UNDER CHAPTER ELEVEN OF THE NAFTA

AND THE UNCITRAL ARBITRATION RULES

BETWEEN

UNITED PARCEL SERVICE OF AMERICA, INC.	:
Claimant/Investor,	:
v.	:
THE GOVERNMENT OF CANADA,	:
Respondent/Party.	:

VOLUME I

Monday, July 29, 2002

The World Bank
1818 H Street, N.W.
Washington, D.C.

The hearing in the above-entitled matter was convened at 10:06 a.m. before:

THE RT. HON. JUSTICE SIR KENNETH J. KEITH, KBE, President

MR. L. YVES FORTIER, CC, QC, Arbitrator

DEAN RONALD CASS, Arbitrator

ELOISE M. OBADIA, ICSID Representative

APPEARANCES:

On behalf of the Claimant/Investor:

Legal Representatives:

MICHAEL CARROLL, Q.C.
BARRY APPLETON
FRANK BOROWICZ, Q.C.
RAY CALAMARO
IAN LAIRD
JOHN LANDRY
ROSEMARY MAROTTA
KEITH MITCHELL
RAJEEV SHARMA
STANLEY WONG

Client Representatives:

DAVID BOLGER
MATTHEW CAPAZZOLI
KEN CHURCHILL
ALAN KAUFMAN

On behalf of the Respondent/Party:

DONALD RENNIE
MELANIE AITKEN
HOWARD BAKER
TREVOR BARK
PATRICK BENDIN
CAROLYN BERTRAND
GRAHAM COOK
JEREMY COTTON
JENNIFER DRYSDALE
WILLIAM FIZET
PHIL FURGE
JOANNE HAMILTON
JOHN HANNAFORD
MEG KINNEAR
DENYSE MacKENZIE
MARY ANNE McMAHON
DAVID OLSEN
MICHAEL PEIRCE
JEFF RICHSTONE
SHELLEY ROWE
SYLVIE TABET
ALAN WILLIS

ALSO PRESENT:

On Behalf of the United States:

ARTHUR ARONOFF
JENNIFER GEHR
U.S. Department of Commerce

RICHARD LARM
U.S. Department of Justice

ALAN J. BIRNBAUM
MARK A. CLODFELTER
BARTON LEGUM
ANDREA J. MENAKER
DAVID A. PAWLAK
LAURA A. SVAT
JENNIFER I. TOOLE
U.S. Department of State

KIMBERLY EVANS
GARY SAMPLINER
MELIDA HODGSON
U.S. Department of the Treasury

JOSEPH FREEDMAN
PADMINI SINGH
U.S. Environmental Protection Agency

On behalf of the United Mexican States:

MAXIMO ROMERO JIMENEZ
SALVADOR BEHAR LAVALLE
SANJAY MULLICK

C O N T E N T S

P R O C E E D I N G S

PRESIDENT KEITH: Good morning, ladies and gentlemen. Could I welcome you all to this jurisdictional hearing in the matter United Parcel Service America against Canada. We have, of course, had some discussions about the timing that we might follow today and tomorrow and, if necessary, on Wednesday. Perhaps when the representatives of the parties, of the two parties have introduced themselves--and I should also welcome representatives of the United States and Mexico--we might have some indication of just where we are in terms of the timing.

Could I ask Canada, the representative of Canada, to introduce his team?

MR. RENNIE: Thank you, Mr. Chairman. Indeed, it's with pleasure that I introduce the members of the Canadian team at counsel table today. To my left, Sylvie Tabet, Mr. Patrick Bendin, Mr. Michael Peirce, and Mr. Alan Willis. There are, of course, many other members of the

team who don't have the benefit of a speaking role today, and in terms of the timing, Mr. Chairman, we are about where we thought we were when we last spoke. But we will be certainly done today.

PRESIDENT KEITH: Thank you.

MR. CARROLL: Good morning, Mr. Chairman. My name is Michael Carroll. With me today as part of our group are, to my immediate left, Keith Mitchell, Mr. Stan Wong, Barry Appleton, Ian Laird, Rosemary Marotta, Rajeev Sharma, John Landry, and I may not be going in the right order, but I'll just give you the group, Mr. Ray Calamaro, Frank Borowicz, Mr. Mat Capazzoli, and Alan Kaufman.

PRESIDENT KEITH: Thank you, Mr. Carroll.

Yes, Mr. Rennie?

MR. RENNIE: Thank you, Mr. Chairman, and good morning, members of the Tribunal. I would like to ensure that you have with you the materials to which I will refer today. Those, of course, encompass the Amended Statement of Claim, the submissions of the parties, and those of the other

treaty parties.

We've also provided you with a compendium this morning, as we have our friends, which is simply a digest of the specific pages extracted from our authorities in the order to which we will refer to them.

With your leave, we will also use a PowerPoint presentation of our argument, and you will find a copy of the slides at Tab 1 of this compendium.

Now, if I may start, let me at the beginning give you a brief road map of the order of Canada's argument and how we propose to use the day.

I will begin first with a review of the NAFTA and its architecture. This review will establish that there is no recourse by an investor before a NAFTA Chapter Eleven Tribunal in respect of the anticompetitive business practices of a government monopoly or state enterprise. In our submission, this conclusion is in and of itself

sufficient to dispose of the motion in Canada's favor.

Second, we will review the legal precondition to the sole situation where the conduct of a government monopoly or state enterprise could give rise to investor recourse. This, of course, requires the exercise of a delegated governmental authority. We will turn to that issue second.

Third, we will address and dispose of the arguments UPS advances to avoid what we say is the plain text of the treaty.

Fourth, even were UPS to succeed in all of the above, it would be to no avail because, in any event, anticompetitive business conduct is not within the legal scope or ambit of the minimum standard of treatment.

I will conclude the day, and while we will take the day, Canada's case is relatively straightforward. However, given what has been raised in the Memorial--Counter-Memorial, some time must be

spent in clarifying that which we say is otherwise clear.

There is one issue before this Tribunal today, and one issue alone: Does the NAFTA confer jurisdiction on a Chapter Eleven Tribunal to provide a remedy to an investor in respect of the anticompetitive business conduct of a government monopoly? The simple answer to this question is no. The NAFTA unequivocally reserves claims for anticompetitive conduct of a government monopoly to the dispute settlement mechanisms between the parties. This answer arises from a reading of Article 1116(1)(b) in accordance with the principles of interpretation set forth in Article 31 of the Vienna Convention, which, of course, and as you know, provide that a treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in context and in the light of its object and purpose.

It is the application of those principles of the convention to the NAFTA that lies at the

heart of this motion. Simply put, the task for this Tribunal today is to discern the intent of the treaty which is the highest expression--the highest expression of which is the text of the treaty itself.

Before proceeding further, let me take you to the paragraphs which Canada says as a result must be struck and those which we do not challenge today, and I ask you to turn to Tab 2 of the compendium, please. If you turn over the first page to the Amended Statement of Claim which you find there, you will find a version of the Amended Statement of Claim highlighting the relevant paragraphs which we say are beyond the jurisdiction of a Chapter Eleven Tribunal. And you will note the legend at the top of each page in the left-hand corner indicating the color coding. And so if I could ask you, for example, to turn to page 10 of that document, you will see on page 10 the use of all three colors reflecting anticompetitive conduct, national treatment, taxation, cultural, or

other measures being represented by the pink.

Now, a review of this Amended Statement of Claim indicates that there is no question as to the jurisdiction of this Tribunal with respect to a broad range of questions said to breach national treatment obligations in Chapter Eleven. For example, the alleged differential treatment of UPS and Canada Post in the customs clearance process and the alleged differential in labor legislation matters are matters which remain in front of this Tribunal.

Canada is anxious to address these remaining substantive issues as soon as convenient to the Tribunal. However, it is imperative that the allegations in respect of which there is no jurisdiction be taken off the table.

Finally, Canada has, for the purposes of this motion and as it is required to do, admitted the facts in the Amended Statement of Claim. It has done so in order to frame the jurisdictional question.

This admission is, needless to say, for the purposes of this motion and this motion alone. Outside of this proceeding, it is the Government of Canada's position that the allegations are wholly devoid of merit.

My approach this morning will be as follows: First, it is important to understand the nature of the allegation Canada seeks to strike. Second, those allegations must be evaluated against the obligations and remedies that the NAFTA provides for investors and treaty parties. Third, I, together with my colleagues, will show you how UPS seeks to avoid the provisions of the treaty through a selective reading and partitioning of the terms of the treaty and the introduction of irrelevant notions which serve to obscure the express language.

So turning, if I may, to the claim itself, this claim is about alleged anticompetitive conduct of a government monopoly, Canada Post Corporation. UPS seeks redress in the amount of US$160 million

for damages claimed to have been suffered by it in part by reason of the anticompetitive practices alleged to have been carried on by Canada Post.

Now, I need not go far to establish that the gravamen of this claim is about anticompetitive conduct. In its Counter-Memorial at paragraph 1, UPS writes, "This is a case about unfair, discriminatory, and anticompetitive conduct by the Government of Canada." To the same effect, in paragraph 8, we read, "The investor is claiming that Canada, as owner of Canada Post, failed and is failing to ensure that Canada Post does not engage in anticompetitive practices."

I think I would refer at this point only to two paragraphs in the Amended Statement of Claim which confirm what is probably uncontroverted. Paragraphs 22, for example, of the claim indicate that the obligations under the NAFTA in Article 1105 include not engaging in anticompetitive practices while exercising governmental authority, such as the type delegated to Canada Post.

Examples of such anticompetitive practices include cross-subsidization, predatory conduct, predatory pricing, using a monopoly infrastructure in an unfair manner, and failing to allocate prices properly and pricing products below avoidable costs--allocated costs.

Similarly, 27 provides that since 1997, Canada Post has engaged in anticompetitive and unfair conduct, including predatory conduct, predatory pricing, tied selling, cross-subsidization, and the unfair use of its monopoly infrastructure and network, which conduct is inconsistent with Canada's obligations under the NAFTA.

So turning to the second matter which I said I wished to canvass, the nature of the obligations and the remedies. On examination of the NAFTA, we find that anticompetitive conduct by a government monopoly is accorded a precisely proscribed treatment. The treaty establishes a coherent and comprehensive framework for addressing

anticompetitive conduct of government monopolies and state enterprises. Most importantly, it limits and it limits precisely by whom and in what circumstance recourse is available.

As to the specific issue of competition policy, monopolies and state enterprises, and by way of summary only at this point, the parties agreed to what I would call a three-tiered hierarchy or a three-set obligations and remedies. And, of course, I will return to these in greater detail later. But, first, the treaty establishes an obligation on the parties to maintain and enforce laws proscribing anticompetitive business conduct. Neither the parties nor the investors have recourse to dispute resolution or arbitration in respect of these matters.

Second, the treaty establishes an obligation on the parties to impose and enforce specific disciplines on monopolies and state enterprises to ensure that they act as commercial players when they engage in the economy. With

respect to this second set of obligations, only the parties have resource to dispute resolution.

Third, the treaty establishes an obligation for which both parties and investors have recourse to either arbitration or, if you're a party, to dispute settlement; and, that is, first, to comply with certain listed obligations imposed on the parties in Section A of Chapter Eleven; and, second, to ensure that government monopolies and state enterprises comply with those obligations. But this obligation only arises where the government monopoly or state enterprise is exercising a delegated governmental authority.

To understand why the NAFTA cannot be manipulated so as to find jurisdiction for the UPS claim, I will turn to each of these obligations and their associated remedies. Canada respectfully submits that when this analysis is undertaken in accordance with the convention, it is clear that UPS has no jurisdiction to advance--sorry, that there is no jurisdiction in a NAFTA Chapter Eleven

Tribunal to entertain a claim of this nature.

So if I may now turn to the first obligation and the associated remedy. Chapter Fifteen of the NAFTA addresses competition policy and, in particular, the obligations which the parties have undertaken with respect to monopolies and state enterprises. The title of Chapter Fifteen makes that clear. Chapter Fifteen's title provides for competition policies, monopolies, and state enterprises.

In this chapter, the parties carefully limit their responsibility under the NAFTA in respect of these entities. There is no question that Canada Post is both a government monopoly and a state enterprise within the meaning of Chapter Fifteen; and, hence, Canada's responsibility, therefore, is set out in and is subject to the limitations imposed by Chapter Fifteen.

If I may now turn in particular to Article 1501 of Chapter Fifteen, as we can see, in Article 1501 the parties undertook as between themselves to

adopt and maintain measures to proscribe anticompetitive business conduct. However, the parties are only obligated to consult from time to time about the effectiveness of these measures.

Further, as we can see from Article 1501(3), not even the parties may have recourse as between themselves in respect of the adequacy of enforcement of competition law or competition policy. The parties have confirmed this limitation in Note 43 of the treaty--

ARBITRATOR FORTIER: Mr. Rennie, sorry for interrupting you. Article 1501, paragraph (3), the reference to any matter arising under this article, do you agree that this is exclusively Article 1501 that's referred to here?

MR. RENNIE: It is indeed. That's what the text says, yes. Indeed, yes.

To continue your question, Mr. Fortier, the point with which I would conclude on this is that Article 1501 is part of the text and it is part of the context within which the issue of

whether there is jurisdiction of a Chapter Eleven Tribunal to grant a remedy is to be assessed.

So if I may, we were talking about the note. Note 43 provides that no investor shall have recourse to investor/state arbitration under the investment chapter for any matter arising under this article and, hence, my point as to the context.

So the notes and the language of Article 1501 in my respectful submission signal an obvious intention by the parties to leave the substance and enforcement of competition law and competition policy within the sovereign control of each party.

PRESIDENT KEITH: Mr. Rennie, you make an argument based on Note 43 that presents an implication in respect of the other provisions of Chapter Fifteen. Do you come to that later?

MR. RENNIE: Yes, I do.

PRESIDENT KEITH: Thank you.

MR. RENNIE: Turning now to the second set of obligations, and here we find that the parties

address the conduct of government monopolies in the marketplace and the appropriate disciplines to which they would be subject. Article 1502(1) and 1503 begin a parallel treatment of state enterprises--of monopolies and state enterprises that continues throughout the text. They make clear, these two articles make clear that a government monopoly and state enterprise are expressly permitted. They are de jure legitimate. There is no presumption or bias that monopolies are somehow incompatible or inconsistent with the broader objectives of the parties of encouraging competition. This presumably was in recognition of the important role government monopolies and state enterprises serve in fulfilling certain public policy objectives.

Now, one of the objectives of NAFTA was to ensure that the parties did not avoid their obligations that they undertook as between themselves simply by delegating their governmental authority to monopolies or state enterprises. To

this end, controls were designed and integrated into the treaty to prevent the erosion of the parties' obligations through delegation to these entities.

Articles 1502(3)(a) and 1503(2) fulfill this objective. These articles, which deal with state enterprises and government monopolies, respectively, ensure that they remain subject to all the NAFTA obligations when exercising a delegated government authority. So if I may, just to return to the text, the obligations to ensure that a monopoly acts in a manner that is not inconsistent with the parties' obligations under the agreement, whenever such monopoly exercises any regulatory, administrative, or other governmental authority that the party has delegated to it in connection with the monopoly good or service. And, similarly, with respect to state enterprises, 1503(2), each party shall ensure through regulatory control, administrative supervision, or the application of other measures that any state

enterprise that it maintains or establishes acts in a manner that is not inconsistent with the party's obligations under Chapter Eleven, Investments, and Fourteen, Financial Services, wherever such enterprise may exercise a regulatory, administrative, or other governmental authority that the party has granted to it--has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

A further obligation of the NAFTA was to promote competition within the free trade area. As state enterprises and government monopolies could in circumstances cause distortions that result in a lessening of competition, the NAFTA parties included certain disciplines to ensure that monopolies act as commercial players when they engage in the economy. This is the purpose of Article 1502(3)(b). This article requires that monopolies act solely in accordance with commercial consideration in its purchase and sale of monopoly

good and services, wholly divorced from the nationality of the vendor or the purchaser. To the same effect, paragraph (c) requires that the government monopoly not discriminate on the basis of nationality in respect of the purchase and sale of monopoly good or service.

And, finally, Article 1502(3)(d). This article addresses the issue of anticompetitive behavior by government monopolies carrying on a competitive business operation as well as its monopoly business. This article provides that monopolies should not use--should not engage in anticompetitive practices in the non-monopolized market, including the discriminatory provision of the monopoly good or service, cross-subsidization, or predatory conduct.

This is the only provision in the NAFTA that deals with the issues that UPS has raised in its Amended Statement of Claim. And as we will demonstrate further, it is a matter in respect of which an investor has no recourse against the

party. And as we know from our reading of the text and the materials, Article 1502(3)(d), this article, is not one of the obligations listed in Section A of Chapter Eleven. And, again, it is useful to remember what this claim is all about. This is a claim about Article 1502(3)(d). This is a claim that includes an excess of 30 references to the very language of what 1502(3)(d) encompasses.

In sum, the parties agree that with the second obligation, government monopolies must in their commercial dealings adhere to commercial considerations; secondly, act in a non-discriminatory manner as they conduct their business affairs; and, third, not engage in anticompetitive practices. And if they do, any of eight--of (b), (c), or (d), the parties have recourse by way of dispute resolution procedures provided by Article 2004 of Chapter Twenty. This is the recourse provision between parties which provides that the dispute settlement provision of this chapter shall apply with respect to the

avoidance or settlement of all disputes between the parties.

ARBITRATOR CASS: Mr. Rennie, are there any circumstances under which conduct could arguably violate both provision 1502(3)(a) and 1502(3)(d), where a government monopoly could be exercising delegated governmental authority in a way that also uses its monopoly position to impose harm on an investment of an investor?

MR. RENNIE: I would say that that is unlikely because Section A is controlling. For an investor/state recourse, you would have to find a Section A breach in the context of--from the investor's perspective, you have to look at this through Section A. So the question, if I may, with respect, would be could that kind of conduct fall within Section A, and that would be the inquiry, and that's the inquiry that we will address later this afternoon, quite specifically, in fact.

PRESIDENT KEITH: Mr. Rennie, just to follow that, you are accepting, though, that a set

of facts could fall within paragraph (a) and also within paragraph (d), for instance?

MR. RENNIE: I assume those facts could exist.

PRESIDENT KEITH: So that each of these paragraphs is not exclusive and complete unto itself.

MR. RENNIE: No, just as (b) and (c) could both exist in the same situation or (b) and (d). I agree, certainly.

PRESIDENT KEITH: Thank you.

MR. RENNIE: I just can't quite--haven't contemplated specific examples of where these may arise.

Now, if I may, turning to Chapter Eleven, in this chapter the parties--this is in a sense the final tier in this scheme, and it concerns the obligations which the parties undertook as between themselves, government monopolies, and investors. So this party--this obligation concerns the interface between Chapter Eleven and Chapter

Fifteen.

As the Tribunal is aware from its reading of the materials, the parties undertook in Section A of Chapter Eleven a set of obligations. These substantive obligations include, for example, the obligation to provide the protection of aliens against the breaches of the minimum standard of treatment, the obligation to accord the same treatment to foreign investors as to national investors, and to prevent expropriation without compensation. For our purposes today, it is only Articles 1102 and 1105 with which we are concerned. Those articles provide in turn, as you can see from the screens, each party shall accord to investors of another party treatment no less favorable than it accords in like circumstances to its own, and 1105, each party shall accord investments of investors treatment in accordance with international law. So that is Section A.

