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 II

Tuesday, July 30, 2002

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

The hearing in the above-entitled matter was reconvened at 9:05 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:

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ALSO PRESENT:

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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. We will now resume the hearing, and I call on Mr. Carroll.

MR. CARROLL: Thank you, Mr. Chairman.

This morning in my submissions, I will be referring to several documents, and I just would ask initially if the members of the Tribunal have copies of the NAFTA. I am going to be referring to portions of that, as well as the Rejoinder Memorial of the Investor, and certainly to Volume I of the Investor's Authorities. I'm going to be referring to the Oil Platforms case, which is in Volume I.

Before I get there, I would like to just finish off with a point that I started briefly to discuss yesterday afternoon, which is the argument of Ms. Tabet with respect to the issue of the wholly owned subsidiaries of UPS. And let me just say briefly that I didn't hear Ms. Tabet to be taking any issue with the fact that UPS Canada is properly before this Tribunal, but her argument

related to the other U.S. subsidiaries.

To the extent that U.S. subsidiaries may operate in Canada, they're also investments of the investor, according to Article 1101(b) and, in our submission, Article 1139. If the U.S. subsidiaries--and I say "if"--incurred damages as a result of the NAFTA breaches and the damages flow to the parent investor, then in our submission, Article 1116(1) permits the claim.

We deal with this in our Memorial, in our Rejoinder Memorial, at paragraphs 138 and following, and I would just as the members to note those paragraphs and would say this as well--

ARBITRATOR FORTIER: Excuse me, Mr. Carroll--

MR. CARROLL: No, I'm sorry. It's the Reply Memorial, Mr. Mitchell reminds me. I thought it was the Rejoinder.

[Pause.]

MR. CARROLL: It's the Counter-Memorial. I apologize.

Now, at this stage, we would say simply that the pleadings are sufficient to alert Canada to the case that it has to meet, and to the extent that the U.S. subsidiaries have suffered any damage as a result of the actions of Canada in Canada, then it will be up to UPS to establish that those U.S. subsidiaries have suffered damages. That is a matter for the merits.

The pleadings disclose in my submission a sufficient case to be met by Canada. If UPS is unable to establish at the hearing on the merits that its U.S. subsidiaries have suffered damages as a result of the impugned activities pled, then unless the secondary argument succeeds--that is to say, that there are damages suffered by the parent UPS--then clearly that case will not be made out and the panel will dismiss that portion of the action.

My point is simply that it is premature to prejudge the case at this stage and that Canada has all of the allegations that it needs to meet the

case and will be able to argue, presumably, at the merits if we fail to meet the test.

I turn next to the first of what I would call the threshold issues for this panel, which is the question of the interpretation of the NAFTA and how it is to be interpreted. Throughout Canada's argument and underlining all of its submissions is the suggestion that the obligations under NAFTA Chapter Eleven are narrow, and Chapter Fifteen, and that the claims which may be brought have been carefully limited. This is apparent from Canada's submissions, for instance, paragraph of its Memorial, where it refers to the NAFTA as a carefully prescribed agreement, clearly limiting the scope of the investor's claims. Another example is paragraph 24 where they refer to narrowly prescribed circumstances where claims can be brought.

However, neither the language of NAFTA nor the decisions interpreting it, we say, support that view. In our submission, the NAFTA has created a

stringent set of obligations upon States, interpreted in light of the NAFTA's objects and purposes and its context against which Canada's conduct towards investors will be measured.

The basic argument of Canada is that the thrust--and I mentioned this yesterday--of the UPS claims alleges breaches of Canada's obligations under Chapter Fifteen of the NAFTA to take appropriate action to prescribe anticompetitive business conduct by its government-owned monopoly, and that these breaches are not subject to investor/state dispute settlement. And as I mentioned yesterday, this is not the case of UPS. UPS alleges breaches of Articles 1502(3)(a), 1102, and 1105.

Now, it's interesting to note, members of the panel, that in advocating its interpretation of the NAFTA, Canada has avoided reference to the object and purposes of the treaty. Accordingly, it didn't examine whether, in light of those objects and purposes, its interpretation could withstand

scrutiny. It did not undertake any critical analysis of the approach taken by the other Chapter Eleven Tribunals in interpreting some of the very same provisions at issue in this case, including any analysis of those cases in which Canada was a respondent.

We say that the reason Canada avoided those cases is because even a cursory analysis of them would show that their interpretation is inconsistent with the approach taken by other panels.

The parties do agree, I believe, that the Convention on the Law of Treaties, the Vienna Convention, and in particular Articles 31 and 32, are the proper starting place for an interpretation of the Chapter Eleven obligations of NAFTA. And I should have mentioned this to you: Articles 31 and 32 are at Tab 10 of our friend's authorities, Canada's authorities.

Article 31-1 is the starting place which provides essentially that the NAFTA must be

interpreted in good faith in accordance with, firstly, the ordinary meaning of the words used; secondly, in their context; and, thirdly, in light of the NAFTA's object and purposes. And I note and ask you to note that all three of those objectives, if you will, are relevant. In other words, it is not one or the other or other; it is the three. So you don't only look at the ordinary meaning of the words used. You also look at the context, and you also look at the object and purpose. And in our material, we provide an example of this, and I think it makes good sense. It's the oft-cited example where you don't only rely on the ordinary meaning of the words, for example, the classic case of the will where the gentleman leaves an estate to mother. And, of course, one would ordinarily say that the ordinary meaning of those words was that he intended to leave his estate to his mother. But, in fact, in the context, "mother" was always the word that he used to describe his wife. So that evidence was permitted, and, in effect, the

estate went to the wife as opposed to his mother. A simple example of why you don't only look to the plain meaning of the words.

Now, in the plain meaning of the words--and Mr. Appleton will be dealing with this--we say that it supports equally, at least, the submissions of UPS as it does Canada in any event.

Now, Article 31-1 of the Vienna Convention did refer, as I mentioned, to the context, and the context in the Vienna Convention is defined as including a treaty's preamble. This is significant in my submission in the case of the NAFTA, and here's where I would ask you to turn to the preamble in the NAFTA, which is found, at least in my copy--or it should be--right at the beginning.

I ask you to note some of the following from the preamble: that the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America resolve to create an expanded and secure market for the goods and services produced in their

territories; reduce distortions to trade; ensure a predictable commercial framework for business planning and investment; and enhance the competitiveness of their firms in the global markets.

Also, in my submission, it is necessary to refer to Article 1022, sub (2) of the NAFTA itself, and it sets out how the NAFTA is to be interpreted and applied by the parties. Article 102 states this: Objectives. The parties shall interpret and apply the provisions of this agreement in light of its objectives set out in paragraph (1) and in accordance with the applicable rules of international law, i.e., the Vienna Convention. The objectives of the NAFTA, which are critical to the interpretive task, are set out at 102, the objectives. The objectives of this agreement as elaborated more specifically through its principles and rules--and I ask you to underline this--including national treatment, most-favored-nation treatment, and transparency. And I expect Mr.

Appleton to be dealing with those principles specifically in his submissions on the relationship between Articles 1105 and Chapter Fifteen.

They are to eliminate barriers to trade in and facilitate the cross-border movement of goods and services between the territories of the parties; promote conditions of fair competition in the free trade area; increase substantially investment opportunities in the territories of the parties; establish a framework for further trilateral, regional, and multilateral cooperation to expand and enhance the benefits of the agreement. Those would be the ones that we would focus on. There are others, of course, which I submit are not particularly relevant to our task here.

ARBITRATOR FORTIER: Mr. Carroll, isn't paragraph (e) relevant, effective procedures for the implementation and application of the agreement and for the resolution of disputes? That was one you left out of your reading.

MR. CARROLL: Just let me get that. I'm sorry, Mr. Chair.

Yes, I have it. Sorry. I missed that.

PRESIDENT KEITH: It just seemed to me as you were going through the list that paragraph (e) was relevant to your argument as well.

MR. CARROLL: Effective procedures for the implementation and application, yes.

PRESIDENT KEITH: And including resolution of disputes.

MR. CARROLL: Yes, that's a fair statement. So in implementing the NAFTA, I submit to you that you must not only consider the provisions of the NAFTA themselves, but the context in which they occur.

Now, Canada has avoided any reference in its submissions to what has become quite a controversial issue relating to Article 32 of the Vienna Convention, and Article 32 is the article to which one or people may refer if there is still any doubt after looking at Article 31.

The issue of Article 32 arose particularly in the Pope & Talbot case, but it is, I submit, of considerable relevance here. Again, the Pope & Talbot case that I'm referring to is the most recent decision of Pope & Talbot which the panel received from my firm sometime ago now, and I assume that the panel has a copy of that. If not, we can arrange to have copies.

Article 32, as I mentioned, is headed "Supplementary means of interpretation." It states that recourse may be had to supplementary means of interpretation, including the preparatory work of the NAFTA, or les travaux preparatoires, as they're often called, including--and the circumstances of its completion, when the interpretation, according to 31, as I say, leaves the meaning ambiguous.

Until recently, Canada maintained that such preparatory documents did not exist with respect to the NAFTA, and as you're aware, that was a topic of some considerable discussion in the most recent Pope & Talbot case, and it was shown to,

regrettably, have been false.

There were considerable preparatory works, and a lengthy discussion of those was set out in the decision. We know now that there's a lot of information that has yet to be produced by Canada, even to the Pope & Talbot Tribunal. And certainly nothing has been produced to this Tribunal, and that that information we say could be relevant to this Tribunal's interpretive task when we get to the merits, as we say we must.

Given now that we know the documents exist, the fact that Canada has not produced them when the interpretation of those provisions is squarely in issue gives rise to the inference that those documents don't support Canada's interpretation. Now, the--I'll say no more about that. It may very well be that once those documents are produced as part of this that additional arguments may be made with respect to the interpretation. We simply don't know until we see and get from Canada additional production of

the documents which have not--the preparatory works which have not already been produced.

That completes the portion of my submissions on the question of interpretation, and I propose, unless there are some questions from the panel on that, to turn to the question of the test for jurisdiction.

Of course, that is the principal task here for the members of the panel. What test ought you to apply? Canada has said twice in the course of its oral submissions that there's one issue for this panel to determine. It says that the issue is: Does the NAFTA jurisdiction on a Chapter Eleven Tribunal to provide a remedy to an investor in respect of the business conduct of--sorry. Does it provide a remedy to an investor in respect of the business conduct of a government monopoly? It's used the words "commercial activities."

With respect, we say that's not the question that must be determined, nor do we say Canada--and we suggest Canada has not undertaken a

proper analysis for the resolution of that jurisdictional issue. We say first that the pleadings must disclose a prima facie claim. That's the first principle.

In order to decide whether you have jurisdiction, you are bound to examine, in my submission, only whether our pleadings disclose an arbitrable issue, not whether UPS's case will ultimately succeed or fail. And I do refer you and would like you to turn, if you might, to paragraphs 9 through 12 of the Counter-Memorial of UPS.

As I mentioned, the task is not to examine whether UPS's claim will ultimately succeed or fail, and if you look at Footnote No. 7, we refer to the case of AMCO and Indonesia, and the quote, which I'm picking up about a third of the way down from those reasons are this: "If on its face"--that is, if there is no dispute by the claimants, the claim is one arising directly out of an investment, then this Tribunal would have jurisdiction to hear such claims. In other words,

the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration and, consequently, of this Tribunal.

And as we say in paragraph 10, this approach has also been taken by previous NAFTA Tribunals when addressing jurisdictional challenges. And we quote from the Ethyl case, and we refer in the Footnote to the three cases--Ethyl, Myers, and Pope & Talbot.

In Ethyl--and, again, I won't read the quote in its entirety, but pick it up about three-quarters of the way down--Claimant's Statement of Claim satisfies prima facie the requirements of Article 1116 to establish the jurisdiction of this Tribunal. When the allegations in a petition bring a claim within the terms of the treaty, the jurisdiction of the commission attaches, and the

panel cites, I submit to you with approval, the case of Ambatielos--and if you turn over to page 5, you'll see the quote there--"The fact that a claim purporting to be based on the treaty may eventually be found by the Commission of Arbitration to be unsupportable under the treaty does not of itself remove the claim from the category of claims, which, for the purpose of arbitration, should be regarded as falling within the terms of the declaration of 1926."

In other words, it may still be on the merits that you decide that ultimately the claim does not properly fall within the terms of the treaty, or put in the context of the present case, that the propositions being advanced by our friends from Canada are ultimately meritorious with respect to how you should interpret the NAFTA.

The Pope & Talbot Tribunal in that decision, as noted in Footnote 10--and it's the one from January 26, 2002. We've produced several Pope & Talbot decisions, but the dates are on the

decisions. And I ask you to note this from the Pope & Talbot one, again, about halfway down that quote, "The investor claims breaches of specified obligations by Canada which fall within the provisions of Section A of Chapter Eleven"--similarly to the case here. "In the view of the Tribunal, the investor and Canada are disputing parties within the definition of 1129. Whether or not the claims of the investor will turn out to be well founded in fact or law, at the present stage it cannot be stated that there are not investment disputes before the Tribunal."

And then, finally, members of the panel, the Loewen case, which we've noted as well, and there in the Loewen case the Tribunal deferred to the merits phase certain matters which required an assessment of the factual context in order to be properly determined and also deferred consideration of those issues which might but did not clearly go to jurisdiction.

ARBITRATOR CASS: Mr. Carroll?

MR. CARROLL: Yes?

ARBITRATOR CASS: I take it to be your contention--and please correct me if I'm wrong in this--that even if we were to find Canada's argument is correct on the interpretation of the treaty with respect to matters such 1105's meaning, and even if there is no factual dispute at this point that would alter their argument, that we would still find jurisdiction over the claim based on an assertion that 1105 has been violated. Does that misstate your argument?

MR. CARROLL: That is the argument at its basic. That is correct.

ARBITRATOR CASS: Thank you.

MR. CARROLL: We say, by the way, that Canada's position with respect to the jurisdictional test now appears to be somewhat unclear. As you're well aware, of course, the parties have filed lengthy written submissions here, and not only Canada and UPS but also, of course, the USA and Mexico. We thought there was

basic agreement about the appropriate test when reading through the various arguments. For example, in Canada's Reply Memorial, paragraph 49, they stated the task this way at that time: "It must"--when dealing with the Tribunal's test, they said, "It must conduct a prima facie analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are capable of constituting a violation of these obligations."

We accept that test. We accept that test, "are capable of." We say that that is--you simply can say are they capable of, is there a way that they could. You don't have to. We've basically made the allegations you don't have to decide one way or another at this point. You do not have to decide that.

However, in its oral submissions, Canada only referred to the Oil Platforms case. Now, we say to support a more onerous test, which it initially relied upon with reference to that decision in its first Memorial, which was at

paragraph 39 of its initial Memorial. It seems to cite Oil Platforms for the proposition that to engage a tribunal's jurisdiction, the claim must clearly fall within the parameters of Chapter Eleven and that it was not sufficient that the claim be plausibly or arguably connected to Chapter Eleven obligations, a much more stringent test, a much more onerous test than the one which we say is the right test.

