

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**THE COUNCIL OF CANADIANS, and DALE CLARK, DEBORAH BOURQUE,  
and GEORGE KUEHNBAUM on their own behalf and on behalf of all members of  
the CANADIAN UNION OF POSTAL WORKERS**

Applicants

- and -

**HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY THE  
ATTORNEY GENERAL OF CANADA**

Respondents

**AFFIDAVIT OF JAMES CRAWFORD  
(Sworn 15 July 2004)**

I, **JAMES CRAWFORD**, Professor of International Law, of the City of Cambridge, in the County of Cambridgeshire, United Kingdom, make oath and say:

1. Since 1992, I have been the Whewell Professor of International Law in the University of Cambridge and a Professorial Fellow of Jesus College, Cambridge. I am currently also Chair of the Faculty of Law at the University of Cambridge. From 1996-2003, I was Director of the Lauterpacht Research Centre for International Law, University of Cambridge. From 1992-2001 I was a member of the United Nations International Law Commission, and from 1997-2001 Special Rapporteur on State Responsibility, a subject which touches directly on the relations between the international responsibility of States, including under treaties such as NAFTA, and the internal processes of States under their own internal or domestic law. Attached as **Exhibit "A"** to my affidavit is a copy of my

curriculum vitae, setting out in particular experience as arbitrator in international investment disputes, including under Chapter Eleven of NAFTA.

2. I have been asked by the Respondent, the Attorney General of Canada, to comment on various issues raised by Professor Sornarajah in his Affidavit, sworn on 28 April 2003 and filed by the Applicants in these proceedings.

3. In his Affidavit Professor Sornarajah argues, in effect, that by providing for investor-State arbitration under Chapter Eleven, Canada has abrogated or impinged upon the sovereignty of Canadian legislatures and courts in a way which is unprincipled, unprecedented and improper: this conclusion forms a basis for the Claimant's case that NAFTA, as applicable in and to Canada, is unconstitutional. For example at paragraph 13(vii) of his Affidavit, Professor Sornarajah expresses the opinion that "By establishing such extra-judicial dispute procedures, matters which had historically been the exclusive sovereign preserve of parliaments and the courts are now subject to adjudication by these [Chapter Eleven] tribunals."

4. Such statements are misleading in a number of ways. In this affidavit I make five basic points to demonstrate this. Taken in ascending order of importance, these are as follows:

- (1) Recourse under NAFTA Chapter Eleven is distinct and separate from recourse available under internal law (see paragraphs 5-8 below);
- (2) Chapter Eleven Tribunals are not appellate courts from the courts of NAFTA Parties (see paragraphs 9-16 below);
- (3) Chapter Eleven Tribunals are accountable under NAFTA and their decisions are subject to appropriate forms of review (see paragraphs 17-27 below);
- (4) NAFTA does not impede the Parties' ability to act in the public interest (see paragraphs 28-39 below);

- (5) Chapter Eleven Tribunals, far from being unprecedented, form part of a pattern of international recourse which is historically attested, is widely accepted and globally provides a useful check on abuse of State authority, both within the context of foreign investment disputes and otherwise (see paragraphs 40-51 below).

**(1) RECOURSE UNDER NAFTA CHAPTER ELEVEN IS DISTINCT AND SEPARATE FROM RECOURSE AVAILABLE UNDER INTERNAL LAW**

5. Statements by Professor Sornarajah such as that quoted in paragraph 3 above imply that the investor-State arbitration regime established by Chapter Eleven duplicates and “internationalizes” whatever recourse an investor may have under the relevant internal law.<sup>1</sup> This is not the case. Rather Chapter Eleven grants investors new causes of action under international law, independent from any cause of action an investor may otherwise have under internal law: this is made clear in the applicable law provision, Article 1131(1).<sup>2</sup> In other words, whether there has been a breach of the obligations contained in Chapter Eleven and whether there has been a breach of internal law are different questions. Actions that may breach internal law may not involve any breach of substantive guarantees under Chapter Eleven and *vice versa*.

6. This principle was affirmed, in the context of a bilateral investment treaty (“BIT”), in *CAA and Vivendi Universal v. Argentine Republic*. There, an arbitral panel under the World Bank Convention for the International Settlement of Investment Disputes (“ICSID”)<sup>3</sup> had declined to decide a claim for breach of a BIT on the basis that the dispute involved the interpretation of a concession contract which granted exclusive jurisdiction to the Argentine domestic courts.<sup>4</sup> In effect the panel conflated the domestic claim for breach of contract and

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<sup>1</sup> See also Sornarajah Affidavit, para. 48.

<sup>2</sup> This provides that “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

<sup>3</sup> Convention for the Settlement of Investment Disputes between States and Nationals of other States, Washington, 18 March 1965. There are currently 140 States parties to the Convention. Among NAFTA States, only the United States is a party to the ICSID Convention.