Section B of Chapter Eleven provides investors with recourse to arbitration where the

parties are in breach of these obligations, of these obligations under Section A.

So if I may turn first to state enterprise, to the specific provisions--and, again, this is the beginning of the parallel structure that we saw before we respect to monopolies and state endpoints. Article 1116(1)(a) permits a claim by an investor in respect of alleged breaches of Section A of Chapter Eleven and Article 1503(2). So if we read the two in parallel, as we must, an investor can only submit a claim where a state enterprise exercising a delegated government authority has acted inconsistently with the parties' obligations under Section A. Hence, it is immediately apparent that the investor has a qualified right of recourse both as to the nature of the obligations in respect to which it might seek recourse and the conditions under which it might seek recourse. It is limited to breaches of Section A and where the conduct of a government monopoly is concerned, it arises only where the

monopoly has acted both in a manner that is inconsistent with the parties' obligations and it has done so in the exercise of a delegated governmental authority.

We find the same parallel structure with respect to monopolies in Article 1116(b). This article permits an investor to submit a claim in respect of alleged breaches of Section A, but only where the monopoly is exercising a delegated governmental authority and in the course of that has acted in a manner inconsistent with the parties' obligations under Section A of Chapter Eleven.

Again, the investor's right to bring a claim is qualified both as to scope in Section A and both as to the legal prerequisite that has occurred in the exercise of a delegated governmental authority.

ARBITRATOR CASS: Mr. Rennie, would we be in a different position if the language in 116(1)(b) used a term other than "where"? If

instead of saying the claim may be brought under Article 1502(3)(a), where the monopoly has acted in a manner inconsistent with the parties' obligations under Section A, would we have a different provision if it says "to the extent that" or "in order to allege that" or language that seemed to be more restrictive than at least the argument that's made here that these are additive clauses?

MR. RENNIE: As a general response, I'm urging on you an interpretation that is neither liberal nor restrictive, and say it is a literal interpretation, one that accords with the text itself. So were one to insert those other words which you've suggested, I would think it would change the meaning because they would be different words. The parties chose the word "where."

ARBITRATOR CASS: Does the word "where" in your view have the meaning that so long as the finding is made that a monopoly has acted in a manner inconsistent with obligations under Section A and has breached the requirements of 1502(3)(a),

other claims or cannot be brought, is this statement a statement that is one that limits all of the claims that can be brought by an investor? Or if an investor satisfies the terms of this, can other claims be brought as well? I believe that's the argument being advanced by the investor.

MR. RENNIE: No. As I indicated, it is a qualification and limitation on the investor's right to bring a claim. An investor, assuming, if I may, for the purpose of responding to your question, that there has been a delegated governmental authority, an investor can only--having the benefit of that and passed that test, can only claim a remedy in respect of a breach of an obligation listed under Section A. The investor's rights are confined and proscribed to Section A. So in answer to your question, the answer is no, the investor does not have a right of broader claim.

And, indeed, the investor's right of a qualified access, if I can call it that, or

restricted remedies is contrasted to that of the parties. Under 1502(3)(a), a party can submit a claim that a party has failed to ensure that a monopoly exercising delegated governmental authority has acted inconsistently with the parties' obligations writ large under the NAFTA. The parties are not constrained as is the investor in Article 1116(1)(a) or (b). The investor, assuming you can establish the exercise of a delegated governmental authority, can only claim--is only entitled to recourse if it can be established that in the course of exercising that delegated governmental authority, a monopoly has acted in a manner inconsistent with the obligations under Section A.

Put another way, if I may, Dean Cass, Article 1116(1)(b) narrows the class of obligations that can be subject to investor/state arbitration. It is to those listed in Section A.

Article 1116(1)(b), when read in conjunction with 1502(3)(a), stipulates that a

claim that a party has breached an obligation under Section A can proceed only where the monopoly has acted in a manner inconsistent with the parties' obligations under Section A and it has done so in the exercise of that delegated authority.

And as we will see, what the investor would have you do to succeed in this case is to add on to the very end of Articles (a) and (b) that we see on the screen in front of us now the words "1502(3(d)."

ARBITRATOR FORTIER: Could you repeat that?

MR. RENNIE: What the investor would have you do is add on or add in to articles--to paragraphs (a) and (b) the words "1502(3(d)."

ARBITRATOR FORTIER: Mr. Rennie, not to press the point too far, but just to make sure that I understand, your reading of Article 116(1)(b) would be the same if it read in places of the word "where," "where the monopoly has acted," if it said "by the monopoly acting in a manner inconsistent,"

that would not change the reading you have given, would it? Nor would it if it said "to the extent that the monopoly has acted"? If I understand your argument.

MR. RENNIE: If I may reflect on those propositions and indicate to you as well that we will engage later this morning in a more detailed dissection of that very language. But I won't forget your question in that regard.

So if I may summarize at this point, what emerges from this is that the NAFTA drafters prescribe with considerable care which obligations would be subject to investor recourse and which would not. The drafters prescribed with considerable care the responsibilities that they would assume respecting competition, monopolies, and state enterprises. And they also addressed specifically the question of anticompetitive conduct by a government monopoly, which is the true complaint made by UPS, no matter how it may choose to characterize it.

So the obligations, if I may, and the associated remedies can be summarized as follows:

One, the parties in Article 1501(1) have an obligation to adopt and maintain measures to proscribe anticompetitive business conduct. The parties are to consult from time to time about their effectiveness.

The second obligation, the treaty subjected monopolies to certain disciplines, commercial considerations, and non-discrimination obligations in their activities within the monopolized market, and a particular reference here, not to use--not to engage in anticompetitive conduct. Here the dispute resolution procedures in respect of these provisions are state to state only under Chapter Twenty.

Three, the parties--the treaty recognized that the parties could and sometimes do delegate regulatory or governmental authority to monopolies and state enterprises. Accordingly, in recognition that breaches of NAFTA Chapter Eleven could occur

by monopolies and state enterprises acting in a regulatory as opposed to commercial capacity, the parties included breaches of Chapter Eleven occurring through the exercise of such regulatory capacity in the provisions listed in Article 1116. These in a sense are anti-avoidance mechanisms to ensure that the obligations that the parties undertook in Chapter A--or Section A of Article 1116 are not eroded or narrowed by governments' delegating to monopolies their authority.

And were an investor able to prove both as a matter of law the delegation of a governmental authority and that in the exercise of that authority a government monopoly breached an obligation listed in Section A, then there would be no question as to jurisdiction.

However, there are overwhelming indications in the text of the NAFTA and its architecture and the relationship between the two chapters, Chapters Eleven and Fifteen, that the parties did not intend allegations such as those

set forth in the claim to be subject to arbitration. The express language of the treaty, its structure and relationship to the relevant provisions to each other compel the conclusion that there is no jurisdiction which would render the anticompetitive conduct of a monopoly subject to investor/state recourse.

And it is our position that these conclusions are not matters of conjecture and they're not matters of inference. They arise on the face of the treaty itself. They constitute the inescapable legal reality within which UPS seeks to force its claim in an effort to persuade this Tribunal that it has jurisdiction.

So in an effort to escape the text and to change a qualified right into an unqualified right, UPS argues, first, that Canada Post Corporation is exercising a delegated governmental authority, as is required at the threshold of Article 1502(3)(a); and if that is the case, that it can establish that, that the obligations on a government monopoly

not to engage in anticompetitive conduct can somehow be found in Section A, and so it engages in an exercise of reading in remedies for anticompetitive conduct into the list of obligations in Chapter Eleven in Section A.

Secondly, UPS argues that even if the claim doesn't meet the first condition or the second condition, the same claim can nonetheless be brought directly against Canada by reading into Article 1105 an obligation to proscribe anticompetitive behavior. Hence, it need not go through the first box or the first test prescribed by the treaty.

Now, to make these arguments, UPS is forced in our submission to strain the language, to strain the text and ignore others. They would not have you read Chapter Eleven and Chapter Fifteen together. It introduces two concepts, the concept of state responsibility and overlapping remedies, neither of which have any application on the face of the treaty itself.

In our submission, these arguments, which we will deal with in detail later, serve only to draw attention away from the text which is controlling and dispositive. Under the guise of these arguments, UPS would have you read into Article 1105 the minimum standard of treatment or 1502(3)(a) a remedy for anticompetitive conduct, the very subject matter covered by (d) and for which no recourse for an investor has been provided.

If I may put it somewhat in the vernacular, and if I may go back to the summary sheet of the three obligations, the UPS case, simply put, is about crossing boundaries, crossing lines. UPS is squarely within the third box, investor/state arbitration, and that interaction between Eleven and 1502(3)(a) and 1503(2) are controlling. They establish preconditions and limits.

UPS doesn't want to be in that box. They prefer the territory that the parties have reserved

to themselves in the second box under 1502(3) where the parties can, as between themselves, through the Chapter Twenty dispute settlement mechanisms, address the issue of anticompetitive conduct of a government monopoly.

So this is why this motion is quintessentially jurisdictional. It is about crossing lines.

So in our submission, the issue is squarely joint. UPS must somewhere find a home within the scope of 1502(3)(a) to find--or 1116--a home for anticompetitive conduct. And we say this argument fails for three reasons:

First, as a matter of law, the UPS claims cannot fall within the scope of 1502(3)(a) or 1503(2). The facts are incapable of falling within the ambit, the legal scope or ambit of the phrase "the exercise of a delegated governmental authority." My colleague, Mr. Peirce, will explain to you why this is so.

Secondly, even if the conduct complained

of falls within the ambit of 1502(3)(a), you cannot read into that provision and you cannot read into Article 1105 a remedy for anticompetitive conduct. That is the very matter which the parties have expressly dealt with in (d), and it is (d) that they reserve to themselves. I will deal with those issues this afternoon.

And, finally, even if both myself and Mr. Peirce are wrong, it is to no avail to the investor because, as Mr. Willis will demonstrate this afternoon, even if the investor is successful in entering, getting into the list of obligations in Section A, a remedy for anticompetitive conduct cannot be found within the scope of the minimum standard of treatment prescribed by law. And as I say, we will deal with each of these arguments in turn.

Now, before ceding the floor to Mr. Peirce, you will recall that to activate the anti-avoidance mechanisms of 1502(3)(a) and 1503(2), the pleadings must fall within the scope of a delegated

governmental authority. And, again, these provisions were designed to prevent the parties from narrowing the obligations that they undertook between themselves and investors--as between themselves in Chapter Eleven in Section A. And I will say no more of this other than to note that establishing the monopoly is exercising a delegated governmental authority is a mandatory precondition which an investor must satisfy before it can even argue that there has been a breach of a Section A obligation. They are, in essence, jurisdictional portals through which the investor must pass to gain access to the list of remedies set forth in Section A.

Where the conduct of a monopoly is concerned, as it is here, it is not sufficient to allege the government monopoly has breached any provision of the NAFTA; rather, the right to make an allegation in respect of a Section A obligation occurs only where the monopoly has been acting in this prescribed legal context. And if I may at

this time refer to two passages that I suggest are very well put both by the Americans and the Mexicans in their written submissions, paragraph 7 of the American submission on this point I think is apt.

They write that an investor submitting a claim to arbitration--an investor submitting a claim to arbitration under either Article 1116 or 1117, which is not in issue here, based on a breach of either 1502(3)(a) or Article 1502(3)(2) must meet jurisdictional requirements that are in addition to those that must be met by a Chapter Eleven claimant who does not allege a breach of Article 1502(3)(a) or Article 1503(2). One such requirement is that the actions of the monopoly or state enterprise that is the subject of the claim involve the exercise of a regulatory, administrative, or other governmental authority that the party has delegated to it.

Similarly, the United States has put it effectively in paragraph 15(g). Subparagraph (a),

referring now to 1503(2)(a), subparagraph (a) is not arbitral in a Chapter Eleven proceeding unless it is proven that the monopoly is exercising regulatory, administrative, or other governmental authority that the party has delegated to it in connection with the monopoly good or service. This establishes a condition precedent to the taking of jurisdiction. The claimant must prove that such authority has been delegated to the authority. If the condition precedent is not satisfied, there is no case to answer.

I may reflect on questions that the panel has put to me and cede the floor now to Mr. Peirce, who will proceed with the second part of our argument, and this is that there is, in fact, no delegated governmental authority. Thank you.

PRESIDENT KEITH: Thank you, Mr. Rennie.

Mr. Peirce?

MR. PEIRCE: Good morning, Mr. Chair, members of the Panel.

My submissions today start from a simple

proposition that's clear from the text of the NAFTA that has been elaborated by my colleague, Mr. Rennie. The proposition is this. An investor such as UPS can only found a claim for breach of the NAFTA based on the activities of a state enterprise of government monopoly such as Canada Post Corporation, if the investor can establish a breach of Article 1502(3)(a) or Article 1503(2) in combination with a breach of Chapter Eleven of the NAFTA. My submission has the effect of Article 1116 together with Articles 1502(3)(a) and 1503(2).

A number of conditions must be met in order for an investor to establish a breach of Article 1502(3)(a) or 1503(2), the most important of which is that the investor must show that any alleged breach of Chapter Eleven occurred in the exercise of delegated governmental authority of the state enterprise of government monopoly.

My submissions therefore will address the meaning of delegated governmental authority in Articles 1502(3)(a) and 1503(2), and the issue of

whether UPS has pleaded any facts capable of establishing the Canada Post Corporation has exercised governmental authority in a manner that breaches Canada's obligations under those two articles. In my submission they have not.

My submissions are divided into three parts. In the first part I will focus on the interpretation of Articles 1502(3)(a) to 1503(2). In my submissions those two articles establish clear and specific conditions that must be met in order for an investor to found a Chapter Eleven claim based on the conduct of a monopoly or state enterprise such as Canada Post.

In the second part of my submissions, I will examine UPS's pleadings, and address their absolute failure to plead any specific examples of the exercise of delegated governmental authority by Canada Post Corporation.

I will expose UPS's attempt to rely on a mere bald assertion that Canada Post exercises delegated governmental authority unconnected to the

actual conduct that is alleged on the part of Canada Post Corporation in the Amended Statement of Claim.

In the final part of my submission I'll address the disparate collection of arguments that UPS brings forward in order to try and avoid the language of 1502(3)(a), 1503(2), the specific conditions set out there in order to shore up their pleadings.

For ease of reference, I'm going to refer to Article 1502(3)(a) throughout my submissions, and not to Article 1503(2) just be it's a tongue twister and it's rather difficult to keep referring to both. They both include similar language, the requirement of delegated governmental authority, and Canada Post Corporation, for that matter, as both a monopoly and a state enterprise. I will, however cross reference 1503(2) where there is a material difference relevant to these proceedings.

Turning then to the first part of my submissions. Consistent with Article 31 of the

Vienna Convention on the Law of Treaties and established principles, of course, of treaty interpretation at Customary International Law, a starting point for the interpretation of 1502(3)(a) is the text of the Treaty, the ordinary meaning to be given to the terms of the Treaty in their context. In my submission the text is clear on its face and provides all of the guidance necessary for this Tribunal to properly interpret Article 1502(3)(a) consistent with the intention of the NAFTA parties.

What I will do first is to break down the key constituent elements in Article 1502(3)(a) that reflect on the meaning of the key phrase here, the exercise of regulatory administrative or other governmental authority. I will then turn to that key phrase to ensure a clear and accurate interpretation.

Looking at the text, the first phrase that I would like to address then is the phrase "wherever such a monopoly exercises." This phrase

establishes that the authority in question must be something that is capable of being exercised. It cannot just be a status such as the status of being an institution of the Government of Canada or a Crown Corporation, both of which are true of Canada Post Corporation. You need an exercise though of authority here.

The phrase also tells us that it is not every activity by a monopoly that is subject to Article 1502(3)(a), rather that that article is only engaged where the monopoly exercises the delegated governmental authority. But the fact the monopoly may have the capacity to exercise delegated governmental authority, it does not by itself trigger 1502(3)(a).

It is only where the authority is actually exercised that 1502(3)(a) may apply. It follows then that investor state obligations under Chapter Eleven, based on the conduct of the monopoly arise only in regard to the actual exercise of delegated governmental authority. It's not sufficient to

allege that a monopoly has been delegated governmental authority and that quite independently the monopoly has breached an obligation under Chapter Eleven, but the breach of Chapter Eleven must occur in the exercise of delegated governmental authority.

Turning to the next phrase, not sequentially, but I'll skip the key phrase here, so the next phrase I'd like to address is the phrase "that the party has delegated to it." This language confirms that the authority in question must reside with the party in its sovereign capacity and must be an authority that the state could or does exercise. The word delegated authority--sorry, the word "delegated" imports the concept of an active formal assignment or transfer of authority. This requirement is confirmed in Note 45 of the NAFTA which provides that in Article 1502(3)(a), quote: "A delegation includes a legislative grant and a government order, directive or other act transferring to the monopoly or

authorizing the exercise by the monopoly of governmental authority."

As the United States has put in its submissions at paragraph 9, and it stated, "Well, to fall within Article 1502(3)(a) or 1503(2), the sovereign authority being exercised must have been transferred to the monopoly or state enterprise by some affirmative act of the NAFTA party." It cannot therefore be authority that's simply inherent in the nature of a monopoly. It must be an additional power.

ARBITRATOR CASS: Mr. Peirce, could you help me? Who used to deliver the mail before Canada Post was created, before the corporation was created?

MR. PEIRCE: It was delivered by a Department of the Government of Canada, Canada Post.

ARBITRATOR CASS: And there are obligations of the intergovernmental kind to ensure that mail is delivered under the Universal Postal

Convention and so on.

MR. PEIRCE: That's correct.

ARBITRATOR CASS: So that function then was being exercised by the Canadian Government through the post office, and then it was under the statute a function--under the statute it was a function of Canada Post or it became a function of Canada Post, particularly the monopoly.

MR. PEIRCE: That's correct. It was something that Canada Post was subsequently authorized to do.

ARBITRATOR CASS: By a statute.

MR. PEIRCE: By a statute. It was not though a delegation of authority for Canada Post to exercise over third parties. It's a key point that I will come to, the difference between being authorized or permitted to do something by statute and being authorized to exercise authority over someone or something.

ARBITRATOR CASS: Well, there's no reference to over somebody. It's when Canada Post

or previously the Department delivered mail, say from a foreign country to Canada, it was carrying out that governmental responsibility, wasn't it?

MR. PEIRCE: But the mere test here is not to is it a governmental function, something governments have done? The test is whether there is an exercise of governmental authority. So you need the additional concept that this is an exercise of authority, and it must be an exercise of authority over someone or something as opposed to--

ARBITRATOR CASS: The other point I think is a different point, but just going back to the different words we've been using, it was a responsibility of Canada to deliver, and only it within Canada, I take it, had the authority to do that, presumably the postal monopoly existed before Canada Post was created.

MR. PEIRCE: Effectively, yes.

ARBITRATOR CASS: And then that authority was handed on to Canada Post with the monopoly

attached to it.

MR. PEIRCE: The difficulty I have is in the notion of handing on authority.

ARBITRATOR CASS: Well, Parliament did that, didn't it?

