Court File No. 01-CV-211576

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DEMOCRACY WATCH, and JUDY DARCY on her own behalf
And on behalf of and for the benefit of all members of the
Canadian UNION of PUBLIC EMPLOYEES

Applicants

- and -

THE ATTORNEY GENERAL OF CANADA

Respondents

AFFIDAVIT OF DENYSE VIGORS MACKENZIE
(Sworn December 18, 2003)

I, **DENYSE VIGORS MACKENZIE**, public servant, of the City of Ottawa, in the Province of Ontario, make oath and say:

1. I am the Senior Deputy Commissioner of Competition for the Criminal Matters Branch of the Competition Bureau. From January 1999 to August 2003, I was the Director General and Principal Counsel of the Trade Law Bureau of the Department of Foreign Affairs and International Trade (hereinafter the "Department").

2. The Trade Law Bureau advises the Government of Canada on international trade law and provides legal advice in the negotiation and implementation of international trade agreements, including the North American Free Trade Agreement ("NAFTA"), the World Trade Organization ("WTO") Agreement, the Free Trade Area of the Americas ("FTAA)", Canada's free trade agreements with Chile, Israel and Costa Rica, and Canada's Foreign Investment Protection Agreements ("FIPA").

3. The Trade Law Bureau also represents Canada in dispute settlement proceedings initiated under these agreements, including investor-state arbitration conducted pursuant to Chapter 11 of the NAFTA.

4. From April 1997 to December 1998, I was the Director of the Investment Trade Policy Division of the Department. The Investment Trade Policy Division is responsible for international investment trade policy issues within the mandate of the Department. The Division coordinates the development of Canada's policy in respect of international agreements dealing with investment. The Division also coordinates Canada's position in relation to investment disputes under Chapter 11.

5. In my capacity as Director General and Principal Counsel of the Trade Law Bureau and Director of the Investment Trade Policy Division, I have been involved in all investor-state arbitrations under Chapter 11 in which Canada has been a party.

6. In 1993, I was the Departmental Trade Policy Advisor and Assistant to the Minister of Industry, Science and Technology and International Trade. I was responsible for providing policy advice to the Minister on the management of Canada's international trade and economic relationships and specifically on negotiations in respect of the WTO and NAFTA.

7. From 1991 to 1993, I was the Trade and Economic Counsellor at the Canadian Permanent Mission to the Organization of Economic Cooperation and Development ("OECD") in Paris.

8. From 1988 to 1991, I was assigned to the GATT Affairs Division of the Department and became Deputy Director of that Division in 1989. The GATT Affairs Division was responsible for overseeing trade policy relating to Canada's participation in the General Agreement on Tariffs and Trade ("GATT") and for the carriage of dispute settlement under that agreement. While at the Division, I was involved in initial discussions that helped inform the policy debate leading to the negotiation of the NAFTA.

9. As such, I have personal knowledge of Canada's international trade policy, Canada's involvement in international dispute settlement and the matters to which I herein depose.

A. Overview

10. The purpose of this affidavit is to situate investor-state dispute settlement conducted pursuant to the investment chapter of NAFTA, Chapter 11, in the broader context of Canada's international trade policy. In Part B, I will provide an overview of Canada's international trade policy, including investment trade policy. In Part C, I will set out the context in which Chapter 11 was negotiated, including the relevant international rules and practices which influenced the development of Chapter 11 provisions. Thereafter, in Part D, I will describe Canada's efforts to promote transparency in investor-state dispute settlement under Chapter 11, in relation to specific cases and working in conjunction with Canada's NAFTA partners. I will also touch briefly upon Canada's efforts to promote transparency in relation to international trade policy generally.

B. Canada's International Trade Policy

(a) Overview of General Objectives and Context

11. Canada's international trade policy is an integral component of the Government of Canada's overall political, social and economic objectives. This policy seeks to promote economic prosperity through the establishment of a fair, open, transparent and rules-based system of international trade and investment.

12. Trade liberalisation is a cornerstone of Canada's international trade policy. The reduction of tariff and non-tariff trade barriers including barriers to services and investment, enables Canadians to compete more effectively in foreign markets. Trade liberalization by providing greater access to imported products and services also stimulates domestic competition and promotes innovation and productivity gains amongst domestic producers, with attendant benefits to consumers.

13. Canada's international trade policy has been developed in the context of a world economy that is increasingly integrated. The costs of transportation and communication have decreased significantly; goods, services, capital and people are increasingly mobile. Canadian domestic and international trade policies seek to ensure that Canada remains competitive in view of a changing global marketplace.

14. The establishment of a rules-based trading system, a system that includes effective means for the settlement of trade disputes, is another cornerstone of Canada's international trade policy. A rules-based system provides greater security and predictability for the conduct of international trade. Secure and predictable access to foreign markets is indispensable to an economy such as Canada's that is so dependent on trade.

15. Canada's international trade policy strategy is set out in greater detail in a document published by the Department entitled *Canada's Trade Policy Strategy – Sustaining Our Success* ("*Canada's Trade Policy Strategy*"). Released in 2003, it is attached as Exhibit "1".

16. Canada's trade and investment performance is detailed in an annual report entitled *Report on Canada's State of Trade*. The fourth annual report was released in May 2003 and is attached as Exhibit "2". The Trade and Economic Analysis Division of the Department prepares the report based primarily on data provided by Statistics Canada.

17. These and other material relating to Canadian trade and investment objectives and priorities appear on the Department's Trade Negotiations and Agreements website, which is found at http://www.dfait-maeci.gc.ca/tna-nac/menu-en.asp.

18. Canada's international trade policy owes a good deal of its genesis to the period following World War II with the development of the General Agreement on Tariffs and Trade ("GATT 1947"). In the aftermath of the war, the world's major trading nations recognized the need to develop institutions and arrangements to promote economic and political stability and enhance national economic welfare. It was in this context that Canada joined other signatories in negotiating the GATT 1947, an agreement directed to the

reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce. Over the years, through successive rounds of negotiations, the Contracting Parties of the GATT 1947 elaborated upon and expanded their original commitments to respond to emerging challenges. In April 1994, the Uruguay Round of Multilateral Trade Negotiations culminated in the establishment of the World Trade Organization ("WTO"), a major achievement in providing a framework for international trade in goods and services and the protection of intellectual property rights.

19. Canada is an active Member of the WTO, participating extensively in trade negotiations, dispute settlement and other ongoing work conducted under the rubric of the WTO.

20. Canada's multilateral approach to trade and investment policy is complemented by regional and bilateral agreements. Trading partners use these agreements to advance trade and investment liberalization objectives beyond the disciplines established under the GATT and WTO.

21. Canada's first major bilateral initiative arose out of recommendations of the Royal Commission on the Economic Union and Development Prospects for Canada, chaired by the Honourable Donald S. MacDonald, ("MacDonald Commission"). In 1985, the MacDonald Commission reported on its examination of the long-term economic potential, prospects and challenges facing Canada, the national goals for economic development, and the institutional and legal arrangements most appropriate for attaining these goals. The MacDonald Commission recommended that Canada negotiate a free trade agreement with the United States. Attached as Exhibit "3" is the Executive Summary of the MacDonald Commission's report *Canada, A Commission on Canada's Future: Challenges and Choices*.

22. Negotiations for the Canada–United States Free Trade Agreement ("CUSFTA") were commenced shortly thereafter. The CUSFTA was signed on January 2, 1988 and came into force on January 1, 1989.

23. Almost three years after the conclusion of the CUSFTA and building on the foundation laid by that agreement, the United States, Mexico and Canada signed the North American Free Trade Agreement ("NAFTA") in December 1992. The NAFTA entered into force on January 1, 1994.

24. The regional approach to international trade and investment agreements was extended with the launch in 1995 of negotiations for a hemispheric free trade agreement with 34 countries of North, Central and South America (Free Trade Area of the Americas or "FTAA"). In 2001, Canada commenced negotiations for a free trade agreement with Nicaragua, Guatemala, Honduras and El Salvador ("CA-4").

