

## Archived Content

Information identified as archived on the Web is for reference, research or recordkeeping purposes. It has not been altered or updated after the date of archiving. Web pages that are archived on the Web are not subject to the Government of Canada Web Standards. As per the [Communications Policy of the Government of Canada](#), you can request alternate formats by [contacting us](#).

## Contenu archivé

L'information archivée sur le Web est disponible à des fins de consultation, de recherche ou de tenue de dossiers seulement. Elle n'a été ni modifiée ni mise à jour depuis sa date d'archivage. Les pages archivées sur le Web ne sont pas assujetties aux normes Web du gouvernement du Canada. Conformément à la [Politique de communication du gouvernement du Canada](#), vous pouvez obtenir cette information dans un format de rechange en [communiquant avec nous](#).

08:57:51

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

----- x  
:
In the Matter of Arbitration :
Between: :
:
UNITED PARCEL SERVICE OF AMERICA, INC., :
:
Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Party. :
:
----- x Volume 4

HEARING ON THE MERITS

Thursday, December 15, 2005

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

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

KENNETH J. KEITH, President

L. YVES FORTIER, Arbitrator

RONALD A. CASS, Arbitrator

08:57:51

Also Present:

ELOISE OBADIA,  
Secretary to the Tribunal

Court Reporter:

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

851

08:57:51

APPEARANCES:

On behalf of the Claimant/Investor:

BARRY APPLETON  
ROBERT WISNER  
DR. STANLEY WONG  
FRANK BOROWICZ  
PROF. ROBERT HOWSE  
DR. ALAN ALEXANDROFF  
ASHA KAUSHAL  
NICK GALLUS  
HERNANDO OTERO  
Appleton & Associates  
International Lawyers  
77 Bloor Street  
Suite 1800  
Toronto, Ontario M5S 1M2  
(416) 966-8800  
tribunal@appletonlaw.com  
director@appletonlaw.com

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

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

852

08:57:51 APPEARANCES: (Continued)

On behalf of the Respondent/Party:

IVAN G. WHITEHALL  
Heenan Blaikie  
55, rue Metcalfe  
Bureau 300  
Ottawa (Ontario)

Canada K1P 6L5  
(613) 236-1696  
iwhitehall@heenan.ca

THOMAS CONWAY  
McCarthy Tetrault  
The Chambers, Suite 1400  
40 Elgin Street  
Ottawa, Ontario  
Canada K1P 5K6  
(613) 238-2102  
tconway@mccarthy.ca

KIRSTEN HILLMAN  
SYLVIE TABET  
CAROLYN KNOBEL  
RODNEY NEUFELD  
International Trade Canada  
125 Sussex Drive  
Ottawa (Ontario) Canada  
ALAN WILLIS  
RICHARD CASANOVA  
JOHN DEVEEN  
DONALD CAMPBELL  
BRIAN MACLEAN  
ANDREW GIBBS  
Department of Justice, Canada  
Room 1241-East Tower  
234 Wellington Street  
Ottawa (Ontario) Canada K1A 0H8  
(613) 957-4802  
richard.casanova@justice.gc.ca  
kris.layton@justice.gc.ca  
robin.nicol@justice.gc.ca

853

08:57:51 APPEARANCES: (Continued)

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

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

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

RICHARD LARM  
CALDWELL HARROP

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

DAVID WEEMS

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

GARY SAMPLINER

On behalf of the Office of the U.S. Trade  
Representative:

JASON KEARNS

On behalf of the Government of Mexico:

MAXIMO ROMERO JIMENEZ  
SALVADOR BEHAR LA VALLE  
J. CAMERON MOWATT  
GRAHAM COOK

854

08:57:51

C O N T E N T S

	PAGE
CLOSING ARGUMENT	
ON BEHALF OF THE CLAIMANT:	
By Mr. Wisner (continued)	855
By Mr. Wong	995
By Mr. Appleton	1029
ON BEHALF OF THE RESPONDENT:	
By Mr. Willis	1116

09:00:32 1

P R O C E E D I N G S

2                   PRESIDENT KEITH: Mr. Wisner, are you

3 ready to resume?

4 CONTINUED CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

Pages 855 - 1115: this portion of the hearing was held in camera and the pages have accordingly been redacted.