MR. PEIRCE: I'm not sure that Parliament has handed ont authority to do something. It's authorized, rather, Canada Post to do something. It's permitted Canada Post to do something. Now that permission is in the form here of a monopoly.

ARBITRATOR CASS: I was using the word "handed on" to avoid the void "delegate." You've used the word "authorized." Aren't we just fencing around a standard meaning of delegation?

MR. PEIRCE: I think there's more to it than that, and the reason is that it's not, in my view, just the question of whether it's being delegated and passed on. It's the nature of the actual authority itself that is important.

ARBITRATOR CASS: Thank you.

MR. PEIRCE: Now, I draw your attention to

the words "in connection with the monopoly good or service." Those words are found in 1502(3)(a), but not in 1503(2). Naturally that's because 1502(3)(a) deals with monopolies, whereas 1503(2) deals with state enterprises. The fact that it's absent from 1503(2) does not take away from the fact that that language imposes inoperative limitation within 1502(3)(a). It must be the exercise of authority has been delegated in connection with the monopoly, good or service. Here again we see a distinction between the monopoly, good or service, and the authority.

That leads me to the key language: "Any regulatory, administrative or other governmental authority." These terms are not defined in the NAFTA. In my submissions then they take their ordinary meaning in their context. The word "regulatory" and "administrative" are specific examples of the general class of governmental authority referred to in this provision. This is clear by virtue of the word "other." It also

follows from the set of rules of interpretation, noscitur a sociis ejusdem generis, regulatory, administrative or other governmental authorities. The meanings in form each other.

Now, the term "regulatory" derives from the word "regulate", which has been defined in Black's Law Dictionary to mean to fix, establish or control; to direct by rule or restriction, to subject to governing principles of law. An exercise of regulatory authority is normally formal in nature, generally involves a formal instrument for the exercise of that authority, such as a statutory instrument, delegated legislation and regulation.

Administrative authority similarly included administrative orders, rules, directives, including the exercise of the powers and privileges of the executive.

The next term, the word "governmental" confirms the nature of the authority in question. Governmental authority is the authority to govern

the conduct of others. And it is authority that is vested in the state.

ARBITRATOR CASS: Mr. Peirce, can you give me an example of governmental authority that is neither regulatory nor administrative that would be covered by this provision?

MR. PEIRCE: "Expropriation." The power to expropriate but not necessarily be a power that is considered regulatory in the sense of passing regulations or an administrative order, but it is a governmental power, quintessentially governmental, and it's referred to as an example f the exercise of governmental authority in Article 1503(2). So in my submission that would be a clear example.

ARBITRATOR CASS: Can you think of a reason why that's not included as an example in 1502(3)(a), although it is in 1503(2). And could you also help me understand why governmental authority necessarily includes regulation of someone or action upon someone as opposed to a governmental function?

MR. PEIRCE: I'll talk your second question first if I may. I think there are two clear reasons why it's got to be regulation essentially of a third party, authority over a third party. The first is--and they both draw directly from the text, which is the source to which we should look for the answers to these things. The first is that they didn't use the language. The NAFTA parties did not use the language of governmental function. They used the language of governmental authority.

The second, and I think it's a key point is to look at the examples that are listed, examples of governmental authority to give meaning to those terms, and they are powers, clearly, the exercise of authority over third party. We have licensing powers. We have the ability to set quotas. We have the power to expropriate. Those are clearly powers that effect the rights of third parties.

I would add, I guess, in addition, that

the entire language of 1502(3)(a), the entire language of 1503(2), gives meaning to these terms, and clearly together supports the conclusion that we're talking about the exercise of authority over third parties.

The governmental function--I'm sorry. I didn't answer the question about expropriation for state enterprises. It seems to me that in Article 1502(3)(a), for example, we have a list of powers, and there may have been specific examples in the minds of the drafters of this agreement when they were setting out those examples. the right to grant licenses, for example, in combination with a monopoly power would be something that may have been in the minds of the drafters because that very situation exists with the Canadian Wheat Board, for example, where it has a monopoly over the interprovincial trade in wheat, and also has a power to impose export licenses. So there are specific examples that may have been in place.

I don't know of a specific example that

has to do with expropriation by state enterprises, but it seem to follow that when you look at state enterprise and the conduct of state enterprises since the range of possible state enterprises has to raise concern itself about expropriation that a specific reference was included there simply by virtue of the breadth of those things, and the fact that expropriation is a truly governmental act.

ARBITRATOR CASS: Might I ask also, is it your view that this phrase is intended to broadly reach any sort of governmental authority or is intended narrowly to be construed to reach only the sorts of authority that are similar to the examples listed in the provision?

MR. PEIRCE: Again, as my colleague, prefer not to entertain the language of narrow versus broad, but rather of a textual reading, and it would suggest to you that on a textual reading those examples clearly are language that give meaning to the preceding phrase, regulatory, administrative or other governmental authority, and

in that sense help us to understand that it is restricted to those kinds of circumstances where the possibility is there to affect the rights of third parties.

So it is language that certainly helps us to interpret and does so in a way that shows us the relatively constrained circumstances where governmental authority would be in place.

I do have a suggestion. My colleagues passed me a note. Expropriation, where a state enterprise might expropriate and why it might have been considered, is, for instance, state enterprises controlling hydroelectric power may well have been the kind of issue that would be in the minds of the drafters of the NAFTA, and so you would have a state enterprise that expropriates in those circumstances. Just a possible example.

PRESIDENT KEITH: Mr. Peirce, it may be that the explanation as well is that 1503 is of course concerned with all state enterprises, including those which are in 1502. And it's not to

be contemplated that a nongovernmental monopoly, the other entity within 1502 would have the power of expropriation. I don't know. I mean that's a possible explanation of the difference.

MR. PEIRCE: I'm attracted to it, and not just because you came up with it.

[Laughter.]

MR. PEIRCE: We've talked about governmental functions. I would submit to you that even the notion of governmental functions is a fairly narrow concept that does deal with the exercise of authority affecting third parties.

I draw your attention to paragraph 97 of the Canada Dairy Products Case. You'll find it at Tab 6 of your compendium. You see the paragraph starts with a reference to Black's Law Dictionary. That saves me from having to cite Black's again.

And then it goes on and says, "The essence of government is therefore that it enjoys the effective power to regulate, control or supervise individuals or otherwise restrain their conduct

through the exercise of lawful authority." The meaning is derived in part from the functions performed by government and part from the government having the powers and authority to perform those functions. "A government agency"--this was the key language at issue in the dairy case--"is in our view an entity which exercises powers vested in it by a government for the purposes of performing functions of a governmental character, that is, to regulate, restrain, supervise or control the conduct of private citizens."

Again, while we are not--

ARBITRATOR FORTIER: Did you say at Tab 6?

MR. PEIRCE: It should be at Tab 6 of the compendium.

PRESIDENT KEITH: Mr. Peirce, could I just make the comment on that? I don't know the context, but again, as I narrow reading of "government agency", of course depending on the context, a school board is a government agency I

take it, and while it exercises some of those functions of regulating and restraining, it's primary in the business, isn't it, of facilitating and providing a service and assisting the citizens of Canada or Ontario, whatever the jurisdiction is. And then--

MR. PEIRCE: When I was at school I felt the authority of the school board, perhaps more than you're describing. But it's true that the government carries out other activities. The question is whether those other activities are really the exercise of governmental authority, and that that is a distinction to be drawn here, because that's the precise language in Article 1502(3)(a) and 1503(2).

I referred earlier to the difference between the term "authority" and the concept of authorization. Being vested with authority means having the authority of power over someone or something in a manner that affects their rights. Being authorized to do something means having the

right or being permitted to do something. For example, having a driver's license authorizes an individual to drive, gives an individual permission to drive. Having the authority to issue driver's licenses is different all together. That confers on the issuer the authority to determine the rights of others to drive.

The distinction between authorization and authority is important here. It helps to confirm that the exercise of governmental authority, and not a mere authorization for the purpose of 1502(3)(a), means the exercise of the power of a governmental nature. We've seen what governmental nature refers to here in regard to that authority, capable of determining the rights of third parties, as opposed to a mere authorization. It is the difference between being authorized to operate a monopoly or a commercial enterprise. And remember, all of our corporations, at least in Canada, are authorized to act by virtute of a statute, the Canada Business Corporation Act or its provincial

counterpart, and the actual delegation of authority of a governmental nature, which allows an entity to determine the rights of third parties.

My submission, if there was any doubt as to the nature of delegated regulatory, administrative or governmental authority referred to in 1502(3)(a), it's put to rest by the representative list of examples set out at the end of that article. We've talked about those examples, the power to grant import or export licenses, approve commercial transactions or impose quotas, these or other charges. Article 1502(3)(a) provides a similar list but replaces the power to grant import and export licenses with the power to expropriate--you were ahead of me on this point obviously.

These examples limit the general language of regulatory, administrative for other governmental authority powers that are quintessentially governance powers affecting the rights of third parties not normally associated

with a commercial enterprise by itself.

I would submit to you in addition that the context surrounding Article 1502(3)(a) confirms Canada's interpretation. The context provided by Articles 1502(3)(b) to (d). Articles 1502(3)(b) to (c) expressly address the commercial activities of monopolies within the monopolized market. 1502(3)(d) covers the commercial activities of the monopolies outside the monopolized market.

The fact that 1116 permits investor state claims in respect of breaches of Article 1502(3)(a), but not in respect of Articles 1502(3)(b) to (d), provides overwhelming contextual support for the proposition that Article 1502(3)(a) is limited to circumstances where a monopoly exercise delegated governmental authority and does not cover the commercial activities of the monopoly.

ARBITRATOR CASS: So far as the exercise of governmental authority is concerned, would a state enterprise operating a prison be in a

different position than a state enterprise operating a store? Would its decisions with respect to the operation of the prison be governmental or would they be nongovernmental since each of these decisions will have an impact on the people in the prison on the rights and the enjoyment, the liberties enjoyed by people in the prison?

MR. PEIRCE: There would be a difference in my submission insofar as--and I take this to be the core of your question, but correct me if I'm wrong--insofar as in the prison context, generally what we find is as delegated authority to prohibit the activities of prisoners, to permit them to be out of their cells for a certain amount of time, to subject them to searches. Those are truly governmental authority, and any inmate will I'm sure confirm that's the case. That's not the same thing as simply being in a government store where things are for sale and you're able to buy something off the rack.

ARBITRATOR CASS: Could you locate where between those two decisions such as the terms on which one could connect to the postal monopoly would fall?

MR. PEIRCE: In my submission, the postal monopoly itself is in the nature of providing a store that can sell and in regard to the postal monopoly, we find that there are no delegations of regulatory, administrative or other governmental authority as that term is used in 1502(3)(a), so clearly, it remains in the context of the commercial side if you will.

To conclude this part of my submission then, the operative language in 1502(3)(a) delineates relatively formal delegation of governmental authority over third parties in the nature of regulation making powers, administrative orders or the like. The authority cannot be a mere status, nor can it be a mere authorization to act such as an authorization to carry out commercial activities. The examples of governmental authority

in 1502(3)(a) give important guidance in interpreting the phrase "delegated governmental authority." It is those kinds of powers over third parties that are in issue.

What is more, it's not enough for an investor to show that a monopoly has the capacity to exercise delegated governmental authority. The investor must show that the monopoly actually exercised that authority in a manner to breach Chapter Eleven of the NAFTA.

ARBITRATOR FORTIER: Mr. Peirce, I know you'll be dealing with it later, but the questions that you have just posed, how the investor must show this, the investor must demonstrate that. Doesn't this by definition call for a factual inquiry?

MR. PEIRCE: We've admitted the facts alleged here. There's no further inquiry required. You can look at the Amended Statement of Claim of the United Postal Service.

ARBITRATOR FORTIER: [Off mike] I know

you're coming to--

MR. PEIRCE: And accept those facts as pleaded. And what we'll see is that the facts as pleaded contain no reference to actual delegations of governmental authority.

ARBITRATOR FORTIER: Except an affirmation.

MR. PEIRCE: Except an affirmation, exactly. My first and main point, of course.

UPS admits at paragraph 90 of the Counter-Memorial that the only allegations in the Amended Statement of claim that are relevant to the exercise of delegated governmental authority by Canada Post are in paragraphs 1 to 3 of the Amended Statement of Claim. As you read through the Amended Statement of Claim, it's startling to discover that there's no reference to the exercise of delegated governmental authority by Canada Post Corporation and no apparent connection between the commercial activity described in the Amended Statement of Claim and the exercise of delegated

governmental authority. By UPS's own admission then, paragraphs 27 to 19, on the Amended Statement of Claim, under the heading "Breaches of Articles 1502(3)(a) and 1503(2)," contain no allegation of the exercise of Delegated Governmental Authority. It's simply not there.

PRESIDENT KEITH: Mr. Peirce, just going back to your reference to paragraphs 1 to 3. What about the last sentence of paragraph 2?

MR. PEIRCE: That's what I said, it's only there. Excuse me.

PRESIDENT KEITH: All right. Sorry I missed that.

MR. PEIRCE: But it's there and that's it, and it's a bald assertion. Canada Post exercised delegated governmental authority in the operation of a monopoly.

PRESIDENT KEITH: Well, they then refer to the legislation in the court of their written argument, don't they?

MR. PEIRCE: They do appoint--which I will

address--you'll see that there's nothing in the pleading though that actually draws us to that, paragraphs 1 to 3. So what we see is a reference to commercial activity. We have a subsequent reference in their pleading, and I'm foreshadowing my argument here. A subsequent reference in their written argument--I'm sorry--to, for example, the power, in Section 19, Canada Post Corporation Act that allows the making of regulations. They mischaracterize it, but I'll get to that point. What they don't do is actually point to a regulation. They don't say, "This regulation breaches Chapter Eleven."

So they've suggested, perhaps subsequently, that there's some capacity to Canada Post Corporation to make regulations, a point that I contest, but nevertheless, even if that capacity existed, they haven't actually pointed to any regulation they might be breaching. They haven't founded their claim on the necessary fact.

Now, UPS attempts to explain its bald

assertion, the assertion at paragraph 2 of the Amended Statement of Claim that Canada Post Corporation exercises delegated governmental authority in operating the postal monopoly and it's related businesses.

UPS explains it at paragraph 91 of the Counter-Memorial. According to UPS, and I quote: "The Tribunal must proceed on the basis of the admitted fact that Canada Post does indeed exercise delegated governmental authority in operating the postal monopoly and its related business." On that basis it's not open to Canada at the jurisdictional level to challenge that proposition the Tribunal need proceed no further.

This assertion misconstrues the admissions made by Canada, mischaracterizes the nature of the issue relating to the exercise of delegated governmental authority and misapprehends the role of this Tribunal in deciding this motion on jurisdictional grounds.

In order to base a claim on Article

1502(3)(a) UPS must establish that the conduct of Canada Post involved the exercise of delegated governmental authority within the meaning of Article 1502(3)(a). That's clear on the language. That is a legal requirement. Whether UPS has satisfied that legal requirement is a legal conclusion that involves the application of the law, the language of the treaty that is to the facts alleged and admitted for the purposes of this motion. It is not a fact admitted by Canada, although such an admission would undoubtedly be convenient for my friends. They cannot so easily deny this Tribunal its proper role of applying the law to the facts alleged and admitted. That's why we're here. We say on the facts alleged and admitted, there is no exercise of delegated governmental authority.

There's a second fundamental flaw that UPS relies on a bald assertion. Even if this assertion were accepted as true for the purposes of this motion, UPS has failed to make any attempt to

connect the actual exercise of delegated governmental authority with the conduct of Canada Post Corporation. This is an alleged breach of Article 1502(3)(a) and Chapter Eleven.

This is a point I referred to earlier, but I'll go through it with you. As I demonstrated in the first part of my submissions, it's not simply by virtue of monopolies having the capacity to exercise delegated governmental authority that 1502(3)(a) imposes obligations on the NAFTA parties for the conduct of those monopolies. Rather, the obligations of the party must arise out of the exercise of delegated governmental authority. IN other words, it's not enough to assert the Canada Post exercises delegated governmental authority in general to characterize their status, say they have this capacity. There must be facts pleaded that connect the exercise of delegated governmental authority with the breach of Article 1502(3)(a). UPS has failed to plead any such facts.

Paragraphs 27, 28 and 29 of the Amended

Statement of Claim under the heading again, "Breaches of Articles 1502(3)(a) and 1503(2)." Describe commercial activities. There's no reference, no connection to the exercise of governmental authority. I'd like to draw your attention for a second to paragraph 27. It should be on the Power Point here for you if you want the follow there or in your materials.

Paragraph 27 of the Amended Statement of Claim. "Since April of 1997 Canada Post has engaged in anticompetitive and unfair conduct including predatory conduct, predatory pricing, tight selling, cross-subsidization and the unfair use of its monopoly infrastructure network, which conduct is inconsistent with Canada's obligations." There simply is no reference to delegated governmental authority to an exercise of such authority here. There's nothing such as the granting of an import or export license that's addressed here. No setting of quotas, no expropriation. This is commercial activity.

Let's look to paragraph 27(a). What are the examples? Perhaps the devil's in the detail. Requiring its retail franchisees to enter into a standard dealership agreement prohibiting those franchisees from selling products which compete with Canada Post courier or messenger services such as UPS Canada's courier products. There simply is no devil in these details. There is no reference to the exercise of delegated governmental authority. It's purely commercial activities. It's entirely implausible to suggest, for example, that entering into a dealership agreement with franchisees regards the exercise of governmental authority. It cannot seriously be contended, for example, that every time Ford enters into a dealership agreement restricting its retail franchisees from selling Chryslers, that that's the exercise of governmental authority, certainly not delegated governmental authority at that. That's simply implausible. But that's the nature of the allegation.

Every allegation in the Amended Statement of Claim, based on the conduct of Canada Post similarly refers to commercial activity with no reference to the exercise of delegated governmental authority. UPS makes no effort whatsoever to explain why these activities constitute the exercise of delegated governmental authority within the meaning of 1502(3)(a). The obvious reason for UPS's approach is that these activities bear no relationship to the plain meaning of Article 1502(3)(a). The result though is that UPS has failed to allege facts that are capable of establishing a prima facie breach of Article 1502(3)(a) and Chapter Eleven based on the conduct of Canada Post.

Despite UPS's attempts to have this Tribunal simply accept and rely on the bald assertion, the Canada Post does, sometimes, somewhere perhaps exercise delegated governmental authority. This is so clearly deficient that UPS raises a collection of disparate arguments in its

written submissions to try to get around the express language of Article 1502(3)(a).

PRESIDENT KEITH: You're moving to your final argument, I think, Mr. Peirce, are you?

MR. PEIRCE: I'm moving to, yes, the final part, yes.

PRESIDENT KEITH: I just wondered if that's a convenient point in your argument for us to take the morning adjournment.

MR. PEIRCE: That would be quite fine, yes.

PRESIDENT KEITH: 15 minutes. Thank you.

[Recess.]

MR. CARROLL: Mr. Chairman, if I might, I spoke to my learned friends over the break. I have one issue which I would like to raise for the Tribunal at this point, and you may have recalled that last week I sent a letter to the panel concerning some 14 new and additional authorities which our friends had provided us last week.

And the position of UPS is that the

parties have had ample opportunity to develop their arguments in an extensive way, and our position is that these authorities should not be permitted to be cited at what is, in effect, the 11th hour.