Now, despite its submissions at paragraph 39 of its initial Memorial, there is no reference anywhere in the judgment of the majority in Oil Platforms--and I grant you this, that reading Oil Platforms is not a task for the timid. There are 14 different panel members--or there were 14 different panel members sitting on that panel, and several of the judges wrote their own reasons, and it does require a careful and somewhat painstaking analysis to go through to try to figure out what actually happened in the end. But we say that in the majority, there was no reference of the need

for the claim to be more than plausible or arguably capable of, connected to the obligations relied upon.

The majority decision only required that the facts alleged by Iran be capable of having the effect of violating the obligations contained in the treaty, and I simply ask you to note paragraph 38 of the majority reasons in Oil Platforms to that effect, where the Tribunal stated that the question to be asked was whether the actions of the United States complained of by Iran had the potential to affect commerce. That was the case where certain oil platforms had been destroyed by an attack from the U.S. military, and the treaty there was a friendship treaty between Iran and the United States, and the question was whether or not Iran could bring a claim under that treaty for those damages, or one of Iran's nationals could bring that claim. The question was: Did it have the potential--did the action have the potential to affect commerce? The panel found that it did have

the potential to affect commerce.

I ask you as well to refer in Oil Platforms to the reasons of the majority paragraphs 50 and 51 to that effect.

Now, UPS relies upon the analysis of Oil Platforms and the other decisions relied upon by Canada in its Counter-Memorial and Rejoinder and says that the proper approach is the one articulated actually in Pope and Ethyl and Loewen, to which I've already referred.

So, to summarize, UPS says that it needs only to advance a prima facie claim at this stage, that there have been violations of NAFTA Chapter Eleven, that the Tribunal has jurisdiction ratione materiae to entertain the claim. The facts alleged need only be capable of having the effect or the possibility of violating NAFTA Chapter Eleven. Those are the words that other panels have used. Those are the words in our submission of the majority even in Oil Platforms.

With respect to the claim of UPS under

1105--and remember that the submission or position of UPS, which my friend Mr. Appleton will be dealing with in some considerable detail--is that there are two ways, if you will, to get to jurisdiction. One is through the aperture of 1502(3)(a) and the other is the direct entry through 1105 or, alternatively, 1102.

But with respect for a moment to the claim under 1105, the jurisdictional question could be addressed in several ways based on these cases, I say. One way might be to frame it this way: Is it possible that Canada's conduct with respect to Canada Post falls short of the minimum and fair--of minimum standards of fair and equitable treatment, which Canada is obligated to accord to investments of investors of another party? That's one way.

Another way might be: Is the panel capable of concluding that such conduct fails to meet the minimum standard of treatment?

A third way might be: Is it arguable that the conduct of Canada fails to meet the minimum

standard of fair and equitable treatment?

We say the answer to those questions--and hopefully that is what Mr. Appleton will be dealing with--is a resounding yes.

The bottom line is that the initial test of the jurisdictional phase of the hearings is not a particularly onerous one on a claimant at this stage. That will be different when we get to the merits where the onus will be on UPS to establish its claim on the merits.

The panel will be able to determine whether a breach of Article 1105 has occurred only after all the evidence is in.

Let me just give you an example of what I'm talking about. Canada seems to be saying that you have before you now everything that you need. You have the facts, pled and admitted, and they say: What more do we need? You've got everything. You can determine right now.

May I make this suggestion? Let's use the example of the fair and equitable treatment. Let's

suppose that evidence comes in of some form of cross-subsidization. Let's suppose that that evidence that came in of cross-subsidization was what I might loosely call de minimis, very isolated, one instance, not particularly burdensome. It would be open to the panel at that point to say, given all of the factors in this case, that evidence does not meet the fair and equitable threshold. In other words, given everything, it's still fair and equitable.

Alternatively, the evidence might come in--and we say the evidence will come in--of substantial cross-subsidization, predatory pricing. It's only when you hear all of that evidence, when you see it in the documents and hear the submissions at the merits, that you are going to be able to make a determination: Does that breach the fair and equitable standard of conduct that is required for an 1105 claim to be successful?

I close by--

ARBITRATOR CASS: Mr. Carroll?

MR. CARROLL: Yes?

ARBITRATOR CASS: Forgive the interruption. If we conclude that the standard in 1105 requires a violation of a specific international law, and that cross-subsidization cannot provide that violation, would we be appropriate in saying there is no jurisdiction over that claim at this stage?

MR. CARROLL: For a claim under 11--at this stage? If you were to make that conclusion today?

ARBITRATOR CASS: Yes.

MR. CARROLL: Well, I would suggest--yes, if you--if you were to make that conclusion today, yes. But we are saying you should not make that conclusion today. It's not appropriate to make that conclusion today. You should--basically, Mr. Appleton will be covering in detail why you shouldn't make that conclusion today when it comes to international law. But if you were, I can't really argue that you would say yes. But it would

be, in my respectful submission, wholly inappropriate to do that at this stage.

ARBITRATOR CASS: I'm just trying to make sure I understand the jurisdictional test you are suggesting here. And if I understand what you are saying now, if the law is clear that the facts pled cannot make out a violation that it is appropriate to find no jurisdiction, but if it is open whether they can, then jurisdiction attaches over that claim. Is that--

MR. CARROLL: Yes, that's fair. That's fair, Dean Cass, yes.

Let me just close by referring you to the passage from Sir Eli Lauterpacht's book on "Aspects of the Administration of International Justice." This is referred to at paragraph 32, if you could--again, I apologize. I think it's in the Rejoinder Memorial, and I'm not sure whether you--yes, I guess you do have the Rejoinder Memorial. It's at page 13, paragraph 32. It's the Rejoinder Memorial, Dean Cass.

He says this, when talking about the meaning of "equity" or "equitable principles," things that we're basically talking about here when we refer to 1105. "They are intended to refer to elements in legal decision which have no objectively identifiable normative content. They are, in the present context, virtually synonymous with `fair' or `reasonable.' The concepts have no meaning in isolation from the details of the particular factual situation in which they fall to be applied.

"There are basically two ways in which equity in this broad and elastic sense can find its way into the international legal system.

"The first possibility is that a treaty or a rule of customary international law may prescribe the application of a rule which is itself expressed in terms of `equity' or `equitable principle' or even a fair or just or reasonable treatment. All these formulae are inherently identical in that the result that they prescribe is not specifically

elaborated. Instead, the judge is called upon to construct a solution out of whole clothing according to the needs of the case.

"Nor is reference to equity limited to multilateral treaties. We find, for example, that in many bilateral treaties the standard of treatment which is to be accorded by each of the parties to the nationals of the others is that of `fair and equitable' treatment. Everybody appreciates that there is no intrinsic or objective concept of equity applicable in those circumstances, but that we are there dealing with a concept the content of which is closely related to the specific facts of any given case." Which was the point I was making with the example of cross-subsidization.

Members of the Tribunal, if you have no questions of me at this stage, I would propose to turn things over to my colleague, Mr. Appleton, who will deal with 1105 and Chapter Fifteen.

PRESIDENT KEITH: Thank you. Thank you

very much, Mr. Carroll.

MR. APPLETON: Good morning. As my friend Mr. Carroll has set out for you, I'm going to address three arguments this morning for the Tribunal. The first is going to be the relationship of NAFTA Chapter Fifteen and NAFTA Chapter Eleven. The second will be the meaning that this Tribunal should consider with respect to NAFTA Article 1105, and the third will be the cultural industries exemption and Canada's Publication Assistance Program.

Turning to my first argument about the relationship of NAFTA Chapter Fifteen and NAFTA Chapter Eleven, one of the fundamental questions for this Tribunal to consider is how does NAFTA Chapter Fifteen operate in relation to NAFTA Chapter Eleven.

Now, the investor submits that these two chapters work together seamlessly to provide protection to investments and to investors within the North American marketplace.

Canada, however, takes a very different position here. It says that whenever a government measure could deal with a competition issue in any way, it must be cut out from the scope of NAFTA Chapter Eleven.

Now, with respect to Canada--and their arguments, by the way, are set out in the Memorial, paragraphs 1 and 2. I'll make references just so you can keep it in the transcript. But I will advise you when I want to turn to materials today that my friend has asked you to have available.

With respect to NAFTA Chapter Fifteen, UPS has asserted that Canada has failed to adequately supervise its Canada Post monopoly and that this monopoly has engaged in unfair and anticompetitive activities. Canada suggests this Tribunal cannot hear this claim because government measures that are anticompetitive are, in Canada's view, outside of the jurisdiction of a Chapter Eleven Tribunal. And, therefore, it is impossible in Canada's view that the investor's claim can be asserted under

NAFTA Article 1502(3)(a), NAFTA Article 1503(2).

To succeed, therefore, Canada must show that the investor's claim is not possible such that the facts that have been pleaded are not capable of fitting into the requirements of NAFTA Chapter Eleven. We say that this is a very difficult test and that Canada's argument cannot succeed.

Now, NAFTA Article 1116 plainly states that the investor may submit to arbitration a claim that Canada has breached an obligation resulting in damage under three sections: the first, Section A of Chapter Eleven, including breaches of NAFTA Articles 1102 and 1105, as has been expressed in this claim; the second, Article 1502(3) regarding state enterprises; and the third, with respect to Article 1502(3)(a) where the monopoly has acted in a manner inconsistent with the parties' obligations under Section A of Chapter Eleven.

Now, there's no doubt here that the NAFTA parties intended Chapter Eleven to apply to monopolies and state enterprises. We can see that

expressly within the text, and if there is any doubt, we know that Canada's own Statement on Implementation specifically addresses the fact that NAFTA Chapter Eleven would apply to Canada Post. We've set that out specifically in our Rejoinder at paragraph 38, and that's at paragraph 181 of Canada's Statement on Implementation.

So our key interpretive task today is to deal with the meaning, then, of NAFTA Article 1116. Now, NAFTA Article 1116(1)(b) states that for a claim to be brought with respect to the obligations under NAFTA Article 1502(3)(a), that the monopoly must have acted in the manner that breaches Section A of Chapter Eleven.

Now, we know that there is a disagreement between the disputing parties as to how Article 1116 and Article 1502(3)(a) interrelate.

First of all, we would submit to you that it is not necessary to definitively determine the relationship between NAFTA's Eleven and Fifteen today. To satisfy the prima facie requirements

under NAFTA Article 1116--and that's the test that we submit is proper for jurisdiction--this Tribunal doesn't have to make a final determination about this issue. It needs to be satisfied that the investor has made a prima facie claim with respect to Canada Post's breach of the NAFTA Chapter Eleven obligation, or Canada's breach, in essence, of the NAFTA Chapter Eleven obligation, with respect to Canada's failure to supervise Canada Post under NAFTA Articles 1502(3)(a) and 1503(2).

If you come to that conclusion, then it would be proper for this Tribunal to assume jurisdiction and proceed to the next phase of this arbitration.

So, in our view, the key points in dispute that need to be addressed by the Tribunal in this motion on the relationship between Chapter Eleven and Chapter Fifteen can be summarized as follows:

The first, is it possible that the conduct complained of is covered under NAFTA Chapter Eleven? We call this the overlap issue.

The second, can an investor/state claim under NAFTA 1502(3)(a) extent to other obligations under the NAFTA?

Then the third, is it possible that Canada Post was exercising a delegated governmental authority such as that mandated by NAFTA Articles 1502(3)(a) or 1503(2)? Those are the three points.

The first, on the overlap issue, this principal question from our perspective is to determine whether the Tribunal has jurisdiction to arbitrate measures which can be characterized in some way as being anticompetitive. Canada argues that whenever a claim deals with anticompetitive conduct, it could not be arbitrated under the Chapter Eleven process, notwithstanding the fact that the breach could be equally characterized as a breach of national treatment or a breach of treatment in accordance with international law or expropriation, or any other of the panoply of obligations contained in NAFTA Chapter Eleven.

Now, the investor submits that

anticompetitive conduct taken by governments or their organs is not somehow hermetically sealed off from the obligations of NAFTA. Such conduct can breach NAFTA obligations such as those claimed by UPS under NAFTA Articles 1102, national treatment, or 1105, treatment in accordance with international law.

Now, we seem to have agreed basically with Canada on the same facts may apply to more than one NAFTA obligation. There seems to be some agreement there, but it appears that Canada has evaded, in our view, the application of the context that would be appropriate for the jurisdiction motion today, because Canada argues that the NAFTA parties intended that there be no overlap between NAFTA Chapter Fifteen and Chapter Eleven, and that any conduct that can be termed as being anticompetitive could not be within that. And we disagree, and we invite the Tribunal first to review our arguments we've set out in the Counter-Memorial at paragraphs 55 and 64, and the Rejoinder at paragraphs 18 and

20, and so we're not going to repeat them here.

We make reference in our Counter-Memorial, though, at paragraph 61 and 62 to the S.D. Myers and Pope & Talbot Tribunals because in that case on the issue of overlap, or those cases, Canada's argument of overlap was rejected, the same type of argument that they're making here. And we submit that this Tribunal should also reject Canada's argument as well.

Now, Canada suggests that factual overlaps is not relevant because the NAFTA parties designed the NAFTA so that anticompetitive conduct of monopolies would only be covered by Articles 1501 and 1502(3)(d). So that if it's anticompetitive, it could only be covered by one of those two obligations. There is absolutely no textual support for that argument. They have not brought textual support to you. They cannot bring textual support. It does not exist.

Canada relies first on the plain meaning, they claim, of these provisions in the context of

NAFTA as a whole. And then they say that the plain meaning of NAFTA specifically withholds the application of NAFTA Articles 1102 and 1105 with respect to anticompetitive conduct.

Now, to examine the objectives of NAFTA as a whole, as Mr. Carroll has pointed out to you, this Tribunal is directed by NAFTA Article 102 to look to the objectives of the NAFTA. This is a little different from what we normally find in the treaty. Normally in the treaty, we look to the Vienna Convention, but in NAFTA, Article 102 mandates that this Tribunal look to these objectives and to the principles of the NAFTA in coming to its interpretation of the NAFTA. So first we look to 102. Then we look to the other international law, principles such as the Vienna Convention.

NAFTA Chapter Eleven would reflect some of those objectives, such as the promoting conditions of fair competition in the free trade area, or as the Chairman pointed out, the objective to have

better processes to settle international disputes. And these can help us, but in particular, we can look to the objective of promoting conditions of fair competition in the free trade area. We think that's particularly relevant to this question today.

Now, Canada states that the principle--excuse me. Moreover, even a prima facie understanding of the national treatment obligation will reveal that it's fundamentally about promoting fair competition. So not only is this a question in terms of the objectives of the NAFTA, but let's look at the principles. And remember, national treatment is not only an obligation of NAFTA Article 1102, it is an interpretive principle of the NAFTA referred to in NAFTA Article 102. So we have a principle of national treatment which looks to international law and assumes that this is a principle, plus we have a different and very specific articulation of national treatment in Article 1102.

In fact, I believe in my book on NAFTA, I think we found seven different national treatment obligations contained within the NAFTA itself. Other chapters also have other provisions. It's a very common obligation that governments undertake in terms of international commerce and conduct.

Whether foreign investments are treated no less favorably than domestic investments, the NAFTA and the WTO jurisprudence describes the purpose of national treatment as guaranteeing the concept which they call effective equality of competitive opportunity. By including national treatment in NAFTA Chapter Eleven, the drafters clearly intended that there was one way in which fair competition could be promoted under the NAFTA in the context of an investment protection.