17                   MR. WHITEHALL: Thank you, sir. We are  
18 just going to put up to remind you that this part  
19 of our presentation is going to be in a number of  
20 pieces, and we are going to start off with the  
21 Chapter 15 issue, and Mr. Willis is going to  
22 address you; to be followed by Ms. Hillman, who

17:07:30 1 will deal with Article 1102, the law; followed by  
2 myself dealing with the leveraging and the  
3 arrangements with Purolator; to be followed by  
4 Mr. Conway, who will deal with the Article 1102  
5 application to the Customs treatment; to be  
6 followed by Ms. Tabet, who will deal with the  
7 Publications Assistance Program and, as I heard,  
8 the two remaining 1105 issues. I noticed that the  
9 labor issue was not addressed, so I expect we won't  
10 have to address it; and Mr. Neufeld will give you a  
11 short submission on 1103, again giving it the  
12 weight that it deserves. I don't think that I will  
13 be responding to any arguments at this moment, so  
14 the bottom line can be removed.

15           So with that, if I may present Mr. Willis,  
16 I think you have seen him before. Thank you.

17           PRESIDENT KEITH: Thank you, Mr.  
18 Whitehall.

19           Yes, Mr. Willis. We have, indeed, seen  
20 him before.

21           MR. WILLIS: Mr. President and Members of  
22 the Tribunal, my topic today will be Chapter 15 and



17:09:03 1 related questions of state responsibility for the  
2 actions of Canada Post, and more specifically I  
3 will be dealing with two general areas. First, I  
4 will be discussing the concept of delegated  
5 governmental authority as set out in Articles  
6 1502(3) (a) and 1503(2) with respect to monopolies  
7 and state enterprises respectively.

8           Our basic proposition here is that the  
9 concept denotes powers of an inherently sovereign  
10 nature, powers that private parties could not  
11 exercise in the absence of a specific act of  
12 delegation by governments. Commercial matters such  
13 as the so-called leveraging of the monopoly  
14 infrastructure and the Fritz Starber claim are  
15 therefore not included.

16           The second part of my argument deals with  
17 the relationship between Chapter 15 and the rules  
18 of attribution in the customary international law  
19 of state responsibility. And here, specifically I  
20 will be responding to the contention that Canada is  
21 responsible under Chapter 11 for the acts and  
22 omissions of Canada Post without with regard to the

1118

17:10:16 1 conditions spelled out in Chapter 15. And there  
2 are at least three independent  
3 contentions--considerations, rather, that refute

4 this contention. The first is that it nullifies  
5 the practical effect of the two key provisions I  
6 just referred to.

7           And the second is the concept of *lex*  
8 *specialis* in the customary international law of  
9 state responsibility, meaning that where a treaty  
10 addresses the conditions and extent of the party's  
11 responsibility, the general rules on attribution  
12 cease to apply. That those rules have in effect a  
13 residual application for cases where the Treaty  
14 remains silent.

15           And finally, the notion that Canada Post  
16 Corporation is a state organ within the meaning of  
17 the state responsibility principles is erroneous.

18 As an independent legal entity, the Corporation is  
19 properly regarded as a parastatal enterprise that  
20 is subject to a distinct regime of attribution  
21 under the international rules.

22           Now, the Tribunal is already familiar with

1119

17:11:35 1 the central role in this disputed Chapter 15 which  
2 is entitled "Competition Policy, Monopolies, and  
3 State Enterprises." The dispute deals with the  
4 Canada Post Corporation.

5           It is common ground between the parties

6 that the corporation is a state enterprise. It's a  
7 Crown corporation within the meaning of the  
8 Financial Administration Act, and Annex 1505  
9 defines such corporations as state enterprises.  
10 And the parties also agree that it is a monopoly in  
11 some of its activities; namely, the letter mail  
12 operations as set out and limited in sections 14  
13 and 15 of the Canada Post Corporation Act.

14 Chapter 15 is where the parties have  
15 defined and set out their general undertakings with  
16 respect to both monopolies and state enterprises.  
17 In addition to its substantive importance, the  
18 jurisdiction of the Tribunal is limited to only two  
19 provisions of Chapter 15, paragraph 1502(3)(a) with  
20 respect to the exercise of delegated governmental  
21 authority by monopolies, and paragraph 1503(2) with  
22 respect to the exercise of such authority by state

1120

17:12:56 1 enterprises.

2 The two provisions are largely but not  
3 entirely identical. They require the parties to  
4 ensure, and I quote, "through regulatory control,  
5 administrative supervision, or the application of  
6 other measures that their monopolies and state  
7 enterprises do not breach certain NAFTA obligations

8 wherever they exercise a regulatory administrative  
9 or other governmental authority delegated to it by  
10 a party."