If the panel is disposed to allowing our friends to use the authorities, then at the very least we would like to reserve the right to respond in writing if we need to because, of course, we don't know--we've just been provided copies of the authorities. We don't know at this point the context in which they will be used or the arguments that will be made for which they will be used as support. So we're a little bit in the dark, and that is the position.

I would suggest, Mr. Chairman, that under the circumstances it is not appropriate for our friends to be referring to additional authorities cited at the 11th hour.

PRESIDENT KEITH: Thank you, Mr. Carroll.

Mr. Bendin, you were going to comment.

MR. BENDIN: Thank you. As my friend has

indicated, Canada did provide 14 authorities last week on the 24th of July, both to the investor and copies as well to the Tribunal.

Canada does so not to raise any additional arguments nor do these authorities constitute in any way evidence. I think the authorities are provided by way of what Canada feels to be its obligation to ensure that all the material that the Tribunal requires in order to properly consider and brief the issues before it are indeed before it. And it's in that spirit in which the authorities have been provided, as the investor has done, quite properly, in bringing to the attention of the Tribunal an authority that is the recent decision of the Pope & Talbot Tribunal in respect of damages, which contains aspects which may be relevant to this case. So it's in that spirit and for that purpose that Canada has provided these authorities, and I think given the context of such hearings and the fact that it's part of the natural evolution of cases that sometimes one can't

anticipate everything that one should have before the Tribunal just as a result of the manner in which argument and representations are exchanged, that it's quite appropriate, I would think, that we do so, so long as we meet the requirements that go with providing authorities, namely, that we give prior notice and that we provide copies of these authorities ahead of time, as we have done.

PRESIDENT KEITH: Thank you, Mr. Bendin.

In reply, Mr. Carroll?

MR. CARROLL: Mr. Chairman, the only point that I would make in reply is that the authority of Pope & Talbot was provided to the Tribunal in correspondence from myself as soon as it came out, within a day or two of it coming out, and that occurred over a month ago. What has happened here, in my respectful submission, is quite different.

PRESIDENT KEITH: Thank you. Perhaps the Tribunal members might just have a brief conversation.

[Pause.]

PRESIDENT KEITH: The members of the Tribunal consider that Canada should be able to make use of this material. Authorities are authorities and are relevant to the argument. if they aren't relevant to the argument, it would, of course, be open to counsel on the investor side if they need to, but they are experienced in responding to argument, and I doubt it would be open to them to file a supplementary written submission if that was necessary to deal with the issues.

Thank you.

MR. CARROLL: Thank you.

MR. BENDIN: Thank you.

PRESIDENT KEITH: Mr. Peirce, I think we are back to you.

MR. PEIRCE: I've just addressed the pleadings of UPS, their failure to plead any facts, to actually connect the exercise--the conduct of Canada Post Corporation to the exercise of any delegated governmental authority.

In their written submissions, though, UPS tries to get around the language, the express language requiring the exercise of delegated governmental authority. Paragraph 104 of the Counter-memorial, UPS states, and I quote, "The acts and omissions of Canada Post arise directly from the governmental authority conferred by"--it says "by." I'm sure my colleagues "on"--"on Canada Post to operate a monopoly."

It appears that UPS's theory here is that if you can't show that the monopoly exercises delegated governmental authority, you simply claim that the operation of the monopoly is the exercise of delegated governmental authority. But that makes nonsense of the text of Article 1502(3)(a).

On its face, Article 1502(3)(a) includes two distinct criteria: the first, in order to come within Article 1502(3)(a), an entity must be a monopoly as that term is defined in Article 1505; secondly, the entity must have exercised delegated governmental authority.

UPS seeks to avoid the second criterion by collapsing it into the first. An interpretation that sees delegated governmental authority as synonymous with the operation of a government monopoly, which is included in the definition of monopoly, would render the qualifying language in 1502(3)(a) meaningless since all monopolies would be subject to Chapter Eleven investor disputes for all of their monopoly activities.

ARBITRATOR CASS: Let me ask, if I might, Mr. Peirce, is that necessarily so or would there be some monopolies that might be deemed to be monopolies exercising governmental authority, such as a monopoly to operate prisons, whereas other monopolies might not be deemed to be exercising governmental authority?

MR. PEIRCE: Of course, all governmental monopolies carry out a public purpose. They are, by definition, state enterprises owned or controlled by the state. As a result, that possibility is already acknowledged in the

requirement that it must be a monopoly or government monopoly or a state enterprise for 1503(2). The difference between having that public function, that public purpose, and the requirement that you exercise delegated governmental authority can be understood in the nature of the provision itself, which is an anti-avoidance measure. It is where that express delegation of authority has been given to a monopoly or a state enterprise and the monopoly or state enterprise exercised that authority in a manner that breaches Chapter Eleven.

ARBITRATOR CASS: If I might just make sure I understand the argument, the school board or the monopoly authority operating prisons would make a number of different decisions in performing its functions. Those decisions may or may not be formalized as regulations, as administrative determinations, but could still be decisions that would be thought of as governmental; whereas, other monopolies might be making similar decisions in a strictly commercial area and not be thought to be

making governmental decisions.

Is your position that in neither case would there be an exercise of governmental authority unless there is a specific and clear formal action by the monopoly?

MR. PEIRCE: I'm just pausing on your language of "specific and clear."

ARBITRATOR CASS: I take it that you are rejecting the concept that there could be a monopoly that operates in all of its activities in the exercise of governmental authority, that that in your view would be an impossibility under the structure of NAFTA? Is that an accurate statement?

MR. PEIRCE: A monopoly must, by definition, have some commercial aspect to it, and as a result, I would accept that it would be an impossibility since my position clearly distinguishes between commercial activity and the exercise of delegated governmental authority.

ARBITRATOR CASS: So then, if we find that Canada Post is engaged in commercial activity, we

would need to find, on your view, some other specific delegation of government authority. On the other hand, if we find that the operation of the Post is the exercise of government authority, we would then not need to find another delegation.

MR. PEIRCE: I certainly agree with the first point you made. I see difficulty in reaching the conclusion that the second point is even possible. So it's difficult for me to entertain a response since the express language distinguishes between the delegation to the monopoly of the monopoly and the need to exercise delegated governmental authority.

In fact, if we were to read the text of 1502(3)(a) and replace the words "regulatory, administrative, or other governmental authority" with the operation of the monopoly, we would have a rather nonsensical provision. You would have the requirement to be a monopoly. You would have to have that monopoly operating a monopoly. They would have to be doing so in connection with a

monopoly good or service. I think it's a tautological proposition that that can't be.

ARBITRATOR CASS: Let me just one more time. Are you then saying that if we had a monopoly authority for the operation of prisons, that would not be an enterprise that exercises governmental authority unless it is adopting formal regulations?

MR. PEIRCE: Unless it has been given the power to exercise those governmental powers, such as search and seizure, restraint on individuals, clearly activities that affect and determine the rights of third parties.

ARBITRATOR CASS: Thank you.

MR. PEIRCE: I would note here that the United States put it well at paragraph 9 of their submission. "There is no jurisdiction under either Article 1116 or 1117 if the authority under which the monopoly or state enterprise has acted is inherent in the nature of the monopoly or the state enterprise." It cannot be that just having the

monopoly itself is the delegation of governmental authority.

UPS makes a similar kind of argument, if not with monopolies, we'll try it with state enterprises. At paragraph 13 of the Investor's Reply to the Submissions of the United Mexican States and the United States of America, when it states that Canada Post "is an agent of the Crown and an institution of government. Accordingly, there is a prima facie basis on which this Tribunal may accept jurisdiction to proceed with this arbitration."

The fact that Canada Post is a Crown agent and an institution of the government is a status. It does not bestow authority on Canada Post. Relying on that status as somehow constituting the exercise of delegated governmental authority then is inconsistent with and fails to satisfy the language of Articles 1502(3)(a) or 1503(2).

Pursuant to those articles, an entity must have the status being a state enterprise or a

monopoly and must, in addition, be found to be exercising delegated governmental authority. If having the statute of being a state enterprise were sufficient to meet the second threshold of exercising delegated governmental authority, that second threshold would again be meaningless to the same structure of the argument that they applied to the monopoly provision.

Since all of Canada's federal Crown corporations have the status of being a state enterprise, they all cross the threshold then into 1503(2). That cannot have been the intention of the parties that they would then simply by virtue of that status cross all of the thresholds. That only takes them across the first threshold. The second threshold of exercising delegated governmental authority must also be crossed.

UPS has failed to show in any manner that that second threshold has been crossed. Again, at paragraph of the Investor's Reply, UPS asserts that "for the purposes of this jurisdiction motion, the

Investor has clearly satisfied the jurisdictional threshold of alleging a delegation of governmental authority. Canada Post is operating under the delegated authority of the Canada Post Corporation Act."

Of course, we see first the bald assertion of delegated governmental authority, but this time it's not even quite right. Whether Canada Post is operating under the delegated authority of the Canada Post Corporation Act is not the issue. Of course, the activities of Canada Post have been statutorily authorized. The issue is whether Canada Post has exercised delegated governmental authority in a manner that breached Chapter Eleven.

In a footnote to paragraph 13, Footnote 8, we are getting a little late in the day for the shoring up of this argument, but we are down to Footnote 8. UPS appears to finally recognize the requirement, the need to establish that the conduct of Canada Post that is alleged to breach Chapter Eleven involved the exercise of delegated

governmental authority. Better late than never, we might have thought, except UPS doesn't deliver here. Instead, UPS claims that, and I quote, "A cursory examination of the Canada Post Corporation Act shows that Canada Post has exercised delegated governmental authority in relation to the conduct described in the Amended Statement of Claim."

It turns out that it's the act itself that contains their pleadings. But the act itself cannot show that Canada Post has exercised delegated governmental authority. That's UPS's task.

The most that the act can do would be to show that Canada Post has some delegated governmental authority, that there's a possibility that it exercises delegated governmental authority. There would have to be an additional allegation of some specific exercise, some regulation, some activity that involves the exercise of delegated governmental authority. And that's what's absent.

The references in Footnote 8 to the

statutory status, Canada Post is a Crown agent and the corporate objects of Canada Post set out in Section 5 do not even suggest that Canada Post has been delegated governmental authority, much less demonstrate that Canada Post has exercised such authority. Those objects describe the commercial orientation of Canada Post.

Finally, Section 19, the Canada Post Corporation Act, UPS does refer to this provision. It says in Footnote 8, "Under Section 19(1), the Canada Post Corporation Act, Canada Post is authorized to make regulations with the approval of the Federal Cabinet for the efficient operation of the business of the corporation and for carrying out the objects and purposes of the Canada Post Corporation Act."

On the first point, UPS has it wrong, I would submit. Canada Post can propose regulations under Section 19 of the act, but, as UPS admits, the statute provides that regulations under Section 19 must be approved by the governor and council, or

the Federal Cabinet, as UPS has put it. It's the governor and council that's politically accountable for those regulations, and their legal force flows from the approval by the governor and council.

There's a more fundamental problem here, though. Regardless of who makes the regulations under the Canada Post Corporation Act, the problem remains that UPS has not pointed to any actual regulations. Again, we have the mere implication, the suggestion that Canada Post has some delegated governmental authority, but no allegation that it's been exercised here and no allegation that the exercise of that authority has breached Chapter Eleven.

Now, I started from the proposition that an investor such as UPS must establish that any alleged breach of the NAFTA founded on the conduct of a monopoly such as Canada Post occurred in the exercise of delegated governmental authority within the meaning of Article 1502(3)(a) in a manner that breached Chapter Eleven. I suggest to you that the

requirement that the exercise of delegated governmental authority is in addition to the monopoly status or the state enterprise status of the entity. Governmental authority is capable of determining the rights of third parties in my submissions and there's been formally delegated to the monopoly in addition to the monopoly powers. UPS makes no attempt to plead a factual foundation on which this Tribunal could conclude that Canada Post has exercised delegated governmental authority and certainly not in a manner that breached Chapter Eleven.

Outside of the mere bald assertion that Canada Post exercised delegated governmental authority, all that UPS has done is point to the commercial conduct of Canada Post as allegedly breaching Chapter Eleven.

I'll pause here to address again the point about government function. All state enterprises and all government monopolies serve a public purpose. They are all in the least in the context

or in the circumstance of the store to which you referred, Dean Cass. You can look beyond that and see. Are there additional powers here? To take your prison example, a prison is--you give a monopoly over prisons--perhaps not a monopoly, perhaps a state enterprise. Monopoly seems a little bit strong for prisons.

The authority that is exercised, though, of restraining individuals, of allowing individuals in and out of their cells at certain times, of search and seizure, those kinds of authorities would be in addition to the giving of the monopoly. They're not even themselves inherent in the nature of a monopoly. Those are the kinds of things that are the exercise of governmental authority and would have to be expressly provided for.

Now, pointing to the commercial conduct of Canada Post by itself without alleging a breach connecting it to--sorry, to the exercise of delegated governmental authority, and then connecting that to the alleged breach of Chapter

Eleven, fails to meet the express requirements in Article 1116 that in combination with Articles 1502(3)(a) and 1503(2) that the conduct of the monopoly is only subject to investor/state dispute resolution where the monopoly exercises delegated governmental authority. As a last attempt to salvage their pleadings, which are bare of any reference except for the bald assertion, UPS asserts a collection of disparate arguments that attempt to circumvent the express language. The monopoly is the authority. The state enterprise is the authority.

Canada Post has the authority, with no reference to the actual authority. As a result, UPS simply has not pleaded a case in relation to the conduct of Canada Post which is, in my submission, even capable of attracting the jurisdiction of this Tribunal.

That's the end of my submissions. I'll ask you, if you would, to call on my colleague, Mr. Rennie.

PRESIDENT KEITH: Thank you, Mr. Peirce.

Yes, Mr. Rennie?

MR. RENNIE: Thank you, Sir Kenneth.

Just picking up where we left off, you had asked me a question, Sir Kenneth, about the note, Note 43, and our response to the opposition's argument with respect to that. Our position on that is that it is there for greater certainty. There are many other obligations in the NAFTA. In fact, most of the obligations in the NAFTA are not subject to investor/state settlement. The only provisions that are, of course, are Section A of Chapter Eleven, and 1501(3) refers to the parties, and so necessarily to include the investors in the limited context of that articles, they didn't feel the need, obviously, to insert a similar note in the balance of the chapters throughout the treaty.

And, Dean Cass, you asked me a question about alternative language that might be used in 1502(3)(a) and 1503 such as to the extent that I would suggest perhaps insofar as would be in the

same category as that, and I would think that the answer to that is yes, that would achieve the same intent of limiting the scope of the recourse intended, but would not change the result that they have to get through 1502(3)(a) by proving the delegated authority and that in the exercise of that, the monopoly acted in a manner inconsistent with the Section A obligations.

Your second question, which I took under reserve, was the question of whether one could conceive of a situation where there was a breach of (a) and (d) at the same time. And I think it's a difficult matter to imagine given that (a) is addressed to the monopoly or state--the monopoly's conduct in a regulatory governmental manner, whereas (b), (c), and (d) are addressed with the commercial functions of the monopoly and that it engages in its commercial capacity. So even if there were a situation, the investor's recourse would still be limited to proving that there was a breach of (a). That would be my answer to that

question.

So if we may return now to the framework of our argument, Mr. Peirce is finished with the issue of no delegated authority, and there are two other arguments that have been raised by UPS that jurisdiction can somehow be found or read into 1502(3)(a), or that if it can't, that somehow Chapter Fifteen can be avoided or circumnavigated.

Essentially, what UPS argues is that since Article 1502(3)(d) is an obligation which Canada owes to its treaty parties, UPS can somehow vicariously partake of that obligation and read it into 1502(3)(a). I note in particular and draw to your attention paragraph 64 of the Investor's Counter-Memorial where they say, "There is nothing that compels the conclusion that the conduct by a government monopoly which is prohibited under Article 1502(3)(d) cannot also form the basis of an investor claim under 1502(3)(a)." Seldom have we seen such a blatant attempt, in my view, to rewrite the treaty. And, in fact, there is much that very

quickly compels the opposite conclusion that you cannot do that. First, this interpretation offends Article 31 of the Convention. UPS would have you read that treaty provision in isolation and avoid the context provided by Chapter Fifteen and Twenty, which, when read together, as they must, expressly address allegations of anticompetitive conduct and confer jurisdiction for the resolution to state-to-state dispute settlement.

In my view, when reading the submissions, counsel for Mexico has put it very well in paragraph 7. They said, and I'll quote, It is a basic rule of treaty interpretation that each provision must be given effect and each must have a different meaning from the others. It is contrary to this basic rule for Article 1503(2)(3)(a) to be read as having the same meaning as 1502(3)(d). The former is arbitral in certain conditions. The latter is not. Article 1503(2)(3)(d)'s content cannot be read into 1502(3)(a) in order to circumvent Article 1116's exclusion of Article

1502(3)(d) from investor/state arbitration.

The second point I would make is that this is a selective reading of the text. Their reading-in argument depends on focusing on the nature of the parties' obligations under the agreement. In fact, they ask the wrong question. The question isn't whether or not the parties have an obligation to ensure that monopoly conduct is governed when it's acting in that capacity. The question is whether or not the investor's recourse is qualified or unqualified.

The third point they make concerns how we read. They say we read too textual. They say we read too literally. We say we read the text. And a plain-text reading of this provision is that Article 1502(3)(a) claims can be brought only in respect of conduct that is inconsistent with the parties' obligations under Section A. Put in other words, Article 1116(1)(b) carves out of the potential universe of 1502(3)(a) claims a subset and a limited subset that may be arbitral by an

investor, namely, those claims that involve a breach of Section A obligations.

So in response to the plain meaning and the plain reading of Article 1116(a) and (b), they add a healthy dose of objectives and purpose of the treaty to support the suggestion that you ought to read (d) into (a). This reminds me of Archimedes who said, "Give me a lever, and I'll move the world." The investor says, "Give me a statement of purpose and object, and I'll rewrite the treaty." Because that is effectively what they're asking you to do. No investor has the right or authority to rewrite this treaty nor, with respect, does this Tribunal.

It's a self-evident proposition that objects and purpose provisions cannot form an independent basis for interpreting the meaning of the treaty so as to give it jurisdiction.

And the final point I would make is that what, in effect, they would be doing were they to succeed in this is to transform a provision that

was put there to ensure that the parties' obligations that they undertook in Section A were not eroded, avoided, or narrowed through delegation of governmental authority. To turn it into an expansive source of jurisdiction for themselves, that is essentially what they are doing by that reading-in.

Now, the second argument that they raise in this context is that they don't have to deal with Chapter Fifteen at all, that you can excise it from your reading of the treaty, and that it can proceed directly to Canada in respect of its actions--in respect of the actions of Canada Post.

It's in this context that they introduce the doctrine of state responsibility and overlapping remedies. But let me just suggest what, in fact, is happening here.

UPS suggests that there's another path to jurisdiction, and probably recognizing that they cannot get through the first threshold that you see on the screen in front of you now, they cannot

establish that Canada Post is exercising a governmental authority, they say we can go directly to Article 1105. They need not cross the threshold. And it is in this context that they introduce state responsibility and overlapping remedies.

It is our submission that this approach essentially negates and renders redundant the precise and carefully limited circumstances under which the framers clearly contemplated party responsibility for the conduct of monopolies.

