

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**BETWEEN:**

**VITO GALLO**

**Claimant/Investor**

**and**

**THE GOVERNMENT OF CANADA**

**Respondent/Party**

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**WRITTEN SUBMISSION OF CANADA  
ON PROCEDURAL MATTERS**

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## INTRODUCTION

1. Vito Gallo (“Gallo”) is a U.S. citizen who claims to own and control 1532382 Ontario Inc., an Ontario business corporation. In September 2002, 1532382 Ontario Inc. purchased an abandoned open pit mine in northern Ontario that had filled with water known as the “Adams Mine lake property”. Gallo alleges that 1532382 Ontario Inc. intended to develop the Adams Mine lake property as a waste disposal site.<sup>1</sup> In June 2004, the Ontario legislature enacted the *Adams Mine Lake Act, 2004* (“*AMLA*”).<sup>2</sup> The *AMLA* prevented the use of the Adams Mine lake property as a landfill for solid waste and required the Government of Ontario to compensate 1532382 Ontario Inc. (and Notre Development Corporation, its predecessor in title) for the reasonable expenses incurred in promoting the Adams Mine lake property as a potential site for waste disposal.

2. On March 30, 2007, Gallo filed a Notice of Arbitration under Chapter 11 of the *North American Free Trade Agreement* (“*NAFTA*”).<sup>3</sup> The Notice of Arbitration alleged that enactment of the *AMLA* was contrary to *NAFTA* Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation) and claimed, \$355,100,000 in damages for breach of those obligations.

3. Counsel for Gallo and Canada have agreed on proposals to address the majority of the procedural matters that will govern this arbitration, as reflected in their joint Draft Procedural Order No. 1<sup>4</sup> (“*Procedural Order*”) and the Draft Confidentiality Order (“*Confidentiality Order*”).<sup>5</sup> Canada’s position on the outstanding procedural and confidentiality issues is explained in this submission and its proposals to address these issues are set out in the bracketed text in the draft orders. In summary, Canada proposes the following:

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<sup>1</sup> Notice of Arbitration, (30 March 2007), ¶¶ 3-7, 23 [*Notice of Arbitration*] (Tab 1).

<sup>2</sup> *Adams Mine Lake Act*, S.O. 2004, c. 6 [*AMLA*] (Tab 2).

<sup>3</sup> North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, 32 I.L.M. 289 (entered into force 1 January 1994), Chapter Eleven [*NAFTA*] (Tab 3).

<sup>4</sup> Draft Procedural Order No. 1 [*Procedural Order*] (Tab 4).

<sup>5</sup> Draft Confidentiality Order [*Confidentiality Order*] (Tab 5).

- *Administration of the Proceedings* (Procedural Order, ¶¶ 11, 12, 14, 19) – This arbitration should be administered by the Permanent Court of Arbitration (“PCA”). The Presiding Arbitrator may also retain an Assistant;
- *Place of Arbitration* (Procedural Order, ¶ 15) – The place of arbitration should be Toronto, Ontario;
- *Location of Hearings* (Procedural Order, ¶ 16) – Hearings should ordinarily be held in Toronto, Ontario;
- *Form of Transcription* (Procedural Order, ¶ 28) – Hearings should be transcribed using Live Note or comparable software and available on a same-day basis;
- *Order to Witnesses* (Procedural Order, ¶ 40)- While a NAFTA Arbitral Tribunal may request that a witness bring documents, it has no power to compel them to do so;
- *Exclusion of Witnesses* (Procedural Order, ¶ 44) – Canada should be entitled to have necessary officials present to provide it with instructions during the hearing even if they could be called as witnesses;
- *Non-disputing Party and NAFTA Article 1128 Participation* (Procedural Order, ¶¶ 47-48) – The Arbitral Tribunal has discretion to consider applications for leave to file a written submission as a non-disputing party. Should this issue arise, Canada urges the Arbitral Tribunal to apply the Statement of the Free Trade Commission on Non-disputing Party Participation dated October 7, 2003.<sup>6</sup> With respect to participation by Mexico or the United States, NAFTA Article 1128 speaks for itself and the Arbitral Tribunal should not agree to additional language in this Procedural Order which is redundant or inaccurate;

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<sup>6</sup> NAFTA Free Trade Commission, “Statement of the Free Trade Commission on non-disputing party Participation”, (7 October 2003), online: Foreign Affairs & International Trade Canada <<http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf>> [FTC Statement] (Tab 6).

- *Sub-national Governments* (Confidentiality Order, ¶ 1(a)) – The Confidentiality Order provides that persons receiving material containing confidential information are bound by that order and requires them to execute the confidentiality agreement. No change to the definition of “disputing party” in the Confidentiality Order is appropriate;
- *Relief for Breach* (Confidentiality Order, ¶ 9) – Either disputing party could raise a breach of the Confidentiality Order with the Arbitral Tribunal. The Arbitral Tribunal could then determine whether it has the jurisdiction to provide relief. The scope of that jurisdiction would be for the disputing parties to address should this matter arise;
- *Treatment of Information Subject to Domestic Statutory Obligations* (Confidentiality Order, ¶ 10, *Appendix A*, ¶ 3) – The Confidentiality Order cannot conflict with the pre-existing domestic legislation of the governments of Canada and Ontario. This domestic legislation establishes a fair and balanced process for the disclosure of documents and the maintenance of records. Canada’s proposed text respects the statutory right to access to information, while protecting confidential information. This proposed language also ensures that Canada and Ontario will not be forced to act in a manner inconsistent with domestic law requiring the maintenance of records;
- *Transparency* (Procedural Order, ¶ 22; Confidentiality Order, ¶¶ 13-14) – Consistent with the binding Note of Interpretation issued by the NAFTA Parties on July 31, 2001, documents generated in these proceedings must be publicly available subject to limited and specific redactions.<sup>7</sup> In addition, hearings should be open to the public with the possibility of holding the proceedings *in camera* where necessary to protect confidential information.

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<sup>7</sup> NAFTA Free Trade Commission, “Note of Interpretation of Certain Chapter 11 Provisions,” (31 July 2001), ¶¶ 1-3 [*FTC Note*] (Tab 7).

## I. ADMINISTRATION OF THE PROCEEDINGS

4. Canada submits that the Permanent Court of Arbitration (“PCA”) should administer these proceedings. The PCA is one of the world’s leading international arbitration institutions. It enjoys a wide range of experience in administering international proceedings and recently has developed expertise in administering investor-State disputes.<sup>8</sup>

5. The PCA is capable of providing the administrative support that the Arbitral Tribunal will require.<sup>9</sup> A staff member of the PCA may be appointed Secretary to the Arbitral Tribunal to carry out administrative tasks at the direction of the Arbitral Tribunal. Such tasks could include:

- transmitting oral and written communications from the disputing parties to the Arbitral Tribunal and *vice versa*, as well as between the disputing parties;
- maintaining an archive of filings and correspondence;
- making all arrangements concerning advance deposits to be made on account of arbitrators’ fees in consultation with the disputing parties and the Arbitral Tribunal;
- holding the deposits of the disputing parties and disbursing the Arbitral Tribunal’s fees and expenses; and
- assisting the Arbitral Tribunal in establishing the date, time and place of hearings, giving advance notice of hearings to the disputing parties, and providing administrative support to the Arbitral Tribunal.

6. Moreover, the PCA offers its assistance at a reasonable cost. The PCA provides the services of Senior and Junior Legal Staff at rates of €175 and €125 per hour respectively, and

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<sup>8</sup> See *Arbitration Services*, online: Permanent Court of Arbitration <[www.pca-cpa.org/showpage.asp?pag\\_id=1048](http://www.pca-cpa.org/showpage.asp?pag_id=1048)> [*Arbitration Services*] (Tab 8).

<sup>9</sup> *Ibid.* (Tab 8). The PCA’s list of administrative services is consistent with the suggested practice in the *UNCITRAL Notes on Organizing Arbitral Proceedings* (1996), online: UNCITRAL <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>> [*UNCITRAL Notes*] (Tab 9).

secretarial assistance at a rate of €50 per hour.<sup>10</sup> The PCA can also arrange for estimates on transcription, interpretation, translation, document reproduction, sound and audiovisual equipment, telephone and videoconferencing.

7. Canada has approached the PCA on a preliminary basis. PCA staff has confirmed their willingness and ability to fulfill the administrative function in this matter, including on the assumption that meetings are to be located in Toronto.<sup>11</sup>

8. Canada thus proposes administration of the arbitration by the PCA in the expectation that it will efficiently and economically provide all necessary services the Arbitral Tribunal may require in these proceedings. Paragraph 11 of the Procedural Order reflects this proposal.

9. Canada also recognises that the Presiding Arbitrator may wish to have an Assistant. Paragraph 12 of the Procedural Order provides for the appointment and remuneration of such a person, which may include an individual from the firm of *Armesto & Asociados*.