<sup>4</sup> For the panel’s decision see (2000) 5 ICSID Reports 296.

the international claim for breach of treaty, in a case where the investor had clearly stated a claim under the treaty and where the facts were at least capable of supporting such a claim. That decision was annulled under Article 52(1)(b) of the ICSID Convention. The Annulment Committee (of which I was a member) held that this amounted to a failure to exercise the jurisdiction conferred by the bilateral investment treaty in conjunction with Article 25 of the ICSID Convention.<sup>5</sup> In doing so the Committee relied on the principle of international law codified in Article 3 of the International Law Commission Articles on State Responsibility, which reads:

“The characterization of an act of a State as internationally wrong is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”<sup>6</sup>

According to the Committee, the fact that the concession contract referred contractual disputes to the Argentine courts did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the bilateral investment treaty between Argentina and France. As the Committee explained, “whether there has been a breach of a BIT and whether there has been a breach of contract are different questions.”<sup>7</sup>

7. Similarly in *Waste Management Inc. v. Mexico (No. 2)*, a NAFTA Tribunal (over which I presided) emphasized the difference between an allegation of breach of contract or other breach of domestic law, on the one hand, and breach of Article 1105 or 1110 of NAFTA on the other. The Tribunal held in the circumstances of that case that, while there had no doubt been breaches of contract by the municipality of Acapulco and possibly by other agencies, these did not rise to the level of breaches of Articles 1105 or 1110 of NAFTA.<sup>8</sup> Waste Management’s claim was accordingly dismissed.

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<sup>5</sup> (2002) 6 ICSID Reports 327.

<sup>6</sup> ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly Resolution 56/83, 12 December 2001; see J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentary* (Cambridge, 2002) 86-90 for the ILC’s commentary on Article 3.

<sup>7</sup> (2002) 6 ICSID Reports 327, 365 (para 96).

<sup>8</sup> *Waste Management v Mexico*, unpublished award of 30 April 2004. See also *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2: (1998) 5 ICSID Reports 269, paras. 81-84.

8. Thus Chapter Eleven grants Canadian, American or Mexican investors (as defined) a dispute settlement mechanism that is additional to those provided under internal law in respect of lawful investments in the territory of one of the other State Parties. Chapter Eleven does not exclude the application of any recourse an investor may have under internal law. This is made clear by Article 1121 of NAFTA, which requires an investor to waive its domestic recourses as a condition precedent to the submission of a claim to arbitration under Chapter Eleven. The two forms of redress are to this extent distinct and separate.

**(2) CHAPTER ELEVEN TRIBUNALS ARE NOT COURTS OF APPELLATE JURISDICTION**

9. It is true that, as Professor Sornarajah states in para. 49 of his Affidavit, investors can invoke Chapter Eleven procedures to challenge judicial determinations made by the courts of a NAFTA Party. But in all three challenges referred to by Professor Sornarajah, tribunals have consistently stated that investors could not use NAFTA to appeal against decisions of domestic courts. The same tribunals have demonstrated considerable deference to the challenged domestic judicial determinations.

10. This is true, in particular, of the first case referred to by Professor Sornarajah, *The Loewen Group, Inc. v. United States of America*.<sup>9</sup> There the Tribunal found that a ruling by a Mississippi State court ordering Loewen Group companies to pay punitive damages of US\$500 million to a United States national was “clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.”<sup>10</sup> The Tribunal nevertheless refused to find that the Mississippi judgment breached Article 1105 of NAFTA, since the investor failed to explain why it chose not to pursue its domestic remedies (in particular, appeal). In its view, for a denial of justice claim to succeed, the whole system of justice must be tried and have failed. For present purposes, what needs to be stressed is the Tribunal’s explicit finding that “A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.”<sup>11</sup>

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<sup>9</sup> (2003) 7 ICSID Reports 430.

<sup>10</sup> Ibid., 476-7 (para 137).

<sup>11</sup> (2003) 7 ICSID Reports 430, 476 (para 134).

11. Professor Sornarajah asserts that investor-State arbitration bypasses “the appellate courts within the host state” and “violates notions of hierarchy of courts established by the constitution and enables the executive to defeat judicial control over domestic matters...” (Affidavit, para. 68). That this is not true is also illustrated by the *Loewen* case, where the Tribunal enunciated the principle that a claimant cannot rely on a lower court decision as a breach of Article 1105 of NAFTA without taking reasonable steps to exhaust available avenues of appeal. As the Tribunal said:

“[I]t would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.”<sup>12</sup>

The Tribunal thus held that the exhaustion of local remedies rule is subsumed within the substantive obligations of Chapter Eleven, a position with which I agree.<sup>13</sup>

12. The second case referred to by Professor Sornarajah is *Mondev International Ltd. v. United States of America*.<sup>14</sup> There a Canadian investor sought to challenge the statutory immunity of the Boston Redevelopment Authority from intentional tort liability. The Investor also alleged that a decision of the Massachusetts Supreme Judicial Court was arbitrary and capricious and contrary to United States obligations under NAFTA. The Chapter Eleven Tribunal (of which I was a member) dismissed the investor’s claims in their entirety, *inter alia* because it found no violation of Article 1105 of NAFTA. In doing so, the

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<sup>12</sup> *Loewen*, (2003) 7 ICSID Reports 430, 483 (para. 164).