And it is, in fact, a ludicrous proposition in my respectful submission to say that the government of the three parties undertook responsibility for every action of monopolies in the state enterprises. What the parties have negotiated is what needs to be applied. Here the parties carefully addressed and carefully circumscribed the boundaries of their responsibility. They were so careful that they addressed it in a specific chapter.

Articles 1116 and 1502(3)(a) and 1503(2), when read together, as they must, indicate an acceptance by the parties of responsibility for the action of government monopolies in certain defined circumstances. In the absence of express language dealing with organizations that, in fact, have delegated authority, an issue could arise in each and every case as to whether or not such organ--the conduct of such entities should be attributed to the state. Here, however, the parties have made explicit that monopolies can trigger party obligations in respect of the minimum standard of treatment when it is acting in lieu of or as a surrogate for the state.

And as the panel in Loewen, another Chapter Eleven Tribunal noted, while state responsibility is an important principle of international law, should not be held to be tacitly dispensed with by international agreement. Such intention, however, may be exhibited by the express provisions which are at variance with the continued

operation of the relevant principles of law. In this case, as they say in Loewen, the general doctrine of state responsibility cannot override the express language of the NAFTA. And we say that to use the doctrine in this context to extend the obligations beyond that which Chapter Fifteen delineated would frustrate what we say is the self-evident intention of the parties to control circumstances under which the parties would assume responsibility for the conduct of government monopolies to investors.

Finally, were the UPS position to be correct, the result would be that in every case it would be a question whether or not the actions of the myriad of state enterprises and government monopolies that exist between Canada, Mexico, and the United States could be a state organ and whether its conduct could be attributed to the state under the rules of attribution. In this case, that question has been displaced by the express language of Chapter Fifteen.

Quite related to this argument is that of overlapping remedies. I will not spend much time on this matter, although it does occupy a fair amount of space from the UPS Counter-Memorial. It is clear and uncontroverted that there are circumstances where the treaty parties could provide that the same topic can be covered by more than one provision or that relief can be found in more than one way, but that manifestly is not the case here. And we have discussed the breadth and extent of that doctrine in our materials. But whatever its breadth might be, it's not a mechanism to allow you to avoid the plain meaning of the text. And the plain meaning here is that the parties have identified a topic as they have here with anticompetitive conduct. They treated it with precision. They did not include that provision in matters that are subject to arbitration by an investor. That provides in our submission compelling textual and contextual basis for concluding that the NAFTA did not--the NAFTA

parties did not intend disputes related to that subject to be arbitral.

It's an entirely proposition to advance, as UPS has done here, that the same obligation, having been specifically addressed in one provision of a treaty can be found in another provision of the treaty, read into it. It's not a question of overlapping remedies. What they're trying to argue is this question of overlapping obligations.

Now, turning to the fourth argument that UPS has advanced, and that is, assuming that they make it across the jurisdictional threshold of Chapter Fifteen and establish that Canada Post Corporation is acting as a surrogate for the state and is exercising a delegated governmental authority, or even assuming that somehow under a doctrine of overlapping remedies or state responsibilities it need not go through or pass the test of Chapter Fifteen, it can proceed directly--sorry. They argue that if they get to Section A, if they get somehow within the scope of Section A,

they can establish that somehow, either under the doctrine of overlapping remedies or state responsibility, that anticompetitive practices, the very anticompetitive practices that were dealt with in 1502(3)(d), arise almost phoenix-like in the content of 1105. They say that anticompetitive practices is a component of the minimum standard of treatment. So even if everything I have said is rejected by you, and even if everything Mr. Peirce has said you found not to be of value, in our position it doesn't matter because they cannot establish that anticompetitive practices are a component of the minimum standard of treatment.

I will ask my colleague, Mr. Willis, to address this argument, and it might be, Sir Kenneth, an appropriate time, even though we are running a little ahead, to take a break because Mr. Willis will be about an hour, I think. We're in your hands.

PRESIDENT KEITH: Thank you.

About how much longer do you think you

need in total?

MR. RENNIE: In total? We will be done by 4 o'clock.

PRESIDENT KEITH: Right. We will resume at 2:00 p.m.

MR. RENNIE: Thank you.

[Whereupon, at 12:50 a.m., the hearing was recessed, to reconvene at 2:00 p.m. this same day.]

AFTERNOON SESSION

[2:05 p.m.]

PRESIDENT KEITH: Yes, Mr. Willis?

MR. WILLIS: Mr. Chairman and members of the Tribunal, my topic this afternoon will be Article 1105, paragraph (1), as interpreted by the Free Trade Commission, and in particular, the minimum standard of customary international law in the treatment of aliens.

In principle, of course--and Mr. Rennie has explained this--it's our position that the Tribunal does not really have to consider this topic. The claimant can only get to Article 1105 by first demonstrating that the criteria of Article 1502(3)(a) and 1503(2) have been satisfied, and this, we submit, they cannot do. And, logically, that is an end to the matter.

We are, therefore, addressing the substance and content of Article 1105 only, as the expression goes, out of an abundance of caution.

First, let me identify the main points of

my presentation today. I'll be dealing briefly with the Free Trade Commission Note of Interpretation on Article 1105. The greater part of my argument will deal with the substantive scope of the minimum standard, what it covers, and, above all, what it does not cover.

Next, I'll talk about the meaning of fair and equitable treatment and full protection and security which are not in our submission independent tests and do not provide a blank check for challenging anything at all on essentially extra-legal grounds of subjective equity.

And, finally, I'll deal with the threshold, the threshold below which the minimum standard ceases to apply.

Now, where this takes us is that the allegations of the claimant taken at face value for the purposes of this motion do not fall within the subject matter of Article 1105, paragraph (1). Jurisdiction under Chapter Eleven, therefore, cannot be found on this provision.

I take as my point of departure the Free Trade Commission Note of Interpretation of July 31, 2001.

ARBITRATOR FORTIER: We'll be celebrating the anniversary in a couple of days.

MR. WILLIS: Exactly. The note links Article 1105 to the minimum standard of treatment of customary international law for the treatment of aliens, and it clarifies that fair and equitable treatment and full protection and security are not additional requirements, but aspects of that standard. In its final paragraph, the commission has also ruled that a breach of another provision of NAFTA does not establish that there has been a breach of Article 1105, paragraph (1).

The note is self-explanatory, and I have only a few basic and perhaps rather obvious points.

First, this is an exercise of the Commission's authority to implement the agreement and resolve disputes about its interpretation under Article 2001. And the interpretation is,

therefore, binding upon the Tribunal by virtue of Article 1131, paragraph (2).

Secondly, there is nothing extraordinary about these powers or about the way in which they have been exercised in this instance. The NAFTA provisions I just referred to reflect the general principles of treaty law whereby the parties are the masters of the agreement. This is set out in the reference in paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties, the reference to any subsequent agreement of the parties with respect to the interpretation of the treaty in question.

There is even a term of art for such an agreed interpretation in the law of treaties. It's called authentic interpretation. Routier, in his introduce to the law of treaties, page 95, paragraph 138, states that, and I quote, "If the parties to a treaty agree on a common interpretation, either by a formal treaty or otherwise, this interpretation acquires an

authentic character and prevails over any other."

The investor refers to Article 102, paragraph (2) of the NAFTA, which requires interpretation in accordance with the applicable rules of international law. But that, of course, includes Article 31, paragraph (3) of the Vienna Convention and this concept of authentic or agreed interpretation.

PRESIDENT KEITH: Mr. Willis, just on Article 31(3), it's concerned, isn't it, with defining the context in which the interpreting body may have regard or is to have regard?

MR. WILLIS: Well, it says there shall be taken into account, as I recall, it begins, "There shall be taken into account, along with other matters"--

PRESIDENT KEITH: Yes.

MR. WILLIS: And then it refers to subsequent agreements. So the context in a sense, but a very decisive form of context.

PRESIDENT KEITH: Yes. And you're saying,

in any event, Article 2001 in this case is a clear statement of the authority and of the blinding effect when you go into--

MR. WILLIS: Yes, and lends, if anything, added weight to these general principles we find in the Vienna Convention.

PRESIDENT KEITH: Thank you.

MR. WILLIS: Now, the claimant refers to Article 102, paragraph (2) of the NAFTA which requires interpretation in accordance with applicable rules of international law, and as I mentioned, this includes Article 31, paragraph (3) of the Vienna Convention and the concept of authentic interpretation.

It's important to bear in mind that the Free Trade Commission is a political body and not a judicial body. It, therefore, has a very wide latitude in adopting these authentic interpretations pursuant to the treaty, and it is not bound by the rules of interpretation that would apply to a judicial or indeed an arbitral body.

But having said that, there are very strong, if not compelling grounds for concluding that the FTC note is, in fact, the correct interpretation. The stipulation that the interpretation is not additive, that the concluding phrase does not require treatment in addition to or beyond international law, gives a proper effect to the use of the word "including." The reference to customary international law reflects the context, including the heading of Article 1105, which refers to the minimum standard of treatment.

Now, that heading takes us straight to customary international law because the minimum standard of treatment is a well-known concept and a fully developed concept of customary international law.

The Canadian Statement of Implementation, issued when NAFTA was concluded, also refers in this connection to customary international law. This was an official, published, and contemporaneous document. It was exchanged with the

other parties before the signature. It elicited no protest at that time or thereafter, and it, therefore, reflects the common understanding of the parties.

ARBITRATOR CASS: Mr. Willis, is customary international law the only source of international law that would provide for minimum rules, standards of treatment?

MR. WILLIS: I believe, in fact, it is the only source that provides for this well-known concept of the minimum standard of treatment. It can, of course, be incorporated into treaties, and then it also becomes a treaty provision. But I think the context of the reference here points us to the customary--to customary international law as the source, and the context is what compels that interpretation.

I was going to come to that in just a moment in a little more detail, but, yes, I think the context of the reference here is it points to customary international law, and I couldn't see

where else we would find a general standard of this character.

ARBITRATOR CASS: Is there a reason why the term was not included in the text?

MR. WILLIS: Well, it's a drafting question, and drafting is never perfect. But I think the assumption of the drafters was that the reference to international law could really point to nowhere else because, for reasons I'll give in a moment, it couldn't really point to treaties, and the other sources of law referred to in Article 38, paragraph (1) of the statute of the International court are not really applicable or are subsumed within the reference to customary international law.

Now, indeed, I was just coming to that. It has been suggested that the note is an amendment of some kind because it limits international law to customary international law rather than to the four sources which are set out in Article 38, paragraph (1) of the ICJ statute. But, again, the context

compels this interpretation.

The treaties contextually could not have been contemplated because that would make nonsense of the narrowly targeted wording in Articles 1116 and 1117.

Now, as to general principles of law in paragraph (c), it's been widely recognized that in reality, if not in form, this is an auxiliary source. It fills the gaps, and it contributes to the development of customary international law. And in this case, in fact, the minimum standard of customary international law incorporates and reflects a number of general principles of law, such as due process and natural justice and acquired rights and others.

So the reference to customary international law in this context does not restrict the natural meaning, and it makes perfect sense. This, in other words, is a clarification that reflects the context and the intentions of the parties.

Mr. Chairman and members of the Tribunal, the note was a perfectly normal exercise of the treaty power in exactly the kind of situation that would have been contemplated when those powers were adopted in the first place. The interpretive power would not logically be invoked where there was no perceived need for clarification.

In this instance, however, the parties were faced with radically conflicting interpretations of Article 1105 from Chapter Eleven Tribunals and a clarification was appropriate.

ARBITRATOR CASS: Mr. Willis, if I might, you were saying that there were conflicting interpretations and a moment earlier had said there really was only one way of reading this. Could you put those two settlements together and tell me how people could have gone off the rails?

MR. WILLIS: I'll do my best. There were conflicting interpretations, and I believe at the same time it is true to say that only one of those conflicting interpretations was correct.

For example, in both the merits award, I believe, and the damages aware in Pope & Talbot, it was recognized by the Tribunal that the additive interpretation was not really in accordance with the language.

Now, in our submission, that should have been the end of the matter. The language was clear and, therefore, it should have been respected. And, therefore, with all due respect we would consider their interpretation, albeit in obiter, not to be the correct interpretation. But, nevertheless, this created a confusion in the community which it was at least appropriate for the FTC to clarify in the exercise of its powers.

I will turn next to the substance or content of the minimum international standard. And, again, the Canadian Statement of Implementation is a good place to begin. The statement describes the standard as one that is based on longstanding principles of customary international law. And the core of those

longstanding principles was described with some eloquence early in the century by United States Secretary of State Root who referred to the established standard of civilization and went on to say there is a standard of justice, very simple, very fundamental, and of such a general acceptance by all civilized countries as to form a part of the international law of the world.

Now, the minimum standard of treatment under international law may be flexible and organic, but it's still a rule of law. It is, therefore, capable of being stated and defined. If that were not so, it would not be normative, and it would not be law. It would lack any predictability and states would have nothing to guide their conduct.

The efforts to codify this area of international law provide some of the best evidence of what the minimum standard covers and does not cover. And one such attempt at code is found in the early work of the International Law Commission

when the state responsibility project of the ILC was still concerned with the substantive rules. Later on, of course, the ILC restricted its efforts to what it called the secondary rules, which are concerned with questions such as attribution, breaches, and reparations. And for that reason, the recently completed draft articles of the ILC do not deal with the minimum standard at all.

However, in the 1950s, the minimum standard was at the heart of the ILC project. A series of reports by the special rapporteur, Mr. Garcia Amador, were concerned above all with the treatment of aliens under general international law, and a revised draft of 1961, which is at Tab 1, brings this work together.

Title 2 deals with the central substantive concepts: denial of justice, maltreatment of the person, arrest and detention, expulsion, negligence in the protection of aliens. All this, of course, is very familiar ground in the annals of state claims. Chapter Four--

ARBITRATOR FORTIER: Excuse me, Mr. Willis.

MR. WILLIS: Yes?

ARBITRATOR FORTIER: You referred to Tab 1. Tab 1 of?

MR. WILLIS: I'm sorry, of the Additional Authorities.

ARBITRATOR FORTIER: Of the additional material, okay. We have quite a few Tabs 1.

MR. WILLIS: Yes. I apologize for that.

Chapter Four is where investment interests are dealt with, and it is entitled "Measures Affecting Acquired Rights."

Now, the idea of acquired or vested rights is, in fact, a recurring theme throughout these reports. This chapter covers expropriation and nationalization, unjustified breaches of state contracts and concessions, unjustified defaults on public debt. The scope is expressly limited to the protection of vested legal rights, and there is no general language that could even conceivably extend

to competition issues.

A second compilation is found in the annexes to the first report of Roberto Ago in 1969. That's after his appointment as ILC special rapporteur on state responsibility. This is at Tab 4 of the Additional Authorities, and actually, it's misidentified in the list at the front. I'm sorry for that.

Now, this report was prepared at the time of the shift of focus of the ILC away from the minimum standard, and the report is a retrospective overview of all the work accomplished up to that point. And the annexes are documents on the substantive law of state responsibility from a variety of sources, the most important being the 1961 Harvard draft convention on international responsibility prepared by Professors Baxter and Sohn.

Now, once again, this was not what could be called a consensus document. It represents a Western perspective and also a forward-looking

perspective. But the subject matter or scope of the coverage is the same, especially when it comes to the protection of economic interests.

Apart from denial of justice, it covers expropriation and de facto takings, damage and destruction of property, and unjustified breaches of state contracts and concessions, but nothing that touches even remotely on the subject matter of the present dispute. The focus and the exclusive focus is on due process and vested legal rights, whether contractual or proprietary. These are representative sources. If anything, they were ahead of their time. They indicate the outer limits of what international law could be taken to cover.

I anticipate the objection that these materials are already out of date, and we are perfectly willing and even anxious to engage on the issue as to whether the relevant principles and their scope of application have changed over the last few years. But there would have to be some

evidence that it has, and the claimant in this case has provided nothing at all.

Customary international law can indeed evolve, but we are talking about law and not political trends. We're talking about the minimum standard under customary international law, in other words, rules that the entire international community accepts as binding. If they have changed in scope or substance, there would have to be evidence of consistent state practice, which is accepted as legally binding, in other words, the double formula of state practice plus the opinio juris.

Now, whatever the balance between those two elements, both are legally required before we can speak of customary international law. The leading case on the formation of customary law is, of course, the North Sea Continental Shelf cases of 1969, which was referred to in the Mexicans' submission, and it shows that it cannot lightly be assumed that a new rule of law has come into

existence or stated not only must be acts concerned that amount to a settled practice, but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. That's a paragraph 77 and 78.

All this is very well put in the Mexican intervention in this case at paragraph 23. Only settled and well-accepted principles of law fall within this category of international law. Precisely because customary law is not reduced to a text, it's important to distinguish between statements of policy or statements of aspiration and what states actually believe to be the law.

International law draws a distinction between law in the making, law that is not yet crystallized, and positive international law, the lex ferenda and the lex lata. It's only positive international law, the lex lata, that constitutes the minimum international standard for the purposes of Article 1105.

There has been recent case law touching on the international minimum standard, generally on the basis of treaties that reflect or incorporate that standard. None of it points to an expansion of the standard of treatment that would even begin to encompass the present case. And, in fact, it falls squarely within the traditionally recognized categories.

One example is Asian Agricultural Products, Ltd., v. Sri Lanka, decided in 1991 under the U.K.-Sri Lanka Investment Treaty, and that's at Tab 5 in the Additional Authorities.

Now, that case dealt with the destruction of property in the civil insurrection in Sri Lanka and with the need for due diligence in protecting foreign property rights under a full protection and security clause and rejecting, of course, the argument that there was strict liability.

Another example at Tab 6 of the Additional Authorities is American Manufacturing and Trading v. Zaire, decided in 1997 based on the United

States Bilateral Treaty, and that dealt with an incident of looting by government troops under an--measured against a full protection and security clause in the Bilateral Investment Treaty.

The Iran-United States Claims Tribunal dealt with state responsibility and the treatment of aliens, but, again, it did not break new ground in terms of the scope of the international standard.

The same is true of two recent cases concerning regulatory changes that displaced foreign enterprises in the Czech television industry. The two cases actually reached opposite conclusions on fair and equitable treatment and full protection and security. The CME award, which is at Tab 8, in part, of the Additional Authorities, the CME award did find a breach of those clauses, but it did so essentially as a consequence of its principal conclusion which characterized the action as a unlawful expropriation and an intentional destruction of the

investment.

In a word, then, these more recent cases cover familiar legal ground. None of this material supports the theory that the minimum standard of customary international law has expanded its scope in recent years. And none of it supports the proposition that the subject matter of the present claim is within the reach of that standard.

Now, in those specific and well-defined areas where the minimum standard applies under customary international law, the law has a definite substantive content. It involves a specific set of rules and principles for each of the topics to which it applies. For example, the denial of justice doctrine carries with it a well-developed set of principles about natural justice, impartial justice, due process, the right to be heard, and so on. The protection of alien property entails principles such as due diligence or negligence. And although not directly relevant here because of Article 1110, the rules on expropriation and taking

include principles of prompt, adequate, and effective compensation.