We can look at the other principles in 102, for example, most-favored-nation treatment, another interpretive principle which was relied on heavily by the Pope & Talbot Tribunal, especially in their most recent award on damages; also, the

principle of transparency, which is also set out in Article 102. And these are, again, principles and rules that this Tribunal is asked to use to elaborate the objectives of this agreement.

So, for example, I think it's relevant for us just for a moment to take this into context. Well, is this Tribunal alone in looking at these principles of most-favored-nation treatment of transparency? Well, in fact, in the case that we're not going to refer to now--if we are able to proceed to merits, we will certainly have a lot of discussion about it--we know that the European Commission has been looking heavily at these issues with respect to postal regulation in their recent decisions in Deutsche Post, where, in fact, they found in those cases, in particular, that anticompetitive conduct undertaken by the German postal office in use of its monopoly engaging in courier service, they found that it was not in keeping with these types of principles, and they ordered Deutsche Post to repay some 572 million

euros, plus interest, back to the government.

Now, my colleague Mr. Carroll talked about providing a level playing field. The European Commission has dealt with those types of issues. The NAFTA, that's what it conceived of for us to look at in terms of this hearing. But Canada somehow alone in the wilderness says anticompetitive conduct is explicitly excluded from Chapter Eleven.

There is no specific exclusion contained in the NAFTA. If such an exclusion existed, it would have been clearly stated in the NAFTA.

Let's look at the text of the NAFTA as we deal with this. Canada says that Article 1116 says that anticompetitive conduct can be addressed under Chapter Eleven obligations, but that conduct cannot--sorry, excuse me. It says they cannot be addressed under Chapter Eleven. It says that anticompetitive conduct can only be addressed in the state-to-state arbitration. The anticompetitive conduct must not be included whatsoever.

Now, we say when we look specifically at the text of the NAFTA, you'll see that cannot be correct. There are five places where the drafters of the NAFTA could have talked about an exclusion of anticompetitive activities. For example, NAFTA Article 1112 talks about the relationship between NAFTA Chapter Eleven and other chapters of the NAFTA. It says that in the case of an explicit inconsistency, the other NAFTA chapter takes priority over NAFTA Chapter Eleven for that purpose. It doesn't say anything about anticompetitive activity. NAFTA Article 1108, which itemizes specific exemptions and reservations from the NAFTA and which incorporates a variety of annexes--voluminous annexes to the NAFTA, in fact. Nowhere will you find any exclusion of anticompetitive activity from the scope of Chapter Eleven. I would have expected that myself to be in that spot. Not there, no mention, no discussion.

Then we have NAFTA Article 1101, which sets out the scope and the coverage of NAFTA

Chapter Eleven. Not a word. They don't refer to it. No discussion.

When we look in Chapter Fifteen, do we find something there? Nothing.

Then perhaps we look at the general exceptions and exclusions from the NAFTA which are contained in Chapter Twenty-one. So, for example, Article 2102, which deals with national security exemptions, or the exemptions that we have before us dealing with taxation issues or cultural industries, they're all listed there. Nothing about anticompetitive activity.

In our submission, it's clearly because this was not the intent of the drafters of NAFTA. They had many different modalities available to them to be able to deal with this. Then, of course, we can look at specifically Note 43, because Note 43, which is not part of the NAFTA but an annex to the NAFTA, specifically deals with investor/state recourse for Article 1501. And it says explicitly no investor may have recourse to

investor/state arbitration under the investment chapter for any matter arising under this article. Well, that's pretty explicit to me. If they adverted to 1501, did they just get tired by the time they got to 1502? Did they just forget about dealing with it? I mean, this is a particularly absurd argument advanced by Canada.

If something is to be excluded in the treaty, it would be excluded, and this Tribunal, to basically accept Canada's argument, would have to make a gigantic leap of faith that just because Canada says that's the fact, that is the fact. "Ipsi dixit" was the words used by the Tribunal in Pope & Talbot, and we say that that would not be appropriate or correct.

This begs the question that if the NAFTA drafters intended to exclude anticompetitive behavior, why do we see no other notes? Why do we see nothing else in the Statement on Implementation? We see nothing else. Legally and logically, anticompetitive acts are simply a subset

of the types of unfair acts or types of discriminatory acts that could be covered by recourse to NAFTA investor/state arbitration. And since the onus is on Canada to support its argument that they have brought here today, we would think that they would now--having recourse to the Vienna Convention, they might have provide us with perhaps some of the travaux preparatoires, some of the negotiating history to show us that this is how they came to this conclusion. But neither Canada nor any of the NAFTA parties have sought to confirm this proposition or any of the other interpretations of the NAFTA that are before us today by producing the preparatory work of the treaty.

In the Pope & Talbot damage award, the Tribunal concluded that based on the fact that some of the negotiating texts were produced, that it is almost certain that the documents provided are not all that exists." That's at paragraph 41 of the Pope & Talbot damage award.

Similarly, in this phase of the arbitration, if such documents existed to confirm Canada's representation, they should have been produced to this Tribunal, and since these materials are entirely in the possession of the NAFTA parties, we must presume that there is, in fact, no support for Canada's position in the negotiation history as well.

So, in answer to the question for this Tribunal, is it possible that the investor's allegations of anticompetitive conduct are Arbitral Tribunal, our answer is an unequivocable yes. They are certainly arbitrable within this arbitration.

That leads us to our second question. Can an investor state claim, under NAFTA Article 1502(3)(a), extend to other obligations under the NAFTA? We have talked about this in our Counter-Memorial at paragraphs 109 to 117, and in our Rejoinder Memorial at paragraphs 21 to 24.

Now Canada asks this Tribunal to answer this question in the negative because Article 1116

says so. They suggest that Article 1116 establishes the parameters for an investor state claim, and this article amends NAFTA, Article 1502(3)(a), so that an investor state claim can only relate to the monopoly violation of a NAFTA Chapter Eleven, Section A obligation.

Now, during the hearing yesterday, Canada contradicted some of the early arguments about the relationship of Article 1502(3)(a) and 1502(3)(d). In response to some questions posed by Dean Cass and the Chairman, and this is at Pages 25 and 26 of yesterday's transcript, Mr. Rennie addressed his watertight compartment arguments, with respect to NAFTA Articles 1502(3)(a) and (d), and he confirmed that a set of facts could fall, could exist that fall both within (a) and (d) of 1502(3). In other words, you could have facts, which we believe are certainly the case, that could be, at the same time, a violation of 1502(3)(a) and 1502(3)(d).

Now Canada's argument is similar to the previous argument about the relationship of Chapter

Eleven to Chapter Fifteen, in that Chapter Eleven could never address anticompetitive conduct because somehow Articles 1501 or 1502(3)(d) are the only parts of NAFTA that can deal with anticompetitive conduct. However, when we look specifically at Article 1116 and then at Article 1502(3)(a), we see that this restrictive view becomes untenable.

Let's go there. Let's look at NAFTA Article 1116. It states that an investor may submit a claim to arbitration that Canada breached an obligation under Section A of NAFTA Chapter Eleven, and when we look at (1)(b), it talks about a breach of NAFTA Article 1502(3)(a).

Now, when we look at 1502(3)(a), it says that Canada must ensure that its monopoly, Canada Post, must not act inconsistently with Canada's obligations under the whole NAFTA agreements. It uses the word "agreement" whenever such monopoly exercises delegated governmental authority. This applies to Canada's obligations under the NAFTA as a whole.

Now, if we return to the text of NAFTA Article 1116 and put it together with 1502(3)(a), we know that a claim can be entertained by this Tribunal for a breach under 1502(3)(a). Paragraph (1)(b) states the claim can be made where the monopoly has acted in a manner inconsistent with the party's obligations under Section A.

Now Canada has argued that "where," in Article 1116, means only in the instance of. On the face of it, without looking at the context or objects or purpose of the NAFTA, there is some appeal we think to this argument. Canada might be correct, but at best, the use of "where," without qualifiers in the situation, is ambiguous, at best. "Where" is simply the wrong word. It is the word used, but it's the wrong word.

Now Dean Cass addressed this ambiguity in some questions to Mr. Rennie yesterday, at Pages 29 and at 33 of the transcripts, suggesting that the drafting language--he gave some suggestions of other drafting language that might have been more

consistent with Canada's interpretation, but because of this ambiguity, this Tribunal is required to resort to the rules of interpretation.

If one looks at this phrase in the context, and in light of the object and purpose of the NAFTA, as we are asked to do under NAFTA Article 102, the ambiguity of this phrase in their submission falls away.

First, with respect to the plain meaning of the phrase, "where" provides a simple condition that if a claim under NAFTA Article 1502(3)(a) is made, there is a requirement that the conduct at issue must involve a breach of a Chapter Eleven obligation, as well as a breach of a 1502(3)(a) obligation. So, by its own terms, 1502(3)(a) requires there be a breach of some other part of the NAFTA for there to be a breach of this provision. It's impossible to give this article any meaning unless it refers to some type of NAFTA inconsistency, because by its simple terms, you must have a NAFTA inconsistency in order to breach

1502(3)(a) in some way.

The object and purpose of the NAFTA is to promote fair competition to increase substantially investment opportunities must be recognized by this Tribunal, and because monopolies, by definition, distort the marketplace, they have the potential to eliminate fair competition, and certainly decrease investment opportunities.

It is entirely reasonable that the NAFTA drafters intended that when a government monopoly acts inconsistently with Chapter Eleven and contravenes some other provision of the NAFTA interfused with an investment, that such conduct be subject to Chapter Eleven remedies.

Canada's argument with respect to how this Tribunal should interpret the scope of 1502(3)(a) has a completely slavish reliance on the use of the ejusdem generis principle.

Counsel for Canada cites the nonexhaustive example cited in the article to support its argument and sections that cover regulations

essentially of a third party, they said this yesterday in the transcript at Pages 56 and at 58, and this argument done by Mr. Peirce, he returns again and again in response to the Tribunal's questions to where he refers to, in our view, an incorrect view of a list of powers for determining the scope of Article 1502(3)(a).

Now, as we've noted in our Rejoinder, at paragraph 23, and particularly in our Footnote 13, a simple textual example of NAFTA shows that cannabis's argument has to fail. For example, if we look at NAFTA Article 1108(8)(b), and that is dealing with reservations and exceptions to the investment chapter, the NAFTA parties obviously thought the procurement activities of a state enterprise and that subsidies or grants should also be accepted. They should be exempted completely from the NAFTA's scope for Chapter Eleven review under Articles 1102, 1103, 1106, and I believe 1107.

These examples are inconsistent with

Canada's limited list argument regarding NAFTA 1502(3)(a). In response to a question from the Chairman, Mr. Peirce agreed that governments carry out more activities than those set out in 1502(3)(a). That's at Page 64 of the transcript.

I'd be happy to take your question now.

ARBITRATOR CASS: Let me ask you this.

In looking at 1116, and the three headings that are set out for investor state claims, the first one sets out together a violation of Section A of Article 11 and a violation of 1503(2), and then separately in (b), addresses a violation of 1502(3)(a) and adds language there not contained above.

It seems, on the face, that the extra language, the "where there's a violation of Chapter Eleven" language, is added in (b) because it's unnecessary in (a), that you have obviously, if there's a violation of Section A, there's a violation of Section A, 1502(3)(2), by its terms, requires a violation of Section A. Why would it

not be a natural reading to see (b) as intended to be limited to cases where there's a violation of Section A just as in the language above?

MR. APPLETON: Let me turn to my next slide because I compare and contrast 1502(3) and 1502(3)(a), and I can answer your question right away.

ARBITRATOR CASS: Thank you.

MR. APPLETON: Please turn to the next slide, and let's address it right now, and I'll come back to my next piece.

There is a difference between 1502(3)(a) and 1503(2). Of course, it would have been nice if the drafters of NAFTA would have used different numbering so that we aren't all tongue-tied and twisted on this, but I think they give just weight for this case and for us all to have fun.

Now what is the idea, what is the principle behind these two different obligations? Because I think that's exactly the question that Dean Cass is asking about. Why would the drafters

use different language in 1116(1)(a) and (b)? Why would we add those extra words?

Well, first of all, I have to suggest, Dean Cass, that my friends from Canada yesterday left a suggestion, which I believe is still here, that somehow 1503(2) suggests you have to have a violation of Section A of Chapter Eleven, and that's not what the words say. I'm just going to ask you to look at perhaps the monitor. The words are that you have to have a violation of Chapter Eleven in its entirety or Chapter Fourteen.

So 1503(2) says that you can have a violation of Section A, Section (b) or Section (c) of Chapter Eleven or anything in Chapter Fourteen. So it is not the same as the suggestion that Canada is putting upon us here that it must only be Section A of Chapter Eleven. They said that yesterday. That is not correct, and certainly with respect to 1502(3)(a), we're going to suggest that's not correct.

You have to make a decision here. On this

relationship, does 1502(3)(a), do you mean with monopolies and state enterprises, did the framers of the NAFTA intend it to cover more behavior or less behavior than state enterprises alone. It is impossible for you to have an interpretation that says that 1502(3)(a) and 1503(2) mean the same thing because 1503(2) is absolutely clear. It says Chapter Eleven and Chapter Fourteen.

So you are left with a choice. You can say there can be less protection for monopolies than state enterprises or you can decide that there should be more protection for monopolies than state enterprises, but you can't decide it's the same.

PRESIDENT KEITH: If I could ask a supplementary on that, Mr. Appleton, you suggested there could be breaches of Parts (b) and (c) of Chapter Eleven in the context of 1503(2). I'm just having some difficulty in thinking about that. You know this material much better than I, but--

MR. APPLETON: I would be happy to give you a suggestion. I thought perhaps you might ask.

We'll take it for granted that you can think of violations of the many financial service issues of Chapter Fourteen.

PRESIDENT KEITH: Yes, I wasn't look at Fourteen for the moment.

MR. APPLETON: For example, the Pope & Talbot Tribunal had suggested that during the course of the conduct of the Pope & Talbot Tribunal hearing, that Canada had violated the types of procedural rules that are set out in Part (b) of NAFTA Chapter Eleven. That would, if it was dealing with a standard enterprise or government monopoly or actually, in this case, state enterprise, be the type of thing that would be a violation of that type of provision. In other words, most violations will be Section A violations.

However, 1503(2), if they are engaged in some type of process that goes from, for example, NAFTA Articles 1115 probably all of the way up to 1135, I would think, or 1137, whatever that Section

(b), if they engage in bad conduct, bad faith, in some other way don't follow those rules, this provides more. The fact is it just says more. If they had intended Section A, they would have said it.

PRESIDENT KEITH: That might be so, but then 1503(2) has the further phrase, doesn't it, "wherever such enterprises exercises" and so on, and that doesn't seem to be apt to the Section (b) process points that you've just referred to.

MR. APPLETON: It's most unlikely, but not impossible. I mean, it seems to me that the real issue is how Canada wants to organize. But what we're looking at is the wording. There is no question that Chapter Eleven is not the extent of the coverage under 1503(2). There is no question that Chapter Fourteen is clearly there, and they've added more.

It seems to me, though, that if it would just have been restricted to Section A, they would have said that. And, in fact, in 1116(1)(b), they

do refer to Section A, and we would suggest that it's because in order to bring a claim before a NAFTA Tribunal, you have to have an issue that is somehow related to the investment chapter, the investor state process under Section A.