## II. PLACE OF ARBITRATION

10. The Arbitral Tribunal has discretion to determine the place of arbitration when disputing parties disagree. In this case, the Claimant suggests Washington, D.C., while Canada proposes Toronto, Ontario.

### A. Applicable Law

11. Determination of a place of arbitration must be made in accordance with the applicable provisions of NAFTA<sup>12</sup> and the *UNCITRAL Arbitration Rules, 1976* (“UNCITRAL Rules”)<sup>13</sup>

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<sup>10</sup> See *PCA Services, Schedule of Fees and Costs*, online: Permanent Court of Arbitration <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1060](http://www.pca-cpa.org/showpage.asp?pag_id=1060)> (Tab 10).

<sup>11</sup> E-Mail from Brooks Daly, Deputy Secretary-General of the PCA to Reuben East, Counsel, Trade Law Bureau, (16 January 2008) (Tab 11).

<sup>12</sup> See *NAFTA*, *supra* note 3, Article 1130 (Tab 3).

<sup>13</sup> *UNCITRAL Arbitration Rules, 1976*, 25 ILM 715 (adopted by the General Assembly on 15 December 1976), Article 16(1) [*UNCITRAL Rules*] (Tab 12).



and should consider the *UNCITRAL Notes on Organizing Arbitral Proceedings* (“UNCITRAL Notes”)<sup>14</sup> as well as established arbitral practice under NAFTA Chapter 11.

12. Article 1130 of NAFTA is entitled “Place of Arbitration.” It stipulates as follows:

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

...

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.<sup>15</sup>

13. Article 16(1) of the UNCITRAL Rules governs the selection of a place of arbitration.

This provision provides that:

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.<sup>16</sup>

14. Additionally, arbitral tribunals applying the UNCITRAL Rules have found it useful to refer to the UNCITRAL Notes which set out additional factors that are relevant to the choice of a place of arbitration.<sup>17</sup> While the UNCITRAL Notes are not binding,<sup>18</sup> NAFTA Chapter 11 tribunals have frequently applied the criteria in the UNCITRAL Notes to determine the place of arbitration.<sup>19</sup>

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<sup>14</sup> *UNCITRAL Notes*, *supra* note 9 (Tab 9).

<sup>15</sup> *NAFTA*, *supra* note 3, Article 1130 (Tab 3).

<sup>16</sup> *UNCITRAL Rules*, *supra* note 13 (Tab 12).

<sup>17</sup> *UNCITRAL Notes*, *supra* note 9 (Tab 9).

<sup>18</sup> *Ibid.*, ¶¶ 2-3 (Tab 9).

<sup>19</sup> See e.g. *Ethyl Corp. v. Canada*, Decision Regarding the Place of Arbitration, (28 November 1997) (UNCITRAL) [*Ethyl*] (Tab 13); *ADF Group Inc. v. United States*, Procedural Order No. 2 Concerning the Place of Arbitration, (11 July 2001) (ICSID ARB(AF)/00/1) [*ADF*] (Tab 14); *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal on the Place of Arbitration, (17 October 2001) (UNCITRAL) [*UPS*] (Tab 15); *Canfor Corp. v. United States*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, (23 January 2004) (UNCITRAL) [*Canfor*] (Tab 16); and, *Methanex Corp. v. United States*, The Written Reasons for the Tribunal’s Decision of 7<sup>th</sup> September 2000 on the Place of Arbitration, (31 December 2000) (UNCITRAL) [*Methanex*] (Tab 17).

15. Paragraphs 21 and 22 of the UNCITRAL Notes provide the following guidance on determining the place of arbitration:

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the Arbitral Tribunal or the institution administering the arbitration to determine the place. If the Arbitral Tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: *(a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.*

[Emphasis added]

16. Canada submits that the factors in paragraph 22 of the UNCITRAL Notes should be applied to determine the place of arbitration in this matter. Applying these factors leads to one inevitable conclusion: Toronto is the only logical choice for the place of arbitration.

#### **B. Application of Factors in Article 22 of the UNCITRAL Notes**

(i) *Suitability of the Law on Arbitral Procedure of the Place of Arbitration*

17. The first factor identified in the UNCITRAL Notes is suitability of the law on arbitral procedure of the place of arbitration. Suitability in this context relates to several facets of the arbitral law that were described by the Arbitral Tribunal in *ADF*:

... the “suitability” in international arbitration of the law on arbitral procedure of a suggested place of arbitration, has multiple dimensions. These dimensions include the extent to which the law, e.g., protects the integrity of and gives effect to the parties’ arbitration agreement; accords broad discretion

to the parties and to the arbitrators they choose to determine and control the conduct of arbitration proceedings; provides for the availability of interim measures of protection and of means of compelling the production of documents and other evidence and the attendance of reluctant witnesses; consistently recognizes and enforces, in accordance with the terms of widely accepted international conventions, international arbitral awards when rendered; insists on principled restraint in establishing grounds for reviewing and setting aside international arbitral awards; and so on.<sup>20</sup>

18. Several NAFTA Chapter 11 tribunals have compared the suitability of arbitral laws in Canada and the United States and have found that these NAFTA Parties have equally suitable legislation.<sup>21</sup>

19. In Canada, the *Commercial Arbitration Act*<sup>22</sup> (“CAA”) implements the UNCITRAL *Model Law on International Commercial Arbitration* (the “Model Law”) through the *Commercial Arbitration Code*.<sup>23</sup> The CAA is a federal act and therefore applies to the Government of Canada in these proceedings. The Model Law was designed to promote the efficient functioning of international commercial arbitration.<sup>24</sup> The CAA and the *Commercial Arbitration Code* address all the facets of arbitral law referred to by the ADF Arbitral Tribunal. Canada therefore has an effective legal regime that would apply to a NAFTA Chapter 11 proceeding conducted in Toronto, Ontario. Thus, Toronto satisfies the first factor of suitability.

(ii) *Treaty Governing Enforcement of Arbitral Awards*

20. The second factor relevant to the selection of a place of arbitration under the UNCITRAL Notes is whether a treaty exists that governs the “...enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced.”

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<sup>20</sup> ADF, *ibid.*, ¶ 10 (Tab 14).

<sup>21</sup> See, e.g. *Ethyl*, *supra* note 19 at 5 (Tab 13); ADF, *ibid.*, ¶ 16 (Tab 14); *Canfor*, *supra* note 19, ¶¶ 24-5 (Tab 16); and, *Methanex*, *supra* note 19, ¶¶ 15-18 (Tab 17).

<sup>22</sup> R.S.C. 1985, c. 17 (2<sup>nd</sup> Supp.), s. 5 [CAA] (Tab 18).

<sup>23</sup> *Ibid.* The *Commercial Arbitration Code* is based on the Model Law and is set out in a schedule to the CAA.

<sup>24</sup> *Ibid.*, s. 5. Section 5 of the CAA makes the *Commercial Arbitration Code* applicable to NAFTA Chapter 11 investor-State disputes to which Canada is a disputing party.

21. Both Canada and the United States are Parties to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”)<sup>25</sup> which would govern enforcement of an award issued in this case. It follows that this factor is neutral.

(iii) *Convenience of the Parties and the Arbitrators*

22. The third factor is the convenience of the place of arbitration for both the disputing parties and the arbitrators.

23. In this case, the Claimant resides in Whitehall, Pennsylvania, a short drive from Pittsburgh. There are direct flights from Pittsburgh to Toronto. Accordingly, Toronto is a convenient place of arbitration for Gallo.

24. The members of the Arbitral Tribunal are based in Orangeville, Ontario (Professor Jean-Gabriel Castel), Vancouver, British Columbia (J. Christopher Thomas) and Madrid, Spain (Professor Juan Fernández-Armesto). Orangeville is only a short drive from Toronto. Convenient, direct flights are available between Vancouver and Toronto. Currently flights between Madrid and Toronto have a single connection, but direct flights between these cities commence in June 2008.<sup>26</sup> By contrast, all three arbitrators would have to fly to Washington. While direct flights are available between Washington and Madrid or Toronto, there are no direct flights between Washington and Vancouver.

25. Similarly, counsel for both disputing parties and most clients reside in or near Toronto. For example:

- the address for service of counsel for the Claimant is in Toronto, Ontario;
- the address for service of counsel for the Respondent is in Ottawa, Ontario and one member of its counsel team works in Toronto;

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<sup>25</sup> *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958, 330 U.N.T.S. 38 [*New York Convention*] (Tab 19).

<sup>26</sup> See *Air Canada Advisory 2007* [*Air Canada Advisory*] (Tab 20).