25. Canada has pursued its international trade objectives bilaterally and to date has concluded free trade agreements with each of Israel, Chile and Costa Rica. Currently, Canada is negotiating a free trade agreement with Singapore.

26. In addition, Canada has negotiated bilateral investment treaties ("BIT") called Foreign Investment Protection Agreements ("FIPA") with a number of its trading partners. I describe Canada's FIPA Programme in greater detail in the next section.

(b) Link Between Trade and Investment

27. Canada's international trade policy has long recognized the interrelationship between international trade and investment. In the latter regard, Canada's investment policy encourages foreign direct investment into Canada ("inward FDI") and improved access and protection for Canadian investors in foreign markets ("outward FDI").

28. The Honourable Pierre Pettigrew, the Minister for International Trade, outlined Canada's Plan for Foreign Investment Promotion in a speech to the Conference Board of Canada on March 6, 2002, a copy of which is attached as Exhibit "4".

29. The Minister stated that Canadian policy is based on the recognition that FDI benefits both recipient and capital exporting countries. FDI tends to strengthen commercial

links and raise the overall level of trade between the two countries. In the recipient country, inward FDI tends to raise imports in the short term and can stimulate exports in the longer run; exports will increase when new production facilities associated with FDI are operational.

30. Currently, Canada is a net exporter of capital; since 1996, the stock of Canadian direct investment abroad has surpassed the stock of inward FDI into Canada. (*Canada's Trade Policy Strategy*, Exhibit "1" hereto, at page 30).

31. As inward and outward FDI becomes an increasingly important aspect of business strategy for Canadian business, restrictions on the flow of investment are increasingly problematic. On March 31, 2000, the Canadian Chamber of Commerce ("CCC") in partnership with Industry Canada released its *Report on Foreign Investment Barriers*. The report notes that "as a very internationally-oriented economy, the dismantling of restrictions on both international trade and investment is critical for the future of Canadian economic prosperity." (Pg. 1). The report further notes that "by promoting a commercial environment based on rules, transparency, openness and predictability, Canadian companies will have a better chance of succeeding in their international aspirations." (Pg. 1) The CCC report is attached as Exhibit "5".

32. The interrelationship between trade and investment has also been recognized at the WTO. At the First Ministerial Conference of the WTO held in Singapore in 1996, WTO Members established a Working Group on the Relationship between Trade and Investment ("Trade and Investment Working Group").

33. At the Fourth Ministerial Conference in Doha, Qatar in November 2001, WTO Members agreed on a Work Programme for the next round of multilateral trade negotiations, the so-called Doha Development Round. In respect of trade and investment, the Work Programme provides guidance to the Trade and Investment Working Group on the modalities for negotiating disciplines relating to investment. Canada has been an active participant of the Trade and Investment Working Group. Attached as Exhibit "6" is a copy

of the Ministerial Declaration of the Fourth Ministerial Conference, adopted 14 November 2001 (WTO document WT/MIN(01)DEC/1).

(c) Investment Agreements

34. The CUSFTA, NAFTA and Canada-Chile Free Trade Agreement ("Canada-Chile FTA") each contain chapters devoted to investment liberalization and protection: Chapter 16, Chapter 11 and Chapter G, respectively.

35. In 1989, the Government of Canada initiated a bilateral foreign investment protection agreement programme ("FIPA Programme"), a copy of which is attached as Exhibit "7".

36. From 1990 to 1993, Canada negotiated FIPAs with Poland (1990), the Union of Soviet Socialist Republics (1991), the Czech and Slovak Federal Republic (1992), Argentina (1993) and Hungary (1993). Each of these agreements was modelled on the *Draft Convention on the Protection of Foreign Property* developed by the Organization of Economic Cooperation and Development ("OECD"). Attached as Exhibit "8" is the *Draft Convention*, adopted by Resolution by the Council of the OECD at its 150th meeting, 12 October 1967.

37. The *Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments*, Can T.S. 1990/43, provides an example of the approach taken by Canada in relation to the initial FIPA. It is attached as Exhibit "9".

38. Following the conclusion of the NAFTA in 1993, Canada developed a new model for its bilateral investment treaties based on the investment rules set out in Chapter 11 of the NAFTA. Since that time, 16 FIPAs have been signed and are in force: Ukraine (1995), Latvia (1995), Philippines (1996), Trinidad and Tobago (1996), Barbados (1997), Ecuador (1997), Egypt (1997), Romania (1997), Venezuela (1998), Panama (1998),

Thailand (1998), Armenia (1999), Lebanon (1999), Uruguay (1999), Costa Rica (1999), and Croatia (2001). FIPAs have been signed, but are not yet in force, with South Africa (1995) and El Salvador (1999). All agreements since 1994 provide for the settlement of disputes through investor-state dispute settlement according to procedures modelled on those in Chapter 11 of the NAFTA.

39. The *Agreement between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments*, Can.T.S. 2001/4, provides an example of the approach taken by Canada in relation to its later FIPAs. It is attached as Exhibit "10".

40. The agreements concluded under the FIPA Programme and the investment chapters of Canada's free trade agreements seek to secure similar policy objectives and create similar obligations. For ease of reference, I will refer to these agreements and investment chapters collectively as "Investment Agreements".

41. Investment Agreements create obligations for signatories in relation to both the treatment and the protection of foreign investment. They are intended to encourage a predictable framework for investment consistent with the rule of law and a market environment for investment that is based on the principles of fairness, transparency and non-discrimination.

42. Investment Agreements, particularly those providing for investor-state dispute settlement, are viewed as an effective means to promote investment into emerging economies and economies in transition. States making the relatively recent transition to a market-based economy often seek to negotiate Investment Agreements in order to demonstrate openness to foreign capital and to reassure foreign investors of a commitment to a rules-based and transparent business and regulatory environment.

(d) International Dispute Settlement

43. Canada's trade and investment agreements provide for state-to-state dispute settlement, pursuant to which a State Party may submit to dispute settlement its claims that another State Party has violated obligations undertaken in the agreement. The agreements provide for rules governing the dispute settlement including the establishment of the adjudicating body, procedure and available remedies. State-to-state dispute settlement, as the term implies, is restricted to State Parties.

44. By way of example, disputes regarding the interpretation or application of the NAFTA are subject to the state-to-state dispute settlement procedures set out in Section B of Chapter 20 of the NAFTA. Disputes arising under WTO agreements are subject to state-to-state dispute settlement in accordance with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), being Annex 2 to the Marrakesh Agreement Establishing the WTO. The DSU is attached as Exhibit "11".

45. In addition to state-to-state dispute settlement, the NAFTA (Chapter 11), the Canada-Chile FTA (Chapter G) and all of Canada's FIPAs provide for investor-state dispute settlement.

46. Investor-state dispute settlement allows an investor who is a national of a State that is signatory to the agreement to initiate a claim on its own behalf to determine through international arbitration whether another signatory State has violated the obligations of the agreement. The investor is entitled to claim damages in respect of the violation. The arbitration proceedings are governed by procedures based on established international arbitration rules.

47. Investment Agreements provide investors the option of international arbitration in lieu of recourse to local remedies. Subject to certain exceptions, an election to pursue international arbitration bars recourse to local remedies. If an investor elects to forego international arbitration, the Investment Agreement does not apply and does not inhibit the investor's right to pursue local remedies.

48. Typically, there is a limitation period of three years within which an investor may elect to pursue international arbitration, after which time recourse to arbitration under the Investment Agreement is barred.

49. Investment Agreements restrict the remedial powers of an investor-state arbitral tribunal to an award of monetary damages, interest and costs and to an order for restitution of property. In the latter case, the State Party has the option of paying monetary damages and interest in lieu of restitution. An arbitral tribunal finding in favour of the investor cannot invalidate the impugned governmental measure. In contrast, in state-to-state dispute settlement, the remedy typically is the removal of the infringing measure, failing which the successful State may be authorized to retaliate against the State whose actions have been found to breach its obligations under the agreement.