11           The obligations in the case of state  
12 enterprises under Article 1503 are limited to  
13 Chapter 11 and Chapter 14 on financial services,  
14 which is not relevant here. In the case of  
15 monopolies, on the other hand, the obligation  
16 extends to all provisions of the agreement, but  
17 with the important limitation that only breaches of  
18 Section A of Chapter 11 are made arbitrable under  
19 the terms of Article 1116. And this was the  
20 conclusion reached after considerable analysis by  
21 this Tribunal in paragraph 69 of the Award on  
22 jurisdiction.

1121

17:14:11 1           Other similarities and differences between  
2 the two provisions were noted in paragraphs 16 and  
3 17 of the Award on jurisdiction where the Tribunal  
4 described their function as follows, and I quote:  
5 "What is common to them is that if a party has  
6 delegated governmental authority to a monopoly or  
7 state enterprise, the party is to ensure, putting  
8 it broadly, that the monopoly acts consistently  
9 with the party's obligations under the agreement as  
10 a whole, and the state enterprise acts consistently

11 with the parties' obligations under Chapters 11 and  
12 14. That is to say, a party cannot avoid its  
13 obligations by delegating its authority to bodies  
14 outside the core government."

15           The lynchpin of both provisions is the  
16 phrase "wherever the monopoly or the state  
17 enterprise exercises regulatory, administrative or  
18 other governmental authority that the party has  
19 delegated to it." In the case of both provisions,  
20 the meaning of this language is fleshed out and  
21 illustrated by a series of examples that are very  
22 similar, though not entirely identical.

1122

17:15:33 1           The award on jurisdiction points to a  
2 contextual interpretation of the concept of  
3 delegated governmental authority. It explains in  
4 paragraph 18 that the other provisions of Articles  
5 1502 and 1503 have a different field of operation.  
6 They focus on the actions of the monopolies and  
7 state enterprises in their commercial activities  
8 through a variety of stipulations prohibiting  
9 discriminatory or anticompetitive practices in the  
10 marketplace, and requiring conduct based on  
11 commercial considerations.

12           The pattern, therefore, begins to emerge.

13 On the one hand, we have provisions relating to  
14 governmental authority that are designed to ensure  
15 that the parties do not avoid their obligations by  
16 delegating authority to bodies outside the core  
17 government. And on the other hand, we have  
18 provisions relating to the commercial activities of  
19 monopolies and state enterprises. And the  
20 fundamental nature of the distinction between the  
21 two categories, governmental and commercial, is  
22 highlighted by the fact that the governmental

1123

17:16:49 1 category is made arbitrable under Chapter 11, and  
2 the commercial category is excluded from the  
3 dispute settlement process.

4 In any event, Mr. President, I suggest the  
5 Treaty language is clear. The two provisions,  
6 1502(3)(a) and 1503(2), use the common phrase,  
7 "regulatory, administrative, or other governmental  
8 authority the party has delegated to it." The  
9 phrase should be read as a whole, and the  
10 individual words in it should be interpreted in  
11 their context. So, regulatory authority is  
12 invariably associated with government.

13 In the context side by side with the  
14 references to regulatory authority and other  
15 governmental authority, the word administrative

16 suggests acts of public administration, matters  
17 governed by Public Law. And at the risk of stating  
18 the obvious, the reference here is to authorities  
19 specially delegated by a government, one of the  
20 three NAFTA parties. And notice also the similar  
21 terminology, including the words "regulatory" and  
22 "administrative" used to describe the governmental

1124

17:18:13 1 obligations imposed by these provisions, and the  
2 delegated governmental authority that triggers the  
3 obligations.

4           The entire context, in other words, is one  
5 of state authority and public administration, in  
6 contra distinction to commercial and operational  
7 matters that a corporation would be capable of  
8 dealing with in the absence of any specific  
9 delegation of governmental authority.

10           Note 45 to the NAFTA confirms this context  
11 of state authority and public administration. It  
12 refers once more to the central concept of  
13 governmental authority, and it describes a  
14 delegation under Article 1502 as including a  
15 legislative grant, a Government Order, directive or  
16 other act transferring to the monopoly or  
17 authorizing the exercise by the monopoly of

18 governmental authority. No such special instrument  
19 of delegation would be needed to authorize an  
20 enterprise to carry out its ordinary commercial and  
21 managerial functions.

22           In most instances, Mr. President, a simple

1125

17:19:23 1 test will determine whether or not we are dealing  
2 with an exercise of delegated governmental  
3 authority. And the question is whether the act is  
4 something that in the ordinary course could and  
5 would be done by a private party carrying on a  
6 business of the same kind. If so, it is not an  
7 exercise of delegated governmental authority as  
8 contemplated by the Treaty, and the inquiry need go  
9 no farther.