- 1532382 Ontario Inc. is established under the laws of Ontario with its head office in Don Mills in Toronto;<sup>27</sup>
- the sole Officer and Director of 1532382 Ontario Inc. is a resident of North York in Toronto, Ontario;<sup>28</sup>
- 1532382 Limited Partnership whose general partner is 1532382 Ontario Inc. is located in Toronto, Ontario, as are its representatives;<sup>29</sup> and
- most of Respondent's clients are located in Toronto.

26. Clearly Toronto is the most convenient alternative for the place of arbitration. Nothing in the circumstances of this arbitration suggests that Washington would be at all convenient for the Arbitral Tribunal, counsel or their clients. None of the participants in these proceedings reside or work in Washington and all of them would have to travel long distances to that city.

(iv) *Support Services*

27. The fourth factor considers the availability and cost of support services. The availability and cost of support services in Toronto and Washington D.C. likely favours Toronto, or is equivalent in Toronto and Washington.

(v) *Location of Subject-Matter in Dispute and Proximity of Evidence*

28. The final factor is the location of the subject-matter in dispute and proximity of the evidence. This factor decisively favours Toronto: the subject-matter in dispute is Ontario legislation, the Adams Mine lake property is located in Ontario, and the majority of witnesses and documentary evidence are in Toronto. By comparison, neither the subject-matter of the

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<sup>27</sup> Corporate Profile Report for 1532382 Ontario Inc. [*Corporate Profile Report*] (Tab 21).

<sup>28</sup> *Ibid.*

<sup>29</sup> BNL P Inquiry for 1532382 Limited Partnership [*BNLP Inquiry*] (Tab 22); see also Letter from Brent W. Swanick, Partner, Swanick & Associates to Meg Kinnear, Senior General Counsel Director General, Trade Law Bureau, (5 February 2008) [*Swanick Correspondence*] (Tab 23); and, Letter from Meg Kinnear, Senior General Counsel Director General, Trade Law Bureau to 1532382 Limited Partnership, (4 January 2008) [*Letter of Request*] (Tab 24). See also Record of Limited Partners for 1532382 Limited Partnership, (5 February 2008) [*Record of Limited Partners*] (Tab 25).

dispute, nor the documents which are likely to be referred to, nor the witnesses who are likely to testify, are located in Washington, D.C.

29. The subject-matter in dispute refers to the measure that is alleged to be inconsistent with the obligations of NAFTA Chapter 11.<sup>30</sup> Several NAFTA Chapter 11 tribunals have held that the subject-matter in dispute is relevant to a determination of the place of arbitration.

30. In *Ethyl*, for example, the subject matter was Canadian legislation removing additives from gasoline. In that proceeding, the Arbitral Tribunal was asked to decide whether Ottawa, Toronto or New York City should be the place of arbitration. The *Ethyl* Tribunal named Toronto as the place of arbitration, finding that the location of the subject-matter in dispute was “not subject to serious debate” and was “clearly” Canada.<sup>31</sup>

31. The *ADF* Tribunal analyzed the subject-matter of the dispute in the same manner as *Ethyl*, finding that:

... the “subject-matter” of the present dispute may be seen to refer to, essentially, the claims made by the Claimant about the consistency or lack of consistency of certain measures (or applications thereof) taken by the Respondent United States with certain provisions of Chapter Eleven of the NAFTA. To the extent that such claims can be regarded as having a “location” or situs anywhere, we consider that those claims may, for purposes of determining an appropriate place of arbitration, be deemed to be located in the place where the United States authorities, to whom they are addressed, are based. We do not imply that that is the only place in which those claims can be deemed to be located for present or related purposes. But the location of the official addressees of the claims appear to us as a sufficiently real and substantial basis.<sup>32</sup>

32. The Arbitral Tribunal in *Canfor* also found that the “subject-matter” referred to the measures at issue.<sup>33</sup> It concluded that:

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<sup>30</sup> *Ethyl*, *supra* note 19, at 8 (Tab 13); *ADF*, *supra* note 19, ¶ 20 (Tab 14); *Canfor*, *supra* note 19, ¶¶ 34-36 (Tab 16); *Methanex*, *supra* note 19, ¶ 33 (Tab 17).

<sup>31</sup> *Ethyl*, *ibid.*, at 5, 8 (Tab 13).

<sup>32</sup> *ADF*, *supra* note 19, ¶ 20 (Tab 14).

<sup>33</sup> *Canfor*, *supra* note 19, ¶ 34 (Tab 16); see also, *Methanex*, *supra* note 19, ¶ 33 (Tab 17).

... the subject matter, independently from the proximity of evidence, does not, in this arbitration, relate to the Claimant's conduct in British Columbia. It rather relates to the Respondent's measures determining the Claimant's softwood lumber importations into the United States as subsidized or dumped, which are alleged by the Claimant to have affected its investments in the United States and breached Chapter Eleven of the NAFTA.<sup>34</sup>

33. Applied to the present proceedings, the Claimant alleges that the enactment of the *AMLA* by the Ontario legislature in Toronto violated the minimum standard of treatment under NAFTA Article 1105 and that it constituted an expropriation that was inconsistent with NAFTA Article 1110.<sup>35</sup> The Notice of Arbitration also raises events that relate to the *AMLA* that occur either in Toronto or northern Ontario.

34. Similarly, the facts relating to the Claim all occur in Toronto or northern Ontario. For example:

- the Adams Mine lake property is located at Kirkland Lake, in northern Ontario;<sup>36</sup>
- the provincial government departments responsible for issuing the relevant permits and conducting the various environmental reviews are primarily located in Toronto;
- the negotiations regarding the purchase of the lands bordering the Adams Mine lake property owned by 1532382 Ontario Inc. were all conducted in Ontario and related to land located at Kirkland Lake in northern Ontario; and
- the City of Toronto rejected the proposal to use the Adams Mine lake property as a solid waste disposal site.

35. Applying the reasoning in *Ethyl*, *ADF* and *Canfor* to the facts of this case demonstrates that the location of the subject-matter of this dispute is in Ontario. Conversely, there is not a single connection between the subject-matter and Washington, D.C.

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<sup>34</sup> *Canfor*, *ibid.*, ¶ 35 (Tab 16).

<sup>35</sup> *Notice of Arbitration*, *supra* note 1, ¶¶ 47-48, 50-51 (Tab 1).

<sup>36</sup> *Ibid.*, ¶ 44 (Tab 1).

36. The proximity of the evidence criteria also demonstrates that Toronto is the most appropriate place of arbitration in this case. The facts giving rise to the allegations in the Notice of Arbitration and the majority of the witnesses who are likely to provide evidence are located in Ontario and, for the most part, in Toronto.

37. Most of the witnesses that the Claimant and Respondent are likely to rely on appear to be located in Toronto or northern Ontario. Such witnesses could include:

- Brent Swanick, the President of 1532382 Ontario Inc. and representative of 1532832 Limited Partnership, who resides in North York in Toronto;<sup>37</sup> and
- various civil servants occupying positions in Ontario government departments who were involved in the events referred to in the Notice of Arbitration.

38. Further, if the Arbitral Tribunal were to determine that a view of the site would be useful, it would have to travel to Kirkland Lake, Ontario. This trip would certainly be more convenient from Toronto than Washington.

39. At the same time, it appears that no evidence is proximate to Washington. Application of this factor from the UNCITRAL Notes for determining place of arbitration favours Toronto.

### **C. Conclusion**

40. The applicable law when applied to the facts of this case supports the selection of Toronto as the place of arbitration. The only fact in the Notice of Arbitration that relates to the United States is the residence of the Claimant in Pennsylvania. No fact connects this Claim to Washington, D.C.<sup>38</sup>

41. On the other hand, numerous facts connect these proceedings to Toronto and Ontario. 15323832 Ontario Inc., is an Ontario business corporation.<sup>39</sup> It owns the Adams Mine lake

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<sup>37</sup> *Corporate Profile Report*, *supra* note 27 (Tab 21); see also *Swanick Correspondence*, *supra* note 29 (Tab 23).

<sup>38</sup> *Notice of Arbitration*, *supra* note 1, ¶ 3 (Tab 1).

<sup>39</sup> *Ibid.*, ¶ 4 (Tab 1).



property in northern Ontario which is at the heart of this dispute. 1532832 Ontario Inc. allegedly intended to develop and ultimately operate a waste disposal site at the Adams Mine lake property in northern Ontario. The Claimant alleges that an Ontario statute is inconsistent with Canada's NAFTA obligations.<sup>40</sup> Counsel for the Claimant and the Respondent are located in Ontario and the vast majority of witnesses and documentary evidence relating to these proceedings will be found in Ontario. Finally, there are suitable facilities for conducting an arbitration in Toronto, and convenient flights to that city.