50. Under international law, an investor who considers that it has been wronged by a foreign state could seek the intervention of its home state in order to protect its interests. If it chose to act, the investor's home state could espouse the investor's claim in accordance with international law. Investor-state arbitration enables an investor to bring a claim against the host state under an international mechanism without the intervention of the investor's home state. In short, investor-state dispute settlement is designed to:

- Eliminate the overt element of politics from investment dispute settlement. Investors can launch claims based on their own assessment of the merits of a particular dispute and their economic self-interest. The potential that the dispute could have a negative impact on the broader relations between the investor's home state and the host state is reduced;

- Ensure that an investor whose interests have been harmed as a result of state action contrary to the agreement is compensated for its loss. If compensation is awarded, the compensation is paid directly to the successful investor or its investment; and

- Provide an effective alternative, based on widely accepted international arbitration mechanisms, to seeking redress through the domestic courts of the host state.

(e) Investor-State Arbitration Rules

51. Procedural rules for investor-state arbitration serve to create a predictable, fair and impartial dispute settlement mechanism. Canada has favoured the use of rules developed through consensus by international organizations.

52. With few exceptions, Canada's FIPAs, Chapter 11 of the NAFTA and Chapter G of the Canada-Chile FTA provide for a choice of arbitration rules for use in investor-state dispute settlement, including:

(a) the ICSID *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* ("ICSID *Convention*", "ICSID" being the International Centre on the Settlement of Investment Disputes);

(b) the ICSID *Additional Facility Rules*; and

(c) *Arbitration Rules* of the United Nations Commission on International Trade Law ("UNCITRAL *Arbitration Rules*").

53. These three sets of arbitration rules have been developed internationally and bring together practices and due process safeguards of diverse jurisdictions.

(i) ICSID *Convention*

54. The ICSID *Convention* establishes an international framework for the resolution of investment disputes, through conciliation or arbitration, between states that are members of ICSID ("Member States") and nationals of other Member States. This framework consists of both a permanent institution (the ICSID or Centre) as well as detailed conciliation and arbitration rules. The Centre has both an Administrative Council and a Secretariat. Attached as Exhibit "12" is the ICSID *Convention*, dated 14 October 1966, Washington.

55. The ICSID *Convention* was developed in the mid-1960s under the auspices of the International Bank for Reconstruction and Development ("World Bank"). The Centre is an autonomous international organization, but it maintains close links with the World Bank; the President of the World Bank is the Chair of the Centre's Administrative Council, the seat of the Centre is the principal office of the World Bank, and the expenses of the Secretariat are financed out of the World Bank's budget.

56. All Member States, whether or not parties to a dispute pursued under the ICSID Convention, are required by the terms of the Convention to recognize and enforce ICSID arbitral awards. As of September 2003, 154 states have signed and 139 states have ratified the ICSID *Convention.*

57. The Secretariat is responsible for maintaining a list of Member States, a Panel of Conciliators and a Panel of Arbitrators. The Secretariat provides registry services and assistance and administrative support for conciliation and arbitration proceedings.

58. Canada has indicated its interest in ICSID membership, but, to date, is not a signatory to the *Convention.* Consequently, arbitration under the ICSID *Convention* is not available for investor-state dispute settlement involving Canada or Canadian investors.

59. Recourse to the arbitration procedures of the ICSID *Convention* is included in the investment chapters of the NAFTA and Canada-Chile FTA and Canada's later FIPAs, in order to ensure that the *Convention* will be available for use in the future in the event that both Canada and the other State Party are signatories to the *Convention.*

60. The rules governing arbitration proceedings under the ICSID *Convention,* being Part D thereto ("*Convention Arbitration Rules*"), are attached as Exhibit "13".

(ii) ICSID Additional Facility Rules

61. The ICSID *Additional Facility Rules* are available for arbitration of disputes between States and foreign nationals that fall outside the scope of the ICSID *Convention,*

including disputes where either the investor's home State or host State is not a party to the ICSID *Convention*. Arbitration proceedings under the ICSID *Additional Facility Rules* are administered by ICSID, providing such proceedings with the benefit of ICSID's institutional and administrative support, and are governed by the arbitration rules of the ICSID *Additional Facility Rules*, being Schedule C thereto ("*Additional Facility Arbitration Rules*"). These rules are attached as Exhibit "14".

62. As Canada is not currently a party to the ICSID *Convention*, recourse to the ICSID *Additional Facility Rules* is available for investment disputes under the investment chapters of the NAFTA, the Canada-Chile FTA and Canada's later FIPAs.

(iii) UNCITRAL

63. The United Nations Commission on International Trade Law ("UNCITRAL") was established by the United Nations General Assembly in December 1966. Attached as Exhibit "15" is United Nations General Assembly Resolution 2205 (XXI), entitled the *Establishment of the United Nations Commission on International Trade Law*, UN Doc. A/6316, (1966).

64. The UNCITRAL is the core legal body of the United Nations system in the field of international trade law. By Resolution 2205, the General Assembly gave the UNCITRAL the general mandate to further the progressive harmonization and unification of the law of international trade in aid of reducing obstacles to trade.

65. The UNCITRAL membership currently includes 60 member States elected by the General Assembly. Membership is representative of the world's geographic regions and its principal economic and legal systems. Members of the UNCITRAL are elected for terms of six years.

66. The UNCITRAL *Arbitration Rules* were adopted by the UNCITRAL in 1976. In 1976, during its thirty-first session, the General Assembly recommended the use of the

UNCITRAL *Arbitration Rules* in the settlement of private international commercial disputes. It did so, noting its conviction that rules for ad hoc arbitration that were acceptable to countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations. Since then, the UNCITRAL *Arbitration Rules* have become widely used around the world. Attached as Exhibit "16" is the *Yearbook of the United Nations Commission on International Trade Law*, 1982, Volume XIII, Part Three, *Recommendations to assist arbitral institutions and other interested bodies.*

67. Initially, the UNCITRAL *Arbitration Rules* were developed for ad hoc arbitration, that is arbitration not administered by an arbitral institution or appointing authority. However, at least one arbitral institution, the Permanent Court of Arbitration ("PCA") in the Hague, has based its procedural rules on the UNCITRAL *Arbitration Rules.* Established in 1899, the PCA administers arbitration, conciliation and fact finding in disputes involving states, private parties and intergovernmental organizations.

68. The UNCITRAL *Arbitration Rules* are attached as Exhibit "17".

C. Chapter 11 of the NAFTA

69. Before discussing Chapter 11 of the NAFTA in detail, I will set out some of the context within which the NAFTA was negotiated.

(a) NAFTA Negotiations

(i) General

70. In 1990, the United States and Mexico initiated free trade discussions.

71. On October 9, 1990, the Honourable John Crosbie, Minister for International Trade at the time, addressed the House of Commons Standing Committee on External

Affairs and International Trade regarding Canada's intention to participate in trilateral free trade discussions with Mexico and the United States. Attached as Exhibit "18" is an extract from the Minutes of Proceeding and Evidence of the Standing Committee, dated October 9, 1990, Issue No. 61.

72. In his address, Minister Crosbie outlined the principle reasons for joining the discussions. The Minister stated at page 61:6 of the Minutes:

> First, Mexico's recent reforms and its economic trade and investment policies are creating trade opportunities for Canadian exporters in the growing Mexican market. We have opportunity there now because they are liberalizing and reforming their whole approach in the economic sector. Second, given the vital importance of the North American market to Canada, we must participate in these talks at the outset to enhance our ability to compete effectively and to attract investment in this emerging market of over 350 million people, a market equivalent to that of the European Community, together with the European Free Trade Association countries in Europe.

73. The existence of two bilateral free trade agreements on the North American continent, both involving the United States, could have diverted investment from Canada to the United States as the platform from which to best access all three North American markets. A bilateral United States-Mexico free trade agreement could have diluted the benefits of the CUSFTA by providing greater competitive opportunities in the U.S. market to Mexican goods and services than to those from Canada.