But once you have that Tribunal together, once we start in that process, you are entitled to bring before this Tribunal, once it's convened, other questions that relate to 1502(3)(a), and 1502(3)(a) says specifically the entire NAFTA Agreement, and there's a policy reason here. And that is that the greatest trade and investment-distorting effects can occur from governmental monopolies.

In other words, there's a spectrum--private actor, state enterprise, governmental monopoly--and that you can have in a trade and investment regime that's created for the objectives we've talked about many times already, the fact is you can get greater distortions or the greatest distortions caused by monopolies.

So you have to prefer one interpretation over an another. Either you're going to have to say that 1502(3)(a) gives less protection to a monopoly and state enterprise, because it certainly wouldn't cover, if you give it less, Chapter Fourteen, for example. So either it has to have less or it has to have more, but it can't be, as Canada suggested, the same.

PRESIDENT KEITH: Could I just add a thought?

MR. APPLETON: Sure.

PRESIDENT KEITH: Obviously, 1503(2) is narrower than 1502(3)(a) in the context of a state-versus-state process; isn't that so? And at that point, just picking up the point you were making, monopolies, whether private or public, are subject to greater constraint and subject to greater discipline, indirectly anyway, through the dispute settlement process at the intergovernmental level?

MR. APPLETON: That is correct.

PRESIDENT KEITH: So there is a sense of

contradiction in this, I suppose, because the Canadian position is that at the point that it's the investor complaining, then the monopoly, as compared, would be nonmonopolistic state enterprises subject to less discipline through the process.

MR. APPLETON: That is correct, and we would suggest that that would be, in fact, inconsistent with the Objective E that you pointed out earlier today; that if you're going to have effective dispute resolution and you have a process that permits investors to bring dispute resolution, that the normal reading that would be purposive here would suggest that that would be covered.

Now that would be different if there was an express exclusion, but we don't see that. What we see is can you meet those requirements set out in 1116(1)(b)? And in this case we clearly have set out breaches of NAFTA Article 1105, dealing with the treatment in accordance with international law, which I will turn to later on in my

presentation, in NAFTA national treatment in 1102, those clearly are there, plus we have an allegation about NAFTA Article 1502(3)(a), and when we look at 1502(3)(a), as we see here on the screen, it uses the word "agreements."

Our contention would be that when they were drafting the NAFTA, if they had meant something different, they clearly would have addressed it. It clearly would have been there. It's not like we're looking at a constitutional arrangement that's 100 or 200 years old. We're talking about an arrangement done together, comprehensively, at the same time.

Do you have any other questions on this point?

ARBITRATOR CASS: Yes. In looking at the argument you are making about the purpose of the NAFTA and the harm that can be done by the activity of state monopolies, it would seem that the drafters of the NAFTA might have included under 116 an arbitration provision for 1502(3) that is not

limited to Section A.

Can you help me with that?

MR. APPLETON: It's true that as the drafters of constitutional types of documents, you can do many things when you're drafting. The fact is, is that Section A, it's clearly within the thought and within the intention of the drafters that in order for us to meet here today, for example, we would have to have something that would be under Section A, but it doesn't say that each and every allegation, that each and every measure has to be also under Section A, and so our suggestion would be, if they had intended that, and there's lots of precision in the NAFTA, they would have said that.

So we understand that in order to convene this Tribunal, there must be allegations dealing with the standard repertoire of investor state arbitration under NAFTA, which is Section A. That's the standard. This is the first case under Chapter Fifteen. There have been many other NAFTA

cases. It is not a usual situation.

However, to suggest that every single claim must be related under Section A would make it easier for governments to evade their obligation, and their obligation under Chapter Fifteen is to supervise the activities of the monopoly. That's the key obligation of Chapter 1502(3)(a) or 1503(2), is to adequately supervise or regulate the conduct of these entities, whether it be state enterprise or monopolies, and so it would give much less meaning to the NAFTA, to the NAFTA investor state process, and certainly in our submission to 1502(3)(a) versus 1503(2).

ARBITRATOR CASS: Certainly, Mr. Appleton, you have suggested that if the NAFTA drafters wanted to be specific about exemptions, they could have been. By the same token, if they wanted to make paramount the enforcement of the various obligations under 1502(3), they could have more clearly incorporated those into the provisions for investor state disputes.

I wonder if you could help me in this regard. Would your argument today be any different if 1502(3)(d) had been specifically included as an item for arbitration, other than also having to find a violation of 1502(3)(a)? I understand that you have to find that in any case, but does that allow you then to bring into the arbitration before the Tribunal a claim under 1502(3)(d) that does not rest on a violation, a coincident violation, of 11(a)? I don't know if that's clear at all.

MR. APPLETON: I'm not sure. So what I'm going to give you an answer, but I'm going to reserve my right to review the transcript and come back on it, but I think I may have an answer to your conundrum. So perhaps I could posit it, and you can tell me if this may assist your thinking on this point, and if it doesn't, we'll come right back there.

Article 1112 of NAFTA talks about the relationship between Chapter Eleven and other chapters. Specifically, and it says specifically,

in the case of an inconsistency between Chapter Eleven, and Chapter Fifteen in this case, any other part of NAFTA, so Chapter 15 would be covered, the other chapter, other than Chapter Eleven, takes priority.

So Canada, in order to get to this conclusion that Section A must change the wording of 1502(3)(a), basically is saying that somehow it is inconsistent. In other words, 1116(1)(b) reads down the wording of 1502(3)(a) for this purpose. We would suggest that if there was to be an inconsistency between the words, and clearly we think that you can't read 1502(3)(a) to mean agreement and at the same time read 1116(1)(b) to just mean Section A, that there is an inconsistency there, Article 1112 assists us by saying that to the extent of an inconsistency, you are to prefer Chapter Fifteen over Chapter Eleven, but only to the extent of an inconsistency.

So if we have, in this situation, 1116 saying Section A and 1502(3)(a) saying agreement,

to the extent of that inconsistency, the fact of the matter is Chapter Fifteen's wording prevails.

ARBITRATOR CASS: Let me see if I can ask this a little more clearly. Canada Post, let's assume, preforms two acts. One act arguably violates national treatment and a claim is brought under 116, claiming a violation of 1502(3)(a) and 1102.

The second act is an act of cross-subsidization that has an impact on the investor, but has a similar impact on domestic firms in Canada, so it does not appear to violate national treatment.

Can you bring those two claims together because one act allows the invocation of jurisdiction and the other violates 1502(3)(d)?

MR. APPLETON: Our answer is, yes, that the act dealing with 1102, the national treatment violation, creates the authority to convene this Tribunal, and that when this Tribunal is convened, it has plenary jurisdiction to be able to deal with

issues under 1502(3)(a) or 1503(2) only with respect to Chapters Eleven or Fourteen.

PRESIDENT KEITH: Is this a convenient moment to break? I think you were a little while back about to go into 1105.

MR. APPLETON: I think this would be a very good time for us.

PRESIDENT KEITH: And it might give you time to reconsider the issues that have just been raised.

Well, thank you. Fifteen minutes.

[Recess.]

PRESIDENT KEITH: If we could resume. Yes, Mr. Appleton?

MR. APPLETON: Thank you, Mr. Chairman. Now where we left off, well, actually, I would first of all ask if the Tribunal has any questions, I would like to, what I would propose to do is address one last issue with respect to this point. It is what I call the "floodgates argument," and then we will turn to the question of delegated

governmental authority just to give you an idea of where we are going.

So if you have some further questions now, if this would be an opportune time, or when I finish about the floodgates, I expect that to take not very long.

[No response.]

MR. APPLETON: Very good. Well, now, Canada has argued that if NAFTA Article 1116 claims were permitted for 1502(3)(a) breaches, with respect to the entire agreement, this would open the floodgates to NAFTA investor state claims. And this argument, in our view, simply ignores the multitude of requirements that must be met with regard to the making of an investor state claim. I believe earlier today the Tribunal members had averted some of the factors that would have to be also present to be able to bring a claim with respect to 1502(3)(a) or 1503(2).

The fact that 1502(3)(a) requires there be an exercise of delegated governmental authority is

an important limiting factor. Another important factor, for example, if we look at 1502(3)(d), would be that a government monopoly that engages in anticompetitive practices must adversely affect an investment of an investor of another party.

So there are very specific requirements that would limit the types of claims to those specifically set out by the requirements of, for example, Article 1502(3). Now we've already talked about the fact that Canada's view is that only 1501 and 1502(3)(d) can deal with anticompetitive activities. We obviously do not agree with that view. I'm not going to take us back there. We've already discussed that.

So our question, then, on the jurisdictional test for Chapter Eleven claims is can an investor state claim under 1502(3)(a) extend to other obligations under the NAFTA? In our view, Chapter Eleven is the gate or 1116 tells you that you can make a claim if you look to Chapter Eleven, but 1502(3)(a) remains unamended in this context,

and therefore the answer is yes. 1502(3)(a) takes us to a situation we look to consistency with a NAFTA agreement, and that is, in our view, the proper interpretation that this Tribunal should give to that interpretative conundrum.

Now I would like to turn to the issue of delegated governmental authority. The question is has Canada Post exercised delegated governmental authority so that its claim meets the requirements of NAFTA Article 1502(3)(a) or 1503(2). Now, as we recall, Article 1502(3)(a) only applies wherever such a monopoly exercises any regulatory administrative or governmental authority.

Now, in our view, Canada has tried to give an excessively narrow meaning to the phrase "governmental authority." We believe that Canada has not advanced an argument based on international case law or Tribunal decisions or settled meaning. Canada simply states that Canada has not delegated any governmental authority to Canada Post.

Firstly, Canada has argued in its own oral

submissions that there is no delegation of authority of any kind with respect to the Canada Post postal monopoly, and we will see that at the transcripts of Page 69, but an examination of the Canada Post Act will clearly show that this is, in fact, completely incorrect, and I will take you through that shortly, and that is set out at Tab 23 of the materials appended to the investor's Counter-Memorial.

Canada has stated that at the jurisdictional stage that the investor must establish that under the two relevant Chapter Fifteen obligations that Canada has been acting in a manner inconsistent with the party's obligations when such enterprise exercises any regulatory administrative or other governmental authority. This is a task in our submission that this Tribunal can only make based on assessment of the facts and the presentation of evidence.

We believe that we can show you, prima facie, why and where there are delegations of

authority, but all of the delegations of authority are not in a statute, and in fact we've already averted, within the pleading, to at least one type of document, the Postal Imports Agreement, that has clearly delegated governmental type of authority from the Government of Canada to Canada Post.

Now Mr. Fortier, yesterday, questioned Mr. Rennie, and this is at Pages 187 to 190 of the transcript, about whether the Tribunal could accept the investor's pleading on its face with respect to the fact of Canada's delegation of authority to Canada Post. This was, in his words, an affirmation. Mr. Fortier pointed out that Canada could have asked for particulars and did not. Mr. Rennie admitted that Canada could have asked for particulars. He admitted that they did not.

In essence, and our submission, Mr. Rennie has acknowledged that the investor's pleadings are, in fact, adequate, with respect to delegated authority and should be addressed at merits. We believe that this question, in essence, has been

dispensed with because of Canada's admission here.

For the purposes of this motion, on a prima facie basis, Canada Post exercises delegated governmental authority within the meaning of Article 1502(3)(a). This is simply, in our view, all that's required for this Tribunal to be seized of jurisdiction at this time.

Now, if the Tribunal wishes to delve more into the substance of the issue, then we have two submissions to make. The first is through the Canada Post Act, Canada has, in fact, delegated governmental authority to Canada Post, and the second, again, looking at the objects and purpose of the NAFTA, it's clear that the NAFTA established greater protection for citizens against monopolies under NAFTA than for state enterprises.

Now we've averted to the second argument earlier this morning, so I'm just going to make reference to it. We don't have to go back through that, but let's look specifically, with some of the time we have remaining, at the Canada Post Act,

which is set out at Tab 23 of your materials.

Now, in our counter memorial, the investor has set out that the fact that postal services are the type of activity that is inherently governmental. Until 1981, Canada Post was a department of the Government of Canada. And when Canada Post was corporatized, it was not privatized.

Canada Post was a government department, and in many ways, in our submission, it is still being treated as a department of the government, and you can look again at this Postal Import Agreement, whereby Canada Post inspects its own courier imports rather than have the function done by Canada Customs--now the Canada Customs and Revenue Agency.

We submit that this is a type of example of an exercised governmental authority that has been delegated. Now we have set out at paragraph, and Footnote 8 of our Article 1128 Reply, that's our reply to the submission of the Government of

Mexico and of the United States, specific examples of authority delegated to Canada Post by the Government of Canada, but I think I'll take you through some of that with the act at Tab 23.

I think that might be easier because we submit that there is a very close connection between the Government of Canada and Canada Post in other ways. For example, if we looked at the act, under the terms of Section 27(4) of the Canada Post Act, only the Government of Canada can own any voting shares of the corporation.

If you look at Section 8 or 9, the entire Board of Directors, the Chairman and the President, are appointed by the Government of Canada and serve at their pleasure.

And at Section 23 of the act, Canada Post is an agent of Her Majesty in right of Canada.

Now, of course, Canada Post has an exclusive letter mail monopoly, and this monopoly can be set by regulations established by Canada Post and confirmed by the Canadian Cabinet. This

provision for confirmation by the Canadian Cabinet is based in Section 20 of the act, and it's most unusual because the Cabinet of Canada is deemed, technically, the government and counsel, under Canadian parlance, is deemed to have approved every regulation proposed by Canada Post, unless a Minister objects to the regulation within 60 days of its submission to the Cabinet--sort of like a negative option billing plan; that you propose a regulation, it goes to the Cabinet agenda, and if no one says anything, it's confirmed.

Now let's look at the powers under Section 5 of Canada Post. I think that that's worthwhile to consider. If we look at, under Section 5, if we looked at (1)(d), we see that the objects of the corporation are, if we turn to (b), to manufacture and provide such products and to provide such services as are, in the opinion of the corporation, necessary or incidental to the Postal Service provided by the corporation.

So we can see already that Canada Post is

authorized by the Parliament of Canada to go beyond the letter mail monopoly.

Section 5(2) states, "While maintaining basic customary Postal Service, the corporation, in carrying out its objects, shall have regard to, A, the desirability of improving and extending its products and services in the light of developments in the field of communications, and if we look down to E, the need to maintain a corporate identity program approved by the governor and counsel that reflects the rule of the corporation as an institution of the Government of Canada.

This is looking very governmental to us. Canada has conveyed authority upon Canada Post to deliver letter mail exclusively, has given it broader powers to do anything necessary or incidental to Postal Services, and these delegated powers are even further evident under Section 19(1) of the act, where Canada Post has been authorized again to prescribe or regulate its own business operations; as well as, and if we look specifically

in that, R, deal with any matter that any provision of the Canada Post Corporation Act contemplates as being the subject of regulations. We've already seen that. It's exceedingly broad; or, S, provide for the operation of any service or systems established pursuant to the Canada Post Corporation Act.