Conversely, and obviously, where the minimum standard does not apply, no such specific rules have come into being. So if the minimum standard were somehow treated as something infinitely open-ended and elastic, we would be forced to make up the rules as we went along, which is not what the NAFTA drafters intended, and the absence of substantive rules of international law with respect to the subject matter of this claim is further evidence that we are simply outside and beyond the subject matter or the scope of the international minimum standard.

Now, I have been dealing so far with what the minimum standard covers. I'd like to turn next to certain matters that customary international law plainly does not cover. And in a word, it does not cover the competition issues involved in the present case. Specifically, it does not cover the matters cited at paragraph 22 of the Amended

Statement of Claim in connection with Article 1105, namely, not engaging in anticompetitive practices while exercising governmental authority, as well as alleged cross-subsidization, predatory conduct, the use of monopoly infrastructure, and failure to properly allocate costs.

Recent court decisions in the United States have resoundingly dismissed the notion that there is a customary international law on competition. The point came up in the Microsoft litigation in a decision of the United States District Court for Maryland on January 12, 2001, which is our in reply authorities at Tab 16. The court stated, and I quote, "The dearth of enforceable international antitrust law highlights the inability of the international community to reach a consensus on competition policy. Moreover, no antitrust claim based on customary international law has been recognized in a U.S. court. Without general agreement on standards of international antitrust law, there can be no customary

international law of antitrust.

And a few weeks later, another U.S. court was equally blunt an equally clear. Kruman et al. v. Christie's International PLC et al. in our reply authorities at Tab 17 included a claim that certain basic anticompetitive activities have risen to the level of customary international law. And the District Court for the Southern District of New York said that that position borders on the frivolous, and the point was later abandoned on a subsequent appeal.

Mr. Chairman and members of the Tribunal, both the preconditions of customary international law are plainly absent when it comes to competition law. There is no legal consensus, and there is no consistent state practice. A recent treatise by Trebilcock et al. on the law and economics of Canadian competition policy has this to say on the current state of affairs: "Almost half the members of the GATT/WTO, including many developing countries, have no competition laws at all, and

among member countries with such laws, there are significant substantive, institutional, and procedural differences." Footnote 9 in the United States second submission in this case also points out that only 13 of 24 Western Hemisphere nations participating in the negotiations on the Free Trade Area of the Americas have competition laws.

So the shared legal consensus that would have to underpin an opinio juris is simply not there. It never has been there. The study by Professor Kennedy in our reply authorities asks rhetorically: Has anything changed since the 1950s to make it realistic to think that we are any closer to reaching consensus on concluding an international competition policy agreement? And his conclusion is pessimistic.

The Doha Declaration calling for the initiation of multilateral negotiations on competition and trade also shows that the international community is still at the earliest stages in addressing competition issues. All this,

in short, is a goal for the future and not a present reality.

Now, I'm aware that the claimant takes the view at paragraph 37 of its rejoinder that all this misses the point. It does not miss the point. If these competition issues are beyond the scope of customary international law, they cannot form part of the international minimum standard. Otherwise, we would end up using the minimum standard to bind states to rules that are not the object of a legal consensus or of uniform practice and to which they have not subscribed either by treaty or otherwise.

Competition is the issue here, but I'll add a word on paragraph 34 of the Amended Statement of Claim which refers to transparency in the supervision--and this is in connection with Article 1105. It refers to transparency in the supervision, regulation, and operation of Canada Post, including through its accounting and financial reporting, et cetera.

Now, this, you will note, is transparency

in a very unusual sense. It's not transparency in the application of Canadian law or administrative process to UPS, but an alleged lack of transparency in the administration by Canada of its own state enterprise and its own institution.

In any event, in the Metalclad statutory review, the British Columbia court noted that no authority was cited or evidence introduced to establish that transparency has become a part of international law, of customary international law, and also that there are no transparency obligations in Chapter Eleven. Those observations are also applicable here.

The NAFTA deals with transparency primarily in Chapter Eighteen, which, of course, is not arbitrable under Chapter Eleven.

Let me sum up the argument so far by referring to a passage in the UPS pleadings. At paragraph 39 of the Rejoinder Memorial, they stated, and I quote, "The very existence of competition law obligations contained in NAFTA

Article 1502(3)(d) is in and of itself evidence that these obligations are indeed a part of the purpose of international law."

That one sentence points up some very fundamental misconceptions. It treats the minimum standard as a catch-all, capable of encompassing almost anything, and making almost anything arbitrable under Chapter Eleven. And it also assumes that international law under Article 1105 includes the lex specialis of the NAFTA itself, which would make nonsense of the limitations on arbitrability in Chapter Eleven. These assumptions are legally wrong, and, of course, they contradict the FTC note. The attempt to connect Article 1105 to the subject matter of this case is, therefore, unsustainable.

The allegations made by the investor take us far beyond the confines of customary international law, and they also lead to a result that is inconsistent with fundamental principles of treaty interpretation. UPS is saying by

implication that the matters covered by Article 1503(2)(d) are also covered by the minimum standards of treatment. Now, if that were so, there would be no need at all for Article 1503(2)(d). It would be entirely redundant, and that, of course, is not the proper way to interpret the treaty.

A final point here, Mr. Chairman and members of that. While there's no burden of proof as to jurisdiction per se, there is a requirement that a party invoking a rule of customary international law must prove its existence. There's abundant authority for the proposition. Its summed up in Brownlie, 5th edition at page 11, which is at Tab 14 of the Additional Authorities with references to rights of U.S. nationals in Morocco and the asylum case.

The claimant, UPS, has plainly failed to discharge this burden in relation to the competition issues involved in its 1105 argument. And, in fact, I'll go further. Throughout the

piece, the claimant has really provided no explanation about how and why Article 1105 applies to the subject matter of this claim.

ARBITRATOR CASS: Mr. Willis, when you say there's a burden to prove the existence of the international rule of law that's being relied on, is that at the merits phase or the jurisdictional phase?

MR. WILLIS: Well, I think that it applies at the jurisdictional phase where it's a treaty matter, as it is here, because in order to establish jurisdiction, the claimant--at least the Tribunal must be satisfied that the subject matter of the claims falls within the subject matter of the treaty provisions on which jurisdiction is based. And in that we've followed some of the international--cited some of the international court jurisprudence such as Oil Platforms in particular. It's not enough simply to cite a provision and state that because it's being cited, jurisdiction has been established. These are

questions of law. They're questions of law that can be canvassed at this time. The UPS has said that these are difficult questions and they involve legal theory. But we don't really see why that should mean that they cannot be dealt with at this time. They say the documents have to be collected, but we're talking about legal documents, publicly available legal materials on which both state practice and an opinio juris would normally be established in an international proceeding.

So based on the test of jurisdiction of subject matter conversions, which we take from Oil Platforms, we would say it is a question for the jurisdiction stage.

There remain two general questions: first, the role of the words "fair and equitable treatment," as well as "full protection and security"; and, second, the threshold that determines whether the standard has been breached.

Now, the operative word in Article 1105 that introduces the fair and equitable treatment

phrase is "including." What that means is that the words that follow are explanatory. They do not provide a stand-alone test, and they add nothing beyond what the minimum standard covers in existing international law.

There's been a good deal of debate about the additive theory of fair and equitable treatment, in other words, the notion that this phrase provides an independent test and with it a very open-ended mandate to challenge government action of virtually any kind. There are two reasons why that theory is wrong: first, it's inconsistent with the plain meaning of the word "including" in Article 1105, as the British Columbia court in Metalclad pointed out; and the second, of course, is that this issue has been ruled upon and the additive theory has been rejected by the FTC Note of Interpretation. Even the recent Pope & Talbot decision on damages recognized in paragraph 9 that the additive theory could only be adopted, and I quote, "notwithstanding the

language of Article 1105, which admittedly suggests otherwise."

Article 1105 refers to fairness and equity in a definite legal context, which involves a limited subject matter, a threshold, and a number of settled principles and rules. I've already referred to a few of these: natural justice and due process, the rules against arbitrary breaches of state contracts, due diligence in the protection of foreign property, and so on. All this is fairness and equity and full protection and security as applied by international law through the minimum standard of treatment. And this is what is contemplated by the concluding phrases of Article 1105, paragraph (1).

So much then for the positive meaning of the terms. Now let me discuss what the fair and equitable phrase does not mean.

It is not a free-floating test that applies to anything and everything, and it's not a blank check for challenging any and all government

conduct on extra-legal grounds of subjective equity, privileging foreign interests to a degree that the minimum standard never contemplated. On the contrary, it's an absolute minimum below which the treatment would universally be recognized by all civilized nations as unacceptable.

At bottom, the UPS position is that fair and equitable treatment within the meaning of Article 1105 is fairness in the loosest and most subjective sense. But this disregards the context of the reference which is the application of a legal standard.

The dispute settlement process is at the heart of Chapter Eleven. If fair and equitable were to be interpreted in a layman's sense, in other words, a subjective sense, an arbitration involving Article 1105 would be indistinguishable from a decision ex aequo et bono. It would, in fact, be such a decision. This would be equity is the length of the chancellor's foot, and this cannot have been intended because under Article

1131, the decision is to be based on international law, which means that it's not to be made ex aequo et bono. As in the International Court, any power under both the UNCITRAL and the ICSID rules to make a decision on purely equitable grounds would have to be expressly conferred.

The last of my topics today is the threshold of the minimum standard, by which I mean the level of gravity or the level of mistreatment required before the standard is engaged. In this and other Chapter Eleven cases, Canada has submitted that the threshold is best captured in the classic formulation of the Neer case.

Now, it's been argued that the Neer formulation should not be disregarded; it should be thrown out because it's outdated. But there is no presumption of obsolescence in customary international law, and there's nothing to dispense with evidence of change or changes alleged.

More fundamentally, it's precisely the rules that are very general and very simple in

character that are the least likely to change, and at bottom, all the Neer standard really provides is that the threshold of the minimum standard is very high. There's no inherent reason why such an elementary proposition should not remain valid. On the contrary, there is every logical reason why it should remain valid.

In the first place, the minimum standard is and must be something that forms the object of a global consensus and one of a stable and enduring character. The consensus could not be limited to a single ideological perspective or to current trends, and in the nature of things, it could not represent the cutting edge of international economic law.

Second, the normal rule is that national treatment is an adequate guarantee of basic fairness. There are not many cases where a state treats its own nationals and businesses so badly that foreigners become entitled as a matter of law to something better. The international standard,

therefore, is a last resort. It's the ultimate safety net, especially in a context of democratic states with advanced market economies.

And, indeed, if the minimum standard were anything more than a residual standard, the utility and effectiveness of Articles 1102 and 1103 and, in fact, 1104 would be called into question.

We have found no real support in international law for the position that this threshold has changed. That issue was discussed in the Pope & Talbot damages award. They cited a passage of the ELSI case before a chamber of the International Court of Justice. It was a passage dealing with arbitrary treatment. In fact, it was not a direct application of the customary international standard, but what is perhaps more to the point is that it, in fact, uses language that supports the position that the threshold is high. It speaks of judicial conduct that shocks or even surprises a sense of judicial impropriety.

The ELSI case also includes a passage at

paragraph 111 where the chamber considered whether a 16-month delay in ruling on the requisition of a factory was consistent with a treaty clause requiring full protection and security. The chamber equated this with the minimum standard of international law. And although it expressed serious misgivings about the amount of time that was taken by the Italian authorities, it, nevertheless, concluded that it must be doubted that the delay can be regarded as falling below that standard.

The passage is vague, but the practical implication is clear. The threshold is still very high.

Now, the Meyers award is still in the process of statutory review, but there is one passage that hits the nail on the head. The award states--I think it's paragraph 263--that a breach of Article 1105 occurs only when it's shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the

level that is unacceptable from the international perspective. The determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.

Canada has expressed its respectful but strong disagreement with the obiter dicta in the Pope & Talbot damages award. But basically the award suggests a relative softening of the test, and even that would be a matter of degree and would not really contradict the basic point that the threshold is high. And let us not forget that in the end, the Tribunal did apply the egregious standard as suggested by Canada.

Mr. Chairman and members of the Tribunal, the competition issues involved in this dispute--cross-subsidization, improper use of infrastructure, predatory pricing, and the like--are remote in kind and in degree from the true concerns of the international minimum standard.

That standard is concerned with grave breaches. It's concerned with the oppressive use of state power or unconscionable derelictions of state duty to the prejudice of foreign persons and property. The allegations do not reach that level, and they do not even come close.

Mr. Chairman and members of the Tribunal, that concludes my argument this afternoon. I thank you for your attention, and if there are no questions, I would request you to call upon Mr. Rennie.

ARBITRATOR CASS: Let me just ask one question, Mr. Willis. A couple of times in your presentation, you spoke of customary international law as a subject of universal agreement among nations, and at other times referred to it as a matter of consensus among nations. Is it correct to say that it must be universal, or is it simply enough that it is very widespread and common acceptance of standards?

MR. WILLIS: I would say that universality

is the principle, but in a situation where all the key players, if I can put it that way, share a given consensus, that might be sufficient. So there is some flexibility in the application of that standard. That's being recognized. And there's also, you can have a concept of regional custom, but that must be strictly proved, and that's very clear from some of the cases in our authorities today, the asylum case and the U.S. Nationals in Morocco.

So, yes, generally, the principle I think is universal coverage, but with some judgment allowed, where for instance, all the key players and the dissenters are not significant. But it is in principle, a global consensus.

PRESIDENT KEITH: Thank you, Mr. Willis, for your submission.

Mr. Rennie.

MR. RENNIE: Thank you, Sir Kenneth. We are now moving into our fourth and last substantive argument which is the argument surrounding the

claims pertaining to cultural taxation measures and the issue of qualifying investments. My colleague, Sylvie Tabet, will now address those, and I can assure you that we are running exactly on time for concluding when we had hoped to conclude.

PRESIDENT KEITH: Thank you.

Yes, Ms. Tabet.

MS. TABET: Mr. Chairman, Members of the Tribunal.

Before I begin, I understand that my friends have agreed to drop the allegations regarding Canada's failure to enforce its good and services tax. As you will recall, Canada had objected to these allegations on the basis of the taxation exemption in Article 2103. So perhaps Mr. Carroll can confirm this for the record.

MR. CARROLL: That's almost right, Ms. Tabet, but not quite. We are abandoning our claims with respect to goods and services taxes only insofar as they relate to Article 1105 of NAFTA, and in particular, Section--or Paragraph 33(a) of

the Amended Statement of Claim. Those allegations that are set out in Paragraphs 16 and 17 of the Amended Statement of Claim, with respect to goods and services taxes and their relationship to Article 1102 remain.

PRESIDENT KEITH: Thank you for that clarification.

Yes, Ms. Tabet?

MS. TABET: So in light of this I will only address two aspects of the UPS claim that clearly fall outside the Tribunal's jurisdiction in addition to those addressed by my colleagues previously.

The first one is the allegations regarding the publication assistance program and the resulting distribution of magazines through Canada Post. The second one is claims for breaches and damages that relate to U.S. subsidiaries of UPS America. In both cases the clear and unambiguous language of the NAFTA does not allow UPS to bring such claims.

The allegations with respect to the publication assistance program are outside this Tribunal's jurisdiction for two reasons: because the program is a subsidy measure with respect to cultural industries, and therefore, both exempt under the NAFTA cultural exemption in Article 2106 and the subsidy exemption in NAFTA Article 1108(7)(b).

Second, the allegations contained in the Amended Statement of Claim with respect to the four U.S. subsidiaries of UPS America are outside the scope of Chapter Eleven and hence outside this Tribunal's jurisdiction because these companies are neither investors--U.S. investors with investments in Canada or investments in Canada.

Our written submissions clearly establish that the NAFTA does not allow these claims. I will therefore focus my argument today on responding to UPS's attempt at circumventing the clear language of the NAFTA. I will demonstrate that the arguments put forward by UPS do not find any

support in the text of the NAFTA and therefore that they should be dismissed by this Tribunal.

So I will first address the UPS allegations regarding Canada's publication assistance program and the UPS claim that the program breaches Canada's national treatment obligation under Article 1102.

There are two reasons why this allegations, as I said previously, fall outside the Tribunal's jurisdiction. First, Canada's publication assistance program is a measure with respect to cultural industries and therefore not subject to NAFTA obligations, including those in Chapter Eleven. And the second reason is that the program, in the very words of UPS, is a subsidy, and therefore, not subject to national treatment under Article 1102.

Let me first address the cultural industry exemption in the NAFTA. The NAFTA cultural industry exemption has its origin in the 1988 Canada-U.S. free Trade Agreement. At Canada's

insistence a broad exemption for cultural industry measures or any measures with respect to cultural industry was included in the agreement. And in return the U.S. Government asked for a unilateral right of retaliation through measures of equivalent commercial effect.

This is reflected in the language of Article 2005 of the Canada-U.S. FTA, which essentially exempts cultural industries from the agreement. The Article, I think the Article is in front of you, and it reads, "Cultural industries are exempt from the provisions of this agreement except as specifically provided in Article 401, Tariff Elimination, paragraph 4 of Article 1607 and 2006 and 2007 of this chapter."

The issue of cultural exemption was also a critical point in the NAFTA negotiations, and it was only resolved at the very end of the negotiations by the parties agreeing to maintain the status quo and exempting cultural industries from the NAFTA obligations.

Article 2106 and Annex 2106 of the NAFTA provide that measures adopted or maintained with respect to cultural industries shall be governed exclusively with the Canada-U.S. FTA with the exception of NAFTA Article 302 dealing with tariff elimination.

As you can see from the text, the effect of Annex 2106 is to make applicable as between the Canada and the other NAFTA parties the FTA provisions that govern cultural industries including the cultural exemption in FTA Article 2005. This is clearly confirmed by the Canadian Statement of Implementation and I think a relevant extract is on the screen in front of you, and we'll just read the relevant provision which says, "That notwithstanding any NAFTA provision, any measure adopted or maintained with respect to the cultural industries will be governed under the NAFTA exclusively in accordance with the provisions of the Canada-U.S. FTA. What follows is that NAFTA Chapter Eleven obligations, including investor

state dispute settlement are not applicable to measures with respect to cultural industries.

Looking now at the definition of cultural industries in Article 2107, the relevant extract can be found in paragraph (A) which deals with publication, distribution, sale of books, magazines, periodicals or newspapers. In this context the program at issue, the publication assistance program, definitely falls within the definition of a measure with respect to cultural industry. The program was designed in the '70s to promote Canadian culture and support the Canadian publishing industry. And through this program, and in cooperation with Canada Post, the Department of Canadian Heritage provides postal subsidies to eligible Canadian publications including periodicals, magazines, newsletters, mailed in Canada for delivery in Canada.

That being said, simply on the face of the allegations in paragraph 18 of the Amended Statement of Claim, the very words of UPS, the

measure complained of the program relates to the distribution of magazines, and as such the measure is a measure with respect to cultural industry as defined in Article 2106.

To get around the application of the cultural industry exemption, UPS attempts to confuse the issue by arguing that Canada Post is not a cultural industry. This is irrelevant. What UPS is challenging is an aspect of the publication assistance program that is the subsidy for the distribution of magazines and periodicals through Canada Post. There is no question that the program as a whole is a measure with respect to cultural industries, and it supports Canadian magazine publishers and the distribution of magazines and periodicals. As such, there is no question that the provision of the NAFTA, including those of Chapter Eleven do not apply with respect to this program.