10           There is nothing inherently governmental  
11 about the nature of the authority a corporation  
12 necessarily has to manage its affairs and carry on  
13 its ordinary business, and it follows that  
14 commercial activities, including the pricing and  
15 costing of corporate products or the management of  
16 corporate property and assets, such as the  
17 so-called infrastructure associated with the  
18 operation of the business, cannot be brought under  
19 the concept of delegated governmental authority.



20           And so, even before we get to the list of  
21 examples in both of these provisions, the general  
22 outline of what is contemplated is clear. The

1126

17:20:38 1 lists remove any possible ambiguity. They're  
2 largely identical, but I will read from both. In  
3 paragraph 1502(3), relating to monopolies, the  
4 words are such as the power to grant import and  
5 export licenses, approved commercial transactions  
6 or impose quotas, fees, or other charges. In  
7 paragraph 1503(2), relating to state enterprises,  
8 it is such as the power to expropriate, grant  
9 licenses, approve commercial transactions, or  
10 impose quotas, fees, or other charges.

11           So, the lists provide in a sense a  
12 definition by way of illustration, and they take us  
13 from the abstract to the concrete. It is difficult  
14 to give a complete exhaustive definition of  
15 governmental in the abstract, though it's clear  
16 enough, I suggest, that the commercial,  
17 operational, and management activities would be  
18 excluded, even in the absence of any examples.

19           But the list of examples tell us more  
20 about the kind of authority at issue than any  
21 abstract definition could possibly do. They are

22 not exhaustive, but any type of governmental

1127

17:21:58 1 authority not specifically referred to would, I  
2 suggest, have to meet a test of substantial  
3 similarity. That is the meaning of the words,  
4 "such as," and the effect of ejusdem generis  
5 principle.

6           The most obvious point is that these are  
7 all matters that are necessarily based on state  
8 power. Only governments or their delegates can  
9 exercise an import and export licensing power or  
10 impose quotas or require that commercial  
11 transactions be approved. These are powers of a  
12 legal character. They control the activities of  
13 third parties on the basis of legal authority.  
14 Quotas, licenses, and approvals, presuppose the  
15 existence of legal sanctions if the requirement to  
16 comply is disregarded.

17           Now, fees and charges might, of course, be  
18 imposed by a private company on a transactional  
19 basis, but the context here implies references to  
20 regulatory charges and regulatory fees.

21           The basic framework of these two  
22 provisions on delegated governmental authority is

17:23:25 1 closely paralleled by Article 5 of the ILC Articles  
2 on State Responsibility. And this parallel with  
3 Article 5 is something that both parties have noted  
4 but to very different ends. And, clearly, we do  
5 read the commentaries completely differently.

6           The ILC commentary in paragraphs one and  
7 two explains that Article 5 is designed to take  
8 account of the increasing phenomenon of paristatal  
9 entities, including public corporations and  
10 agencies. It deals with state responsibility in  
11 connection with entities that are not state organs,  
12 but that are, and I quote, "empowered by the law of  
13 the state to exercise elements of governmental  
14 authority." And that phrase in the light of the  
15 commentaries is designed to capture essentially the  
16 same idea as that of delegated governmental  
17 authority in Chapter 15, and the significance of  
18 the distinction between state organs and paristatal  
19 entities is that in the case of Article 4 and state  
20 organs, it makes no difference that the conduct was  
21 commercial or private, as the commentaries under  
22 Article 4 explain, and, in fact, as the recent

17:24:50 1 Partial Award in Eureko versus Poland pointed out  
2 in connection with the Polish State Treasury.

3           But the distinction between commercial and  
4 governmental is not only relevant, but crucial in  
5 the case of Article 5, and the paristatal entities  
6 to which it applies.

7           There are a couple of points that emerge  
8 from the Article, Article 5, and the commentaries  
9 under it. The parallel is so close as to suggest  
10 that the drafters of the NAFTA were not thinking of  
11 state enterprises and monopolies as state organs,  
12 but rather in terms of paristatal entities of the  
13 kind dealt with in Article 5, and I will come back  
14 to that point later.

15           But the other point, and the one I want to  
16 emphasize here is that the commentaries confirm  
17 that the notion of governmental authority as  
18 reflected in Article 5 is exactly what we have been  
19 proposing as the correct interpretation of the  
20 Chapter 15 provisions, and the concept therefore  
21 excludes commercial activities.

22           The commentary refers to functions of a

1130

17:26:04 1 public character normally exercised by state  
2 organs, giving the example of a security firm  
3 empowered to exercise public powers pursuant to a

4 judicial sentence or to prison regulations.