<sup>13</sup> See J Crawford, Second Report on State Responsibility (A/CN.4/498, 1999) 59 (para 145).

<sup>14</sup> ICSID Case No. ARB(AF)/99/2: (2002) 6 ICSID Reports 192.

Tribunal repeatedly stated that “it is not the function of NAFTA tribunals to act as courts of appeal.”<sup>15</sup>

13. The third case referred to by Professor Sornarajah is *Azinian v. United Mexican States*.<sup>16</sup> In *Azinian*, American investors alleged that the city of Naucalpan had terminated without cause a concession contract that had been awarded to their investment in Mexico to operate a landfill and waste management system for the city. The investors alleged that the termination breached Mexico’s obligations under Chapter Eleven of NAFTA. The validity of the termination of the contract was tested before Mexico’s domestic courts of competent jurisdiction, which held the termination to be valid under Mexican law. NAFTA tribunal dismissed the investors’ claims in their entirety. According to the Tribunal:

“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”<sup>17</sup>

“A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way... There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of ‘pretence of form’ to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.”<sup>18</sup>

14. Since Professor Sornarajah’s Affidavit was filed, another NAFTA Tribunal reaffirmed the principle that tribunals do not have any appellate jurisdiction over the decisions of a State’s domestic courts. In *Waste Management Inc. v. United Mexican States*, an American investor alleged that a combination of conduct of local, state and federal authorities of Mexico, together with the failure of Mexican courts and arbitral institutions to provide any relief, caused the failure of its investment. It alleged that the Mexican authorities’ failure to honour obligations under a waste disposal concession amounted to an

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<sup>15</sup> Ibid., 225 (para 126), 228 (para 136).

<sup>16</sup> ICSID Case No. ARB(AF)/97/2: (1998) 5 ICSID Reports 269.

<sup>17</sup> Ibid., 290 (para 99).

expropriation of its investment under Article 1110 of NAFTA and a denial of the minimum standard of treatment to which its investment was entitled under Article 1105 of NAFTA. The Tribunal dismissed the claims on the merits. In discussing the Mexican legal proceedings, the Tribunal refused to second guess the reasoning adopted by the Mexican federal courts:

“Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of *amparo* [a constitutional review proceeding] in respect of the decisions of the federal courts of NAFTA parties...

In any event, and however these cases might have been decided in different legal systems, the Tribunal does not discern in the decisions of the federal courts any denial of justice as that concept has been explained by NAFTA tribunals, notably in the *Azinian*, *Mondev*, *ADF* and *Loewen* cases. The Mexican court decisions were not, either *ex facie* or on closer examination, evidently arbitrary, unjust or idiosyncratic. There is no trace of discrimination on account of the foreign ownership of Acaverde [the investment vehicle], and no evident failure of due process.”<sup>19</sup>

15. As these cases demonstrate, NAFTA tribunals may be called on to deal with specific investment disputes in cases where the consistency of domestic judicial decisions with NAFTA standards is raised. But considerable deference has been shown to domestic court decisions. Moreover once domestic remedies are attempted, a claim for denial of justice requires reasonable exhaustion of those remedies as a matter of substance.

16. In any event, Chapter Eleven tribunals do not have authority to review the legality of individual judicial determinations under national law, nor do they have any power of correction, revision or remand. There is thus no basis for Professor Sornarajah’s opinion that NAFTA disrupts or threatens the hierarchy of courts within the host state.

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<sup>18</sup> Ibid, 290 (paras 102-103).

<sup>19</sup> *Waste Management v Mexico*, unpublished award of 30 April 2004, paras 129, 130.

**(3) CHAPTER ELEVEN TRIBUNALS ARE ACCOUNTABLE UNDER NAFTA  
AND THEIR DECISIONS ARE SUBJECT TO APPROPRIATE FORMS OF REVIEW**

17. Professor Sornarajah's Affidavit creates the impression that NAFTA tribunals are irregular, "extra-judicial" bodies.<sup>20</sup> It is true that these tribunals are not part of the judicial systems of the member States, in the way in which it can be said that the European Court of Justice is part of the judicial system of each EU Member State. But this does not mean that they are legal Alsatias, beyond any form of jurisdictional control.

18. Unless and until Canada becomes a party to the ICSID Convention, it will be open to Canada to challenge any adverse decision of a NAFTA Chapter Eleven tribunal in the same way as any other international arbitral award can be challenged by a party to it, by proceedings before the courts of the place of arbitration. This was what Mexico did in the *Metalclad* case, obtaining the partial setting aside of an award made in Vancouver, in accordance with the *International Commercial Arbitration Act* (RSBC 1996 c. 233) which was held to be the applicable law.<sup>21</sup>

19. Professor Sornarajah states that "Chapter Eleven... significantly circumscribes the superintending and reforming power of the superior courts in Canada" (Affidavit, para. 90). This is not true. NAFTA Chapter Eleven has had no effect on the powers of Canadian courts concerning international arbitral awards: they have now the same powers as they had under relevant Canadian legislation before NAFTA's entry into force. If the grounds for judicial oversight by superior courts of awards rendered by Chapter Eleven tribunals are limited this is not because of NAFTA but because of domestic legislation governing recourse against international arbitral awards and the enforcement and recognition of such awards, to which NAFTA refers in its Article 1136.