42. Application of the relevant legal test cannot reasonably result in Washington, D.C. as the place of arbitration. For the foregoing reasons, Canada asks the Arbitral Tribunal to designate Toronto as the place of arbitration pursuant to NAFTA Article 1130(b) and Article 16(1) of the UNCITRAL Rules.

### III. LOCATION OF HEARINGS

43. Canada proposes that hearings ordinarily be held in Toronto, Ontario. The Claimant proposes that hearings should be held in Washington, D.C. or New York City, New York.

44. Articles 16(2) and 16(3) of the UNCITRAL Rules provide the Arbitral Tribunal discretion to hold meetings at any locale it determines is appropriate having regard to the circumstances of the arbitration.<sup>41</sup> These provisions provide that:

2. The Arbitral Tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.<sup>42</sup>

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<sup>40</sup> See generally *AMLA*, *supra* note 2 (Tab 2).

<sup>41</sup> *UNCITRAL Rules*, *supra* note 13 (Tab 12).

<sup>42</sup> *Ibid.* (Tab 12).

45. Paragraph 23 of the UNCITRAL Notes<sup>43</sup> confirms that the purpose of this discretion is to permit arbitral proceedings to be carried out in the most efficient and economical manner. Paragraph 23 explains that:

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the Arbitral Tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration “the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents” (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.<sup>44</sup>

46. Toronto would be the most efficient and economic location for hearings in all the circumstances of this case. Most of the persons who would have to attend a hearing reside in or near Toronto. Counsel for the Claimant,<sup>45</sup> the head offices of 1532382 Ontario Inc.,<sup>46</sup> 1532382 Limited Partnership and the President of 1532382 Ontario Inc.<sup>47</sup> are all located in Toronto or within a short distance of that city.

47. Likewise, Arbitrator Castel resides in Orangeville, a short drive from Toronto. Arbitrator Thomas resides in Vancouver, British Columbia, which has convenient, direct flights to Toronto. The Chair resides in Madrid, Spain which will have direct flights to Toronto commencing in June 2008.<sup>48</sup>

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<sup>43</sup> UNCITRAL Notes, *supra* note 9 (Tab 9).

<sup>44</sup> *Ibid.* (Tab 9).

<sup>45</sup> Counsel’s address for service is: Bennett Gastle Professional Corporation, 36 Toronto St., Suite 250, Toronto. See *Procedural Order*, *supra* note 4, ¶19 (Tab 4).

<sup>46</sup> The corporate registration of 1532382 Ontario Inc. lists its head office as: #101, 225 Duncan Mill Road, Don Mills Ontario, M3B 3K9, which is a suburb of Toronto. See *Corporate Profile Report*, *supra* note 27 (Tab 21).

<sup>47</sup> For example, Brent Swanick, the President and Secretary of 1532382 Ontario Inc., lists his address as: 104 Yorkminster Road in North York in Toronto. See *ibid.* (Tab 21).

<sup>48</sup> See *Air Canada Advisory*, *supra* note 26 (Tab 20).

48. Counsel for Respondent resides in Toronto and in Ottawa. The instructing clients of the Respondent are located mainly in Toronto, where the Government of Ontario is headquartered and in Ottawa, where the Government of Canada is headquartered. The majority of witnesses likely to be called by the Respondent reside in Toronto or northern Ontario.

49. Toronto offers multiple locations equipped to efficiently address the meeting requirements of this arbitration. Moreover, meeting facilities are available in Toronto at rates typically lower than those available in cities such as Washington or New York.

50. By contrast, if hearings are held in Washington or New York, all counsel for the disputing parties, the members of the Arbitral Tribunal, and most witnesses will be required to travel to the hearing and bring relevant materials, each and every time they meet. This will certainly increase the cost of the hearings and cause significant inconvenience to all involved.

51. The Claimant has suggested that hearings must be held in a location outside of Toronto to avoid possible interference with the process. This concern is highly speculative. No previous NAFTA Chapter 11 case has experienced such interference, notwithstanding that several other cases have dealt with equally controversial topics of public interest.

52. The Claimant's concern about interference is especially untenable if it prevails in its request for closed hearings. If the hearing is held *in camera*, there is no opportunity for any member of the public to disrupt the hearing and no justification to hold hearings outside of Toronto.

53. In conclusion, Toronto is the most economic and efficient location for hearings in this arbitration.

#### **IV. FORM OF TRANSCRIPTION**

54. At paragraph 28 of the Procedural Order, Canada proposes that LiveNote or comparable software be used to make the hearing transcripts instantaneously available to the disputing parties and that transcripts be provided on a same-day basis. Canada understands that the Claimant has concerns over the cost of this service and would prefer normal transcription services.

55. LiveNote is commonly used in NAFTA Chapter 11 arbitrations and other complex litigation to increase the efficiency of the proceedings. LiveNote is offered by most firms that provide transcription services. This service supplements and does not replace transcription by a reporter. Canada has made enquiries with firms providing transcription services which have indicated that LiveNote can be made available at a cost of \$1.75 per page per computer.<sup>49</sup> Accordingly, this service is affordable and should be used to increase the efficiency of this proceeding.

56. LiveNote is especially useful to the Tribunal and disputing parties in an arbitration such as this one where evidence and argument are heard in a very short time frame. The Tribunal should therefore direct the use of LiveNote for real time transcription during hearings at this proceeding.

## **V. ORDER OF WITNESSES**

57. Counsel for the Claimant has proposed language in paragraph 40 of the Procedural Order that suggests that the Arbitral Tribunal may compel witnesses to appear with all relevant documents under their care or control.

58. NAFTA Chapter 11 tribunals certainly can and do request that witnesses appear before them with all relevant documents. However, the NAFTA and the UNCITRAL Rules do not provide Arbitral Tribunals with the power to compel a witness to do so.

59. The consequences of a witness failing to appear or refusing to provide documents should be addressed on a case-specific basis and will depend on a variety of factors. Relevant factors could include: whether the witness is under the control of a party, or the availability and relevance of the documents.

60. The proposed language in paragraph 40 is misleading and ambiguous as it suggests that the Arbitral Tribunal has the power to compel a witness without elaborating on the scope of this power or the conditions under which it would be appropriate.

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<sup>49</sup> Estimate from Atchison & Denman, (20 February 2008) (Tab 26).

61. In any event, Canada suggests that Rules 4(10) and 4(11) of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (“IBA Rules”) address the issue of compulsion of witnesses.<sup>50</sup> Rule 4(10) provides that a disputing party may request that the Arbitral Tribunal take all legally available steps to obtain the testimony of a witness who refuses to appear. Similarly, Rule 4(11) permits an Arbitral Tribunal to order a disputing party to provide or to use its best efforts to provide for the appearance of any person for testimony at a hearing.

62. Accordingly, the Tribunal should reject the proposed language in paragraph 40 as it is at best unnecessary, and more likely creates an unhelpful ambiguity.

## **VI. EXCLUSION OF WITNESSES**

63. In paragraph 44 of the Procedural Order, the Claimant opposes Canada’s position that officials of the governments of Ontario and Canada who might provide testimony as witnesses should not be excluded from the hearing before their examination. Counsel for the Claimant takes the position that Gallo should not be excluded. Notwithstanding that Gallo will certainly be a witness in these proceedings, Canada is willing to allow the Claimant to be present throughout the hearing so that his counsel may obtain instructions.

64. By the same token, Canada should be permitted to have the necessary government officials present throughout the hearing, so that it may receive instructions. Given the collective nature of government decision-making and the fact that officials from various departments may have different perspectives on issues, an arbitrary limit on the number of officials present at the hearings could prove prejudicial to Canada.

65. Finally, if the presence of the Claimant or any government official were to raise serious questions of prejudice in a specific instance, the Arbitral Tribunal would have discretion to address the issues in those circumstances.

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<sup>50</sup> *IBA Rules and the Taking of Evidence in International Commercial Arbitration* (1999), online: International Bar Association <<http://www.ibanet.org/images/downloads/pubs/IBA-Rules-on-Taking-of-Evidence.pdf>> [IBA Rules] (Tab 27).

66. Accordingly, both Gallo and officers of the governments of Ontario and Canada should be permitted to be present throughout the hearing.

## VII. NON-DISPUTING PARTY AND NAFTA ARTICLE 1128 PARTICIPATION

### A. Non-disputing Party Participation

67. At paragraph 47 of draft Procedural Order, Canada proposes that the Arbitral Tribunal addresses non-disputing party participation in a manner consistent with the Statement of the Free Trade Commission on Non-disputing Party Participation (“FTC Statement”).<sup>51</sup>

68. NAFTA Chapter 11 tribunals have determined that they have broad discretion to accept non-disputing party submissions – often referred to as *amicus* briefs – under Article 15 of the UNCITRAL Rules.<sup>52</sup> In fact, every NAFTA Chapter 11 tribunal that has considered the issue has affirmed its discretion to consider non-disputing party submissions.<sup>53</sup>

69. The FTC Statement confirms that the NAFTA does not limit an Arbitral Tribunal’s discretion to accept non-disputing party submissions, and provides appropriate guidance on the criteria for determining when to accept such submissions. This criteria include whether:

- (a) the non-disputing party submission would assist the Arbitral Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address matters within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the arbitration; and
- (d) there is a public interest in the subject-matter of the arbitration.<sup>54</sup>

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<sup>51</sup> *FTC Statement, supra* note 6 (Tab 6).