So the act itself confirms that employees of Canada Post, whether they are engaged in letter mail, postal delivery, courier delivery, electronic commerce or any other act, are considered to be engaged in governmental service. We can see that in Section 13 for the act. It says it specifically, and it refers to Section 9 of the Aeronautics Act, and I, in fact, looked up Section 9 of the Aeronautics Act which is incorporated into this document, and I make reference to, and it says the following:

"The governor and counsel may make regulations establishing the compensation to be paid and the persons to whom and the manner in

which such compensation shall be payable for the death or injury of any person employed in the public service of Canada or employed under the direction of any department of a public service of Canada that results directly from a flight." This is aeronautics, dealing with injury.

ARBITRATOR CASS: Mr. Appleton, I take the burden of these remarks to be establishing that this is not only a monopoly, but also a state enterprise. Can you help me see where we get not just that it's a state enterprise, but that it is exercising governmental authority which is an additional requirement not only under 1502(3)(a), but also under 1503(2).

MR. APPLETON: I take it by your question you specifically want it, you're not averting the question of monopoly--we take that as a given--it's a question of the governmental authority.

ARBITRATOR CASS: That's correct, which seems to be the issue that Canada is pressing, and it would not be sufficient to say that this is a

corporation that is a governmental entity.

MR. APPLETON: That's correct. Our submission is that Canada Post is more than merely an investment owned by the Government of Canada. Canada Post is undertaking and provides essentially, and fundamentally, governmental functions with regard to its mail delivery. Its letter mail monopoly is essentially and fundamentally a governmental function, and our case is about the abuse of the letter mail monopoly infrastructure, the funds made available to Canada through the letter mail monopoly, the use of the sovereign debt of Canada to deal with a letter mail monopoly, the fact that Canada Post has red-letter mail boxes that are then used in the nonmonopoly services, but done for the monopoly.

It has infrastructure, transportation systems, distribution systems, postal sorting systems that are used for the courier business, not the letter mail monopoly, and that these are being used improperly. So that is the abuse of the

governmental monopoly in the nonmonopoly area, and that is why, we submit, that this is within the purview of this Tribunal.

ARBITRATOR CASS: Your argument, then, is that anything Canada Post does is an exercise of government authority?

MR. APPLETON: No. Anything Canada Post does with respect to the letter mail monopoly and the infrastructure that is pertinent to that is part of the monopoly service covered by 1502(3)(a) and delegated. However, it is quite possible that Canada Post could have a separate division that is entirely separated from the governmental monopoly, that is entirely separated from the letter mail operations, and then it's a question of evidence and fact to see whether or not it would be part of that governmental function.

Part of the issue here, Dean Cass, is that Canada Post has been delegated so much authority under its act by the Government of Canada, so that's one issue; in addition, we believe that

there are additional pieces of evidence that are to be obtained that will show other extents of the delegation that are not available to us at this time, but we've already seen that there are some of them--for example, this Postal Imports Agreement. So, again, this is a factual determination, rather than one that can be just asserted at this time.

But more fundamentally than all of that, take the issue of Purolator Courier. Purolator Courier is a subsidiary of Canada Post. It is completely separate and owned by Canada Post, but it is a question of fact as to whether or not Purolator Courier is covered by 1502(3)(a) or not. And the reason in that respect--we don't know. It looks like Purolator Courier may use aircraft of Canada Post. It may use some other facilities, or the debt ability of Canada Post, which gives it the sovereign rate, so capitalization's an important issue, especially with current markets. But we don't know for sure. And, therefore, that's a factual determination that we need to be able to

deal with. But it's not something we can determine at the point of jurisdiction.

But, clearly, it's the type of issue that this Tribunal should have jurisdiction to be able to determine and which we should be entitled to be able to seek materials from our friends opposite to be able to canvass.

So that's our position on that matter. Does that clarify that for you?

PRESIDENT KEITH: If I could just ask a supplementary, Mr. Appleton, the argument that you've just made would be just as strong, wouldn't it, in your view, if Canada Post had been privatized and otherwise all the factors were still the same? That is, so far as 1502 is concerned. 1503, of course, would not be relevant, but 1502 would continue to be relevant if it had the same sort of statute and the same sort of power.

MR. APPLETON: If it had the same statute and the same powers, then it would be the same, absolutely.

PRESIDENT KEITH: So the point here is the monopoly plus the exercise of governmental power which could be in the hands of a private monopoly, as 1502 contemplates, doesn't it?

MR. APPLETON: That's correct.

PRESIDENT KEITH: Thank you.

ARBITRATOR FORTIER: Mr. Appleton, having listened to your argument on this point, and following up on some of the questions of my colleagues, it seems to me that your argument goes as far as this: that any action by Canada Post, any activity by Canada Post is the direct result of delegated governmental authority. Am I correct?

MR. APPLETON: Because of the words, in our view, of the Canada Post Act and the other materials we've seen, so that's possible. But let's use a different example.

If it wasn't Canada Post, if it was another governmental monopoly that did not have as broad an authorization to engage in activities as Canada Post, then it could be answered differently.

It's a factual--

ARBITRATOR FORTIER: Well, let's stay with Canada Post. Is your answer to my question yes?

MR. APPLETON: Yes, it is.

ARBITRATOR FORTIER: Thank you.

MR. APPLETON: I'd like to turn to some comments made by Mr. Peirce yesterday where he spoke about the limits to governmental authority-- governmental functions in the context of delegated governmental authority, and he cited in particular a case. This was a case brought to this Tribunal, I believe just yesterday, and it's the appellate body decision in the WTO Milk case.

Now, he used that case to support the proposition that delegated governmental authority must be construed narrowly by this Tribunal. That's at pages 62 and 63 of yesterday's transcripts.

Now, we have a copy of that case. We've now read it. And our view is that a close reading of the appellate body's decision in that case

supports UPS's arguments, and certainly not Canada's arguments, with respect to the issue of delegated governmental authority and the issue of state responsibility.

We can give you a copy of this case, if you would like to have it, or I'm going to refer specifically to a paragraph, but it's not in the materials provided by Canada. They gave you a specific cite and not the entire matter. But we have that. But I'm going to refer specifically to paragraph 99 and 100.

ARBITRATOR FORTIER: Do you have an extra copy?

MR. APPLETON: Yes. We'll give a copy first to Canada, to make sure that they're happy with it, and we'll--

MS. TABET: Actually, I understand that you've cited that case in your material.

MR. APPLETON: Oh, we have cited the case. The issue isn't citing the case--

MS. TABET: So I hope you have read it.

MR. APPLETON: But it's a question of we've reviewed specifically the points raised yesterday. But we cited--Ms. Tabet, we cited the dispute settlement panel report, and you cited yesterday the appellate body, and they're different cases, or they're different levels. So when we filed our material, I believe that decision wasn't out. It was? Or we didn't have to worry about it. But now that we have the opportunity to worry about it, I would like to have us look at paragraphs 98 to 100, and I'd like to quote specifically from paragraph 99.

At paragraph 99, the Tribunal states, "As regards the source of the Provincial Milk Marketing Board's powers, it is clear that, in the words of the panel, they operate within a legal framework set up by federal and provincial legislation. Furthermore, the Provincial Board's powers and functions may only be modified by governments. In these circumstances, it is clear, as the panel said, that these boards act under the explicit

authority delegated to them by either the federal or provincial governments. Indeed, we are of the view that Canada accepts that Provincial Milk Marketing Board's act on the basis of delegated powers vested in them by federal and provincial governments."

Then the Tribunal goes over to paragraph 100, where they dismiss Canada's restrictive approach to governmental authority by stating the following, the next page: "The panel did not, however, rely solely on the fact of the delegation of powers. The panel examined the functions of Provincial Milk Marketing Boards and concluded that their powers enabled them, again, in the words of the panel, to regulate a particular sector of the economy, namely, the dairy sector. Although the Provincial Boards enjoy a high degree of discretion in the exercise of their powers, governments retain ultimate control over them."

The panel was, therefore, correct to conclude that Provincial Milk Marketing Boards are

government agencies. So we would submit that even relying upon Canada's own authority--in this case the WTO appellate body decision in Milk--they concluded that, despite the fact that Milk Marketing Boards were engaged in this activity of selling milk, they, nevertheless, attracted state responsibility and exercised governmental authority that was delegated to them. So the commercial test isn't necessarily the key issue here. And so, too, here UPS suggests that Canada Post, a Crown corporation, specifically designated as an agent and institution of the government, has a high degree of discretion but ultimate governmental control. It has been delegated governmental authority. It has used that delegated governmental authority to harm or engage in conduct that has been harmful to the investor, contrary to the terms of Chapters Fifteen and Chapters Eleven as permitted by this Tribunal in your ruling to be able to be presented here.

Now, I'd like to look at this concept of

governmental authority with respect to the NAFTA, because NAFTA Article 201, which sets out general definitions of the NAFTA, it gives a definition of the term "measure." Measure includes any law, regulation, procedure, requirement, or practice.

In our submission, this definition of "measure," which is a critical part of defining what NAFTA Chapter Eleven applies to and is used repeatedly throughout the NAFTA itself and was canvassed extensively by the Ethyl Tribunal in its jurisdictional award, in our view this term "measure" is used to describe what governments do.

We submit that the definition of "measure" helps this Tribunal to understand what is meant by the term "regulatory, administrative, or other governmental authority" that's used in Article 1502(3)(a). We submit that Canada has been restrictively applying an interpretation that narrows the scope of what constitutes delegated governmental authority, and this cannot be reconciled with the term "measure" in NAFTA Article

201, which broadly defines the types of acts and actions and activities which are done by governments.

And if Canada is correct in its narrow interpretation, it seems somewhat absurd that NAFTA Chapter Eleven contemplates a right of action respecting a governmental measure without any express limitation, but yet Fifteen seems to have more of a limitation about the nature of what governments do. And it seems to us that that's an area where there should be consistency.

Now, without having the benefit of any travaux preparatoires of the NAFTA for us to be able to illustrate the intention of the drafters, it seems reasonable for us to conclude that the drafters did not intend to limit the applicability of the term "measures" in Chapter Eleven, and we also would suggest that it seems to us that there should be a consistent view as to what the types of authorities described here would mean. And in our view, the authorities that are described here,

whether they're regulatory, administrative, or governmental, deal with the entire panoply of governmental types of actions that between them they're covering pretty well everything that governments do.

ARBITRATOR CASS: Mr. Appleton, perhaps you could help me here. If the intention in Chapter Fifteen was to embrace any conduct that could come within the meaning of "measure," why the drafters chose to speak in terms of regulatory, administrative, or other government authority instead of using the term "measure"? I mean, it seems on its face that just because a government practice could be a measure does not mean that all practices of all entities constitute the exercise of government authority.

MR. APPLETON: The first point I'd like to make in response to your question is that the delegation is from a government to the monopoly. So when we're looking at that delegation, that would, in fact, have to be a measure of some form

as covered by the NAFTA in any event. In other words, the definition of "measure" would have to cover that type of conferral any way we'd be looking at that.

So then the question is: Why did they use a different term in Chapter Fifteen than they used in other parts of the NAFTA? Would that be correct?

ARBITRATOR CASS: Yes.

MR. APPLETON: It is possible, for example, by looking at the Ethyl decision to see that in the Ethyl case Canada argued that proposed measures were not measures. In other words, policies or practices that had not been engaged, for example, would not be a measure as defined in Article 201. That's one type of difference between the types of acts that governments can do. They can send a memo saying we're going to do this. That could be in itself conferral of authority, but yet it might not because it's draft or hasn't been dealt with yet. And given the fact that we have

this proposal here that Canada Post has to go to the cabinet, the 68 period, they might be acting on that type of conferral of authority, but it might not be a measure yet. That's one possibility.

It also could just be inconsistent drafting. That could be another possibility. But it seems that if you're asked what does the authority of government mean, we have a good example in the NAFTA to tell us what those functions, what those jobs of government are considered by NAFTA. And so it would have been better if there had been a definition of governmental authority, in our view. It would have been good to have it in Chapter Fifteen in its definitions. It would have been good to have it in Article 201. But just the absence of that definition doesn't mean that we can't look to what the NAFTA tells us what governments are already doing, and it's concluding that that is part of the authority of governments. It's a question of consistency in interpreting the NAFTA. That's

really what we're submitting.

ARBITRATOR CASS: It looks to me as if the term "measure" to describe what governments do is cast to be a broad enough term to cover all of what governments do. But in Chapter Fifteen, when the limitation is inserted that we are dealing only with situations where the monopoly or state enterprise is exercising regulatory, administrative, or other government authority, that seems to be a term of limitation that covers only certain activities of monopolies or state enterprises, and it doesn't look on its face to be intended to be as broad as the term "measure."

Perhaps you could help me in seeing what I'm missing here.

MR. APPLETON: It's not a question of what you're missing, Dean Cass. It's a question of trying to find a consistency in the interpretation of the NAFTA.

There is no other guidance for this Tribunal to be able to reply upon. There's not

interpretive guidance other than the objectives and purpose of the NAFTA. That would seem to suggest that when we're looking at the types of issues that could be dealt with by dispute settlement that would be brought here, but other than that, we have no other guidepost to assist us.

What we do know is that we have indications with respect to this case that there look like there are delegations of authority, in our view. It looks like the type of issue but we need not prove that issue today.

The question is: Do you and your colleagues believe that there is a prima facie ability of this Tribunal--could we make that type of claim? And if we could be able to prove it at the merits phase, then we would be entitled to have jurisdiction conferred, and we'd be able to proceed. But it could very well be an issue of proof. And the issues here as to what, in fact, the types of authority, what, in fact, has been dealt with, could very well be something that's

going to have to be dealt with by way of evidence.

There's nothing else for us to go on. I appreciate the difficulty and the difficult task that is left with this Tribunal. But we would submit that this, again, is something that we can deal with at the merits phase rather than having to deal with definitively at the jurisdictional phase.

ARBITRATOR CASS: Thank you.

MR. APPLETON: So I'm going to conclude on this issue by saying that, first, we need not determine all the questions here, that this is about prima facie jurisdiction, have we been able to establish that there could be facts that could be dealt with, and there could very well be evidence here, and as my friend Mr. Carroll pointed out, this would be best handled, in our view, at the merits.

Second, it's our submission that Canada Post has, in fact, received delegated governmental authority, that they exercised governmental authority in the monopoly and in the non-monopoly

sectors, and that the legal and factual relationship between the Government of Canada and Canada Post does not support Canada's contention that Canada Post does not exercise delegated governmental authority.

Third, NAFTA Articles 1502 and 1503 must mean that delegated governmental authority needs to be interpreted broadly, that the objectives and the purposes of the NAFTA as a trade and investment protection or promotion treaty do not support Canada's restrictive characterization of this phrase "delegated governmental authority." And, on the contrary, Canada's characterization would frustrate rather than to promote these objectives.

And, fourth, this issue of measures, that the meaning of "governmental authority" is akin to the types of measures described in the NAFTA, and we think that can provide some guidance in some way to help the Tribunal to find some interpretive consistency throughout this process. But it's not determinative. It's just a guide to assist the

Tribunal.

Now, I'd like to turn to the issue of NAFTA Article 1105, if the Tribunal does not have any other questions here.

All right. Let's turn then to the issue of NAFTA Article 1105. NAFTA Article 1105 is one of the most economical provisions in the NAFTA. Its one operative line incorporates hundreds of years of international law, and it states, "Investors must be given treatment in accordance with international law, including fair and equitable treatment and full protection and security."