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<sup>20</sup> Affidavit, para. 13 (vii).

<sup>21</sup> *United Mexican States v Metalclad Corporation*, 2001 BCSC 664; 5 ICSID Reports 236 (Tysoe J).

20. Such legislation is of course not enacted in isolation but in accordance with international guidelines and standards. In Canada, most jurisdictions have adopted legislation based on a Model Law on International Commercial Arbitration developed by the United Nations Commission on International Trade Law. The Model Law, drafted in conformity with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,<sup>22</sup> provides that domestic courts may refuse to recognize and enforce an award on the grounds, *inter alia*, that the recognition or enforcement would be contrary to domestic public policy.<sup>23</sup> But as the Supreme Court of Canada recently said, Canadian legislatures have...

“voluntarily placed limits on such review [for error of law], to preserve the autonomy of the arbitration system. Public order will of course always be relevant, but solely in terms of the determination of the overall outcome of the arbitration proceeding...”<sup>24</sup>

21. In addition to post-award review, NAFTA itself provides further disciplines for the functioning of Chapter Eleven arbitration. Important in this regard is NAFTA Article 1131, which provides that:

“1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”

The Free Trade Commission which exercises this function is established pursuant to Article 2001 of NAFTA: it comprises cabinet-level representatives of NAFTA Parties or their designees. Although doubts have been raised as to whether the Commission under the guise of “interpretation” might validly attempt to amend Chapter Eleven,<sup>25</sup> the power

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<sup>22</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS 3. There are 134 States parties to the New York Convention (including Canada).

<sup>23</sup> UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985, Art. 34(2)(b)(ii).

<sup>24</sup> *Desputeaux v. Éditions Chouette (1987) Inc.*, [2003] 1 S.C.R. 178 (at para 68).

<sup>25</sup> *Pope & Talbot Inc. v. Canada*, Award in respect of Damages, (2002) 7 ICSID Reports 44, 154 (para 24).

of interpretation has been cautiously exercised and subsequent tribunals have given effect to FTC interpretations.<sup>26</sup>

22. Turning from substantive to procedural disciplines applicable to Chapter Eleven tribunals, Professor Sornarajah argues that:

“The procedural norms of international commercial arbitration reflect the fundamental assumption that these disputes are essentially private in character and of no consequence to third parties.” (Affidavit, para. 28).

By contrast, as he points out, Chapter Eleven arbitration may well involve issues of public concern, which should not be dealt with in private without any accompanying publicity.

23. I agree that such issues were initially raised by NAFTA Chapter Eleven, and that the analogy of private commercial arbitration is not necessarily an appropriate one. However Professor Sornarajah ignores recent efforts made by the Parties to enhance transparency and to clarify the issue of non-party participation in arbitration under Chapter Eleven.

24. In particular on 31 July 2001, the Free Trade Commission issued Notes of Interpretation clarifying and reaffirming the meaning of certain NAFTA provisions including those relating to access to documents. Attached as **Exhibit “B”** is a copy of the Note of Interpretation of Certain Chapter 11 Provisions. Among other things 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.

25. In October 2003, the FTC met in Montreal to evaluate the impact of 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 “C”** is a copy of the FTC Joint Statement, dated 7 October 2003. In their Joint Statement, NAFTA Ministers directed the Investment Experts Group, comprising trade officials from each NAFTA Party, to continue its work seeking ways to improve the implementation of Chapter 11. NAFTA

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<sup>26</sup> See esp. *Mondev*, 6 ICSID Reports 192, 217-24 (paras 100-24).

Ministers also adopted a statement on non-disputing party participation in Chapter 11 proceedings, which is attached as **Exhibit “D”**.

26. Separately, Canada and the United States have confirmed that they will consent to open hearings in Chapter Eleven proceedings to which either is a disputing Party and that they will request the consent of disputing investors to such open hearings. Attached as **Exhibit “E”** is a statement of Canada summarizing this announcement. In fact the subsequent hearings in the *Methanex*<sup>27</sup> and *UPS*<sup>28</sup> cases have been open to the public.