5           And it states that in order to attract  
6 state responsibility under this Article, the  
7 conduct of an entity must accordingly concern  
8 governmental activity and not other private or  
9 commercial activity in which the entity may engage.  
10 And here again, the example given is enlightening,  
11 the exercise of policing powers by a railway  
12 company would be covered, but not the sale of  
13 tickets or the purchase of rolling stock.

14           Now, the claimant has acknowledged--

15           ARBITRATOR CASS: Might I interrupt for  
16 just one moment. You said policing powers as  
17 opposed to police powers. In American legal terms,  
18 police powers refers to a broad set of powers of a  
19 state. Policing would be one very particular power  
20 and a very small subset of the very broad general  
21 power over other activities that we would refer to  
22 by that term. Did you mean something different

1131

17:27:32 1 here?

2           MR. WILLIS: Well, I believe the ILC was  
3 not using the expression police powers at all in  
4 the United States constitutional sense. It really  
5 refers to law enforcement by uniformed constables

6 and the like.

7           PRESIDENT KEITH: For what it's worth, the  
8 commentary like the articles were probably written  
9 by an Australian, and I think you would have that  
10 narrow meaning in mind.

11           MR. WILLIS: Now, as I was saying, the  
12 claimant has referred to this important passage,  
13 but has failed to draw the obvious conclusions.  
14 And instead, it's built much of its argument around  
15 a single paragraph of the commentary under Article  
16 5, which is paragraph six of the commentary.

17           And here, the ILC explains that it has not  
18 defined precisely the scope of governmental  
19 authority, and that beyond a certain limit the  
20 concept varies according to national traditions,  
21 et cetera.

22           But this appears in the narrative of the

1132

17:28:42 1 commentaries as a qualification with respect to the  
2 main thrust of the analysis of the ILC, which  
3 points to a decisive dividing line between private  
4 and commercial activity which could be carried out  
5 by any private person, and public authority which  
6 only governments or their delegates can exercise.

7           And there is no suggestion here in the  
8 commentary that the governmental concept is

9 infinitely variable or subjective.

10           The ILC refers to paristatal entities as  
11 an increasing phenomenon, and this helps explain  
12 the underlying purpose of the delegated  
13 governmental authority provisions in Chapter 15  
14 because there has been a trend over the years for  
15 governments either to privatize their operational  
16 and commercial functions or at least to move them  
17 outside the core government to state enterprises  
18 which are modeled on the private sector. And  
19 airport management might be an example, at least in  
20 the Canadian context.

21           The policy of Chapter 15 is that if any  
22 truly governmental authority is transferred out

1133

17:29:57 1 along with the operational functions, that  
2 authority should not escape NAFTA disciplines. But  
3 conversely, it would defeat the purpose of the  
4 transfer to treat the operational and commercial  
5 activities that have been transferred out as if  
6 they were still an integral part of the core  
7 government.

8           The commercial governmental distinction  
9 has been applied by arbitral tribunals in a wide  
10 variety of situations. In the Maffezini

11 jurisdictional award, which dealt with a regional  
12 developmental agency in Spain, the Tribunal  
13 referred to an earlier version of what is now ILC  
14 Article 5, and it noted that the agency carried out  
15 functions which are by their very nature typically  
16 governmental tasks that could not normally be  
17 considered to have a commercial nature. And the  
18 same distinction was applied in the award on the  
19 merits which found that in some respects the agency  
20 was carrying out public functions not normally open  
21 to commercial companies, and those functions could  
22 not be considered commercial in nature and could be

1134

17:31:17 1 attributed therefore to the Government of Spain.

2           Now, the Maffezini awards do help to  
3 illustrate the distinction, but I would hesitate  
4 to--I would hasten, rather, to add a qualification.  
5 Maffezini talks about governmental functions, but  
6 Chapter 15, in common with ILC Article 5, talks  
7 about governmental authority which is not  
8 necessarily the same thing.

9           And the same qualification applies to  
10 Salini versus Morocco which characterizes the main  
11 object of a state company responsible for highway  
12 building and operation as the performance of tasks  
13 under state control.



14           But authority, governmental authority, as  
15 I will be explaining, is a somewhat different  
16 concept than functions or even tasks. It's  
17 narrower and more precise, and it's authority that  
18 we have to consider here.