So what is this? What does this mean? Canada has to give an investment of a U.S. investor, in this case, treatment in accordance with international law, and we have examples of fair and equitable treatment and full protection and security. So we know at least that we have to look at least to these types of tests, that whatever else international law might be, we have

to address fair and equitable treatment and full protection and security.

Now, first, the fact of the matter is NAFTA Article 1105, while it's a question of law, the determination of consistency with NAFTA Article 1105 must be considered in the merits phase. If we look at the decisions that have been taken under NAFTA Article 1105, we see that there are factual determinations that this Tribunal must take to see whether or not the conduct complained of meets the international standard that's expressed in 1105 or not. So the fact of the matter is that if you want to deal with fair and equitable treatment, you must look at the facts. You must assess the sufficiency of the facts in the context of the evidential record to determine whether or not it would meet fair and equitable treatment or not.

Now, Mr. Willis yesterday gave some observations regarding the existing jurisprudence with respect to NAFTA Article 1105, and he stated at page 117 of the transcripts that the parties

were faced with radically conflicting interpretations of Article 1105 from Chapter Eleven Tribunals and that clarification was appropriate. He used this to justify the use by the Free Trade Commission of the interpretation.

Now, the investor has set out the various interpretations of the NAFTA Tribunals on Article 1105 at paragraph 73 to 76 of our Counter-Memorial. Of course, this does not deal with the observations of the Pope & Talbot Tribunal in its damage phase, which came out after that. But they're also considerably similar.

All of these decisions are consistent as to the meaning of "treatment in accordance with international law" under NAFTA Article 1105. We see no radically conflicting interpretations here. They all categorically rejected the interpretations advanced by the NAFTA parties that the appropriate threshold test was the egregious test advanced in Neer, this egregious standard, this concept that you have to be tortured or such an outrageous basis

of governmental activity before you can rule whether or not something is fair and equitable or not.

We have outlined in our Counter-Memorial at paragraphs 73 to 76 decisions in the Pope case and the Myers case and the Metalclad case, and they all reject this argument out of hand.

NAFTA Article 1105 makes reference to the customary international law concept of fair and equitable treatment. That's the standard. The investor's claim makes clear that we have made allegations with respect to the fair or equitable treatment of UPS's investments in Canada. So at the jurisdictional phase, we submit that that really is all the test we really need to look at to consider whether this Tribunal has jurisdiction to be able to consider the question before it.

In our submission, all the facts that have been put forward in the claim are capable of constituting a breach of NAFTA Article 1105. These facts, if proven, constitute the types of

activities that would be inconsistent with NAFTA Article 1105 as Canada's international obligations to meet treatment in accordance with international law.

For example, if we look at the independent commission, the Radwanski Commission, that looked at Canada Post's own conduct, the Radwanski report called Canada Post "a vicious competitor whose activities are incompatible with the basic principles of fairness." We set that out at paragraph 1 of our Counter-Memorial. So it's not just us giving you something. We already have something from an independent Canadian Government report telling us that there is a serious issue here.

So if the investor can prove these facts and show that Canada and Canada Post are using its monopoly and non-monopoly businesses in the manner that UPS alleges, then surely it should be possible that such conduct should be characterized as unfair and fitting within the simple test of Article 1105

right on its face before we look anywhere else.

ARBITRATOR CASS: Mr. Appleton, forgive me again, but is your contention that the meaning of the phrase "in accordance with international law, including fair and equitable treatment" would be synonymous with a domestic use of the term "fairness" in evaluating government actions? Would we be in the same position as a court of equity would be in evaluating the fairness of activity, or do we need to advert to a different and perhaps more definite standard?

MR. APPLETON: I think first it's important to make clear that domestic legal systems, municipal law, are not controlling in this Tribunal, but we look to international law. That's what we're told--that's our governing law that we look at, NAFTA and international law. Are the concepts that may be used in any particular domestic court, whether it's a Canadian court, a Mexican court, an American court, dealing with fairness, are they helpful? They might be. But

they aren't dispositive.

There are principles established by NAFTA Tribunals that could be very persuasive here since there is no stare decisis but could be very helpful to this Tribunal in being able to appreciate what NAFTA Article 1105 means. But, for example, when we look at the situation in Pope & Talbot, a regulatory situation dealing with the administration of the export lumber quota for an American company operating in Canada exporting to the United States, they must receive their quota from the Government of Canada.

In that situation, it was clear that the behavior of the government's officials was abusive, unfair, disquieting. They didn't treat Pope & Talbot fairly or equally. And so there are a variety of types of issues that were there.

At the end of the day, the Tribunal said, yes, this was outrageous behavior, but what's outrageous to one may be different to somebody else. It's a determination the Tribunal will need

to make.

A different situation is the Myers case. In the Myers case, Canada's then-Deputy Prime Minister, Minister of the Environment, who's now the Minister of Canadian Heritage, she decided that she was going to block the border for the export of PCB waste from Canada to the United States. She put an emergency environmental ban. The reason for putting the ban on, as became evident to that Tribunal, was that an American company had contracts to be able to reduce the cost of PCB destruction significantly over the Canadian virtual monopoly. It was a de facto monopoly. Their cost for destruction was exceedingly high, and as a result, Canadians that had PCB waste and wanted to destroy them wanted to go to this U.S. producer, actually, an expensive producer in the U.S. side, but much lower than the Canada.

The Tribunal concluded that that type of behavior, to interfere in the business operations of the Myers Company, violated not only national

treatment, because they were American and they were preferring Canadian companies and that was the goal, but also was a violation of 1105. It wasn't fair or equitable.

So these are some examples. I mean, there are others we can talk about if you like, but the type of issues that have been here are considerations that after the presentation of evidence are as this Tribunal left, in the words of the Pope & Talbot damages Tribunal, surprised. That is, is this surprising? Would you be surprised if you were to see this? And if you were surprised at this type of behavior, then you could find that it's a violation of Article 1105.

So the question, though, is: Is the test--is the test, the Neer test--that's really the question. Is it this egregious standard, this torture standard, is that the test that we need to apply? And we don't have to say anything more than what the Pope & Talbot Tribunal said in their damage award, which is no, it is--the international

law, despite what Mr. Willis said yesterday, is not frozen in amber, in the words of the Pope & Talbot Tribunal. There have been tremendous developments in international law, and the fact of the matter is that the mere existence of 1,800 bilateral investment treaties--one of the reasons why we're in this marvelous ICSID Center here today is that they administered disputes under these bilateral investment treaties. They clearly demonstrate that there is a tremendous understanding, appreciation, and recognition of core values, and that includes, amongst other things, treatment in accordance with international law, which is expressed in those agreements.

And so to have an interpretation of NAFTA that in some way is--first of all, we would say that this is not an interpretation of NAFTA. We would say it's amendments. But to have an interpretation of NAFTA that somehow reduces the scope of what treatment in accordance with international law means for NAFTA, but yet to have

this Tribunal have to bring that back in through interpretation using most-favored-nation principles in 102, or, again, perhaps in 1103, if that needed to be pleaded, would be an absurd situation. Either it's the international standard or it's not.

My colleague has asked me to suggest to you that the wording on the Radwanski report is just to give you an indication that such conduct could occur. We're not leading evidence on--I mean, it's in our pleading, of course. But we're not leading evidence at this time. We don't believe that the test for this Tribunal is to conclusively make a determination as to what Article 1105 means. There's significant amounts of evidence that you'll need to consider when you determine whether or not the conduct of the Government of Canada meets the standard or not.

But the test for this Tribunal, again, is on the prima facie basis. Could this type of claim be entertained under Article 1105? And to that we say resoundingly yes.

Now, I'd to advert just very briefly to the Pope & Talbot decision with respect to the Free Trade Commission interpretation. You have the documents. You can see it was a very thoroughly considered opinion by this NAFTA Tribunal. We obviously do not share our friend's view as to the meaning that should be accorded to that decision, which we believe is very persuasive and very helpful for the issues that are before us.

But this Tribunal need not make determinations about what the implication of the Free Trade Commission interpretation of it is with respect to NAFTA Article 1105. It can confirm jurisdiction without having to look at any further, in our view. We obviously feel this is a very live issue. We feel that we would support the views of the Tribunal in Pope & Talbot, but whether we support them or not, the fact of the matter is this need not be determined by this Tribunal at this time.

But should this Tribunal decide that it

wants to engage in that type of exercise, then we would have to suggest that, first of all, is the view of the Tribunal correct? Which, of course, we say it is. The second is, Is Canada's interpretation of NAFTA Article 1105 correct? And in our respectful submission, we say that this is a merits question. But if we were to determine it, the answer would have to be no.

And the concern we have, of course, is that the Free Trade Commission note of interpretation is not in the nature of an interpretation but, clearly, in the nature of an amendment. The words "international law" and "customary international law" do not mean the same thing. Article 38-1 of the statute of the International Court of Justice, which is a part of the charter of the United Nations, gives out what is, in fact, a customary international law definition of what international law means. There are at least four component elements of international law, one of which is customary

international law, but that is not the entire corpus of international law. And to suggest that customary international law is, in fact, the same thing as international law could not be correct. The Pope & Talbot damage award refers to suggestions made before it and other Tribunals that, in fact, there is a negotiating history that hasn't been produced, that the word "customary" was struck from the record and "international law" put in its place.

But even whether you need to look there or not, it's clear under Article 38 that "international law" means more than "customary international law." And you cannot interpret something to give it a different meaning. It can't mean something different, especially if it's clear on its face. And "international law" is a term recognized in international law and set out in the statute of the International Court.

So I think we'll just leave it to say that in our view the reasoning in Pope & Talbot on

damages is persuasive. There's a detailed analysis that may be able to assist the Tribunal if you decide to canvass that issue.

I'd like to turn briefly to the Neer case. Again, this issue of the standard in Neer, this was a case that was decided over 76 years ago. In Pope & Talbot, the Tribunal concluded that the international law has moved on since that time. It is not fixed. It wasn't a good test. I'm sorry to disagree with my friend Mr. Willis. It wasn't a good test at that time. It was rarely relied upon by Tribunals of that time, and the U.S.-Mexican Claims Commission--it was only relied on in two cases. That commission had hundreds of decisions.

So it's not that it was a--in fact, it's had more review, discussion, an activity by NAFTA parties since NAFTA Chapter Eleven has been an issue than ever before, and that's some 76 years later. And it ignores the panoply of international agreements--OECD, WTO, bilateral investment treaties--and we are just not able to have an

interpretation consistent with NAFTA Article 102 that can ignore those types of developments that have occurred since the time shortly after the First World War.

I have referred you to the factual issues involved in the Pope & Talbot case. When we look at the standard described by that Tribunal, the egregious standard, the Pope & Talbot Tribunal said egregious was not the standard. They said at paragraph 65 that the strict formulations that were going to be applied here, even under egregious, could have worked in that case, but the fact of the matter is that that isn't truly what the test needs to be. But even under Canada's restrictive test, it would apply because egregious is in the eye of the beholder.

And so even if you were to apply the egregious test, we'd still have to consider the evidence and, therefore, it would not be dispositive for you to be able to deal with that issue at jurisdiction.

Now, before--I'd like to see if the Tribunal has any questions about Article 1105, because I want to turn to the Publications Assistance Program.

[No response.]

MR. APPLETON: Now, Canada has made some comments with respect to the Publications Assistance Program, and basically what the Tribunal needs to engage on with respect to this issue is fundamentally the question of what reasonable meaning should be given to the exception in Annex 2106 of the NAFTA. In other words, is the cultural industries exemption powerful enough to insulate from review by NAFTA--not just Chapter Eleven but from everything in NAFTA--anything that could ever in any fashion in any way be connected to a cultural industry or, in the words of Annex 2106, any measure adopted or maintained with respect to cultural industries.

If it's a measure adopted or maintained with respect to cultural industries in any way

incidentally in any form, Canada says it must be exempted. We say that that is not correct. We say that you have to look to what is, in fact, going on with this program to see whether or not it truly was adopted or maintained with respect to cultural industry. And if it goes beyond the types of issues that relate to a cultural industry, then it can't apply.

So Canada to succeed, in our view, must convince the Tribunal that Canada Post is a cultural industry--and we know that Canada Post is not a cultural industry--or that Canada Post's mandated delivery of periodicals under the Publications Assistance Program is a measure adopted or maintained with respect to a cultural industry. Let's deal with that latter point because I'm sure that nobody's saying that Canada Post is, in fact, a cultural--if they do, we'll have to get back to that in the surrebuttal.

Canada's argument strains the common-sense view of this exemption because it advances such an

expansive cultural industries exception that the exception swallows the rule. It leads to fundamentally absurd results if it was to be followed.

For example, we submit that Canada Post's mandated delivery rule under the Publications Assistance Program is not a measure adopted or maintained with respect to a cultural industry. The Publications Assistance Program is a measure with respect to cultural industries when it deals with a content or the design or production of a periodical. But when it mandates a specific delivery mode or a specific provider, that has nothing to do with the cultural industry.

Canada Post is engaged to the same--as a cultural industry itself to the same extent that a wall is a cultural industry if it displays a billboard. It is just--that argument doesn't work. But to suggest that because you mandate, because you force under this term that you have to be using Canada Post to deliver, that goes too far. There

are many examples and many options that could have been done. I mean, Canada, for example, could have very easily said we'll subsidize this industry, we'll give you whatever you want, and you have to use the lowest-cost producer. Or you're free to do it, and you can funds to deal with it. Or--but they didn't do that. They have actually tried to shoehorn into this exemption something that's ancillary but not related to this program.

The delivery mode has nothing to do with promoting Canadian culture or Canadian cultural industries. It's just something else. We refer to some of this at paragraphs 127 to 134 of our Counter-Memorial. We just think that this argument can't work and this Tribunal must use some common sense in dealing with this, because, otherwise, we would be looking at using the cultural industries exemption to be able to avoid every obligation of the NAFTA. Canada would be able to engage in expropriation without compensation by being able to put that in somehow to a cultural program. I mean,

the suggestion that, you know, if the Minister of Canadian Heritage decided that she wanted to expropriate the vacation home of the president of the Ford Motor Company in Canada and throw it into some Canadian book store act, therefore, it's a measure of respecting Canadian cultural industries, or in connection to some national issue that would be there, that has nothing to do with the types of issues that need to be protected under the cultural industries exemption. And that's just too far. It is just inappropriate.

However, if, in fact, the Government of Canada wished to expropriate something for the purpose of having a specific book store, for example, which is specifically covered, if they were to do that, then that would be covered. But it's for this Tribunal to look at the sufficiency of what's going on rather than to say it's just exempted, we can't look at that. That would not be appropriate. That would be--it would lend an exception that would be so abusive as to remove

completely from purview the ability of this Tribunal to determine facts, and that is fundamentally what this Tribunal is empowered to do under Chapter Eleven.

I'd like to look at the issue of the subsidy. On the subsidy issue, our concern is not that there is a subsidy, but the way the subsidy operates goes beyond the issue of the subsidy. In other words, the subsidy again is focused towards promoting Canadian periodicals. But the last time I looked, Canada Post is not a Canadian periodical. To mandate Canada Post, that's the problem. The subsidy part is completely fine. But, again, Canada has gone too far in this area. And there are many ways they could have dealt with it to be a matter of general application to not be specific and use the words of subsidy determinations. They could have made it available to anyone who was prepared to do it for a certain price and have that as part of the subsidy so anyone could deliver. They could have it to the lowest-cost producer.