27. Different views can legitimately be held as to the extent to which Chapter Eleven hearings should be shielded from publicity or from forms of public involvement such as the filing of *amicus* briefs. In practice I would observe that the pleadings of the parties and the decisions, including interlocutory decisions, of tribunals are promptly made available, unless specific items are covered by protection orders, and that there is a rather high level of public awareness (e.g., through the legal and financial press but also through daily newspapers) of the commencement, progress and outcome of proceedings. The high level of confidentiality traditionally applied to international commercial arbitration (e.g. under the auspices of the ICC) does not apply to NAFTA proceedings. Yet it is not suggested that the recognition and enforcement of ICC awards involving States as parties raises fundamental constitutional issues.<sup>29</sup>

#### **(4) NAFTA DOES NOT IMPEDE THE PARTIES’**

##### **ABILITY TO ACT IN THE PUBLIC INTEREST**

28. One of the major criticisms that has been made of NAFTA is that it impairs the capacity of States Parties to take measures in the public interest, including local protective measures. But it is necessary to distinguish here between policy debates about whether regional free trade regimes are desirable in the public interest, and the question whether such

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<sup>27</sup> <http://www.worldbank.org/icsid/methanex-form.htm>

<sup>28</sup> <http://www.worldbank.org/icsid/ups.htm>.

<sup>29</sup> I have dealt comprehensively with issues of confidentiality in international arbitration in an Affidavit, sworn on 14 April 2003, in *Democracy Watch and another v Attorney-General of Canada* (Ontario Superior Court of Justice, Court file 01-CV-211576).

regimes amount to an unconstitutional threat to the legal authority of Canadian legislatures or courts. As to the former, Professor Sornarajah criticizes the policies of trade and investment liberalization. For example he asserts that “the adverse impacts of these dramatic developments upon the sovereignty of nations, the integrity of their domestic constitutional arrangements and their capacity to achieve other societal goals, such an [*sic*] environmental and human rights protection, are only now coming to light.” (Affidavit, paragraph 13(x)). I think that these concerns are (to put it mildly) exaggerated by Professor Sornarajah. But at this level it is sufficient to note that the Canadian Government in the exercise of its prerogative powers over foreign affairs and treaty making decided to participate in NAFTA, a decision approved by the Canadian Parliament. If the responsible Canadian bodies were to change their view on the issue of policy, Canada could of course withdraw by invoking NAFTA Article 2205, which provides that a Party may withdraw on six months notice.

29. Of course virtually any international commitment undertaken by a State will restrict that State’s freedom (while it continues to be a party) to take action contrary to the treaty. But that is the point of treaty-making in the collective interest, whether in the field of investment protection, environmental protection, the protection of culture or any other field. There is no constitutional reason for preferring autarchy, local protection or unilateralism to cooperation, free trade and the pursuit of collective goals. It is for the responsible authorities to decide on the appropriate national policy, as they have done with NAFTA.

30. Nonetheless Professor Sornarajah seeks to make a narrower and more specifically legal argument when he asserts that treaties such as NAFTA contain obligations that take the form of “general prohibitions against government action, legislative and otherwise, that would, for example, impose foreign ownership restrictions for key industries or sectors” (Affidavit, para. 33). This statement ignores the fact that State Parties to free trade agreements can take exceptions from the obligations contained in treaties for “key industries or sectors”. Thus Canada has made a reservation for “Social Services” under Annex II-C-9 and another for “Aboriginal Affairs” under Annex II-C-1. Under Annex I-C-14 Canada has taken a reservation to the national treatment obligation of Article 1102 with respect to the

existing foreign ownership restrictions in the equity of Air Canada, the dominant Canadian air carrier. Other examples include the reservations taken by Canada in Annex I-C-29 to Articles 1102 and 1103 of NAFTA with respect to the foreign ownership restrictions in uranium mining property and the reservation taken by Canada in Annex I-C-28 to Article 1106 of NAFTA with respect to performance requirements imposed for the Hibernia Oil and Gas development project.

31. These arguments relate more to other aspects of NAFTA as a free trade agreement than they do to investment protection under Chapter Eleven. It is a basic principle of investment arbitration agreements that the investor must have lawfully invested in the territory concerned, complying with whatever limitations on foreign entry the State may impose consistently with its treaty obligations. In NAFTA the matter is addressed in Article 1101, as well as in Article 1108 and Annexes I and II.

32. Turning specifically to investment arbitration, a particular target of criticism for present purposes has been the decision in *Metalclad Corp. v. United Mexican States*, to which reference has already been made.<sup>30</sup> According to Professor Sornarajah: “By holding that there was a taking that had to be compensated, the tribunal effectively impeded the duty of the State to act to the benefit of its people’s health” (Affidavit, para. 50). This assessment ignores findings of the tribunal that Mexico was satisfied that the investor’s project was “consistent with, and sensitive to, its environmental concerns.”<sup>31</sup> The evidence as assessed by the tribunal led it to conclude that the landfill project conformed to Mexico’s environmental requirements. Furthermore, it is not true that Mexican concerns were ultimately overridden. Since the award was rendered in August 2000, the “cactus refuge” which was challenged by the investor is still in place and the municipality, which did not want the landfill site reopened, succeeded in this aim. At the same time Metalclad, which had invested substantial sums in the landfill on the faith of apparently reliable undertakings by the Mexican Government, was compensated for its losses. The decision was reviewed, and partially set aside, by the British Columbia Supreme Court, but on the key issue of

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<sup>30</sup> (2000) 5 ICSID Reports 209.

<sup>31</sup> Ibid., 229 (para. 98).

expropriation by reference to the “cactus reserve” it was upheld and Mexico complied with that decision, choosing not to appeal further.