<sup>52</sup> See e.g. *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, (15 January 2001), (UNCITRAL), ¶¶ 31, 53 [*Methanex Amicus*] (Tab 28); *UPS v. Canada*, Decision of the Tribunal on Petitions of Intervention and Participation as Amici Curiae, (17 October 2001), (UNCITRAL), ¶¶ 61, 73 [*UPS Amicus*] (Tab 29); and, *Chemtura Corp. v. Canada*, Procedural Order No. 1, (21 January 2008) (UNCITRAL), ¶ 60 [*Chemtura P.O. 1*] (Tab 30).

<sup>53</sup> See e.g. *Methanex Amicus, ibid.* (Tab 28).

<sup>54</sup> *FTC Statement, supra* note 6, ¶ 6 (Tab 6).

70. The FTC Statement further provides that any non-disputing party submission should avoid disrupting the proceedings, and that a disputing party should not be unduly burdened or unfairly prejudiced by such submissions.<sup>55</sup> The FTC Statement also sets out procedural requirements for non-disputing party submissions to ensure efficiency, including formal requirements for leave to file such submissions,<sup>56</sup> restrictions on length and on subject-matter, and limiting such submissions to matters within the scope of the dispute.<sup>57</sup>

71. Recent NAFTA Chapter 11 tribunals have relied on the FTC Statement to deal with requests for non-disputing party participation.<sup>58</sup>

72. Accordingly, the FTC Statement should be relied on if the Arbitral Tribunal is called upon to consider requests for non-disputing party participation.

#### **B. NAFTA Article 1128 Participation**

73. In paragraph 48 of the Procedural Order, the Claimant proposes language that would limit the discretion of the Arbitral Tribunal to consider Article 1128 submissions that were not “strictly limited” to issues related to the interpretation of the NAFTA.

74. Article 1128 provides that a NAFTA Party may make submissions on a question of interpretation of the NAFTA. It follows that the Claimant’s proposed language in paragraph 48 is entirely redundant. Perhaps even more alarmingly, the proposed language could also be read as attempting to limit the intervention of other NAFTA Parties under Article 1128. Canada considers that Article 1128 speaks for itself and any attempt to modify or qualify the NAFTA in a procedural order is not appropriate.

75. For these reasons, the Tribunal should reject the Claimant’s proposed language in paragraphs 47 and 48 of the Procedural Order.

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<sup>55</sup> *Ibid.*, ¶ 7 (Tab 6).

<sup>56</sup> *Ibid.*, ¶ 2 (Tab 6).

<sup>57</sup> *Ibid.*, ¶ 3 (Tab 6).

<sup>58</sup> See e.g. *Methanex Corp. v. United States*, Letter of Tribunal to Disputing Parties Concerning Non-party Participation, (19 March 2004), (UNCITRAL) (Tab 31); see also *Glamis Gold v. United States*, Decision

## **VIII. SUB-NATIONAL GOVERNMENTS**

76. Another proposal of the Claimant concerns the definition of a “disputing party” in paragraph 1 of the Confidentiality Order. In that paragraph, the Claimant proposes that this definition be extended to include sub-national governments. Canada considers this proposed expansion of the “disputing party” to be both unnecessary and confusing.

77. Paragraph 6 of the Confidentiality Order provides that persons receiving material containing confidential information are bound by this Order. Moreover, paragraph 7 requires such persons to execute the confidentiality agreement appended to the Confidentiality Order. The same requirement applies when material containing confidential information is disclosed to any employees or consultants of a firm, organization, company, or group. It follows that the Confidentiality Order already ensures that officials of sub-national governments cannot disclose confidential information. Claimant’s proposal in paragraph 7 is therefore unnecessary.

78. Accordingly, the Arbitral Tribunal should reject the Claimant’s proposed expansion of the definition of “disputing party” in paragraph 1(a) of the Confidentiality Order.

## **IX. RELIEF FOR BREACH**

79. At paragraph 9 of the Confidentiality Order, the Claimant proposes that a disputing party should be permitted to seek relief from the Arbitral Tribunal for an alleged breach of a Confidentiality Agreement or the Confidentiality Order.

80. Canada does not take issue with the proposition that either disputing party may raise an alleged breach of the Confidentiality Order or Confidentiality Agreement with the Arbitral Tribunal. However, the jurisdiction of the Arbitral Tribunal and the consequences of such a breach are legal issues which would have to be determined in those circumstances.

81. Canada suggests that the language proposed by the Claimant at paragraph 9 of the Confidentiality Order is of little assistance and presupposes that the Arbitral Tribunal has



jurisdiction that may not exist. As a consequence, Canada submits that this paragraph should not be included in the Confidentiality Order.

## **X. TREATMENT OF INFORMATION THAT IS SUBJECT TO DOMESTIC STATUTORY OBLIGATIONS**

82. Canada submits that the obligations it has agreed to assume under the Confidentiality Order cannot be placed in conflict with its pre-existing domestically-legislated obligations to disclose and maintain records.

83. Canada has proposed language in paragraph 10 of the draft Confidentiality Order to ensure that documents that are subject to a request by the public for disclosure, pursuant to the federal *Access to Information Act* (“*ATIA*”)<sup>59</sup> or that are required to be maintained under the *Library and Archives of Canada Act* (“*LACA*”),<sup>60</sup> *Privacy Act*,<sup>61</sup> or the *Privacy Regulations*<sup>62</sup> be governed by these acts or any other relevant legislation.

84. Similarly, paragraph 10 ensures that Ontario is able to act consistently with its own law concerning the disclosure of documents pursuant to the *Freedom of Information and Protection of Privacy Act* (“*FIPPA*”),<sup>63</sup> and with respect to the maintenance of public records and personal information under the *FIPPA*, Regulations 459 and 460 (collectively the “*FIPPA Regulations*”)<sup>64</sup>, and the *Archives and Recordkeeping Act, 2006* (“*ARA*”) and any other relevant Ontario legislation.<sup>65</sup>

85. Canada’s proposed language ensures that any objection to public disclosure or the maintenance of records pursuant to this legislation will be dealt with through the safeguards

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<sup>59</sup> *Access to Information Act*, R.S.C. 1985, c. A-1 [*ATIA*] (Tab 33).

<sup>60</sup> *Library and Archives Act*, R.S.C. 2004, c-11 [*LACA*] (Tab 34).

<sup>61</sup> *Privacy Act*, R.S.C., 1985, c. P-2 [*Privacy Act*] (Tab 35).

<sup>62</sup> *Privacy Regulations*, SOR/83-508, ss. 4(1) [*Privacy Regulations*] (Tab 36).

<sup>63</sup> R.S.O. 1990, c. F.31 [*FIPPA*] (Tab 37).

<sup>64</sup> R.R.O. 1990, Reg. 459 (Disposal of Personal Information), and R.R.O. 1990, Reg. 460 (General), [*FIPPA Regulations*] (Tab 38).

<sup>65</sup> *Archives and Recordkeeping Act, 2006*, c. 34 [*ARA*] (Tab 39).

already set out in the *ATIA*, the *FIPPA* or other relevant domestic legislation, while remaining consistent with its commitment to transparency under the NAFTA.

**A. Federal Legislation Concerning the Disclosure of Documents and the Maintenance of Records**

*(i) Canada's Disclosure Legislation Balances Public Access Against the Need to Protect Confidential Information*

86. Canada has long-standing, specialized privacy and access to information legislation that fairly balances the public's right to access the records of a government institution, while protecting the release of confidential information, including business information. Under the *ATIA* every Canadian has the right to access records under the control of a government institution, upon request and within a reasonable period of time. Such requests can include materials that Canada has received in the course of a NAFTA Chapter 11 proceeding.