They could have it open to tender. They could have given the periodical the amount of money to be able to deal with it themselves instead of put the money directly to Canada Post, because as we recall, the operation of this program works that the Government of Canada puts the money directly to Canada Post and sits in accounts. Then they can draw from that.

That's the difficulty with this program, is that the objective of the subsidy has become to subsidize Canada Post rather than to subsidize the Publications Assistance Program, and that issue is not covered by the cultural exemption. That's the difficulty that we have here.

So we would suggest that the Vienna Convention, Article 32(b), mandates this Tribunal interpret NAFTA provisions so as not to lead to manifestly unreasonable or absurd results, that NAFTA Article 102 mandates that this Tribunal interpret the NAFTA so as to substantially increase investment opportunities within the free trade

zone, and that Canada's reading of the subsidies exemption is so broad and so all-encompassing that NAFTA's obligations become almost meaningless if it would be permitted to operate in the manner as postulated by Canada.

I'm going to check and see if the members of the Tribunal have any other questions for me on the matters that I have presented today, and then I am going to turn to my colleague Mr. Carroll to be able to do a wrap-up and to deal with some ancillary issues, if that's acceptable to you.

PRESIDENT KEITH: Thank you, Mr. Appleton.

Mr. Carroll?

MR. CARROLL: Just to give the members of the panel a time estimate, I would anticipate being finished in probably something just under 15 minutes.

Members of the panel, the issue which I would like to deal with first is the issue of the pleadings, and I started to touch upon that earlier this morning with respect to those allegations

concerning the subsidiaries of UPS.

A further elaboration of the position of UPS on the pleadings is set out in paragraphs 149 through 161 of the first Memorial of the Investor, and I would like to direct your attention to paragraphs 150 and 151 of that document. The correct name for it is the Counter-Memorial of the Investor.

The purpose for my doing so is to draw your attention to the rules with respect to pleadings that are apposite in this matter. The requirements of a Statement of Claim are found in Article 18(2) of the UNCITRAL arbitration rules, and we set those out in paragraph 150, and they are there. I won't re-read them. But if we turn to paragraph 151, this is the point that I would like to make, and that is that the essential requirement of the Statement of Claim is that it be specific enough that the respondent can reply adequately in the Statement of Defense, and I would suggest to you that in the fora I'm familiar with and in which

I practice, that's fundamentally the rule, which is that you have to give your adversary a case to meet. They have to know what the case is that they have to meet. But you do not have to plead every single allegation of fact and law in that case.

As we say, it does not require an exhaustive statement of the facts or the evidence supporting the claim, and we cite a passage from the article of Mr. Pellenpaw and David Caron, which is at Footnote 84. The claimant must include in his statement those particulars listed in subparagraph (1) of Article 18(2), et cetera. While mandatory, these elements need not be fully elaborated at the time the Statement of Claim is submitted. Thus, in place of the full statement of facts and a summary of evidence supporting the facts envisioned in the preliminary draft, a more general description of the alleged facts is sufficient at this stage.

The requirements concerning the points at issue presupposes explication of the legal

arguments with adequate particularity, but does not necessitate a final elaborate of the legal theories supporting the claim. And in our respectful submission, based on what we've set out in our memorandum at those paragraphs, 149 through 161, we say we've met that test.

The next point I want to deal with very briefly is the question that Dean Cass asked me earlier this morning in which my answer was perhaps somewhat cryptic, and the question was quite cryptic as well, which was suppose we find that there is no international law--at least I understood the question to be suppose we find there is no international law dealing with competition. Does that mean we can allow your claim to go forward? And I answered that question in the affirmative, saying yes, if you did make that conclusion now, we couldn't go forward with our arguments on 1105. But I do believe that I also said that it would not be appropriate for the panel to do so at this stage.

The reason that I said that--and it was with respect to the specific issue of cross-subsidization, Dean Cass, I think that you asked the question, and basically what I would like to say is that cross-subsidization can't be viewed in abstract isolation. It's only part of a larger course of arbitrary and discriminatory conduct here that we've got. It is one part of that conduct.

And the real question in my submission is whether it could ever be considered under 1105 as unfair and inequitable. That's the operative question. Could you look at that conduct--you posed or somebody, one member of the panel posed a domestic type case. Is it fair theory, is it fair and equitable? That quote from Sir Eli Lauterpacht basically put it the same way. And my submission to you is that even if you didn't find a single case hypothetically in international law which said that anticompetitive behavior is unfair or could be unfair and inequitable, that would not be the end of it; that what you would have to do in my

submission is to look at those words "unfair and inequitable" and to judge based on that behavior whether or not that test was met.

So our friends have basically chosen to give it the label of anticompetitive behavior, but just think of it as conduct and look at the conduct and at the end of the day make the determination as to whether it's unfair or inequitable.

To use an example of particularly egregious conduct, take an example of expropriation, expropriation of an asset of a foreign national. Is it conceivable that there is--that could be--that would be anticompetitive in nature, in my submission, and it could be that there is no single case, arguably--i don't know whether that's the case or not--in international law which says that this is part of a body of international law.

But even if that were the case that there was not such a case, in my submission, it would not prevent you from looking at the facts of this case

and making a determination is that conduct capable of being classified as unfair and inequitable. So that's why I say it's, at best--or, sorry, at worst, at the least, a mixed question of law and fact at the end of the day.

It's not, in our submission, as you've heard Mr. Appleton refer to the Pope & Talbot decision. I would simply ask that you look at that decision, if you haven't already done so, and look at the passages which my friend has referred to, Mr. Appleton, dealing with what is customary international law, what is not customary international law. Evidence can be led, evidence will be led. The question of travaux preparatoires as well, we alluded to that. We don't know what additional travaux preparatoires, preparatory works, may be available. That may shed some light on this.

My point simply, Dean Cass, was that it is premature to make that evaluation at this stage. It would not be appropriate.

I want to say one point, make one point just to elaborate on my friend Mr. Appleton's submissions with respect to the issue of delegated governmental authority, and he has gone into that in some detail. But I would like to try to at least in my words summarize what I would say the investor is attempting to do here and to prove ultimately, and that is this: that what we are saying is, firstly, that the exercise of the postal authority, the classic postal authority, is clearly, and we say unassailably, an exercise of delegated governmental authority.

Now, we do go further, as Mr. Appleton said in response to the question of Mr. Fortier, which was--we do go further than that. We say because of this particular statute, the Canada Post Act, that indeed all of the acts of Canada are part of a delegated governmental authority. But in my submission, to succeed on the merits of this case, we do not have to go that far.

What we have to show--and, again, let me

just use the specific example of cross-subsidization. What we have to show, in my submission, is that the cross-subsidization occurring is, in effect, part of the narrower scope of delegated governmental authority. It results from the exercise of Canada Post in the postal monopoly sector, the clear sector that has been given to it, the delivery of mail.

What we are saying is that Canada Post is effectively piggybacking on that infrastructure which is without doubt part, we say, of the delegated governmental authority to compete unfairly with those in the private sector, such as our client.

So, to that extent, it is part of the narrower concept of a delegated governmental authority that we are attacking, and, therefore, in my submission, even on that narrower issue, we meet the test of 1502(3)(a).

One final point on that which came out in the discussions with Mr. Appleton, which was the

point our friends made, and certainly I think Dean Cass questioned my friend Mr. Appleton on this, and that is this issue of ejusdem generis and the words that are used in Article 1502(3)(a), those narrows words such as--I forget, the words are licensing, something like that.

The only word of caution I would have is this: Yes, ejusdem generis is a principle of interpretation, but it's only one principle of interpretation. There are others. And we--perhaps Mr. Laird can refer to our Memorial because I don't have the passage with me at the moment, or anyone in our group, but we do in our Memorial point out that, indeed, the concept of ejusdem generis is an interpretive rule, but you can always find other interpretive rules.

And in our case, we would say if you applied ejusdem generis or looked at ejusdem generis, don't do that without looking at the principles of interpretation that I have alluded to earlier, those set out in Article 102, which my

friend Mr. Appleton has elaborated on significantly, and basically look at the object and purposes of the treaty, look at the preamble of the treaty. And when you do that, at the very least you've got an argument on the other side which says that if you do that, the interpretation should not be as restrictive as our friends at Canada would have you believe on reading 1502(3)(a).

So what does that mean at the end of the day? These concepts--do our friends have an argument? Of course, they have an argument. Is that argument frivolous? Of course, it's not frivolous. Is our argument frivolous? Of course, it's not frivolous. It is at the end of the day that you have to hear all of the facts and basically come to the decision that you come to. Look at some of those other NAFTA Tribunal decisions that I referred you to earlier. They don't tackle the merits issue at the jurisdictional phase.

The reference, I'm told, is in paragraphs

14 through 19--sorry. Oh, I'm sorry. Where's that--what's that...

It's paragraph 49 and 50 of the Counter-Memorial of the Investor. Thank you, Mr. Laird.

So, in conclusion, I would say simply this: that the principles of interpretation compel us to look at the object and purposes in the preamble of NAFTA. This interpretation of the investor, of the relationship between Chapter Eleven and Chapter Fifteen, we say, our interpretation is more compatible and more in keeping with those objects and purposes than the interpretation of our friends; that at this stage the claimant need only establish an arguable or plausible case, that it is for the Tribunal to establish at the merits whether that case is met out.

Thank you very much. Those are my submissions.

PRESIDENT KEITH: Thank you very much indeed, Mr. Carroll.

The discussions that I had at the break, before I forget it, I think part of the discussion was about a photograph, so I shouldn't neglect that. But the discussion I had suggested that the parties might like a two-hour break now to prepare their replies, and the suggestion was that they might take an hour, perhaps an hour and a half each, the times for the two different sides.

So on that basis, we will resume at 2:15 and hear the replies.

MR. CARROLL: Mr. Chairman, if I might, I would respectfully request a little bit of guidance here, as may be obvious from my submissions. My normal practice is before domestic courts, and basically in domestic courts reply is usually restricted to matters which arose out of the other side's argument which were not covered in chief. And, likewise, any sur-reply, which is quite rare, quite frankly, in cases that I'm normally involved in, would be, again, something that comes out of the reply for the first time.

So I expect then--if that is the case here, I would expect us to be quite a bit shorter since I don't see any surprises.

PRESIDENT KEITH: Mr. Carroll, my experience is the same as yours, and I was having difficulty even with the words because I'm not used on the whole to the fourth round, although I know it happens in international litigation. But certainly my experience--and, anyway, it's efficient and we don't need repetition. My experience and the sensible practice is that the reply and the final reply should just relate to matters that have arisen freshly and that haven't already been traversed in the earlier primary submissions.

So, on that basis, too, I thought that we might have a slightly shorter afternoon than my figures then just suggested. And I have been reminded about the photo. Didn't I mention it? But we will now adjourn for two hours, and we will wait about for that purpose.

[Whereupon, at 12:20 p.m., the hearing was recessed, to reconvene at 2:15 p.m. this same day.]

AFTERNOON SESSION

[2:20 p.m.]

PRESIDENT KEITH: The hearing now resumes.

Mr. Willis for Canada?

MR. WILLIS: Thank you, Mr. Chairman and members of the Tribunal. I will be dealing very briefly--and bearing in mind your strictures about sticking to new points, I'll deal very, very briefly with two issues, and one is the arguments heard this morning on the scope of Article 1105 and the minimum international standard of treatment, and the other is the test of jurisdiction.

First, on the question of the international minimum standard, counsel this morning referred to hundreds of years of international law encapsulated in Article 1105, and yet it was remarkable that nothing in that long and very substantive legal tradition brings this case within or indeed anywhere near the minimum international standard.

It became increasingly clear this morning

and, above all, in the concluding remarks that UPS is relying essentially on an extra-legal understanding of fairness and equity as if that phrase stood alone. But as the Myers award pointed out, correctly, it does not stand alone. It has a definite context, and it appears in the defined legal framework, and that framework, of course, is one of the key clarifications in the FTC Note of Interpretation, paragraph 2.

So, contrary to the conclusions drawn this morning, it is plainly not enough to say that the claimant has suffered unfair competition in the Canadian market. That approach really would treat Article 1105 as a kind of catch-all, creating a roving mandate and making anything at all arbitrable, and arbitrable not on the basis of a legal standard but on the basis of a purely subjective conception of equity.

The North Sea Continental Shelf cases--we referred to those yesterday, and there's another interesting analogy there, because at the heart of

that case is a sharp line which the International Court drew between equity in the context of the application of a legal rule and equity as it would be applied in a ex aequo et bono context. And it's clear that as in the case of the situation before the court in that instance, here we are dealing with equity within a definite legal context and a constrained legal context.

I have little to add on the contention that the FTC Note of Interpretation is not an interpretation, in fact, but an amendment. We've had a full debate on that, and it's our submission, again, that it's not only an interpretation, it's the best interpretation, it's the natural interpretation because it flows from context. It does exclude treaties, and logically so, because otherwise--well, the word was used this morning, the flood gates argument. Everything would be factored into the arbitration framework of Chapter Eleven.

It does not really exclude general

principles of law, which is referred to in Article 38, paragraph 1, nor does it exclude the subsidiary sources of law, which are referred to in paragraph (d), because these flow into and feed into the formation of customary international law, particularly--especially in the context of the customary international standard which throughout reflects these general principles in many different respects.

It's of interest that in the CME award, which is in our Additional Authorities--I think it's Tab 8--at paragraph 614, the Tribunal equated a reference in the treaty, in the bilateral treaty in that case, to international law with customary international law.

So those are our main points on the minimum international standard. I'll add only a few points of clarification. Although perhaps it's not legally significant, there were conflicts in the Chapter Eleven case law, as shown by the fact that the Pope & Talbot Tribunal in a number of

instances expressly rejected interpretations adopted by the Myers Tribunal.

There were references to 1,800 bilateral investment treaties, but there was no demonstration, in fact, not the hint of a demonstration of how or why those treaties may have changed the scope or content of the minimum standard of customary international law.

There was a discussion of the Neer standard, and, again, a reversion to the theme that it's outdated. But the point about the Neer standard, it's not based on the significance of that one case. It's the fact that it's been quoted in textbooks, in scholarly writings, in other cases over the years as a classical definition of the idea that there is a very high threshold involved where the international standard is at issue.

That will conclude my representations on the question of the minimum standard. If there are no questions, I'll move on to the test of jurisdiction.

At times, on the question of jurisdiction, the argument was at times confusing because on some occasions UPS seemed to accept the ICJ test, the Oil Platforms test. And on other occasions, they seemed to revert to language or formulations that were completely inconsistent with that test, for instance, that it's sufficient merely to allege a provision upon which jurisdiction could be based, or that a prima facie basis is sufficient. A prima facie test, incidentally, in ICJ practice is a test for provisional measures of protection and not for jurisdiction.

But I think the two parties are agreed on one thing, and that's that it makes sense to look at the International Court of Justice jurisprudence in considering what the test of jurisdiction should be. And that makes sense partly because it's a very rich source of case law on jurisdiction in an international context. In case after case, both the Permanent Court and the International Court have had to consider jurisdictional challenges.