74. On February 5, 1991, Canada, the United States, and Mexico ("NAFTA Parties" or "Parties") announced their intention to negotiate the NAFTA. The Press Release issued by the Office of the Prime Minister announcing the decision, dated February 5, 1991, is attached as Exhibit "19".

75. The NAFTA negotiations were formally launched on June 12, 1991 at the first Trilateral Ministerial Oversight meeting. The Trade Ministers from the three NAFTA Parties held seven Trilateral Ministerial Oversight meetings during the course of negotiations.

76. Canada's key objectives in the negotiations were to secure barrier-free access to Mexico's market for Canadian exporters and investors and to protect and improve upon the major benefits of the CUSFTA, notably in respect of customs procedures, rules of origin, intellectual property, services, and provisions governing the application of countervailing and antidumping duties. Canada also wanted to reinforce its attractiveness as a location for investment for the whole North American market.

(ii) Chapter 11

77. Canada's objectives in respect of investment negotiations included the maintenance of Canada as an attractive location for investment within the North American market, the preservation of the scope of foreign investment review in Canada, and enhanced access and protection for Canadian investors in Mexico. Initially, Canada advocated an investment chapter in the NAFTA based on investment disciplines in Chapter 16 of the CUSFTA.

78. Investment disciplines in Chapter 16 of the CUSFTA include the obligation to accord national treatment and most-favoured nation treatment, obligations in respect of expropriation and the elimination of financial transfer restrictions. The CUSFTA, however, provided no mechanism for investor-state disputes settlement.

79. The United States has a history of significant investment losses associated with foreign investment in Mexico, including the 1980s nationalization of Mexican banks. In the trilateral negotiations with Canada and Mexico, the United States sought an agreement on investment disciplines informed by the U.S. experience with bilateral investment treaties ("BIT") negotiated with a number of countries since the early 1980s. In particular, the United States sought investment protections relating to expropriation, repatriation of profits and investor-state dispute settlement. Attached as Exhibit "20" is a Fact Sheet relating to the U.S. Bilateral Investment Treaty Program produced by the United States Department of State, dated November 1, 2000.

(iii) Conclusion of Negotiations

80. The NAFTA was negotiated as a single undertaking, meaning that nothing was agreed upon until the entire text was agreed upon.

81. The final text of Chapter 11 and, more generally of the NAFTA, reflects a balancing of and compromise between often diverging objectives and interests. The provisions relating to investor-state dispute settlement were weighed in recognition of the potential exposure to claims by investors against the Government of Canada and the benefits that Canadian investors would enjoy in the United States and Mexico in terms of enhanced investment protection.

82. The bargaining leverage of each NAFTA Party reflected, to a large degree, its market size and potential, its ability to provide concessions and its tolerance for the risk of non-agreement. Not only did the three governments have to consider the bargaining leverage of other states, but each government had to balance competing domestic interests, policies and priorities. Mexico's different stage of economic, political and social development, the significant economic asymmetries between the NAFTA Parties, the dynamics of domestic politics, all contributed to the complexity of the negotiations.

83. After nearly 18 months of intense negotiations, on December 17, 1992, the three Parties signed the NAFTA in Washington. Authorization for Prime Minister Brian Mulroney to sign the NAFTA on behalf of Canada was conferred by Order-in-Council P.C. 1992-2553. Attached as Exhibit "21" is Order-in-Council P.C. 1992-2553, approved December 10, 1992.

(iv) Domestic Implementation

84. In Canada, treaties are not self-executing. A treaty which requires a change in the internal law of Canada is implemented by the enactment of a statute which makes the required change in domestic law. In the case of the NAFTA, the implementing legislation is

the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44 ("*NAFTA Implementation Act*"). The *NAFTA Implementation Act* was given Royal Assent on June 23, 1993.

85. By Order-in-Council P.C. 1993-2196 the Governor in Council authorized the Secretary of State for External Affairs to take "the action necessary to bring into force for Canada [...] the North American Free Trade Agreement" and authorized the "Secretary of State for External Affairs or the Minister for International Trade to sign, on behalf of the Government of Canada, exchanges of Letters" in relation to the NAFTA. The exchange of letters confirmed that the NAFTA Parties had satisfied all legal requirements for the implementation of the NAFTA in their respective jurisdictions. Attached as Exhibit "22" is Order-in-Council P.C. 1993-2196, approved December 29, 1993.

86. The *NAFTA Implementation Act* came into force on January 1, 1994.

87. Part I of the *NAFTA Implementation Act* contains general implementing provisions. Section 10 of Part I states that "the Agreement is hereby approved." Part II of the *NAFTA Implementation Act* contains amendments to Canadian legislation required to ensure that it complied with the obligations Canada undertook in the NAFTA.

88. The Government of Canada's objectives in implementing the NAFTA are set out in the Canadian Statement on Implementation, North American Free Trade Agreement, C. Gas. 1994.I.147 ("Statement on Implementation"), excerpts of which are attached as Exhibit "23". Three overriding considerations are noted (at Pg. 69):

(a) the importance of global trade and investment to the well-being of all Canadians;

(b) the long-standing commitment of Canada to a fair and open international trade and investment regime; and

(c) the critical role played by agreed rules and procedures in securing equal opportunities for Canadians in a world of much larger and more powerful trading entities.

(b) Chapter 11 – Overview

89. NAFTA Chapter 11 contains provisions to promote investment liberalization and to protect foreign investors and their investments in the territory of the NAFTA Parties. Chapter 11 is divided into three sections:

- Section A: Investment.
- Section B: Settlement of Disputes between a Party and an Investor of Another Party; and
- Section C: Definitions.

(i) Chapter 11 – Section A

90. Chapter 11 applies to measures adopted or maintained by a NAFTA Party relating to:

(a) investors of another Party;
(b) investments of investors of another Party in the territory of the Party; and
(c) with respect to performance requirements and environmental measures, all investments in the territory of a Party (Article 1101).

91. The term “investment” is defined in Article 1139 to include an enterprise, equity securities, debt securities, and loans to an enterprise.

92. Article 201 of NAFTA defines “measure” as including “any law, regulation, procedure, requirement or practice”.

93. The obligations of a NAFTA Party to investors and investments of investors of the other Parties are set out in Section A. These include obligations to accord national treatment (Article 1102), most-favored nation treatment (Article 1103) and a minimum standard of treatment (Article 1105); restrictions on the imposition and enforcement of performance requirements (Article 1106); and obligations with respect to financial transfers (Article 1109) and expropriation (Article 1110)

(ii) Chapter 11 – Section B

94. Section B of Chapter 11 allows an investor of a NAFTA Party to initiate arbitration proceedings against another NAFTA Party alleging a breach by the NAFTA Party of obligations under Section A of Chapter 11 (or Articles 1503(2) and 1502(3)(a)) and that, as a result, the investor has incurred loss or damage (Article 1116). There is a similar provision permitting an investor to bring a claim on behalf of an enterprise that the investor owns or controls (Article 1117).

95. Investor-state dispute settlement under Chapter 11 is in addition to state-to-state dispute settlement that may be initiated by a NAFTA Party in respect of investment obligations under the NAFTA.

96. There are several conditions precedent to submission of a claim to arbitration under Section B of Chapter 11. Article 1121 requires the disputing investor (and the enterprise if the claim is under Article 1117) to consent to the arbitration and waive the right to initiate or continue proceedings before any domestic administrative tribunal or court in relation to the alleged breach of Section A obligations. The waiver does not apply to proceedings for injunctive, declaratory or extraordinary relief. The waiver provisions prevent an investor from pursuing damages through Chapter 11 in addition to domestic proceedings in respect of the same measure that is alleged to be a breach of the NAFTA. If an investor elects to forego arbitration under Chapter 11, Chapter 11 does not inhibit the investor’s right to pursue domestic remedies.

97. Under Article 1122, the NAFTA Parties consent to the submission of a claim to arbitration in accordance with Section B of Chapter 11. The effect of Article 1122 is that the NAFTA Parties consent to arbitrate only those claims permitted under Article 1116 and 1117.