87. However, the right of public access to information is not absolute under the *ATIA*. Restrictions imposed upon *ATIA* requests safeguard against the indiscriminate release of specific categories of confidential information, including business confidential information. The *ATIA* provides that the head of the responsible government institution shall refuse to disclose any record that contains:

- trade secrets of a third party;
- financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party; or

- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.<sup>66</sup>

88. As well, the head of the government institution to whom an *ATIA* request is directed must give written notice to affected third parties when it intends to disclose:

- a record requested under the *ATIA* that it has reason to believe might contain trade secrets of a third party;
- financial, commercial, scientific or technical information that is confidential information; or
- information that the government institution reasonably foresees will affect the competitive or contractual position of a third party.<sup>67</sup>

89. The head of the responsible government institution must make every reasonable effort to give such notice within thirty days after the receipt of an access to information request.<sup>68</sup>

90. After being notified, the affected third party can either consent to the disclosure or make representations to the responsible government institution explaining why the record should not be disclosed.<sup>69</sup> Any government decision to disclose a third party's information may also be reviewed by the Federal Court of Canada.<sup>70</sup>

91. The procedures and exemptions in the *ATIA* thus provide ample protection for any of Claimant's business confidential information that may be provided to Canada in the course of these proceedings.

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<sup>66</sup> *ATIA*, *supra* note 59, ss. 20(1) (Tab 33).

<sup>67</sup> *ATIA*, *ibid.*, ss. 27(1) (Tab 33).

<sup>68</sup> *Ibid.*, ss. 28(1)(a) and (b) (Tab 33).

<sup>69</sup> *Ibid.*, ss. 44(1) (Tab 33).

<sup>70</sup> *Ibid.* (Tab 33).

(ii) *Canada Must Comply with its Legislation Concerning the Maintenance of Records*

92. Section 67.1(1) of the *ATIA* provides that a federal institution may not:

- (a) destroy, mutilate or alter a record;
- (b) falsify a record or make false a record;
- (c) conceal a record; or
- (d) direct, propose, counsel or cause any person to do anything mentioned in paragraphs (a) to (c).<sup>71</sup>

93. A record is defined under the *ATIA* as "... any documentary material, regardless of medium or form."<sup>72</sup> Material obtained in the course of these proceedings will fall within the definition of a "record" under the *ATIA*. For the purposes of the *ATIA*, to "destroy" a record may include cases where Canada releases that record without retaining a copy. Any person who disposes of documents in contravention of the *ATIA* may be found criminally liable.<sup>73</sup>

94. For its part, the *LACA* provides in section 12(1):

No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, *without the written consent of the Librarian and Archivist* or of a person to whom the Librarian and Archivist has, in writing, delegated power to give such consents.<sup>74</sup>

[Emphasis Added]

95. The *LACA* defines a "government record" as a record that is under the control of a government institution.<sup>75</sup> "Record" is broadly defined under the *LACA* as "... any documentary material other than a publication, regardless of medium or form."<sup>76</sup>

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<sup>71</sup> *Ibid.*, ss. 67.1(1) (Tab 33).

<sup>72</sup> *Ibid.*, s. 3 (Tab 33).

<sup>73</sup> *Ibid.*, ss. 67.1(2) (Tab 33).

<sup>74</sup> *LACA*, *supra* note 60, ss. 12(1) (Tab 34).

<sup>75</sup> *LACA*, *ibid.*, s. 2 (Tab 34).

<sup>76</sup> *Ibid.* (Tab 34).

96. Finally, the *Privacy Act* requires at section 6(3) that:

A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information.<sup>77</sup>

97. “Personal Information” is defined under the *Privacy Act* as, “information about an identifiable individual that is recorded in any form ...”.<sup>78</sup>

98. The *Privacy Regulations* further provide at s. 4(1) that:

Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution

(a) for at least two years following the last time it was used unless the individual consents to its disposal.<sup>79</sup>

99. If Canada receives documents that fall within the definition of “personal information” under the *Privacy Act*, it cannot simply return these documents to the Claimant. Rather, it must first review all documents for the existence of personal information and request that affected persons consent in writing to the documents’ destruction. Canada cannot know in advance whether such consent will be granted.

100. These three legislative regimes both individually and collectively make it impossible for Canada to make any commitment to document return. Canada cannot agree to a provision in the Confidentiality Order that on its face places Canada in conflict with its pre-existing domestic legal obligations.

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<sup>77</sup> *Privacy Act*, *supra* note 61, ss. 6(3) (Tab 35).

<sup>78</sup> *Ibid.*, s. 3 (Tab 35).

<sup>79</sup> *Privacy Regulations*, *supra* note 62, ss. 4(1) (Tab 36).

**B. Provincial Legislation Concerning the Disclosure of Documents and the Maintenance of Records**

(i) *Ontario's Disclosure Legislation Balances Public Access Against the Need to Protect Confidential Information*

101. The *FIPPA* also attempts to strike a balance between the right of individuals to access documents held by the Government of Ontario with a third party's expectation that their confidential information will be protected.

102. As described in section 28(1) of *FIPPA*, an Ontario government institution that receives a request for access to third party information must provide written notice of this request to the third party to whom the information relates, and must seek their views on whether the information should be disclosed. This notice must be provided to the third party within twenty days of the request.<sup>80</sup>

103. The *FIPPA* also sets out mandatory exemptions for access to information, which includes third party information, if supplied in confidence and where disclosure could prejudice the interests of a third party.

104. Specifically, section 10(1) provides that the right to access information is subject to exemptions:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.<sup>81</sup>

105. Section 17(1) of the *FIPPA* provides for a mandatory exemption to the right of access to third party information as it relates to, *inter alia*, commercial or financial information:

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<sup>80</sup> "Third Party Information and the Request Stage", IPC Practices, No. 5, Office of the Privacy Commissioner, (September 1998) (Tab 40).

<sup>81</sup> *FIPPA*, *supra*, note 63, ss. 10(1) (Tab 37).

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

106. If a government official decides that business confidential information of a third party is not exempt under section 17, the third party can appeal that decision to the Privacy Commissioner.<sup>82</sup> A decision of the Privacy Commissioner may also be reviewed by the Ontario courts.

(ii) *Ontario Must Comply with Legislation Concerning the Maintenance of Records*

107. The *FIPPA*, the *FIPPA Regulations* and the *ARA* all concern the maintenance of records in Ontario. These statutes individually and collectively prevent the Government of Ontario from returning documents to the Claimant after the arbitration.

108. A record is defined under section 2(1) of *FIPPA* as:

... any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other

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<sup>82</sup> *Ibid.*, ss. 50 (1) (Tab 37).

documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;<sup>83</sup>

109. This broad definition of “record” would likely capture almost all material generated in the course of these proceedings.

110. The *ARA* assigns the responsibility of overseeing records relating to Ontario public bodies to the Archivist of Ontario (“Archivist”). The Archivist approves record retention schedules for each public body, including the agencies and ministries relevant to these proceedings.<sup>84</sup> All such public bodies must indicate how long they will keep their records in record retention schedules.<sup>85</sup> When this period of retention elapses, those records must be submitted to the offices of the Archivist, where they will be retained as archival records.

111. Subject to the direction, agreement, or written consent of the Archivist, section 15(1) of the *ARA*, provides that:

15. (1) A public record shall not be,

- (a) destroyed or damaged;
- (b) altered so as to delete information from it;
- (c) made illegible;
- (d) removed from the custody or control of a public body or the Archives of Ontario; or
- (e) concealed from a public body or the Archivist.<sup>86</sup>

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<sup>83</sup> *Ibid.*, ss. 2(1) (Tab 37).

<sup>84</sup> *ARA*, *supra* note 65, ss. 11-13; see also ss. 8(4) (Tab 39).

<sup>85</sup> *Ibid.*, s. 11 (Tab 39).

<sup>86</sup> *Ibid.*, ss. 15(1) (Tab 39).



112. A “public record” is defined under subsection 2(1) as:

... a record made or received by a public body in carrying out the public body’s activities, but does not include constituency records of a minister of the Crown or published works;<sup>87</sup>

113. It is an offence to damage, destroy or otherwise dispose of a public record designated by the Archivist under section 20(8) to be of “archival value”.<sup>88</sup>

114. The Government of Ontario is also subject to other important obligations with respect to the treatment of personal information. The *FIPPA*, section 40(4) requires that:

A head [of an institution] shall dispose of personal information under the control of the institution in accordance with the regulations.<sup>89</sup>

115. “Personal information” is defined under section 2(1) of *FIPPA* as :

... recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

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<sup>87</sup> *Ibid.*, ss. 2(1) (Tab 39).

<sup>88</sup> *Ibid.*, ss. 20(8) (Tab 39).

<sup>89</sup> *FIPPA*, *supra* note 63, ss. 40(4) (Tab 37).

- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;<sup>90</sup>

116. According to the *FIPPA Regulations*, personal information must be retained for one year after its last use, unless the individual in question consents to destroy this information earlier.<sup>91</sup> Furthermore, this one year retention period may overlap with a separate retention schedule established under the *ARA* which would require the retention of this personal information for many more years.