19           I come back to the way in which the  
20 governmental commercial distinction has been  
21 reflected in arbitral awards in various situations  
22 and for various purposes. A recent jurisdictional

1135

17:32:31 1 decision Impreglio versus Pakistan notes that the  
2 same set of facts can give rise to both contract  
3 claims, private contract claims, and Treaty based  
4 claims, and that only the Treaty based claims could  
5 be arbitrable under a Bilateral Investment Treaty.  
6 And the Tribunal, without making final  
7 determinations because this was a jurisdictional  
8 award, characterized the dividing line in terms of  
9 the conduct of the state in the exercise of its  
10 sovereign power or *puissance publique* going beyond  
11 that of an ordinary contracting party. The same  
12 test was applied in *Salini versus Jordan* in an  
13 award on jurisdiction given last year. Again, the  
14 context here is different, but the language  
15 reflects the same pervasive distinction in

16 international law between what is commercial on the  
17 one hand or private and what is governmental in  
18 character.

19           There is another parallel and perhaps more  
20 familiar, the law on state immunity or sovereign  
21 immunity distinguishes between governmental acts  
22 and private and commercial acts and it restricts

1136

17:33:54 1 immunity to the governmental category.

2           A 1999 ILC Working Group on the  
3 jurisdictional immunities of states after an  
4 overview of the case law concluded that, and I  
5 quote: "Sovereign and governmental acts which only  
6 a state could perform and which are core government  
7 functions have been found not to be commercial  
8 acts. By contrast, acts that may be and often are  
9 performed by private actors and which are detached  
10 from any exercise of governmental authority are  
11 likely to be found commercial acts."

12           The claimant's reply to the Mexican  
13 Article 1128 intervention at paragraph 95 cites the  
14 Eureka Partial Award and another recent arbitral  
15 award, Noble Ventures versus Romania, and it says  
16 they reject any idea of an absolute distinction  
17 between governmental and commercial acts.

18           Well, this is true, but the reference to

19 the governmental and commercial distinction in  
20 Eureko is in the context of ILC Article 4 rather  
21 than Article 5. And I refer to paragraphs 128 and  
22 130 which first quote out and set out the text of

1137

17:35:20 1 Article 4 and then bring in the Article 4  
2 commentary that I just referred to. And the Award  
3 does go on to say that the same result could have  
4 been reached by other routes, but it's fair to say  
5 that the primary focus is on Article 4 and the  
6 Article 4 commentary.

7 Now, Noble Ventures is less explicit and  
8 less clear on this point, but it implies that the  
9 Romanian agency at issue was also being treated as  
10 a state organ under Article 4, and not as a  
11 paristatal entity exercising elements of  
12 governmental authority under Article 5. And this  
13 follows from its determination in paragraph 79 that  
14 no relevant legal distinction could be drawn  
15 between the agency and the government Ministry.

16 In practice, as the Noble Ventures award  
17 observes, the governmental versus commercial  
18 distinction can sometimes be difficult to apply.  
19 This is a gray area. But not, I suggest, in terms  
20 of the issues in this case, and not above all with

21 the illustrative examples that Chapter 15 provides.  
22 The costing and pricing of services and the

1138

17:36:38 1 management of corporate assets, the so-called  
2 infrastructure, lack any inherently sovereign  
3 character or governmental character. There can be  
4 a gray area, but I suggest we are well clear of it  
5 here.

6           Delegated governmental authority typically  
7 implies the exercise of a power to control the acts  
8 of third parties or affect their rights and  
9 interests. This is a common feature of all of the  
10 examples in the two lists. What is contemplated  
11 then is authority that's associated with the  
12 sovereignty of the state.

13           Now, the claimant says the power to  
14 control the activities of others is irrelevant, and  
15 we heard that today and in the reply at paragraph  
16 698 and following. And they cite one of the  
17 follow-up proceedings in the WTO Canada Dairy  
18 decision where the appellate body affirms that,  
19 yes, the expression "governmental action" in the  
20 agreement on agriculture can extend to situations  
21 where no compulsion is involved. But governmental  
22 action is one thing and governmental authority is

17:38:01 1 another, especially authority of the kind  
2 illustrated in the Chapter 15 lists.

3           But more to the point, I suggest, are the  
4 passages in the main appellate body report of 1999  
5 which focused on the nature of governmental--of  
6 government and governmental authority in the  
7 context of provincial marketing boards. The  
8 appellate body said at paragraph 97, "The essence  
9 of government is, therefore, that it enjoys the  
10 effective power to regulate, control, or supervise  
11 individuals or otherwise restrain their conduct  
12 through the exercise of lawful authority."