98. Generally, a Tribunal established under Chapter 11 is composed of three arbitrators. Each party to the dispute appoints one arbitrator and endeavors to agree to the appointment of the third, who is the "presiding" arbitrator (Article 1123). If the parties cannot agree, the Secretary-General of International Centre for the Settlement of Investment Disputes ("ICSID") appoints the presiding arbitrator.

99. The place of arbitration is determined by agreement of the parties to the dispute, and failing that, by the Tribunal seized of the matter in accordance with the applicable arbitration rules. Unless otherwise agreed by the disputing parties, the Tribunal holds the arbitration in the territory of one of the NAFTA Parties.

100. A Tribunal must decide the issues in dispute in accordance with the terms of the NAFTA and applicable rules of international law (Article 1131(1)).

101. A Tribunal is subject to the interpretative guidance of the NAFTA Free Trade Commission ("NAFTA FTC"). Established under Chapter 20, the NAFTA FTC comprises cabinet-level representatives of the NAFTA Parties or their designees. An interpretation of a provision of the NAFTA by the NAFTA FTC is binding on a Tribunal (Article 1131(2)).

102. A Tribunal finding in favour of the investor cannot invalidate the impugned governmental measure found to have breached an obligation in Section A of Chapter 11. Rather, the remedial power of a Chapter 11 Tribunal is restricted to awarding monetary damages and interest, and ordering the restitution of property (Article 1135). However, in the latter case, the State Party found liable has the option of paying monetary damages and interest in lieu of restitution (Article 1135(1)(b)).

103. Final awards are binding only on the parties to the dispute (Article 1136(1)). A party to the dispute may not enforce the final award until proceedings to revise, set aside or annul the award, if any, have been concluded (Article 1136(3)).

104. Awards made under the ICSID *Additional Facility Rules* or UNCITRAL *Arbitration Rules* are reviewable by domestic courts. Awards made under the ICSID *Convention,* to which Canada is not yet a party, are reviewable by an ad hoc committee of arbitrators in accordance with the terms of the ICSID *Convention.*

105. In Canada, a disputing Party may apply under the federal *Commercial Arbitration Act* to a domestic superior court to set aside or refuse to recognize or enforce an award of a Chapter 11 Tribunal. The *Commercial Arbitration Code* ("*Code*") is a schedule to the *Commercial Arbitration Act.* The *Code,* based on the UNCITRAL 1985 Model Law, sets out procedures for commercial arbitrations involving the federal Crown. Articles 34 and 35 of the *Code* enumerate the grounds on which a domestic court may set aside or refuse to recognize or enforce an arbitral award.

(iii) Applicable Procedural Rules

106. As set out under Part B(e) of this Affidavit, Chapter 11 provides for a choice of arbitration rules for use in investor-state dispute settlement, including:

(a) ICSID *Convention*;
(b) ICSID *Additional Facility Rules*; and
(c) UNCITRAL *Arbitration Rules*.

107. The selected rules will govern the proceedings, except to the extent modified by Section B of Chapter 11. The chart below summarizes which rules currently are available in Chapter 11 investor-state dispute settlement:

	Canadian Investor	**Mexican Investor**	**U.S. Investor**
Claims Against Canada	n/a	UNCITRAL	UNCITRAL or ICSID A/F Rules*
Claims Against Mexico	UNCITRAL	n/a	UNCITRAL or ICSID A/F Rules*
Claims Against the United States	UNCITRAL or ICSID A/F Rules*	UNCITRAL or ICSID A/F Rules*	n/a

*ICSID *Additional Facility Rules*

108. In all arbitrations involving Canada, disputing investors have elected the UNCITRAL *Arbitration Rules* (Ethyl Corporation; S.D. Myers, Inc.; Pope & Talbot, Inc.; United Parcel Service of America, Inc.("UPS")).

109. In arbitrations involving the United States, disputing investors have elected the UNCITRAL *Arbitration Rules* in three cases (Methanex Corporation; Canfor Corporation; Kenex Ltd.) and the ICSID *Additional Facility Rules* in the remaining three cases (The Loewen Group, Inc.; Mondev International Ltd.; ADF Group Inc.).

110. In arbitrations involving Mexico, disputing investors have elected the UNCITRAL *Arbitration Rules* in three cases (International Thunderbird Gaming Corporation; Robert J. Frank; GAMI Investments, Inc.) and the ICSID *Additional Facility Rules* in five cases (Metalclad Corporation; Robert Azinian; Waste Management, Inc.; Marvin Roy Feldman Karpa; Fireman's Fund).

(c) Confidentiality in Chapter 11 Investor-State Dispute Settlement

(i) Chapter 11 provisions

111. There are no provisions in the NAFTA governing the confidentiality of Chapter 11 proceedings other than Annex 1137.4, which governs the publication of Chapter 11 arbitral awards. Consequently, except in relation to the publication of awards, the applicable arbitration rules govern the confidentiality of the Chapter 11 proceedings.

112. Annex 1137.4 provides that where Canada is a disputing party, Canada or the disputing investor may make the award public. By negotiating this provision, Canada wanted to ensure publication of an award in cases involving Canada. Likewise, where the United States is a disputing party, the United States or the disputing investor may make the award public. In cases involving Mexico, the applicable arbitration rules govern the publication of the award.

113. In all arbitrations involving Canada, Chapter 11 Tribunals have confirmed that Annex 1137.4 publication provisions apply to partial, preliminary and final awards.

114. In all arbitrations involving Canada, Canada has made available to the public every final award issued by a Chapter 11 Tribunal. To my knowledge, Canada also has made available to the public every interim, interlocutory, partial and preliminary award issued by a Chapter 11 Tribunal in all arbitrations involving Canada. By the terms of the NAFTA Free Trade Commission Notes of Interpretation of July 31, 2001 (which I will describe in greater detail in Part D(b)), each NAFTA Party "has agreed to make available to the public in a timely manner all documents […] issued by, a Chapter Eleven tribunal," subject to redaction of specific categories of information. Consequently, all future awards will be made available to the public in a timely manner.

(ii) UNCITRAL Arbitration Rules

115. In keeping with general principles of arbitration, proceedings pursuant to the UNCITRAL *Arbitration Rules* will be *in camera* unless the parties to the dispute agree otherwise. Article 25(4) of the UNCITRAL *Arbitration Rules* reads as follows:

> Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

116. Article 32(5) of the UNCITRAL *Arbitration Rules* provides that the award of the arbitral tribunal may be made public only with the consent of both parties to the dispute. This is superseded, however, by Annex 1137.4 of the NAFTA.

(iii) ICSID *Convention* Arbitration Rules and AF Arbitration Rules

117. Arbitrations under the either the ICSID *Convention* or the ICSID *Additional Facility Rules* require the consent of both disputing parties to the attendance at the hearing of any person, other than the parties, their agents, counsel and advocates, witnesses and experts during their testimony, or officers of the Tribunal.

118. Rule 32 of the *Convention Arbitration Rules* and Article 39 of the *Additional Facility Arbitration Rules* (being Schedule C to the ICSID *Additional Facility Rules*) govern the confidentiality of the hearing and read as follows:

> The Oral Procedure
>
> (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.
>
> (2) The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.

> (3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

119. In relation to the publication of awards, Rule 48 of the *Convention Arbitration Rules* and Article 53 of the *Additional Facility Arbitration Rules* are virtually identical. Rule 48(4) provides as follows:

> The Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal.

D. Canada's Efforts to Promote Transparency in Investor-State Dispute Settlement

(a) Position Taken by Canada in Chapter 11 Proceedings

120. Canada consistently has taken the position that Chapter 11 proceedings should be as open and transparent as possible subject to the protection of genuinely confidential information, such as confidential business information, information provided in confidence by third parties to the dispute and information which is otherwise privileged.