117. Under section 61 of *FIPPA*, it is a criminal offence to dispose of personal information without the individual's consent.<sup>92</sup>

118. The Government of Ontario therefore cannot simply return documents to the Claimant that fall within the definition of "personal information" under *FIPPA* and the *FIPPA Regulations*. Rather, it must first obtain the consent of the individual to whom the personal information belongs. As with Canada, Ontario cannot possibly know in advance whether such consent will be granted.

119. In summary, these provincial statutes make it impossible for Canada to commit to document return, lest it contravene its own domestic legislation.

### **C. The Domestic Legislative Regime is Consistent with NAFTA's Objective of Transparency**

120. The *ATIA* and *FIPPA* regimes are also consistent with the commitment of the NAFTA Parties to transparency.<sup>93</sup> The FTC Note, which is binding on the Arbitral Tribunal, expressly

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<sup>90</sup> *Ibid.*, ss. 2(1) (Tab 37).

<sup>91</sup> Reg. 460, *supra* note 64, ss. 5(1) (Tab 38).

<sup>92</sup> *FIPPA*, *supra* note 63, s. 61 (Tab 37).

provides for the general disclosure of information subject only to specified exceptions, including the protection of confidential business or privileged information; that is, the regime that already applies and is in place under the *ATIA* and *FIPPA*.<sup>94</sup>

121. Additional support for these regimes can be found in the absence of any general duty of confidentiality under the NAFTA. In particular, nothing in the NAFTA precludes Canada from providing public access to documents in NAFTA Chapter 11 proceedings. Canada has limited this right only to the extent set out in the *ATIA* or *FIPPA*, and pursuant to such requirements as solicitor-client privilege, cabinet confidence and other relevant privileges.

**D. Canada's Proposal is Consistent with Past NAFTA Practice**

122. Past NAFTA Chapter 11 tribunals have acknowledged the role and importance of domestic disclosure legislation, and have expressly recognized that such legislation is not qualified by the NAFTA or by applicable arbitration rules. For example, the Arbitral Tribunal in *Mondev* rejected the Claimant's request for an Order directing the United States to refrain from releasing materials exchanged in the arbitration in response to a request made under the U.S. *Freedom of Information Act* ("*FOIA*"). The Arbitral Tribunal found that:

The FOIA creates a statutory obligation of disclosure upon the Respondent. The ICSID (Additional Facility) Rules provide that the minutes of all hearings shall not be published without the consent of the parties (Article 44(2)) and that the consent of the parties determines who shall attend those hearings (Article 39(2)). *In general terms, however, the Rules do not purport to qualify statutory obligations of disclosure which may exist for either party.*<sup>95</sup>

[Emphasis Added]

123. More generally, the Arbitral Tribunal in *Metalclad* found that domestic disclosure obligations cannot be ignored by either disputing party:

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<sup>93</sup> *NAFTA*, *supra* note 3, Article 102 (1) (Tab 3). Article 102 (1) states that: "The objectives of this Agreement, as elaborated more specifically through its principles and rules[...], includ[e][...] transparency..."

<sup>94</sup> *Ibid.*, Article 1131(2) (Tab 3). Article 1131(2) provides that: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section".

<sup>95</sup> *Mondev International Ltd. v. United States*, Interim Decision regarding U.S. compliance with FOIA request, (25 January 2001), (ICSID Case No. ARB/AF/99/2), at 2 (Tab 41).

Indeed, as has been pointed out by the Claimant in its comments, under United States security laws, the Claimant, as a public company trading on a public stock exchange in the United States, is under a positive duty to provide certain information about its activities to its shareholders ...

The above having been said, it still appears to the Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, *subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.*<sup>96</sup>

[Emphasis Added]

124. Similarly, the *UPS* Arbitral Tribunal reconciled the objectives of confidentiality and the public interest in transparency by making Canada's *ATIA* applicable to information generated in that NAFTA Chapter 11 proceeding.<sup>97</sup> The *Chemtura* Arbitral Tribunal did likewise.<sup>98</sup>

#### E. Conclusion

125. Absent paragraph 10 of the Confidentiality Order this Arbitral Tribunal will be left in the position of judging the scope of disclosure under the *ATIA* and the *FIPPA*, a function normally fulfilled by the domestic courts.

126. As in the recent *UPS* and *Chemtura* cases, the Arbitral Tribunal can and should resolve this matter in a way that is transparent and permits Canada to comply with both its domestic and international obligations. The provision of the Confidentiality Order proposed by Canada at paragraph 10 accomplishes this objective, without prejudice to the Claimant.

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<sup>96</sup> *Metalclad Corporation v. Mexico*, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information regarding ICSID Case ARB/(AF)/97/1, (27 October 1997), (ICSID Case No. ARB/(AF)/97/1), ¶¶ 9-10 (Tab 42).

<sup>97</sup> *United Parcel Service of America Inc. v. Canada*, Procedural Directions and Order of the Tribunal, (4 April 2003), (UNCITRAL), at 5, ¶ E.11 [*UPS Procedural Direction*] (Tab 43).

<sup>98</sup> *Chemtura Corp. v. Canada*, Confidentiality Order, (21 January 2008) (UNCITRAL), ¶ 8 (Tab 44).

## XI. TRANSPARENCY OF PROCEEDINGS

### A. Presumption of Transparency in NAFTA

127. The disputing parties disagree on the extent to which these proceedings should be confidential. Their differences arise in two distinct contexts:

- the extent to which documents generated in the course of the arbitration should be publicly accessible (Procedural Order, ¶ 22; Confidentiality Order, ¶¶ 13-14); and
- whether hearings should be open to the public or held *in camera* (Confidentiality Order, ¶¶ 13-14).

128. All of these issues must be determined in the light of one fundamental principle applicable to NAFTA Chapter 11 proceedings: there is no general duty of confidentiality. Rather, information generated in NAFTA Chapter 11 proceedings is presumed to be available to the public unless a specific provision, rule or order prohibits such access. This is consistent with the stated objectives of transparency in the NAFTA.<sup>99</sup>

129. One of the first NAFTA Chapter 11 tribunals to find that there is no general duty of confidentiality under the NAFTA was the Arbitral Tribunal in *Loewen*. This Arbitral Tribunal found that:

... we do not accept the Claimants' submission that each party is under a general obligation of confidentiality in relation to the proceedings. In our view, Article 44 [of the ICSID Additional Facility Rules] does not impliedly impose such an obligation on the parties, when read in its context or against the background of international commercial law. In the case of an arbitrator [*sic.*] under NAFTA, particularly an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs.<sup>100</sup>

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<sup>99</sup> *NAFTA*, *supra* note 3, Article 102 (1) (Tab 3). Article 102 (1) states that: "The objectives of this Agreement, as elaborated more specifically through its principles and rules[...], includ[e][...] transparency..."

<sup>100</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, "Decision of the Tribunal on the Respondent's Request of May 26, 1999, for a Ruling on Disclosure", (ICSID Case No. ARB(AF)/98/3)(28 September 1999), ¶ 8 (Tab 45).

130. The Arbitral Tribunal in *Loewen* correctly took into account the strong public interest favouring transparency where a State is a party in an international investment arbitration. NAFTA Chapter 11 proceedings challenge the measures of a NAFTA Party under international law and frequently have serious public policy dimensions. As such, an arbitration involving a NAFTA Party may capture the public interest in a manner that must be reconciled with the investor's desire for privacy.

131. The absence of a general duty of confidentiality in NAFTA and the presumption in favour of transparency was subsequently confirmed by the Note of Interpretation issued by the NAFTA Free Trade Commission on July 31, 2001 ("FTC Note").

132. The FTC Note provides that:

- a) Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Arbitral Tribunal.
- b) In the application of the foregoing:
  - i In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven Arbitral Tribunals, apart from the limited specific exceptions set forth expressly in those rules.
  - ii Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven Arbitral Tribunal, subject to redaction of:
    - a. confidential business information
    - b. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
    - c. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
  - iii The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the

preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.

- iv The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
- v The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.<sup>101</sup>

133. Article 1131(2) provides that the FTC Note is binding on NAFTA Chapter 11 tribunals.<sup>102</sup>

134. In summary, the NAFTA and the FTC Note contemplate disclosure of information generated in the course of a Chapter 11 arbitration, subject only to specific exceptions. Put another way, the Arbitral Tribunal should approach all questions of access to documents or information from the perspective that nothing is confidential unless a specific provision, rule, or order so provides.

#### **B. Open Hearings**

135. Canada's proposed text at paragraph 14 of the draft Confidentiality Order states that hearings in this matter should be open to the public, except as required for the protection of confidential information.<sup>103</sup> This position reflects Canada's commitment to transparency and public accountability under the NAFTA.

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<sup>101</sup> *FTC Note, supra* note 7, ¶¶ 1-3 (Tab 7).

<sup>102</sup> *NAFTA, supra* note 3, Article 1131(2) (Tab 3). Article 1131(2) provides that: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section".