And also, and especially because it's an international setting where jurisdiction is always based on consent and can never be presumed, and partly for that reason, while there's no burden of proof in international proceedings, in the end the court or tribunal must be satisfied that jurisdiction has exists--has been granted by the consent of the parties.

ARBITRATOR FORTIER: Mr. Willis, to enlighten us, would you put as succinctly as possible what you--what Canada sees as the test, the jurisdictional test in the Oil Platform case? There are so many--as counsel said yesterday, there are so many opinions in that particular decision, it would be helpful if you could put it to us succinctly.

MR. WILLIS: I believe it can be summed up as follows: It's a subject matter convergence test. The subject matter of the claims must fall within the subject matter of the treaty provisions on which jurisdiction is asserted.

There's also a separate opinion in the Oil Platforms--there's a number of separate opinions, and one of them is by Judge Higgins. She speaks of a sufficiency of subject matter connection, which also puts it very well in a nutshell.

So, again, expanding on that answer, one could put it as follows: The subject matter of the claim, accepting the facts as alleged, must fit within the subject matter of the treaty or the treaty provisions upon which jurisdiction is based.

Or, in an alternative formulation, which was quoted this morning, it must be capable of falling within the treaty provisions. And as we understand it, in principle, UPS has accepted that test.

I referred--

ARBITRATOR FORTIER: You have not resiled from that statement in your Counter--

MR. WILLIS: No.

ARBITRATOR FORTIER: --in your Reply Memorial?

MR. WILLIS: No, we have not.

ARBITRATOR FORTIER: Okay.

MR. WILLIS: And it's a stringent test because you have to interpret the treaty and determine what the subject matter scope of the provisions is, and then look at the allegations and take them at face value and determine whether, having interpreted the treaty, they do or do not fall within those treaty provisions. And it does involve a definitive interpretation of the treaty for that limited purpose.

ARBITRATOR CASS: Mr. Willis, when you say it involves a definitive interpretation for that limited purpose, do you mean a definitive interpretation of whether the claims fall within the treaty or a determination that the claims at least arguably fall within the treaty sufficiently to move on to an examination of the claims on the merits?

MR. WILLIS: With respect, I don't think it's really an arguable test. I think the

interpretation of the treaty is definitive insofar as the scope of the treaty provisions, the subject matter scope of the treaty provisions is concerned. Now, that will not exhaust all the questions of interpretation that would arise in relation to those provisions in a hearing on the merits. But it does involve a definitive interpretation and not just an arguable interpretation on the subject matter scope of what that treaty provision applies to.

And I think if we look at what the court actually did in Oil Platforms, it's clear that its conclusions on the subject matter scope of what are the three or four provisions that were at issue under the SCN Treaty that was being considered, they were final. They were final determinations.

Even the freedom of commerce, where the case is going on, so far as what that provision could and could not encompass, that was a definitive interpretation. And certainly with respect to the claims that were struck, those

interpretations were by no means provisional. Nor is there any suggestion in the majority reasons that the test is one of arguability.

ARBITRATOR CASS: In your view, then, if we were to find that a claim is within 1105 at this point, it would not be open to us to revisit that in a hearing on the merits?

MR. WILLIS: If you find that a claim is within the subject matter scope, the implication would be that it would be surprising if the Tribunal were to find that the subject matter scope is something different in a later phase of the case. But I think at this stage it is proper to look at what the coverage of each provision involved should be. Because, after all, in Oil Platforms, on those provisions that were struck, they couldn't revisit those issues. Those decisions had to be definitive.

And, also, without spending too much time on Oil Platforms, it is interesting to look at some of the separate opinions, including Judge Higgins

and Judge Vadin (ph), who go over some of the jurisprudential background and note that there were conflicting strands in the ICJ jurisprudence, some setting a very low test and some setting a very stringent test. And I think it's correct to say that Oil Platforms comes out toward the stringent end of the spectrum. Also, I believe some of the earlier jurisprudence--and I believe that Ambatielos was fall within this category--are now superseded by Oil Platforms and the other cases in recent years such as the Bosnia Genocide case and, indeed, the provisional measures case in which Canada and other NATO countries were involved a couple of years ago, which we cited in our reply.

PRESIDENT KEITH: Mr. Willis, could I ask you just another question about this? It may be semantics, but is there a difference between saying that the subject matter must fall within the jurisdictional provision on the one side, and that it is capable of falling within the jurisdictional provision? You used both of those, and I don't

know whether they relate in some way to the spectrum you've just been mentioning.

If I could just add another thought, a good deal may depend--obviously, a good deal does depend on the way the jurisdictional provision is written. There's a difference, obviously, between the jurisdictional provision that talks, say, generally about an investment dispute and something that is more specific, as you are arguing 1105 is.

MR. WILLIS: Actually, I don't really see a distinction of significance between capable of falling within and falls within. I mean, the International Court did use both phrases.

I believe that when it came--I don't have it in front of me, but when it came to the dispositif and in some of the other cases they said fall within.

When they use the phrase "capable of falling within," I think that has to do with the need for determining on the facts at a later stage on the merits whether the facts actually bring it

within that treaty provision. But, again, I don't think there's anything provisional about the determination of the subject matter scope at the jurisdictional stage.

Now, moving on from Oil Platforms and the related jurisprudence, UPS is suggesting--and it's a major theme--that everything depends on the facts. The first short answer to this is that Canada for the purposes of this motion has accepted the facts as alleged. And the second is--and perhaps this goes a little further. If this were really the test, no preliminary objection on jurisdiction could ever succeed in the face of an assertion that Article 1105 has been violated. It would always be sufficient to allege any kind of unfairness in order to trigger a full-scale international review. And I submit this cannot have been contemplated when the parties concluded this agreement.

In conclusion, the investor in this case is essentially seeking to do two things: first, to

obliterate any distinction between jurisdiction and the merits; and, second, to turn this Tribunal through an extra-legal interpretation of Article 1105 into a court of equity.

If there are no further questions, I would thank the Tribunal for its attention, and I would request the Chair to call upon Mr. Rennie to conclude our case. Thank you.

PRESIDENT KEITH: Thank you, Mr. Willis.

Yes, Mr. Rennie?

MR. RENNIE: I shall be very brief. I'm going to address the issue of delegated governmental authority, the scheme of the act and a few other miscellaneous points, if I may call them, that have been raised by UPS.

With respect to delegated governmental authority, it is my submission that in their argument they have missed the point. The focus of their argument was on the function and status of Canada Post Corporation. The test is neither one of function nor of status, the test is one of

exercising a delegated governmental authority, and it's not surprising that the test would be that of being exercised of a delegated governmental authority because we are talking about governmental monopolies, and presumably all governmental monopolies are serving a governmental function. So the argument advanced by UPS gets us no further.

The second point I'll make with respect to the delegated governmental authority argument is that what 1502(3)(a) requires on its face is the exercise of a regulatory, administrative or other governmental authority of a nature informed by the examples in 1502(3)(a), such as granting import or export licenses. That point, with respect, is not addressed by the Respondents, by UPS, in its submission.

The third point concerns a WTO appellate body decision in the dairy case. It is referred to by us with respect to the meaning of governmental as meaning authority over third parties at paragraph 97. UPS cited the test for the test set

out there, but the test they referred to, the paragraph they referred to in paragraph 100, was whether provincial marketing boards were an agent of the government which was, in fact, the issue in Article 91 of the agreement on agriculture. That isn't the issue here, whether these are agents of the government or not. It is quite clear.

The third point I'll make on this one on delegated governmental authority is that if this Tribunal were to accept that Article 1502(3)(a) applies to all of the commercial activities of a government monopoly, that would leave Articles 1502(3)(b), (c), and (d) devoid of content.

Mr. Appleton also says, and it follows from the focus on status and function, that because Canada Post derives its authority from an active parliament, then presumably the actions and activities of all state enterprises and all government monopolies would be subject to the same strictures in 1502(3)(a). In effect, everything would be collapsed into 1502(3)(a), and if that was

the intent, you're left with the question of why would the drafters have bothered with informing the substantive content of (b), (c) and (d).

They pressed the issue of particulars, suggesting that we ought to have asked for more on this point, and I'll just make three very quick points on that.

First of all, their statement in paragraph 2 is a conclusion of law, which you are not bound by the inferences, you are not bound by their allegations of law.

The second point I would make is, practically speaking, what particulars would we have asked for? All we would get would be further allegations of more legal conclusions, and that's what paragraph 2 is. In sum, paragraph 2 is a legal conclusion, and in essence it is not susceptible to admission or being admitted. It is a legal proposition which is before you and joined as a jurisdictional question.

The Deutsche Post, the Deutsche Post

decision was raised by UPS, quite distinctly a different situation under the Treaty of Rome. Private citizens were specifically allowed recourse to the European Commission for alleged breach on competition rules against a national postal organization like Deutsche Post. That, of course, is not the situation we are dealing with here. That decision is under appeal.

On the Publications Assistance Program, the NAFTA says that any measure with respect to cultural industries is exempt, any measure. The program as a whole is a measure, with respect to cultural industries, and in any event, the aspect of which UPS is complaining is also related to culture industries. It deals, as UPS says, with the distribution of magazines and periodicals which is cultural industry. So it's not a completely unrelated measure like the example given by Mr. Appleton, which was the expropriation of a Ford plant for cultural purposes. So, in respect, the analogy example doesn't serve the argument.

Finally, they've argued that the program subsidizes Canada Post and not the publication industry. This is irrelevant, and it is also untrue.

With respect to the scheme and the interrelationship between Eleven and Fifteen, just a few points. They say that the word "where" in Article 1502(3)(a) is the wrong word.

ARBITRATOR FORTIER: You mean in 1116.

MR. RENNIE: Sorry. Correct. When asked as to what the right word was, they come up short.

My respectful submission, this is the clearest attempt of what UPS has attempted to do throughout this amplification and that is to rewrite the terms of the treaty. They can't answer this question, they leave the question hanging because they cannot avoid the plain and natural meaning of the article.

The second question that they could not answer is whether their case would have been any easier if D was included in A. There's no answer

to that. The question is as telling as is the absence of an answer.

Thirdly, they argue that, A, provides them with an entre into all of the parties' obligations under the agreement. In this case, if that's right, they choose to select the parties' obligations in respect of anticompetitive conduct, in respect of government monopolies.

In another case, they may choose to choose something in another chapter that is to the interest of the party concerned. So, if they get through the door, basically any NAFTA Chapter Eleven Tribunal would become a roving band of inquiry, and quoting them, "exercising their plenary jurisdiction" to make decisions on all sorts of aspects of the NAFTA and the parties' obligations therein.

So, in response to the floodgates argument, they come full circle, and they say you need not worry, Article 1502(3)(a) would pose a limitation on that. The argument is quite

circular.

They spent a healthy amount of time on object and purpose. They brought to your attention the Canadian statement on implementation, which refers to the general objectives of the NAFTA as elaborated in the agreement. So the objectives are elaborated in the agreement, and similarly, in Article 102, the NAFTA states that the objective of this agreement, as elaborated specifically through its principle of rules.

So this is critical. The parties chose how they intended to implement the objectives, and what the Tribunal must apply is the objectives of the Treaty, as implemented, and made effective in the terms and obligations of the NAFTA. They chose quite specifically the disciplines they wish to impose on monopolies, and they chose quite specifically the types of dispute settlements and mechanisms they wish to have in place in respect of parties, in respect of investors and states.

The final point I will leave you with is

that at not one point over the course of the argument was the argument impeded or constrained in any respect by the absence of any fact of any kind.

Mr. Chairman, members of the Tribunal, thank you very much for your patience.

I am subject to your questions.

ARBITRATOR CASS: As I understand it, Mr. Rennie, you have two different arguments on government authority; one is a positive argument where you say government authority means authority over other individuals. You have spelled that out previously. The other argument is responding to UPS and saying that their argument essentially consists of saying that all monopolies being authorized by the government constitutes government authority, and therefore the limitation is meaningless.

Is it fair to characterize their argument that way, as, if I understand it, 1502 applies to private monopolies, as well as government monopolies, the government monopolies that deal

with strictly commercial matters, as well as government monopolies that may deal with matters formally within the core competence of the government, and I believe their argument is that what we deal with here is a government monopoly dealing with matters, the delivery of mail, that traditionally were within the core competence of government.

My question to you is whether stating their argument that way you would still find it insufficient and whether it is a fair characterization of their argument, as you understand it.

MR. RENNIE: It's a long question. I think the answer is that that argument when unmasked is simply that it's another functional argument. The core function argument is simply to replace the word "exercising a delegated governmental authority" with a functional argument.

ARBITRATOR FORTIER: Sir Rennie, we heard an argument this morning, on behalf of the

investor, which was directed to Article 1112, the relation to other chapters, and in the event of any inconsistency between Chapter Eleven and another chapter, the other chapter shall prevail, to the extent of the inconsistency.

Is it because Canada's position is that there is no inconsistency that you haven't addressed 1112?

MR. RENNIE: Quite so. We see no reason whatsoever to rely on Article 1112.

ARBITRATOR FORTIER: You don't see any inconsistency between 1116(1)(b) and 1502(3)(a)?

MR. RENNIE: No. We think when they're read together as part of the scheme, the hierarchy of obligations and associated remedies, we think it's a coherent, comprehensive, carefully prescribed scheme which the parties directly address their minds to in the context of competition issues and the roles of state enterprise and government monopolies. So we see neither ambiguity nor inconsistency.

Thank you.

PRESIDENT KEITH: Thank you, Mr. Rennie.

Yes?

MR. CARROLL: Mr. Chairman, thank you. I wonder if I might ask the permission of the Tribunal to take a short recess? I'd like to caucus with my colleagues and my client to see what, if anything, we'll be saying.

PRESIDENT KEITH: Surely. Yes, Mr. Carroll.

[Recess.]

PRESIDENT KEITH: Yes, Mr. Carroll?

MR. CARROLL: Mr. Chairman, I am pleased to advise that we have nothing further to say. We have said everything that we have to say, and we rest our case.

PRESIDENT KEITH: Thank you very much, Mr. Carroll. That, as I indicated earlier, is the experience that I have with these matters, that ordinarily three oral presentations are sufficient to the purpose.

The representatives of Mexico and the United States have asked for the right, in terms of Article 1128, to make submissions relating to the interpretation issues that have arisen. They have until 23 August to make those submissions. Those submissions should, of course, be confined to matters that have arisen in the course of the oral hearing. They have already made some submissions relatively light in the written process, and so the element of newness or freshness that was discussed earlier is relevant there.

The parties to this particular dispute then have 10 days which they perhaps may not need, but they have 10 days to respond to those submissions from Mexico and the United States.

Unless there are any other matters, I think that brings us to the end of the hearing, subject of course to the filing of those further documents. Could I say, for my part, that I am very grateful, and I'm sure my colleagues are, for the cooperative spirit in which the hearing has

been carried through.

We will, of course, now give anxious consideration to the submissions and will attempt to prepare our award as rapidly as possible.

Before I conclude, I should have said this at the beginning of the hearing, but I say it doubly now, if I could thank Ms. Obadia and her colleagues and also thank the reporters whose skill amazes me, and thank everybody else who was involved with the hearing. As I say, unless there is any other matter that anyone wishes to raise, the hearing is now completed.

Thank you.

[Whereupon, at 3:03 p.m., the hearing was concluded.] •