121. Since the jurisdictional hearing in *Ethyl Corporation v. Canada*, Canada has sought the agreement of disputing investors to open Chapter 11 hearings to the public in each Chapter 11 proceeding against Canada. The disputing investors in *Pope & Talbot, Inc. v. Canada* and *S.D. Myers, Inc. v. Canada* refused to consent to open hearings. Consequently, hearings in those arbitrations were held *in camera*. The disputing investor in *UPS v. Canada* has consented to hearings open to the public.

122. In Chapter 11 proceedings against Canada, Canada has sought to make public all documents submitted to or issued by Chapter 11 Tribunals, subject only to redaction for genuinely confidential information.

(i) Ethyl Corporation v. Canada

123. Ethyl Corporation submitted its claim to arbitration under Article 1120 of the NAFTA on April 14, 1997.

124. Ethyl Corporation challenged the *Manganese-based Fuel Additives Act*, S.C. 1997, c.11, federal legislation that imposed a ban on the importation into Canada of, and the inter-provincial trade in, MMT, an organo-metallic compound added to gasoline to increase octane levels. This was the first investor-state arbitration under Chapter 11 against Canada. The matter proceeded to a jurisdictional hearing before a Chapter 11 Tribunal on June 24, 1998.

125. During the same time period, the Government of Alberta challenged the *Manganese-based Fuel Additives Act* under the *Agreement on Internal Trade* (Part 1, Canada Gazette, 1994) ("AIT"), an agreement in relation to inter-provincial trade within Canada. On June 12, 1998, a Panel, convened under Article 1704 of the AIT, found the *Act* to be inconsistent with obligations under the AIT and recommended the removal of the inconsistency.

126. On July 20, 1998, Canada adopted a regulatory amendment (SOR/98-393) deleting MMT from the list of controlled substances under the *Act*. In light of Canada's response to the AIT Panel's recommendation, Canada settled the NAFTA Chapter 11 claims by Ethyl Corporation for $20 million before the matter was arbitrated on its merits. Attached as Exhibit "24" is an Environment Canada News Release entitled "Government to act on Agreement on Internal Trade (AIT) panel report on MMT" dated July 20, 1998.

127. During the course of the NAFTA Chapter 11 arbitration, on October 13, 1997, the Tribunal issued its first Procedural Order requiring the parties to keep confidential all documents submitted by the other party marked as "confidential business information". The parties were also required to seek to agree on acceptable wording to be included in a subsequent procedural order on confidentiality. Attached as Exhibit "25" is the Procedural Order of the Tribunal dated October 13, 1997.

128. On July 2, 1998, the Tribunal issued a Procedural Order relating to confidentiality ordering that the hearings shall be held *in camera* unless the parties agreed otherwise in accordance with Article 25(4) of the UNCITRAL *Arbitration Rules*; that the pleadings may be disclosed publicly (Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defence); that transcripts of hearings and submissions be kept confidential and only disclosed in accordance with the specific provisions for "Protected Documents" (see below); and that awards, including final, partial and preliminary awards, may be published in accordance with Annex 1137.4 of the NAFTA. The Tribunal also incorporated into the order the agreement of the parties relating to the treatment of confidential business information ("Protected Documents") and set out the terms under which Protected Documents could be disclosed: disclosure was permitted to counsel, officials or employees whose involvement in the preparation or conduct of the proceedings was reasonably necessary; to independent experts or consultants retained by the parties; and to witnesses to the extent relevant to their testimony. In effect, the Tribunal treated transcripts and submissions to the Tribunal as confidential, limiting disclosure only to those entitled to receive confidential business information. Attached as Exhibit "26" is the Procedural Order of the Tribunal dated July 2, 1998.

129. Attached as Exhibit "27" is a printed copy of the internet page on the Department's website listing the documents that have been published by Canada relating to this proceeding.

(ii) S.D. Myers, Inc. v. Canada

130. S.D. Myers, Inc. submitted its claim to arbitration under Article 1120 of the NAFTA on October 30, 1998.

131. S.D. Myers, Inc., a U.S. investor, successfully challenged a ban on the export from Canada of hazardous wastes containing PCBs. The impugned export ban was made effective pursuant to amendments to the PCB Waste Export Regulations. The investor was involved in the processing, transportation and disposal of PCBs and was arranging for the

transportation and disposal of Canadian-generated PCBs to its Ohio-based treatment facility when the export ban effectively prohibited such activities. The Chapter 11 Tribunal found that Canada breached Articles 1102 and 1105, and awarded S.D. Myers, Inc. damages of $6,050,000 plus interest and legal and arbitration costs of $850,000.

132. Canada has sought review of the Tribunal's decisions on liability, damages and costs in the Federal Court Trial Division pursuant to the *Commercial Arbitration Act.* Attached as Exhibit "28" are the Notices of Application filed by the Attorney General of Canada in Court File No. T-225-01 (in respect of the decision on liability) and T-81-03 (in respect of the decisions on damages and costs).

133. From the commencement of the proceedings, Canada took the position that the proceedings should be as open and transparent as possible. Specifically, Canada requested that the hearings be open to the public and that all pleadings, documents submitted to the tribunal and all awards be made public, subject to adequate mechanisms to protect business confidentiality. Canada also sought assurances that any confidentiality order of the Tribunal would be without prejudice to the rights and obligations of Canada under its laws relating to the protection and disclosure of confidential information.

134. The investor did not agree that the hearings should be held in public or that documents filed with the Tribunal, other than pleadings, should be made public. Consequently, on the basis of Article 25(4) of the UNCITRAL *Arbitration Rules*, the hearings were held *in camera*.

135. On June 10, 1999, the Tribunal issued Procedural Order No. 3 permitting the release of the Notice of Intent, Notice of Arbitration, Statement of Claim, and Statement of Defence into the public domain. Attached as Exhibit "29" is Procedural Order No. 3 of the Tribunal.

136. After the parties were unable to agree on proposed text for a confidentiality order, on November 11, 1999, the Tribunal issued Procedural Order No.11 (concerning

confidentiality in materials produced in the arbitration). Attached as Exhibit "30" is Procedural Order No. 11 dated November 11, 1999.

137. The Tribunal ordered that the hearings shall be held *in camera* unless the parties agreed otherwise in accordance with Article 25(4) of the UNCITRAL *Arbitration Rules*; that the pleadings may be disclosed publicly (Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defence); that transcripts and other records taken of hearings be kept confidential and only disclosed in accordance with the specific provisions for "Protected Documents" (see below); and that awards, including final, partial and preliminary awards, may be published in accordance with Annex 1137.4 of the NAFTA. The Tribunal also set out the terms under which confidential business information ("Protected Documents") could be disclosed: disclosure was permitted to counsel, officials or employees whose involvement in the preparation or conduct of the proceedings was reasonably necessary; to independent experts or consultants retained by the parties; and to witnesses to the extent relevant to their testimony. In effect, the Tribunal treated transcripts and other records of the hearings as confidential, limiting disclosure only to those entitled to receive confidential business information.

138. During the proceedings, the investor challenged Canada's practice of sharing Chapter 11 documents on a confidential basis with provincial and territorial governments. On May 13, 2000, the Tribunal issued Procedural Order No.16, prohibiting Canada from distributing confidential documents or information to provincial and territorial governments in the absence of agreement between the parties. Attached as Exhibit "31" is Procedural Order No. 16 dated May 13, 2000.

139. The Tribunal interpreted Article 25(4) of the UNCITRAL *Arbitration Rules* as requiring the confidentiality of submissions and evidence filed with the Tribunal, unless the parties agreed otherwise. The Tribunal stated that: "Such written materials effectively form part of the hearing. The same level of confidentiality that is conferred on the transcripts of the open and closing submissions and witness testimony must logically be applied to

equivalent written materials. It would 'drive a coach and horses' through Article 25.4 of the Rules if any other conclusion were to be reached." (Exhibit "31" hereto, at para. 12)

140. Attached as Exhibit "32" is a printed copy of the internet page on the Department's website showing the documents that have been published by Canada relating to this proceeding. Canada has published the pleadings and awards, but has not published either Canada or the investor's submissions or evidence.