33. It is true that the *Metalclad* tribunal’s broad definition of indirect expropriation has been criticised.<sup>32</sup> But its application to the facts of the case, in particular as concerned the Ecological Decree, was held by Tysoe J to be “not patently unreasonable”,<sup>33</sup> an assessment with which I agree. In other cases involving different facts, NAFTA tribunals have reached their own assessment of indirect or virtual expropriation for the purposes of Article 1110.<sup>34</sup> Overall it cannot be said that the pattern of decisions deprives NAFTA Members States of their regulatory powers over the economy or the environment.

34. The matter should also be seen in context. Since the entry into force of NAFTA on 1 January 1994, four arbitral proceedings have been raised against Canada involving claims totaling US\$938,552,560. To date, three of these arbitrations have been concluded and involved settlements or awards of damages rendered against Canada in the total amount of approximately \$27,800,000. More Chapter Eleven claims have failed than have succeeded, and even when they have succeeded claimants have recovered vastly less than the amounts claimed. There is no evidence that Chapter Eleven damages awards are constituting, so to speak, a clog on the equity of legislative action in the public interest.

35. Although Professor Sornarajah states that investment treaties empower private investors, who are invariably multinational corporations, to seek binding arbitration against a host state (Affidavit, para. 55), in fact many of the claims so far brought under Chapter Eleven have involved individual investors and small corporations. For example, *Azinian v. United Mexican States*,<sup>35</sup> *Feldman v. United Mexican States*<sup>36</sup> and *S.D. Myers Inc. v. Canada*<sup>37</sup> involved claims by individuals and/or small to medium sized corporations.

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<sup>32</sup> Ibid., 230 (para 103): “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State”.

<sup>33</sup> (2001) 5 ICSID Reports 236, 260 (para 104).

<sup>34</sup> See, e.g., *Waste Management v Mexico*, unpublished award of 30 April 2004, paras 141-78.

<sup>35</sup> (1998) 5 ICSID Reports 269.

<sup>36</sup> (2002) 7 ICSID Reports 316.

<sup>37</sup> [http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward\\_final\\_13-11-00.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf)

36. Professor Sornarajah states that “[NAFTA] tribunals are predominantly guided by economic and commercial considerations [and] have often shown an undue deference to the rights of the private investor and far too little consideration for the interests of the state in pursuing other legitimate, and often non-commercial public policy objectives such as environmental protection” (Affidavit, para. 57). This ignores the fact that in all three awards rendered to date against a State-party in a case allegedly involving public interest measures, including the award rendered in *Metalclad Corp. v. United Mexican States*, the tribunals have failed to identify a legitimate measure adopted to defend the public interest which was at the same time contrary to a provision of Chapter Eleven.

37. In the case of *Ethyl Corporation v. Canada*, an American investor challenged Canada’s Manganese-based Fuel Additives Act,<sup>38</sup> federal legislation that imposed a ban on the importation into Canada of, and the inter-provincial trade in, MMT, a gasoline additive. During the same time period, the Government of Alberta challenged the Manganese-based Fuel Additives Act under the Agreement on Internal Trade (“AIT”),<sup>39</sup> an agreement in relation to inter-provincial trade within Canada. On 12 June 1998, a Panel convened under Article 1704 of the AIT found the federal legislation to be inconsistent with obligations under the AIT and recommended the removal of the inconsistency. In reaching its conclusion, the AIT Panel found that the evidence of the negative impact of MMT on the environment put forward to justify the ban was “inconclusive”. It found that “it was the automobile manufacturers who were the driving force behind the elimination of MMT... The evidence as to the impact of MMT on the environment is, at best, inconclusive.”<sup>40</sup> On 20 July 1998, Canada adopted a regulatory amendment deleting MMT from the list of controlled substances. In light of Canada’s response to the AIT Panel’s recommendation, Canada settled NAFTA Chapter Eleven claims by Ethyl Corporation for approximately \$20 million before the matter was arbitrated on its merits.<sup>41</sup> That case cannot be presented as an example of NAFTA preventing a Party from acting in the public interest: rather NAFTA seems to have marched in tandem with applicable Canadian law.

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<sup>38</sup> S.C. 1997, c.11

<sup>39</sup> Part I, Canada Gazette, 1994

38. In the case of *S.D. Myers Inc. v. Canada*, 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. In reaching its decision, the Tribunal relied on evidence emanating from Canada's Department of the Environment stating: "it cannot be demonstrated that closing the border is required to deal with a significant danger to the environment or to human health."<sup>42</sup> Based in part on this evidence, the Tribunal found that: "there was no legitimate environmental reason for introducing the ban."<sup>43</sup>

39. Thus NAFTA Tribunals have yet to render a single award against a State-party and in favour of an investor challenging a measure which was adopted by a Party "pursuing other legitimate, and often non-commercial public policy objectives such as environmental protection". Moreover there is no evidence that the decisions so far are partisan or are unduly slanted towards the interests of private parties.