13           The appellate body discussed the powers of  
14 the provincial boards to regulate the dairy  
15 industry, controlling producers at every stage of  
16 the process, setting quotas, calculating prices,  
17 pulling returns, and doing this through orders and  
18 regulations enforceable in courts of law. These  
19 regulatory powers, the report says at paragraph 100  
20 are, and I quote, "augmented by the machinery of  
21 the state itself with the public force to enforce  
22 that the regulatory functions and decisions are

17:39:28 1 carried out."

2           So, these were the factors that led the  
3 appellate body to affirm that the boards are  
4 governmental agencies taking governmental action,  
5 and this helps give some of the flavor of what is  
6 governmental and what is commercial.

7           Our opponents point to a number of  
8 apparent exceptions that don't seem to fit the  
9 description. Governments procure goods and  
10 services and they pay grants and subsidies, and  
11 that's true enough. And Article 1108 provides that  
12 certain provisions of Chapter 11 do not apply to  
13 procurement or subsidies and grants by a party or a  
14 state enterprise.

15           But the objection, I suggest, carries no  
16 real weight. The exceptions don't prove the rule.  
17 The provisos in Article 1108 were presumably added  
18 for greater certainty and out of an abundance of  
19 caution. For example, to assure the procurement by  
20 state enterprises would only be subject to national  
21 treatment obligations to the extent set out in  
22 Chapter 10. The general pattern is what counts,

1141

17:40:40 1 and it is generally if not always the case that

2 voluntary and consensual dealings would fall on the

3 commercial side of the line, and the coercive or  
4 regulatory powers would fall on the governmental  
5 side of the line.

6           And unquestionably, in the examples in  
7 Articles 1502(3)(a) and 1503(2), the common feature  
8 is the imposition of nonconsensual forms of  
9 authority over private sector undertakings.

10           There are many points of detail in the  
11 pleadings, but above all there is a complete  
12 difference in orientation in the approach of the  
13 parties to these two provisions on delegated  
14 governmental authority. The question is whether  
15 you look at the nature of the authority or whether  
16 you look at the nature of the entity, and clearly  
17 the first option is the right one. You look at the  
18 nature of the authority being exercised.

19           The claimant in contrast approaches the  
20 matter very largely in terms of the nature of the  
21 state enterprise or the nature of the monopoly, and  
22 thus, for example, in the reply at paragraphs 696

1142

17:41:56 1 and 7, the claimant argues that Canada Post acts  
2 under governmental authority because it is owned  
3 and controlled by the government. The board is  
4 appointed by the government, and it inherited

5 authority from the old Post Office Department and  
6 it is subject to directives, et cetera. I suggest,  
7 Mr. President, that this line of argument is  
8 completely misconceived. What counts as the Treaty  
9 language makes clear, is not the nature or status  
10 of the enterprise, but the nature of the specific  
11 authority under which it's acting.

12           In the memorial at paragraph 730 and  
13 following, under the heading Canada Post acted  
14 under delegated authority, the claimant argues the  
15 issue in terms of what it calls general and  
16 specific grants of authority to Canada Post. As it  
17 explains its position, the general grant of  
18 authority to CPC is simply the, and I quote here:  
19 "The control over the right in terms of access to  
20 the Monopoly Infrastructure through the general  
21 provisions of the legislation." That's at  
22 paragraph 733.

1143

17:43:19 1           But decisions on access to the postal  
2 network are commercial decisions. They're matters  
3 of corporate management. The authority--the  
4 authority to manage the monopoly is inherent in the  
5 grant of the monopoly, and of course that's  
6 something that's explicitly legitimized and  
7 recognized by the NAFTA. And if the authority to



8 manage the monopoly were not inherent in the grant  
9 of the monopoly, the privilege could simply not be  
10 exercised.

11           The claimant's argument implies, and we  
12 heard this again today, that everything a monopoly  
13 does is necessarily an exercise of delegated  
14 governmental authority. And that, of course, could  
15 not be right because it would mean that most of the  
16 language in Article 1502(3) (a) would have no  
17 purpose at all.

18           ARBITRATOR CASS: If I might, Mr. Willis,  
19 if we were dealing with Canada Post as an actual  
20 department--if we were dealing with Canada Post as  
21 a department of government, had it not been  
22 corporatized, would its activities all be subject

1144

17:44:35 1 to 1102, apart from the specific exemptions of  
2 procurement and the like?

3           MR. WILLIS: I believe that by creating  
4 Canada Post as a state enterprise, indeed, the  
5 legal situation was altered. That means that  
6 creation of that designation of Canada Post as a  
7 paristatal entity, if you like, means that it is  
8 not, and I will be coming to this later. It is not  
9 a state organ, and that its objection to treaty law

10 and the question of attribution is circumscribed,  
11 circumscribed in this case by treaty and  
12 circumscribed by general international law by the  
13 terms and commentary of Article 5.