This brings me to the second reason why UPS cannot allege that this program breaches NAFTA

Article 1102. Simply put, because the program is a subsidy, then as a subsidy the program is exempted from the application of the national treatment obligations by virtue of Article 1108(7)(b).

UPS has conceded in its amended claim, at paragraph 18, that the program is a subsidy. I refer you to the text of paragraph 18, which alleges that the PAP subsidizes the Canadian magazine industry and results in a breach of national treatment because of the distribution through Canada Post. As you can see from the reading of Article 1108(7), it specifically provides that Chapter Eleven obligations, including national treatment, do not apply to subsidies.

In order to get around this clear language, UPS says that it is not arguing that Canada is not permitted to subsidize the magazine industry at the expense of the foreign magazine industry, but rather that Canada cannot design the subsidy in a way that affects another industry. UPS does not indicate what is the basis for this

novel assertion. In any event, the distinction created by UPS has no merit and is not founded in the words of Article 1108(7). UPS cannot simply invent a test that has no basis in the treaty. The exception in Article 1108 is broad and does not contain any limit regarding either the type of subsidy or the beneficiaries of the subsidy. Furthermore, UPS does not contest that the PAP is a postal subsidy designed to support low cost distribution of magazines and articles.

What it challenges is an aspect of the subsidy program. How Canada chooses to design its subsidy to realize its cultural industry objectives is not at issue. As a subsidy program the PAP as a whole falls within the exception in Article 1108(7)(b).

In conclusion, because the program is both a subsidy and because it is a measure with respect to cultural industries, UPS is prevented from bringing an allegation that this program breaches national treatment.

If the Tribunal has no question on this point, I will turn to the second aspect of the claim.

ARBITRATOR CASS: Is there any aspect of a cultural program that could be deemed to be so unrelated to the purpose of supporting the cultural activity, that it could be deemed to be arbitrable as outside the scope of the intended exemption? So that for instance, if you have a program of subsidizing the arts by expropriating automobile plants, could the claim be brought against the expropriation on the theory that what you do with the proceeds may not be challenged, as the support of the arts may not be challenged, having a subsidy program, but using confiscation of automobile plants can be challenged? Would that--

MS. TABET: I like the example. I am sure that we wouldn't come to this, but looking at the language of the exemption, I think it's broad enough to encompass any measure with respect to cultural industry.

Now, the way that a balance was established in the NAFTA is for the United States and the FTA to have a unilateral right of retaliation. So broad exemption, but also broad right of retaliation.

ARBITRATOR CASS: But then in that example you would say an investor could not challenge the expropriation?

MS. TABET: That's right because the only provisions that are applicable with respect to cultural industry are those of the FTA and they don't include investor state obligations.

Now, I think your example is a little extreme, and we're definitely not in this kind of a circumstance here. It is clearly the program does benefit the cultural industries and it is geared to its cultural industries. I don't think there is any question with respect to that.

ARBITRATOR CASS: If I understand the argument being made by UPS, it is that the benefit to the cultural industry is the subsidy to

distribution, not the requirement that it operate only through Canada Post. And if that argument is credited, is it sensible to say that the challenge then is not to the cultural aspect of the program; it is to the distinction between different forms of delivery?

MS. TABET: I think the language of Article 1008 does not, for example, compared to the language in some of the GATT provisions, does not have any limit with respect to the beneficiary of the subsidy can be or how the subsidy has to be structured. And let me just use one example. For example, parents that would decide to subsidize their child could do so in a very broad manner and give them a check and decide, you know, do whatever you want with it. Conversely, they could decide to subsidize them only with respect to their university tuition, and that still--it's still part of the subsidy and it's a condition for the subsidy and it's the way in which the parents wanted to carry through the subsidy, but nonetheless, part of

the subsidy measure as a whole.

Similarly here, the requirement that the distribution and the subsidy be carried through Canada Post is very--is within the subsidy program as a whole. The government chose to subsidize the industry in this way to support low-cost distribution everywhere in Canada, and they chose to do it in this way, but the exemption covers the whole subsidy program.

So I will now turn to the second point I will be addressing today, which is that the allegations in the UPS claim that U.S. located companies of UPS America are matters that fall outside the scope of Chapter Eleven and are therefore outside the jurisdiction of this Tribunal.

First I should note that the UPS Statement of Claims and the UPS submissions are rather ambiguous and indeed contradictory on this point. Sometimes UPS has referred to these U.S. subsidiaries as investments of the investor, UPS

America, whereas in other aspects of their submissions, they have referred to them as being part of the investor. I will establish that these companies are neither investments nor investors, and that therefore they cannot be--fall within the scope of Chapter Eleven.

The turning points here is to look at the scope and coverage of Chapter Eleven which is established in Article 1101. It provides that Chapter Eleven applies to measures adopted or maintained by a party relating to, (A) investors of another party, and (B) investments of investors of another party in the territory of the party. Article 1101 must be read together with the definitions of the terms "investors of a party" and "investments of investors of a party" as well as the term "investments," all three of which are defined in Article 1139.

Those definitions are in front of you and I will quickly bring your attention to the two first ones. "Investment of an investor of a party"

means an investment owned or controlled directly or indirectly by an investor of such party. "Investor of a party" means a party or a state enterprise thereof or an enterprise of such party that seeks to make, is making, or has made an investment. And the definition for "investment" but the relevant one here is that "investment" means an enterprise.

Now, by reading Article 1101 and Article 1139 together, in the context of this claim, this means that a U.S. investor--in the context of a claim where a U.S. investor is bringing a claim against the Government of Canada, this would mean that Chapter Eleven covers two things. First, the U.S. investor that seeks to make, is making or has made an investment that it owns or controls in the territory of Canada, and second, the investment in Canada of the U.S. investor. This is confirmed by the Canadian Statement of Implementation, the text of which is before you.

Now, more specifically, in the context of this case, UPS has alleged that UPS America is the

investor and that it owns and control an investment in Canada which is UPS Canada. On the basis of these allegations, the claimant by this investor falls within the scope of Chapter Eleven. However, the claim goes on to state that U.S. subsidiaries of UPS America are investments that are subject to the protection of Chapter Eleven. With respect, this does not fall within the scope of Chapter Eleven.

I bring your attention to paragraphs 6 and 7 of the Amended Statement of Claim, in which UPS states that the U.S. subsidiaries are investments of UPS under NAFTA Article 1139. Now, this seems to stem from reading of 1139 without reading the appropriate provisions of Article 1101.

As I noted earlier, there's a fundamental problem with this proposition that these U.S. subsidiaries are investments. NAFTA Chapter Eleven obligations only provide protection to an investor of a NAFTA party and its investment in the territory of another NAFTA party, not to

investments in its home territory. Thus, while the U.S. subsidiaries may be domestic investments of UPS America as the word "investment" is commonly understood, they are not protected investments under the NAFTA because they are not located in another country as required by Article 1101.

Having realized that the U.S. subsidiaries of UPS America cannot be investments within the scope of Chapter Eleven, UPS has shifted its focus in its rejoinder to make a new and different argument. It has argued that U.S. subsidiaries are part of the investor UPS America and therefore that damages related to those entities may also be claimed.

Now, I bring your attention to Article 1116 and 1117 which specify to what extent the investor can claim damages. This claim has been brought under Article 1116, which is entitled "Claim by an investor of a party on its own behalf." Therefore, it is only the investor in its capacity as an investor that can claim that it has

incurred loss. Chapter Eleven cannot be read as protecting other U.S. companies that do not fall within the definition of "investments" or "investor" and that may have been affected by a party's measure. Other chapters of the NAFTA deal with these kinds of repercussions.

In conclusion, for this Tribunal to consider claims against Canada that do not relate either to an investment in Canada or to an investor with an investment in Canada would be to go beyond the scope of Chapter Eleven and the Tribunal cannot do this. As a result, Canada submits that paragraph 6, 7, 17, 19 and 35 of the Amended Statement of Claim as well as any allegations of measures affecting the U.S. subsidiaries or loss suffered by the U.S. subsidiaries should be struck.

PRESIDENT KEITH: I take it you do not mean that the paragraphs should be struck in their entirety?

MS. TABET: No, just any allegations or claims that--breaches relating to these U.S.

subsidiaries. And in fact, the problem is that the Amended Statement of Claim does not specify which claims relate to U.S. subsidiaries and those that relate to damage suffered by UPS America or UPS Canada in this event.

So this concludes my arguments, and if there is no question, I will call upon my colleague, Mr. Rennie to make some additional remarks. Thank you.

PRESIDENT KEITH: Thank you, Ms. Tabet.

Mr. Rennie.

MR. RENNIE: Sir Kenneth, Member of the Tribunal, there are three principles which we say arise from a plain reading of the treaty and which in and of themselves are a complete answer to this case.

The first is that recourse by an investor for breach of the party's obligations is controlled by Article 1116(1)(a) and (b). There is no other independent source of recourse or jurisdiction beyond those two articles, 1116(1)(a) and

1116(1)(b) to hear grievances by an investor. These articles are controlling. They are dispositive. If a claim cannot be said to fall within those articles, there is no jurisdiction. Article 1502(3)(d) and the obligations mentioned thereunder are not included in Section A of those articles.

Secondly, where the conduct of a government monopoly is concerned, the monopoly must, as we know, be exercising a delegated governmental authority and the monopoly must act in a manner inconsistent with the Section A obligations.

Arising from the discussion this morning between Mr. Peirce and the Panel, I think there are a few points that need mentioning. First, the language it the monopoly must be exercising a delegated governmental authority. The language is not whether the monopoly is exercising a delegated governmental function. Were that the case, one would have to ask what the purpose of the express

language chosen was. And I think it's understandable why the language was chosen the way it was, because this qualification arises in the context of a trade treaty and the specific context of Chapter Eleven and the heading of Chapter Eleven is "Investments."

So while we explored analogies of prisons and school boards and different matters, I think we have to really focus on the ejusdem generis clauses that fall at the end of that paragraph, referring to export permits, quotas and the like. I can think of other analogies that I think are perhaps more apt. Interprovincial, interstate trucking licenses, where there could be discrimination in the availability of those licenses, import and export licenses.

Mr. Peirce referred to the Canadian Wheat Board, which exercises a vast control over the Canadian grain economy, and it also has a power to grant and control the export, licenses for the export of grain.

The second point I would leave you with this on this is that UPS's argument really is no higher than this. They say that being the monopoly is the exercise of the delegated authority, and I say when you strip that away, that's simply tautology. If being the monopoly was the exercise of delegated authority, then the rest follows as simply surplusage. There would be no need to have any of the controls that follow in 1502(3)(a) or 1503(2) if all it took to invoke a recourse under Chapter Eleven was being a monopoly. That clearly was not the intent.

The third point is that in any event, as Mr. Willis has indicated, anticompetitive conduct is not within the scope of the minimum standard of treatment reflected in Article 1105.

Now, recognizing that this and these are pure questions of law, UPS advances a number of arguments. First they say as Canada has admitted the allegations, no question of law can arise. And here they confuse assertions of fact with the legal

conclusions to be drawn from those facts. It is the latter that is the issue today.

In its Counter-Memorial, for example, with respect to the question of the Canada Post being a delegated governmental authority, they say because we admitted that, we are bound by those admissions. Well, this belies a fundamental misconception as to the nature of a jurisdictional motion. You are not bound by the legal inferences that UPS seeks to draw from its own pleading.

Its second attempt to avoid these being cast as jurisdictional questions is to suggest that the scope of the law is unknown, and therefore it cannot be said at this time whether the allegations of this nature might fall within the scope of the law. In paragraph 33 of its Rejoinder, it is asserted by UPS that that scope of customary international law or ascertaining the scope of customary international law is quote, "a difficult task," end quote, involving legal theory and evidence of opino juris, and conclude that such

questions are simply not appropriate for a jurisdictional determination and must be joined to the merits.

Well, with respect, I don't understand this argument. There is no valid distinction between easy questions of law or difficult questions of law. If there are points of law, and the jurisdiction of this Tribunal depends on their resolution, then they must be addressed at the preliminary stage. That is the teaching of the Oil Platforms case. And even if the legal decision were of a difficult nature, I doubt very much it is one from which the Tribunal would shy in taking.

And further, I would add, that it is with respect to this question that the law cannot be known and therefore you want to defer your decision. It's axiomatic to our common legal traditions that all law is normative and is capable of being discerned and determined. The content of the law is not a matter of evidence.

Finally, where UPS's argument and approach

to jurisdiction be correct, no statement of claim would ever be rejected on jurisdictional grounds. There would never be any control over the tremendous expense and unfairness in forcing a party to submit to arbitration to which it did not consent.

As the Tribunal well knows, equity plays no role in determining jurisdiction. As the Panel in Ethyl noted, the jurisdiction of a Tribunal constituted under Chapter Eleven is defined exclusively by what the parties negotiated, and it is not surprising that this has been echoed by other NAFTA Tribunals, and we have noted this in our Memorial at paragraph 37 and following. Hence, a Tribunal is compelled, prior to proceeding, to determine what the parties negotiated and whether a claim of this nature is within scope of the Treaty.

The questions raised on this motion are, in our respectful submission, quintessentially jurisdictional questions. Questions such as this have consistently been framed as jurisdictional and

treated by courts and Tribunals as jurisdictional. In the Oil Platforms case, which you will find in the compendium at Tab 4, the ICJ said, and I quote: "The court cannot limit itself to noting that one of the parties maintains that such a dispute exists, and the other party denies it. It must"--and I emphasize the word--"it must ascertain whether the violations of the Treaty pleaded by Iran do or not fall within the provisions of the Treaty and whether as a consequence it has jurisdiction."

And I think it's of greater significance to note how the ICJ framed what it considered to be a jurisdictional question in that case. They said that the United States' objection comprises two facets: one concerns the applicability of the treaty, and the other relates to the scope of various articles of the treaty.

Now, this is not to say that UPS is without recourse for the allegations that Canada Post has engaged in anticompetitive conduct. As we

know from the treaty provisions, if UPS is truly of the view that Canada Post is engaging in anticompetitive practices, the treaty specifically provides that those complaints can be the subject of state-to-state arbitration. Thus, the proper course for UPS is not to attempt to force its complaints into Chapter Eleven with what we would say are the host of errors in interpretation and principle that that would necessitate. Rather, the proper approach for it is to seek the assistance of its government and to convince its government that there is substance to these allegations and to have those grievances the subject of a Chapter Twenty dispute settlement. Now--

ARBITRATOR FORTIER: Would we as a NAFTA Tribunal be informed or should we be informed as to whether or not the investor has approached the party, the United States of America, with a view to having it institute a recourse under Chapter Twenty?

MR. RENNIE: I don't know how that would

inform the determination of a legal question. In other words, the question here is whether or not an investor can find recourse in Article 1116(1)(b) for the anticompetitive conduct of a government of a state enterprise. Similarly, just--I could speak to you, for example, of the extensive control and investigation that the competition bureau domestically in Canada exercises over Canada Post in these very subject areas, and to the same effect, I am not, because this is a jurisdictional question. So I'd say the answer is no.

ARBITRATOR FORTIER: For the investor.

MR. RENNIE: I'm sure, right.

Now, as I said at the beginning of the day, the motion raised a simple question: whether Article 1116(1)(b) of the NAFTA provides an investor with recourse for the anticompetitive conduct of a government monopoly. We say that that question can be answered, and it is a question which should be answered. And the answer to that question should not be deferred.

UPS has in its Amended Statement of Claim put its case at its highest. No amount of evidence will further your inquiry. You will recall that the original Statement of Claim was over 111 pages in length. Canada was prepared to admit the facts in each and every one of those 111 pages. That admission would not have advanced the resolution of the question here today.

Now, UPS would have you--UPS would not have you hold this pleading up to the light of the treaty. They say that it's inappropriate. They say that evidence is required, and they say your ruling ought to be reserved.

In that regard, I think again, if I may quote from what our colleagues from Mexico have said in paragraph 2, in Mexico's respectful view, a Tribunal has a duty at the preliminary stage to strike claims that obviously do not and regardless of the facts cannot fall within its jurisdiction. This gives effect to the NAFTA parties' shared intention, plainly stated in Article 1116, to

permit claims to be advanced in respect of a limited class of NAFTA obligations only. It will also contribute to the orderly administration of Chapter Eleven proceedings and relieve respondents from having to mount costly defenses against claims that cannot succeed and for which an eventual award of costs will not make them whole.

And I would leave you with a final point. There are also compelling public interests which weigh in favor of taking this decision now. This claim raises a series of questions as to the scope of key articles in Chapter Eleven. It also raises questions as to interaction between two chapters in the treaty. The answers to those questions are obviously of concern to the treaty parties. The answers to those questions are of grave concern to Canada. So, in sum, deferring these decisions favors no one's interest.

Sir Kenneth, members of the panel, thank you. Thank you for your patience today. We have completed our submissions 28 minutes ahead of

schedule, so thank you very much.

PRESIDENT KEITH: We have a question.

MR. RENNIE: Certainly.

ARBITRATOR FORTIER: I'm not being very original because one, maybe a second question which I have already been asked by one of my colleagues. But if I come back to it, Mr. Rennie, it's because I'm not entirely happy with the answer that Canadian counsel gave.

I'm looking at the Amended Statement of Claim, paragraph 2. I'm looking at the last sentence which the Chairman referred to earlier.

MR. RENNIE: "Canada Post exercises"--

ARBITRATOR FORTIER: "...exercises delegated governmental authority in operating the postal monopoly and its related businesses." I heard your argument. I heard it well, and it's--I heard your argument. And, in fact, if I can summarize it in one question, you say, you know, where's the beef, where's the regulation which demonstrates this exercise by Canada Post of this

alleged delegated governmental authority?

And you've referred us to the Counter-Memorial of the investor, paragraph 91, which I was re-reading before we resumed after lunch. This bare assertion which Canada for purposes of its motion accepts does allow the investor to enter into the portal--I think that's the word that was used earlier--of 1501(3)(a). Could not Canada have made what in a domestic court we would have called a request for particulars and say where is the regulation that permits you to make this bare statement? And not having done so, since you, as I said, for purposes of the motion, this is taken to the common ground between the parties, is it not sufficient to ground--at this stage to ground the investor's claim?

MR. RENNIE: My response to this I think is essentially one cannot look at that pleading in isolation--that paragraph in isolation. This claim is essentially about anticompetitive conduct, and the question whether or not one gets through the

portal or not is whether or not they can have recourse for this kind of complaint or conduct.

So it advances the inquiry no further. We are still left with the fundamental jurisdictional question as to the Tribunal's jurisdiction.

The second point I would make about that is that this is a question of law whether or not Canada Post in the exercise of it being the post office--this is their assertion, being the post office, constitutes a delegated governmental authority. And you read that in the context of Articles A, B, C, and D, which deal with corporations in its commercial--or a monopoly or state enterprise in its commercial capacity, and these complaints are about its commercial capacity, this is the nub of the question, the bringing to bear precision on the distinction between 1502(3)(a) and Article 1116.

ARBITRATOR FORTIER: I accept that.

MR. RENNIE: We could have asked for particulars. They have put their case at the

highest. Mr. Peirce took you through the regulatory situation, the control of a special committee of cabinet over this Crown corporation, and the gravamen of the complaint, as I said at the very beginning, is about commercial issues contemplated by (d) when the monopoly is acting in the commercial marketplace, and that's the question whether or not complaints with respect to (d) can ultimately find a home in Section of Article 1116. So request for particulars would have furthered that.

