07:25 1 Now, my friend has referred you to
2 documents U231, which was an internal memo of the
3 Department of Canadian Heritage summarizing the
4 view of the industry pursuant to a consultation
5 they undertook. And the document contained the
6 view of some stakeholders who indicated that only
7 Canada Post was prepared to deliver publications in
8 rural regions. Well, that's precisely the point,

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

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

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18:08:43 1 have verification in place. And he's referred to
2 that as grants and contribution-types program. But
3 he also said that those programs are more costly
4 and not as efficient as the current program, and
5 therefore less money would be going to the
6 publishers if they chose that route.

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

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

22 Let me turn to the time limitation point

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18:10:05 1 that I raised earlier.

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

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

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

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

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18:11:35 1 by foreigners, would that be within the cultural
2 exemption?

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

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

15 Is there some point at which you would be

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

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

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18:13:08 1 and--but the NAFTA text doesn't talk about that, is
2 the simple answer. It talks about measures with
3 respect to cultural industries.

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

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

18 But again, that's not for the Tribunal to

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

22 ARBITRATOR CASS: Your submission is there

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18:14:12 1 is no point at which the cultural connection is
2 sufficiently tangential, that a tribunal could say
3 this is outside the cultural exemption?

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

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

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

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

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18:15:32 1 tribunal judge whether the measure really is
2 connected to, related to serving a purpose of
3 advancing a cultural industry? I understand the
4 assertion that here it is, here it's rationally
5 related, connected. I understand the assertion.
6 I'm asking for help with a test.

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

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

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

18:17:01 1 industry" means, and "with respect to" must mean in
2 connection with or something similar.

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

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

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

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

18:18:39 1 crossed? Because I agree, as I generally do with
2 my colleague Dr. Cass, that what was implied in his
3 question, there can be colorable schemes, and I
4 think the example that he gave, in my view, would
5 fall, you know. It must be sold in buildings owned
6 by Canadians. I think that falls on the wrong side
7 of the line.

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

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

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

18:20:10 1 this in his affidavit. And he's also referred to
2 the fact that this particular program has been in
3 place since 1996, and that really the only change
4 that occurred as a result of the WTO decision was
5 the money being paid to the--into the accounts of
6 publishers at Canada Post instead of being paid
7 directly at Canada Post, but really nothing else in
8 the program changed, and the 1997 events are not a
9 basis for the investor to say something changed,
10 even if it has nothing to do with what we are
11 complaining of, and therefore the three year only
12 starts ticking as a result of these changes.

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

22 Now, the key differences between the

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18:21:31 1 parties is whether the requirement to use Canada
2 Post in order to receive the subsidy is covered by
3 this provision, and that's Article 1108(7)(b),

4 which is on the screen before you.

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

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

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18:22:55 1 But in any event, I would like to briefly
2 address the question of whether there is a national
3 treatment violation if everything I have said in
4 the previous 20 minutes doesn't convince you.

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

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

22 Now, it is telling here that the

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18:24:15 1 publishers will not receive any assistance under
2 the program if they use the delivery method other
3 than Canada Post. For example, if they use
4 Purolator or any other Canadian courier company
5 like Purolator, or any U.S. company, there is no
6 difference here, any--if they use anyone else than

7 Canada Post, they will not receive the subsidy.

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

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

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

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

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18:25:29 1 it is to ensure the widest possible distribution of
2 publications to individual consumers at affordable
3 and uniform prices throughout the country. Now, in
4 light of the program's objective and Canada Post's
5 Universal Service Obligation, it is clear that
6 Canada Post and UPS are not in like circumstances.
7 The best evidence of that, in fact, is the fact
8 that UPS Canada is not interested in doing exactly
9 the same thing as Canada Post. Really, what it's

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

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

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

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18:26:58 1 Department of Heritage wants. What it wants is to
2 get magazines to as many households as possible
3 throughout the country. And, in fact, Mr. Fizez in
4 his testimony has referred to the fact that, and
5 you find this again in his affidavit, he's referred
6 to the fact that in Canada most Canadians receive
7 their magazines through subscriptions and not by
8 going to newsstands, so really what UPS is saying
9 would not be helpful to achieving the objectives of
10 the program to delivering Canadian content to
11 Canadian readers throughout the country.

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

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18:28:13 1 company. That's what national treatment means
2 here.

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

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

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

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

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18:29:35 1 referred to the affidavits of Mr. Rosen and
2 Gershenhorn which really highlight very well what
3 UPS is complaining about and the fact that they're
4 neither in like circumstance or that they're
5 receiving less favorable treatment.

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

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

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

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18:30:55 1 his affidavit, and what they do is to calculate or
2 to say, well, we can get some of the business, and
3 then they say, well, on the basis that we are not
4 getting any of the business because there's this
5 requirement, we've suffered damage. But again, as
6 I've said earlier, national treatment doesn't
7 oblige Canada to restructure its program.

8 And Mr. Rosen does the very same thing,
9 when he--in his affidavit he calculates the damage

10 on the basis of delivery of magazines to such
11 customer locations as shopping malls.

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

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

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

22 If you have any other questions, I would

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18:32:15 1 be happy to respond to them.

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

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

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

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

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18:33:34 1 without using Canada Post there is no subsidy, so
2 that's why I say you can't separate them in this
3 case. I'm not saying everything else could.

4 ARBITRATOR CASS: Thank you.

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

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

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

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