14           On the other hand, what we do get through  
15 Chapter 15 is certainty of application and  
16 additional rules that impose additional disciplines  
17 and achieve the NAFTA objectives by imposing just  
18 additional disciplines with respect to state  
19 enterprises and monopoly through the additional  
20 rules such as paragraphs (b), (c), and (d) of  
21 1502(3), 1502(3) and paragraph three of 1503.

22           ARBITRATOR CASS: If, and I just to want

1145

17:46:06 1 make sure I follow where you're going here, if as  
2 in Noble Ventures we said that it looks like the  
3 change they change in name only effectively or in  
4 form only and not a serious change in the operation  
5 from a government department to a state enterprise,  
6 then you would say that we wouldn't need to parse  
7 the particular activities to see which is subject  
8 to 1102 and which is not; is that accurate?

9           MR. WILLIS: Indeed, the ILC referred to  
10 situations where the corporate veil is used merely  
11 as a sham, and that would not alter the substance  
12 of the rules of attribution. But where the

13 establishment of the entity is not a sham and where  
14 it is given an independent legal personality, it  
15 does have--the legal regime is altered, and it  
16 becomes a matter that's subject to the limitations  
17 of Chapter 15 or if we are looking at general  
18 international law, it becomes subject to the  
19 limitations inherent in the Article 5 scenario.

20           PRESIDENT KEITH: While you were  
21 interrupted, Mr. Willis, this is not a final  
22 figure, but you have tonight another seven or eight

1146

17:47:37 1 minutes to go, if you just want to take that into  
2 account, but obviously you can proceed again in the  
3 morning. I just thought in terms of the timing.

4           (Pause.)

5           MR. WILLIS: Mr. President, I could  
6 conclude right now.

7           PRESIDENT KEITH: It's up to you.

8           MR. WILLIS: This is a convenient place to  
9 interrupt and resume tomorrow morning.

10           PRESIDENT KEITH: Thank you. I didn't  
11 mean to suggest that you should stop then, but if  
12 you have completed--

13           MR. WILLIS: I think it's a convenient  
14 point.

15                   PRESIDENT KEITH:  Could I actually just  
16 ask one question about the point you were making,  
17 and I think you've already made it really, and it  
18 goes to some of the words that were used in some of  
19 those decisions you referred us to.

20                   One thing I hadn't really focused on until  
21 we were being taken to the words again of  
22 1502(3) (a) and so on, because we did look at them

1147

17:48:59 1  closely sometime back, is just the verbs because  
2  they are coercive verbs, aren't they?  Ground,  
3  expropriate, approve, and pose.  They're words that  
4  relate much more as you say to, on the face of it,  
5  the sovereign powers than to management or  
6  commercial or consensual activities.

7                   MR. WILLIS:  Yes, they are words that  
8  would be definitely associated with the exercise of  
9  public authority, state power.

10                   PRESIDENT KEITH:  Well, I sort of focused  
11 on it earlier today when I was reading out approved  
12 commercial transactions because obviously Canada  
13 Post enters into a lot of commercial transactions,  
14 but you would say that approving commercial  
15 transactions is a quite different kind of thing.  
16 It is the functions of competition or Securities  
17 Commission or something of that sort.

18           MR. WILLIS: Yes, Mr. President, and I  
19 will be coming back to this tomorrow, and I will be  
20 responding to some of the other comments made today  
21 by Mr. Wisner, but certainly one of the points I  
22 will be making is that the approval of commercial

1148

17:50:11 1 transactions and the conclusion of commercial  
2 contribution transactions are definitely two  
3 different things.

4           PRESIDENT KEITH: Well, if that is a  
5 convenient time, we will start again at nine in the  
6 morning. Thank you.

7           (Whereupon, at 5:50 p.m., the hearing was  
8 adjourned.)

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

20

21

22

1149

17:50:31 1

CERTIFICATE OF REPORTER

2

3

I, David A. Kasdan, RDR-CRR, Court

4

Reporter, do hereby testify that the foregoing

5

proceedings were stenographically recorded by me

6

and thereafter reduced to typewritten form by

7

computer-assisted transcription under my direction

8

and supervision; and that the foregoing transcript

9

is a true record and accurate record of the

10

proceedings.

11

I further certify that I am neither

12

counsel for, related to, nor employed by any of the

13

parties to this action in this proceeding, nor

14

financially or otherwise interested in the outcome

15

of this litigation.

16

17

DAVID A. KASDAN, RDR-CRR

18

19

20

21

22