ARBITRATOR FORTIER: Let's move on then, and I heard your answer, and let's look at the next phase, if you wish, of the inquiry, which we are called upon to make. Again, it's a question that's been addressed earlier by my colleague, Dean Cass, but I want to--I'm slower than he is, so I want to come back to it.

In 1502(3)(a), you have a reference to actions, acts of a monopoly, Canada Post, which are not inconsistent with the parties' obligations

under this agreement. You do accept, do you not, that 1502(3)(d) is encompassed--for purposes of my question is encompassed by the words "the parties' obligations under this agreement"?

MR. RENNIE: Yes.

ARBITRATOR FORTIER: Okay. And I think you answered Dean Cass, you said looking at 1116, which opens the door to a recourse by an investor, and controls a recourse of the investor, 1116 or 1117, in 1116(1)(b) it is said that another party has reached an obligation under 1502(3)(a) where the monopoly has acted in a manner inconsistent with the parties' obligations under Section A. And I guess your answer is that this leg of (b) removes 15--removes 1502(3)(d) from the ambit of recourse.

MR. RENNIE: That's correct. It in a sense narrows the class of obligations.

ARBITRATOR FORTIER: All right.

MR. RENNIE: That's correct.

ARBITRATOR FORTIER: So it giveth with one hand and takes away with another.

MR. RENNIE: Indeed. It speaks--it's an article which speaks in two directions. It, in fact, is an obligation between the parties with respect to which Chapter Twenty could be invoked if there were concerns about anticompetitive conduct. But with respect to the investor, it's tracking into the language of 1116, serves as a--being placed there is a qualifier. It limits, serves to limit this.

ARBITRATOR FORTIER: Thank you, Mr. Rennie. That's all.

MR. RENNIE: And just with respect, Mr. Fortier, with your first question, I think perhaps what I should have said to you, and I may have missed this earlier, was that--and I touched on this briefly in my conclusion, that they make that assertion in paragraph 2. Having admitted the assertion in no way deprives you from drawing the appropriate legal inferences as to the scope of the phrase "delegated governmental authority." We are not bound by their legal assertion in paragraph 2.

That's an assertion of law that they are making which we do not accept. For that reason, particulars would have been to no avail.

ARBITRATOR FORTIER: Your colleague said that this was fact-dependent, the evidence of the delegation of government authority. It's not just a question of law.

MR. RENNIE: The existence of a delegation would have to be established in the pleading, and they haven't. It's not there.

PRESIDENT KEITH: Thank you very much to the Canadian representatives.

Mr. Carroll?

MR. CARROLL: Mr. Chairman, I am, of course, quite prepared to start this afternoon. I would ask that if we do start that we be permitted about a five-minute respite just to collect things and get set up. But I'm prepared, or I'm prepared to start tomorrow morning, whichever you wish.

PRESIDENT KEITH: About how long would you propose to go if we did start in five minutes'

times?

MR. CARROLL: Probably no more than 15 minutes.

PRESIDENT KEITH: Well, if you wish to do that, and everybody else is agreeable, we'll proceed in that way. So we'll take a five-minute--

MR. CARROLL: Sorry. I may need to get some instructions.

[Pause.].

MR. CARROLL: I may have misunderstood your question, Mr. Chairman. I will want to be speaking for much more than 15 minutes, but not today.

PRESIDENT KEITH: Yes, I certainly understood that, yes.

[Laughter.]

MR. CARROLL: My friends may not have.

PRESIDENT KEITH: We'll take a brief break now, and then continue for 15 minutes. Thank you.

[Recess.]

PRESIDENT KEITH: Yes, Mr. Carroll?

MR. CARROLL: Thank you, Mr. Chairman, Mr. Fortier, and Dean Cass. This afternoon I propose to essentially outline the manner in which the submissions will be made by counsel for United Parcel Service of America, or UPS, and then to get started on a couple of the major issues.

Canada basically attacks the position of the investor here in several ways. What Canada says is that the investor is not entitled to bring any claim under Chapter Eleven where the claim touches upon matters which are dealing tangentially or directly with competition law. That's the bold statement and the bold assertion that they make.

Before dealing with those submissions by Canada, in my view it's essential for the panel to keep in mind the rules in which and under which the NAFTA is to be interpreted, and I will be dealing with that issue, the interpretation and how we interpret the NAFTA.

The second point is with respect to jurisdiction and the test that the panel has to

determine on a matter of jurisdiction, and I will deal with the jurisdictional test.

The matters which relate directly to much of what has been said so far today deal with the interrelationship between Chapter Eleven and Chapter Fifteen, and more particularly, the interrelationship within Chapter Fifteen of Article 1502(3)(a), 1502(3)(d), 1503(2), and to a lesser extent, 1501. I will be dealing with the argument insofar as it concerns 1501 for the most part, and my colleague, Mr. Appleton, will be dealing with the Chapter Fifteen, the interrelationship between the articles in Chapter Fifteen and also with respect to how they related to Chapter Eleven and specifically Articles 1102 and 1105.

The second attack--so Canada basically says that the investor can't bring a claim for anticompetitive behavior or acts of anticompetitive behavior because of the interrelationship between Chapter Eleven and Fifteen and the wording of Chapter Fifteen. But it also, as you've heard

today--and this was primarily the submission of our colleague, Mr. Willis--that even looking at Chapter Eleven alone, the investor has no right to bring this claim because of what I would call a somewhat restrictive interpretation of the rules of customary international law. And, again, Mr. Appleton will be dealing with those particular arguments.

Finally, Mr. Appleton will be dealing with the cultural subsidy issue, and I will be dealing tomorrow with the issue of the pleadings and the comments that our colleagues have made with respect to the inadequacy of those pleadings.

So I propose to start now by way of introduction this afternoon by saying this: that the simple question on this motion regarding jurisdiction is whether Canada has established that the claim as pled does not and cannot and is not capable of falling. And I'll be dealing with the cases that are relevant here on those terms within the scope of an investor claim under Chapter Eleven

of the NAFTA.

Now, by way of broad generalization, we make three points here. Canada seems to be relying on arguments which the investor says have already been tried, tested, and have failed in front of other NAFTA Chapter Eleven Tribunals, and I will be referring you to those decisions.

Secondly, we say that Canada seeks to characterize the investor's arguments as something other than what they actually are. And we say that that is simply wrong. They say that with respect to the interpretation of NAFTA that we are attempting to rely on general principles of the intent of NAFTA as, in fact, substantive obligations imposed upon the parties, which is not the case, and we will demonstrate in my submission why that is not the case.

And, finally, we say by way of general comment that much of Canada's argument really deals with issues that are more properly referred to the merits and that this panel at this juncture ought

not to get into issues which can properly be and should properly be determined at the merit stage.

Now, UPS does say that it has fully and properly pled a claim under Articles 1102, 1105, 1502(3)(a), and 1503(2). This motion is not the place to determine whether the UPS claim will ultimately succeed. That's a matter for the merits. Once the Tribunal has seen and heard the evidence about the treatment afforded by Canada Post and UPS and measured that treatment against the standards articulated in the NAFTA, when properly interpreted with regard, due regard to the objects and the purposes for which the NAFTA was designed to achieve.

A word about UPS, and this arises out of the pleadings. UPS, of course, is an American company with a number of wholly owned subsidiaries. But as Ms. Tabet has acknowledged, one of the subsidiaries, not operating in the United States, is United Parcel Service Canada Limited, UPS Canada.

UPS Canada provides courier and small-package delivery services as well as secure electronic communications services in the non-monopoly postal service market throughout Canada. It has been in existence, members of the panel, since 1975. It's a substantial Canadian operation. It employs upwards of 6,500 people throughout Canada.

It has invested literally millions of dollars in Canada. It has built up a network of buildings, sorting machinery, vehicles, and aircraft. It is, in a word, an important contributor to the Canadian economy.

Canada Post and UPS are direct competitors in the Canadian non-monopoly postal services market. And as you know and have heard, Canada Post is a Crown corporation. It was established under the Canada Post Corporation Act, and the act itself establishes Canada Post as an agent of Her Majesty in right of Canada and an institution of the Government of Canada.

Before Canada Post became a Crown corporation in 1981, which was when it did become a Crown corporation, it was, in fact, as Dean Cass has already alluded to, a department of the Government of Canada.

Now, as well as having been delegated to it by Canada the exclusive privilege of collecting, transmitting, and delivering first-class mail and addressed ad mail in Canada, its mandate, which has been endorsed and sanctioned by Canada, includes providing postal services in the non-monopoly courier and small-package delivery and secure electronic communications markets. Its authority for that comes from Section 5 of the Canada Post Act, which you might wish to note.

Canada Post competes directly with UPS and other entities operating in the non-monopoly sector, and it also competes through its 94 percent-owned subsidiary, which is Purolator Courier, Limited.

For the purposes of this application, you

must assume that Canada is responsible for all of the actions of Canada Post based on the wording of the statute. Accordingly, any of the conduct alleged by UPS of Canada Post which you must also assume to be true for the purposes of today and tomorrow's submissions is conduct attributable to Canada for which Canada is responsible.

Now, fundamentally, there's no question that the pith and substance of the complaint of UPS is that there is an unlevel playing field in the non-monopoly sector in Canada. UPS says that UPS Canada and the other express delivery services providers are being treated unfairly and inequitably, and that they face unfair competition from Canada Post and, indeed, from the Canadian Government itself. This unfairness arises in different ways.

For instance, Canada has granted Canada Post certain benefits and privileges that are not available to its competitors. That's Article 1102. They include these benefits and privileges--or

these are outlined, pardon me, in paragraph 16 of the Amended Statement of Claim of the Investor.

The facts alleged are for the purposes of this application true, and the effect of them, individually and collectively, upon UPS and others is something that can only be determined after the evidence is in. But for the purposes of this hearing, I would refer you to paragraph 16 of the Amended Statement of Claim--and I can just review some of the--some but not all of the allegations that are made which seems to me are important to keep in mind when we're determining how this jurisdictional application should be determined.

Canada has given benefits and privileges to Canada Post under an agreement, members of the panel, dated April 25, 1994, with the Canadian Department of National Revenue. That agreement provides for certain things, including payments by the Canadian Department of National Revenue to Canada Post, calculated on the basis of the number of packages imported into Canada through the postal

system.

Customs brokerage services are services equivalent to customs brokerage services by the provision of Canada customs employees to Canada Post without fee, the exemption of Canada Post from interest and penalties for late payment of non-payment of duties or taxes. Furthermore, Canada has permitted Canada Post to levy and retain a $5 handling fee for the collection of duties and taxes from recipients of packages which have been imported through the postal system regardless of the costs properly or fairly attributable to the particular transaction.

It has also exempted--or, I should say, Canada has exempted Canada Post from customs sufferance warehouse regulations and requirements, all matters pled in paragraph 16. It's allowed non-monopoly products access to and the benefit of the infrastructure built to service Canada Post monopoly products without appropriate charges being allocated to the non-monopoly product.

It has granted Canada Post the exclusive right to place its mail boxes in any public place, including a public roadway, without payment of any fee or charge when these mail boxes are also used for the deposit of non-monopoly products.

Furthermore, since April of 1997, we allege--and more fully this is set out in paragraphs 27 and 28 of the Amended Statement of Claim. I could just ask you to note that. We've alleged certain anticompetitive conduct and unfair conduct which has been found to have existed on the part of Canada Post. It is engaged in predatory conduct, predatory pricing, tied selling, and cross-subsidization. And it has unfairly used its monopoly infrastructure and network, as we've outlined in those two paragraphs, 27 and 28, to the prejudice of UPS and UPS's ability to compete on a level playing field.

Now, UPS is not contesting that Canada Post should be allowed to compete, obviously, in the express delivery services business. That's not

what this case is about. But it does say that Canada has not accorded fair and equitable treatment within the meaning of Article 1105 of the NAFTA. It's let Canada Post use its government advantages and its monopoly infrastructures to undercut competitors in the private sector in ways that undermine the objects and purposes in our submission of the NAFTA and that make fair competition impossible and that as a result disadvantage foreign investors while benefiting the Canadian Government and Canada Post.

Canada refuses to scrutinize Canada Post even though its own--that is to say, Canada's own independent inquiry into the matter concluded that Canada Post does not compete fairly with the private sector in the express delivery services business. In 1995, Canada actually appointed a commission to carry out an independent review of Canada Post and its mandate, including its non-monopoly business activities and to look into Canada's role in supervising and regulating those

activities.

The commission found--and we say for the purposes of this application these facts must be assumed to be true--a number of things: firstly, Canada Post's practices raised serious concerns of fairness and appropriateness; that Canada Post had resisted and has resisted repeated calls to adopt a satisfactory accounting system that identifies actual costs and revenues for specific products; that it is an unfair--Canada Post is an unfair competitor in ways detrimental to the private sector companies in the non-monopolized postal market in Canada; that Canada Post's misallocation of costs constitutes cross-subsidization; its ability to leverage and network build up with public funds on the strength of a government-granted monopoly gives it a pricing advantage over competitors that is seriously unfair. These aren't my words. These are the findings of the inquiry.

It's been described by the inquiry as a vicious competitor whose predatory practices have

led corporations to refrain from criticisms for fear of retaliation. And the competitive activities of Canada Post based on the foundation of its postal monopoly and the network it has built with public funds are incompatible with basic principles of fairness. And those matters and findings are all set out in paragraph 25 of the Amended Statement of Claim.

Despite those findings, members of the panel, in 1997, Canada determine that it would not implement any measures to address these findings of the commission. That's alleged in paragraph 26 of the Amended Statement of Claim. All that UPS seeks is a level playing field. This means that neither UPS nor any other express delivery service company should have to compete, in our submission, against an entity that benefits unfairly from a market structure that prevents fair competition.

I have proposed to finish today by just outlining summarily where the battle lines are drawn and the essential positions of the parties,

and then I'll get into the substance tomorrow.

Canada seems to raise three grounds for its motion to strike portions of the Amended Statement of Claim. First, it says the Tribunal has no jurisdiction to arbitrate breaches of NAFTA Articles 1501 and 1502(3)(d) because these breaches are beyond the scope of investor relief under NAFTA.

Now, in answer to that, the summary of our position is that we do not rely, first of all, in any way on alleged breaches of 1501 of NAFTA, and let me just stop there and say that, as we read Section 1501, Article 1501 of NAFTA, that articles in essence sets up an obligation on the part of the parties to put in place an infrastructure to deal with anticompetitive actions and conduct. That's what that section does. We are not making any allegation that Canada has failed to do that. In fact, Canada does have a metafoitier (ph), alluded to the issue of other proceedings and Canada does have a competition tribunal. So that's not what we

are saying and if you can--our position in a nutshell is this: that while Article 1501 says--and Note 43, as my friend, Mr. Appleton will get into in his portion of the argument--prevents an investor from making any claim under Article 1501. It surely does not prevent an investor, we say, from making a claim where the conduct is conduct of the party itself or of one of its--or of a state monopoly or a state enterprise of that party.

So if you had--if Canada, as we say, is guilty of anticompetitive behavior, in our submission, 1501 does not prevent the investor from bringing a claim under either 1502(3)(a) or under 1102 or under 1105. That is simply--so in our position and our submission, it is simply wrong to say that we rely on Article 1501.

Now, the investor does say that it's entitled to adduce evidence of conduct, as we say, on the part of Canada that may constitute anticompetitive behavior, not to show as well a breach of Article 1502(3)(d) directly but, rather,

to show that the conduct is unfair, inequitable, and a breach of Article 1102 and 1105. I can put it a little better, I think, than that.

There are two, if you will, avenues that we approach this claim. The first is the Chapter Fifteen avenue where we do say that given the manner in which you ought to interpret the NAFTA in a much more liberal way--and I would characterize my friend's arguments on interpretation as restrictive in nature, and I will take you tomorrow to the various authorities in the text where we say that the manner in which you interpret NAFTA is quite different, to permit the objects of the treaty to be real, to look at the preamble, for example, that that will permit us to bring a claim under 1502(3)(a) and, incidentally, through 1502(3)(a), 1502(3)(d). But if we ultimately are found to be wrong--and my submission to you is that that's a matter which you can and should determine on the merits when you've heard all of the evidence. But if we were wrong there, we say we

are permitted to bring a claim directly under Chapter Eleven and Articles 1102 and 1105.

Now, the second submission that Canada basically makes, which is more procedural, I submit to you, than anything else, is that we have not--the investor has not established that it has incurred loss or damage as a result of the alleged breaches, and that I can simply refer you to the notice of motion of Canada, paragraph 2, where that is pled. And I simply say--and I won't say anything more on that--that it is sufficient to plead loss or damage. We don't have to--clearly, we don't have to plead the amount of damage we've suffered. It is sufficient for the purposes of this jurisdictional hearing that we have pled that we have suffered loss or damage.

And the secondary issue there is the issue referred to by my friend Ms. Tabet today which is that non-Canadian subsidiaries or related foreign companies are investments of the investor in the territory of Canada, and I'll outline our position

on that tomorrow. We say that we have pled sufficient details of that.

And then, finally, I will deal tomorrow in my portion of the argument with the issue--and my friends really haven't dealt with it very much in my submission, and that's this issue of particularity of pleadings. I don't plan to spend much time on that, much more than a minute.

So those are essentially the submissions that I'd like to make this afternoon, and we can adjourn until tomorrow morning.

Now, my friend Mr. Appleton and I have discussed tomorrow, and we unfortunately haven't had a chance to discuss it with our friends. I just would leave this with the panel: Might it be possible to start at 9:00? And the reason I ask that is that I think if we do start at 9:00, we'll probably be able to finish everything. Because I would believe that starting by 9:00, we will clearly finish before noon. And then we could have the afternoon to deal with replies and sur-replies,

and I think we could all be guaranteed of finishing tomorrow. But I am, again, in the hands of the panel on that.

PRESIDENT KEITH: Mr. Rennie, do you have a--

MR. RENNIE: We're in your hands on that, Sir Kenneth.

PRESIDENT KEITH: But you see no difficulty?

MR. RENNIE: We see no difficulty.

PRESIDENT KEITH: And I assume it's no problem with the administration. On that basis, then, we will resume at 9:00. Sorry, Mr. Rennie?

MR. RENNIE: If I could just add to that, Sir Kenneth, just a procedural point of clarification in order to perhaps leave my friend's workload and that of the Tribunal's, I want to make clear, although he did read significant portions of paragraphs 16 and 17 this morning, if you refer to the Amended Statement of Claim, the color-coded version which we provide in our compendium, you

will see that only one of those, 16(f), is being challenged today.

PRESIDENT KEITH: Yes.

MR. RENNIE: I just want to make sure there's no misunderstanding with respect to that.

PRESIDENT KEITH: Yes, I understood that. Thank you. Mr. Carroll was taking us through that to give us a sense of the background to the claim.

MR. RENNIE: Thank you.

PRESIDENT KEITH: Very well, then. Well, thank you, counsel, for your submissions today, and we'll resume at 9:00 in the morning, looking to complete in the course of the afternoon.

Thank you. We're now adjourned.

[Whereupon, at 4:23 p.m., the hearing was recessed, to reconvene at 9:00 a.m., Tuesday, July 30, 2002.] •