**(5) CHAPTER ELEVEN TRIBUNALS FORM PART OF A HISTORICALLY ATTESTED AND WIDELY ACCEPTED PATTERN FOR ADDRESSING ABUSES OF STATE POWER**

40. Professor Sornarajah argues that:

"Investor-State arbitration under Chapter Eleven effectively internationalizes disputes that have historically been the domain of municipal law. Several commentators have aptly characterized these developments as having established a

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<sup>40</sup> *Report of the Article 1704 Panel concerning a dispute between Alberta and Canada regarding the Manganese-based Fuel Additives Act*, File No. 97/98-15-MMT-P058, 7

<sup>41</sup> For the jurisdictional decision see (1998) 7 ICSID Reports 3.

<sup>42</sup> *S.D. Myers*, para. 176, see [http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward\\_final\\_13-11-00.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward_final_13-11-00.pdf),

<sup>43</sup> *Ibid.*, para. 195. See also *S.D. Myers*, para. 162.

new international constitutional order to which the domestic constitutions of nation states are subservient.” (Affidavit, para. 13(ix), see also para. 76).

In my view these statements, so far as they concern NAFTA Chapter Eleven, are greatly overstated if not entirely misconceived. Bilateral or trilateral treaties on investment protection, terminable by the parties, do not create a “new international constitutional order”. If such an order is struggling to be born, it is not to be found in NAFTA and similar regional agreements.

41. Moreover, for the reasons already given, it is not the case that the “domestic constitutions of nation states” are “subservient” to NAFTA, even in the limited field of investment protection. NAFTA is an international treaty with its own system of enforcement. It is not supranational in design or in effect. Unlike the European Union, there are no separate supranational organs, i.e., organs with authority to override national institutions and whose decisions are given direct effect in national law. Nothing in NAFTA alters the separation of powers under the Canadian, Mexican or United States constitutions. NAFTA does not alter the legislative or other authority whether of federal or sub-national governments, including Canadian provinces.<sup>44</sup> Nor does it change the powers and functions of domestic courts of the three States parties. What it does do is to create an enforceable right to damages via international arbitration in the event that investors can prove breaches of a few, basic and long-established international standards for the treatment of foreign investment. Such a system is not revolutionary, and it does not involve any form of constitutional subordination.

42. Professor Sornarajah implies that NAFTA Chapter Eleven has introduced a wholly new and unprecedented system of international review of national decision-making. For example he alleges that “it was not until after the Second World War that attempts were made to render disputes arising between states and foreign entities amenable to arbitration

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<sup>44</sup> Professor Sornarajah alleges that “investment treaties like NAFTA... contemplate intense supervision of the activities of local decision making bodies if responsibility is to be avoided” (Affidavit, para. 60). But nothing in NAFTA requires the central government to undertake any supervision over the conduct of sub-national entities. In Canada, my understanding is that every sub-national entity is responsible for the conformity of its measures with Canada’s international obligations. In this respect,

under international law or some supranational system akin to international law” (Affidavit, para. 21). The reference to a “supranational system akin to international law” here is presumably a reference to what is now the European Union, first established as the European Coal and Steel Community in 1952. Although it has used certain international law techniques for its establishment and development, the system of EU law which has developed since then is genuinely supranational, *inter alia* because it is given direct effect (including horizontal effect) within member States. The system of NAFTA Chapter Eleven bears no resemblance to the institutional system of EU law.

43. Turning to the case of arbitration under international law, Professor Sornarajah’s assertion, quoted in the preceding paragraph, is simply not true. It is no doubt the case that NAFTA is part of a broader pattern of developments allowing for increased accountability of States under international law and before international tribunals. But the historical antecedents of this system are rooted in classical international law and are by no means a post-1945 novelty.<sup>45</sup>

44. In principle Articles 1102, 1105 and 1110 of NAFTA give expression to certain basic substantive principles which western (capital exporting) States, including Canada, have affirmed in order to foster and protect international investment. The basic rules include non-discrimination, minimum standards of due process and protection against uncompensated taking of property.<sup>46</sup> Traditionally such rules of international law were enforced by means of claims brought by the State of the investor’s nationality under the rubric of diplomatic protection. This institution was based on the principle that the rights concerned were those of the national State itself: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its

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investment treaties are no different than any other treaty that binds and affects sub-national entities such as provinces or municipalities.

<sup>45</sup> See generally C Gray & B Kingsbury, “Developments in Dispute Settlement: Inter-State Arbitration since 1945” (1992) 63 *BYIL* 97.