<sup>103</sup> *Confidentiality Order, supra* note 5, ¶ 13 (Tab 5).

136. By contrast, the Claimant argues that hearings in this matter should be closed to the public. In this instance, the Claimant can avail itself of Article 25(4) of the UNCITRAL Rules.<sup>104</sup>

137. Canada regrets that the Claimant has made this *in camera* election, and suggests that the better practice would be to open the hearing, except in circumstances in which the Arbitral Tribunal is satisfied there is a genuine issue of confidentiality.

138. Open hearings are consistent with the stated NAFTA objective of transparency.<sup>105</sup> All three NAFTA Parties have reaffirmed this objective and have made clear commitments to holding open hearings in NAFTA Chapter 11 arbitrations.

139. On October 7, 2003, Canada issued a Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations, affirming that:

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.<sup>106</sup>

140. The United States issued an identical affirmation on that same day.<sup>107</sup> Mexico joined Canada and the United States in endorsing this policy following the meeting of the Free Trade Commission of 2004.<sup>108</sup>

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<sup>104</sup> *UNCITRAL Rules*, *supra* note 13 (Tab 12).

<sup>105</sup> *NAFTA*, *supra* note 3, Article 102 (1) (Tab 3). Article 102 (1) states that: "The objectives of this Agreement, as elaborated more specifically through its principles and rules[...], includ[e][...] transparency...".

<sup>106</sup> Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, (7 October 2003) (Tab 46).

<sup>107</sup> Statement of the United States on Open Hearings in NAFTA Chapter Eleven Arbitrations, (7 October 2003) (Tab 47).



141. Canada therefore invites the Arbitral Tribunal to consider the clear intent of the NAFTA Parties and open the hearing, except in circumstances in which the Arbitral Tribunal is satisfied there is a genuine issue of confidentiality.

(i) *Recent NAFTA Chapter 11 Arbitral Practice Favours Open Hearings*

142. Practice in the first NAFTA Chapter 11 proceedings under the UNCITRAL Rules was restricted to restating Article 25(4) and holding hearings *in camera*.<sup>109</sup> However, since 2001, the parties in most NAFTA Chapter 11 proceedings have agreed to open hearings, including *UPS v. Canada*,<sup>110</sup> *Glamis Gold v. United States*,<sup>111</sup> *Grand River Enterprises v. United States*,<sup>112</sup> *Methanex v. United States*,<sup>113</sup> and *Canfor v. United States*.<sup>114</sup>

143. In *Thunderbird International v. Mexico* the Arbitral Tribunal adopted a less transparent approach, where hearings were closed but transcripts were made public.<sup>115</sup>

144. NAFTA Arbitral Tribunals have recognized through their practice over the past several years and by express rulings that there is a public interest in the outcome of NAFTA Chapter 11 arbitrations, and that this interest is best served through a transparent process, including open hearings. In the context of a ruling on *amicus* submissions, the *Methanex* Arbitral Tribunal found:

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<sup>108</sup> 2004 NAFTA Commission Meeting “NAFTA Free Trade Commission Joint Statement”, (16 July 2004) (Tab 48).

<sup>109</sup> See e.g. *Pope & Talbot, Inc. v. Canada*, “Procedural Order on Confidentiality No.5” (17 December 1999), (UNCITRAL), ¶ 1 (Tab 49).

<sup>110</sup> *UPS Procedural Direction*, *supra* note 97, at Part II, ¶ 14 (Tab 43).

<sup>111</sup> *Glamis Gold, Ltd. v. United States*, Procedural Order No.1, (3 March 2005), (UNCITRAL), ¶ 5(d) (Tab 50).

<sup>112</sup> *Grand River Enterprises v. United States of America*, Minutes of the First Session of the Tribunal, (31 March 2005), (UNCITRAL), ¶ 10 [*Grand River*] (Tab 51).

<sup>113</sup> ICSID News Release, “*Methanex Corporation v. United States of America* NAFTA/UNCITRAL Arbitration Rules Proceeding”, (8 June 2004) (Tab 52).

<sup>114</sup> ICSID News Release, “*Canfor Corporation v. United States of America* NAFTA/UNCITRAL Arbitration Rules Proceeding”, (2 December 2004) (Tab 53).

<sup>115</sup> *Thunderbird International Gaming Corporation v. Mexico*, Procedural Order No.1, (27 June 2003) (UNCITRAL), ¶ 6.3 [*Thunderbird*] (Tab 54).

The public interest in this arbitration arises from its subject matter [a challenge to an environmental regulation], as powerfully suggested by the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.<sup>116</sup>

(ii) *Claimant's Confidentiality Can Be Maintained*

145. In practice, reasoned claims for confidentiality have been easily addressed in NAFTA arbitrations that have otherwise maintained open hearings. Necessary portions of the public hearings have been held *in camera* to ensure that there was no disclosure of confidential information.<sup>117</sup> Claimant's particular concern about potential interference with the proceeding can be fully addressed, for example, by ensuring public access via live video-feed, which can be suspended briefly for the presentation of confidential information or at the request of either disputing party.<sup>118</sup>

(iii) *Conclusion on Open Hearings*

146. For the foregoing reasons, Canada's position should be preferred, and the hearings in this matter declared open to the public, save for brief periods when confidential or privileged information is under discussion.

147. Alternatively, if the Arbitral Tribunal is inclined to close the hearings to the public by virtue of the Claimant's request under the UNCITRAL Rules for an *in camera* hearing, Canada notes that this simply means that the public is not allowed to be present at the hearings. It does not preclude the public from knowing about the arbitration or having access to pleadings, submissions, and award(s), nor does it prevent public access to transcripts of the proceedings, for example from an internet website.<sup>119</sup>

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<sup>116</sup> *Methanex Amicus*, *supra* note 52, ¶ 49 (Tab 28).

<sup>117</sup> *Confidentiality Order*, *supra* note 5, ¶ 11 (Tab 5).

<sup>118</sup> See e.g. *Grand River*, *supra* note 112, ¶ 10 (Tab 51).

<sup>119</sup> See generally, *Thunderbird*, *supra* note 115 (Tab 54).

### C. Access to Documents

148. Paragraph 22 of the Procedural Order proposed by Canada reiterates that the FTC Note on access to documents governs the treatment of documents in this arbitration. This simply memorializes what is undeniable, given that NAFTA Article 1131(2) makes the FTC Note binding in Chapter 11 arbitrations. By contrast, the Claimant's proposed text impermissibly seeks to modify binding text and in a manner that creates ambiguity. Canada's proposal should be preferred.

149. Similarly, paragraph 14 of the Confidentiality Order proposed by Canada states that either disputing party can disclose documents generated in the arbitration to the public except where such information is designated as confidential under the Confidentiality Order.<sup>120</sup>

150. This provision also reiterates what is evident under the binding FTC Note: documents generated during an arbitration are publicly accessible except to the extent they are expressly exempted from disclosure. Such exemptions typically include information designated as confidential under a Confidentiality Order and information that is the subject of a claim for privilege such as solicitor-client privilege.

151. Canada's proposed language in the Procedural Order and the Confidentiality Order ensure that the public has access to information to the greatest extent possible without prejudicing the Claimant. Such public access is vital to the credibility of the investor-State dispute settlement mechanism and reflects the intent of the NAFTA Parties as expressed in the preamble to the NAFTA and the binding Note of Interpretation. At the same time, proceeding in this fashion protects what is properly confidential and does not prejudice the Claimant in the presentation of its case.

152. Canada is unaware of any justification for the Claimant's objection to these provisions. Given that they reflect mandatory treaty text and respect legitimate claims of confidentiality and privilege, there can be no reasonable basis for objecting to them.

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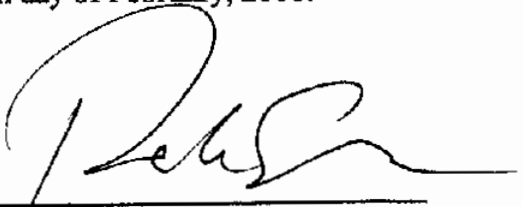
<sup>120</sup> *Confidentiality Order, supra* note 5 (Tab 5)

## RELIEF REQUESTED

153. For the reasons set out above, Canada respectfully requests that the Arbitral Tribunal:

1. Confirm the provisions of Procedural Order and the Confidentiality Order agreed to by the disputing parties;
2. Adopt the language proposed by Canada with respect to issues not agreed upon by the disputing parties in the Procedural Order and in the Confidentiality Order; and
3. Grant such further and additional relief as this Arbitral Tribunal may deem just.

Respectfully submitted on behalf of  
the Government of Canada this  
29th day of February, 2008.

For 

Meg Kinnear  
Jacqueline Dais-Visca  
Reuben East  
Céline Lévesque  
Michael Owen

Of Counsel for the Respondent