(iii) Pope & Talbot, Inc. v. Canada

141. Pope & Talbot, Inc. submitted its claim to arbitration under Article 1120 of the NAFTA on March 25, 1999. The U.S. investor challenged the regulations under the *Export and Import Permits Act* implementing the *Softwood Lumber Agreement between Canada and the United States* ("*SLA*"). The investor operated a wholly-owned investment in British Columbia, with three saw mills. Most of the production from these mills was subject to the *SLA.* The investor claimed that by implementing the *SLA* and applying the quota regime to its investment, Canada breached several of its obligations under Section A of Chapter 11.

142. The Chapter 11 Tribunal held that the softwood lumber quota allocation system used to implement Canada's obligations under the *SLA* did not discriminate on the basis of the nationality. Moreover, in allocating softwood lumber quota, Canada did not breach any obligation under Section A of Chapter 11. The Tribunal held, however, that the treatment of the investment in the verification review process resulted in a denial of the "fair" treatment required by Article 1105. Canada had conducted a verification review of the investment to determine whether its allocations of quota were correct. Of the original $500 million claimed, the Tribunal awarded the investor US$461,566.00 in damages plus interest and US$120,000.00 in costs.

143. Canada requested that the hearings in these proceedings be open to the public. The investor refused Canada's request. Consequently, on the basis of Article 25(4) of the UNCITRAL *Arbitration Rules*, the hearings were held *in camera.*

144. At a procedural meeting held on October 29, 1999, the Tribunal decided that written statements submitted to the Tribunal in advance of the hearing were to be treated in the same manner as the *in camera* proceedings themselves – that is to say, that they would not be made available to the public unless the parties agreed. Attached as Exhibit "33" is a copy of the minutes issued by the Tribunal dated October 29, 1999.

145. On December 17, 1999, the Tribunal issued Procedural Order No. 5 on Confidentiality ("Procedural Order No. 5"), ordering that the hearings shall be held *in camera* unless the parties agreed otherwise in accordance with Article 25(4) of the UNCITRAL *Arbitration Rules*; that the pleadings may be disclosed publicly (Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defence); that transcripts of hearings, submissions, including evidence, and applications or motions to the Tribunal be kept confidential and only disclosed in accordance with the specific provisions for "Protected Documents" (see below); and that awards, including final, partial and preliminary awards, may be published in accordance with Annex 1137.4 of the NAFTA. In effect, the Tribunal treated all transcripts, submissions and evidence as confidential, limiting disclosure only to those entitled to received confidential business information.

146. The Tribunal also set out the terms under which confidential business information, whether received from a disputing party or a third party, ("Protected Documents and Third Party Protected Documents") could be disclosed: disclosure was permitted to counsel, officials or employees whose involvement in the preparation or conduct of the proceedings was reasonably necessary; independent experts or consultants retained by the parties; and witnesses to the extent relevant to their testimony. Attached as Exhibit "34" is Procedural Order No. 5.

147. The Tribunal later amended Procedural Order No. 5 to permit Canada to disclose to trade representatives of "C-Trade", a federal-provincial/territorial trade consultation committee, any confidential or third party protected documents. Attached as Exhibit "35" is the amendment dated April 2, 2000.

148. During the proceedings, Canada received a request pursuant to the federal *Access to Information Act* ("*ATIA*") for documents related to NAFTA Chapter 11 prepared by any of the NAFTA Parties. On February 6, 2002, Canada wrote to the investor stating that Canada intended to release the documents under *ATIA* and providing the investor with 30 days to seek an appropriate remedy pursuant to paragraph 5 of Procedural Order No. 5. Attached as Exhibit "36" is the letter to the investor dated February 6, 2002.

149. The investor objected to the proposed disclosure and sought a ruling from the Tribunal. Canada argued that, by virtue of paragraph 5, Procedural Order No. 5 expressly recognized that information or documents filed with the Tribunal may be subject to disclosure under domestic law and that neither the order nor the UNCITRAL *Arbitration Rules* could purport to affect or modify statutorily mandated disclosure requirements. Attached as Exhibit "37" is Canada's Submission Concerning Release of Documents Requested Pursuant to *Access to Information Act*, dated March 7, 2002.

150. In its Decision and Order dated March 11, 2002, the Tribunal rejected Canada's position and ruled that the disputing parties are obliged to treat the documents in question as confidential in accordance with the Tribunal's orders, notwithstanding the *ATIA*. Canada subsequently sought statutory review of the Tribunal's decision in the Federal Court Trial Division.

151. On September 17, 2002, at the request of both disputing parties, Procedural Order No. 5 was substantially amended to permit release into the public domain of all written and oral (transcripts) submissions, all evidence filed with the Tribunal, and all correspondence to and from the Tribunal, subject to the redaction of confidential business information. The order also clarified procedures for responding to a "request pursuant to law", including an access to information request, for documents that may contain confidential information. Attached as Exhibit "38" is the Amended Procedural Order on Confidentiality No. 5 dated September 17, 2002.

152. On September 20, 2002, Canada discontinued the statutory review proceedings in respect of the Tribunal's March 11, 2002 decision.

153. Attached as Exhibit "39" is a printed copy of the internet page on the Department's website showing the documents that have been published by Canada relating to this proceeding.

(iv) United Postal Service of America, Inc. ("UPS") v. Canada

154. UPS submitted its claim to arbitration under Article 1120 of the NAFTA on April 19, 2000.

155. The U.S. investor alleges that Canada breached several NAFTA obligations in relation to Canada Post's provision of non-monopoly courier services. The investor claims, amongst other things, that Canada breached the national treatment obligations of Article 1102 by failing to provide UPS's Ontario-based operation with access to Canada Post's postal distribution system for courier products and by failing to provide packages imported by its investment with the same treatment afforded to Canada Post's parcels by Canada Customs and Revenue Agency. It also claims that Canada breached Article 1105 by failing to properly investigate and resolve allegations of anti-competitive behaviour by Canada Post and by failing to make Canada Post's accounting records available for review.

156. The Tribunal heard Canada's challenge to the Tribunal's jurisdiction to hear several of the investor's claims, at a hearing held in Washington in July 2002. In its decision of November 22, 2002, the Tribunal struck out the investor's claims relating to Article 1105 and ordered the investor to resubmit an amended statement of claim.

157. Pursuant to an agreement between the disputing parties, the July 2002 hearing was open to the public.

158. On April 4, 2003, the Tribunal issued a confidentiality order providing that hearings shall not be held *in camera* (save those portions of the hearings dealing with

confidential information) and permitting the parties to disclose to the public pleadings, submissions, evidence, correspondence to and from the Tribunals and all orders, ruling, preliminary and final awards. The order protects the disclosure of confidential information based on business confidentiality of the disputing parties and third parties and information otherwise protected from disclosure by legislation. The definition of business confidentiality closely mirrors the definition found in the federal *Access to Information Act*. The order also provides that a request to Canada for documents under the *Access to Information Act* will be governed by the provisions of that act. Attached as Exhibit "40" is the Procedural Directions and Order of the Tribunal dated April 4, 2003.

159. Attached as Exhibit "41" is a printed copy of the internet page on the Department's website showing the documents that have been published by Canada relating to this proceeding.

(v) Crompton Corporation v. Canada

160. Crompton Corporation, a U.S. investor, submitted the first of several notices of intent to submit a claim to arbitration under Article 1119 of the NAFTA on November 6, 2001. Crompton alleges that the Canadian Pest Management Regulatory Agency violated Chapter 11 in banning the use of lindane, a key chemical component of Crompton's seed-treatment product. A tribunal has not yet been established. No orders with respect to confidentiality have been made.

(b) Operational Review of Chapter 11

161. In early 1999, in the context of an operational review of the NAFTA, Canada proposed clarifications to Chapter 11 to enhance the transparency of Chapter 11 investor-state dispute settlement.

162. The Deputy Minister for International Trade discussed this issue during a meeting with his counterparts from the United States and Mexico in Dallas, on April 6 and 7, 2000. No consensus as to this clarification initiative was reached at this time.

163. In December 2000, the Minister for International Trade, Pierre Pettigrew, wrote to his Mexican counterpart, Dr. Luis Ernesto Derbez, Secretary of Economy, encouraging the NAFTA Parties to clarify provisions relating to the conduct of investor-state dispute settlement, including transparency. Attached as Exhibit "42" is the signed French version and the English translation of the said letter dated December 5, 2000.

164. In addressing the House of Commons on investor-state dispute settlement on May 1, 2001, Minister Pettigrew stated:

> [W]e want the investor-state disputes settlement mechanism to be more open and more transparent so it is more effective. In fact, Canada has already taken measures to make this process more transparent.
>
> The Foreign Affairs Department's web site contains all publicly available documents relating to Chapter 11 arbitration cases involving the Government of Canada.
>
> We would like to make all the documents public, within certain limitations, obviously, to protect confidential trade information. We would also like to open hearings to the public.

Attached as Exhibit "43" is the Hansard of Minister Pettigrew's address.

165. On July 31, 2001, after much negotiation, Minister Pettigrew and his American and Mexican counterparts, acting in their capacity as the NAFTA FTC, issued a Notes of Interpretation clarifying and reaffirming the meaning of certain NAFTA provisions including those relating to access to documents. Attached as Exhibit "44" is a copy of the Notes of Interpretation of Certain Chapter 11 Provisions, dated July 31, 2001.

166. In the FTC Notes of Interpretation, the NAFTA Parties agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 Tribunal, subject to the redaction of specific categories of information.

167. On May 28, 2002, the NAFTA FTC released a joint statement reviewing the eight-year history of the NAFTA. The NAFTA Ministers reviewed the operation of Chapter 11 and directed trade officials to continue their work examining the implementation and operation of Chapter 11, including developing recommendations and identifying shared priorities concerning the operation of Chapter 11. The NAFTA Ministers stated that the operational review was necessary and highly beneficial to the effective and proper implementation of Chapter 11 as well as to increase public understanding of the operation of the Chapter. Attached as Exhibit "45" is the NAFTA Free Trade Commission Joint Statement, dated May 28, 2002.

168. Consequently, the Investment Experts Group ("IEG"), comprising trade officials from each NAFTA Party, was formed to develop recommendations and identify shared priorities concerning the operation of Chapter 11.

169. On October 7, 2003, the NAFTA FTC met in Montreal to evaluate the impact of the NAFTA 10 years after its entry into force and to explore means to strengthen the North American economy in an increasingly integrated market. Attached as Exhibit "46" is a copy of the NAFTA Free Trade Commission Joint Statement, dated October 7, 2003.

170. In their Joint Statement, the NAFTA Ministers directed the IEG to continue its work seeking ways to improve the implementation of Chapter 11. The NAFTA Ministers also adopted a statement on non-disputing party participation in Chapter 11 proceedings. Attached as Exhibit "47" is a copy of the Statement of the Free Trade Commission on non-disputing party participation.

171. Separately, Canada and the United States confirmed that they will consent to open hearings in Chapter 11 proceedings to which either is a disputing Party and that they will request the consent of disputing investors to such open hearings. The United States and

Canada will continue to work with Mexico on this matter. Attached as Exhibit "48" is a Press Release of the Office of the United States Trade Representative entitled "NAFTA Commission Meets, Announces new Transparency Measures", dated October 7, 2003.

172. Canada's statement on Open Hearings in NAFTA Chapter Eleven Arbitrations, found at http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp, reads as follows:

> Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, Canada affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. Canada recommends that tribunals determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access.

173. There are a number of constraints to amending the NAFTA so as to provide for greater transparency in investor-state dispute settlement under Chapter 11.

174. Pursuant to Article 2202 of the NAFTA, the NAFTA Parties must agree to the amendment and, pursuant to Article 2202, an amendment to the NAFTA must be approved in accordance with the applicable domestic legal procedures of each NAFTA Party in order for it to be effective. Even assuming trilateral support for amendment to Chapter 11, it may be difficult for the NAFTA Parties to agree to amendment. At the outset, I would expect that the NAFTA Parties would weigh any proposed amendment against the potential costs and benefits of more widely re-opening negotiations to address certain sensitive sectors or in respect of certain institutional arrangements. I expect they would be encouraged to do so by their respective domestic constituencies that would support amendment only in the context of a broader amendment agenda so as to seek renegotiation of particular sectoral or other interests.

(c) Canadian Policy Regarding Transparency in International Trade Negotiation and Dispute Settlement Generally

175. The Canadian government's position regarding transparency in respect of international trade and investment negotiations and dispute settlement is reflected in more recent international negotiations to which Canada is a party.

176. By way of example, following the WTO Ministerial Conference in Seattle in 1999, the Department of Foreign Affairs and International Trade launched an initiative to enhance consultation and transparency in the development of Canada's international trade policy agenda. Using internet resources, this initiative provides an opportunity for Canadians to send their comments on Canada's international trade policy agenda, on an ongoing basis, and stay informed of specific consultation initiatives launched by Canada. Attached as Exhibit "49" is a printed copy of the introductory page of the Department's trade consultation website.

177. In October 2000, Canada released an informal paper setting out a number of initiatives to promote transparency in the WTO. Canada proposed that WTO Members agree to web cast the WTO review of Canada's international trade policy. Canada also proposed de-restriction of a broader range of WTO documents, such as Secretariat working papers, formal contributions from members and draft meeting agendas and provision for a more informative WTO website. Attached as Exhibit "50" is "WTO External Transparency", an Informal Paper by Canada dated October 17, 2000 (WTO document WT/GC/W/415).

178. In relation to dispute settlement in the WTO, Canada posts background information regarding its position on WTO disputes in which Canada is a complaining or defending party on the Departmental website. Canada also makes its Panel and Appellate Body submissions available to the public upon request. Canada also encourages other WTO Members to make their submissions public and is seeking further ways to improve

transparency in WTO dispute settlement proceedings in current WTO Dispute Settlement Understanding negotiations.

179. In relation to the Free Trade Area of the Americas ("FTAA"), at the FTAA Ministerial meeting in Buenos Aires in November 2001 Minister Pettigrew championed a decision among negotiating Parties to release the first version of the consolidated draft negotiating text of the FTAA. Minister Pettigrew also sought the public release of the second version of the consolidated draft negotiating texts of the FTAA. These texts were publicly released in November 2002. Attached as Exhibit "51" is a Press Release No. 137 from the Department dated November 1, 2002.

180. At the June 2003 meeting of the FTAA Negotiating Group on Investment, Canada tabled a proposal setting out new elements to be introduced into the investor-state dispute settlement under the FTAA. Attached as Exhibit "52" is Canada's Proposal.

181. One of the key elements of Canada's Proposal is the inclusion of rules that will make investor-state arbitration proceedings as open and transparent as possible. The proposals relating to public access to hearings and documents are as follows (Exhibit "52" hereto, at page 5):

1. Hearings held under this Section shall be open to the public.
2. The Tribunal shall establish procedures for the protection of confidential information.
3. All documents submitted to, or issued by, the Tribunal shall be publicly available, subject to the redaction for confidential information. Notwithstanding the foregoing, written evidence submitted to the Tribunal need not be made publicly available.
4. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
5. The Parties may share with officials of their respective sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

6. The Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or would be contrary to its essential security interests with the meaning of Article XX (Essential Security).
7. To the extent of any inconsistency between a Tribunal's confidentiality order and a Party's law on access to information, the law of the Party shall prevail. Where possible, Parties should endeavour to protect the disputing investor's confidential information.

182. The Government of Canada also has approved modifications to the negotiating objectives for future FIPAs so that in the future, Canada will seek to achieve the objectives set out in the above paragraph in all subsequent FIPAs.

183. I make this affidavit in support of the Respondent in these proceedings and for no other or improper purpose.

SWORN BEFORE ME at the)
City of Ottawa)
Province of Ontario)
this 18th day of December, 2003.)

DENYSE VIGORS MACKENZIE

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Commissioner for Taking Affidavits