<sup>46</sup> Professor Sornarajah alleges that Chapter Eleven incorporates the U.S. Constitution’s Fifth Amendment protection of property rights, and the Fourteenth Amendment requirement of due process, into international law (Affidavit, para. 65). This is not the case. In fact, NAFTA Tribunals have resisted the

subjects, respect for the rules of international law.”<sup>47</sup> Even so, it was often found more convenient to allow individual claimants to bring their own claims before international tribunals set up under bilateral or multilateral treaties, and the practice of international claims commissions was widespread even before the First World War. Many thousands of decisions were issued by mixed claims commissions, mixed arbitral tribunals or other *ad hoc* tribunals in the period from 1920-1960.<sup>48</sup> A similar pattern was used when the Iran-United States Claims Tribunal was established in 1980.<sup>49</sup> The modern system of investor protection, of which NAFTA Chapter Eleven is a prominent example, essentially builds on these earlier instances. At the same time it remedies deficiencies in “the procedure of diplomatic protection”.<sup>50</sup> Individual investors do not depend on the discretionary decision of the State of nationality whether or not to press their claim; they bring it at their own cost and risk and are bound by the result whether they win or lose.

45. The system of investment arbitration is now widespread and broadly established. The ICSID Convention, which provides a framework for investment arbitration where both States concerned are parties to the Convention, has 140 States parties. There are more than 2000 bilateral and regional investment treaties, almost all of which provide in some measure for investors to bring arbitration disputes to arbitration on their own account.<sup>51</sup> Canada is a party to a number of such treaties.<sup>52</sup>

46. NAFTA is far from the only international treaty that provides for dispute settlement mechanisms that are independent of domestic judicial systems. At the international level

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application of US constitutional principles in favour of a formulations based on customary international law, both in the context of Articles 1105 and 1110.

<sup>47</sup> *Mavrommatis Palestine Concessions*, PCIJ Ser. A No. 2 (1923) at p. 12.

<sup>48</sup> See (among many other examples) AH Feller, *The Mexican Claims Commissions 1923-1934* (NY, Macmillan, 1935).

<sup>49</sup> See GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) ch 1. About 3000 individual claims were filed before the Tribunal. The constitutionality of the Tribunal was upheld by the United States Supreme Court: *Dames & Moore v Regan*, 453 US 654 (1981), and its decisions have been recognised as binding in the courts of third States: e.g. *Dallal v Bank Mellat* [1986] QB 441.

<sup>50</sup> To use the International Court’s language in the *Avena* case, *Mexico v United States of America*, judgment of 31 March 2004, para. 40.

<sup>51</sup> See e.g., R Dolzer & M Stevens, *Bilateral Investment Treaties* (Nijhoff, The Hague, 1995).

<sup>52</sup> The website of Canada’s Department of Foreign Affairs and International Trade ([http://www.dfait-maeci.gc.ca/tna-nac/fipa\\_list-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-en.asp)) records that Canada has concluded 23 BITs to date.

claims may be brought by injured individuals or corporations for breach of treaty standards in a variety of contexts. In particular, systems for redress of human rights violations under regional human rights treaties exist in Europe (the European Court of Human Rights), the Americas (the Inter-American Court of Human Rights) and most recently Africa (the African Commission of Human and People's Rights; an African Court has just been created). These courts (and a number of human rights committees under universal human rights treaties<sup>53</sup>) have received, in aggregate, hundreds of thousands of applications. Their case-law has frequently been influential at the national level, for example in the United Kingdom, even before the Human Rights Act 1998 (UK).<sup>54</sup>

47. International decision-making in human rights cases does not involve a duplication of domestic processes. International human rights courts and other bodies apply international standards expressly accepted by States, allowing a margin of appreciation in particular contexts and taking into account considered State policies.<sup>55</sup> Indeed some of the cases overlap with investment disputes, although because there is no requirement of diversity of nationality (most international human rights claims are brought by individuals or corporations against their own national State) the international element is provided by the human rights standard and not, for example, by the international law of investment protection.<sup>56</sup>

48. No doubt the overall result of such processes is, at some level, a modification or modulation of State sovereignty. States parties to such treaties are no longer free—as a matter of international law—to adopt whatever policies they wish in such matters as domestic relations law, treatment of prisoners or due process before courts and tribunals (among many other areas). But it has never been credibly suggested that these systems

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<sup>53</sup> E.g. the Human Rights Committee under Protocol 1 to the International Covenant on Civil and Political Rights of 1996, to which Canada is a party.

<sup>54</sup> The European Court of Human Rights in the period to 2003 had received approximately 300,182 applications: see ECHR, *Survey of Activities 2003* (<http://www.echr.coe.int/Eng/EDocs/2003SURVEYCOURT.pdf>) 34.

<sup>55</sup> For a thorough review see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2001).

<sup>56</sup> See e.g. *Lithgow v United Kingdom* ECHR Ser. A No. 102 (1986). The European Court also rejected an argument (similar to that made by Professor Sornarajah at para. 67 of his Affidavit) that the conferral of special protection on foreign investors was discriminatory against local investors.

abrogate the sovereignty of the States parties or are unconstitutional. As the Permanent Court of International Justice said in *The Wimbledon*,

“No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”<sup>57</sup>

Moreover where a Claimant succeeds under Chapter Eleven the remedy takes the form of an award of damages for actual injury suffered. Article 1135 of NAFTA makes clear that the sole power of a tribunal is to award monetary damages, any applicable interest and costs. It is true that in certain cases a tribunal may also order the restitution of property, but the Respondent may choose to pay monetary damages instead. It is then for the respondent State to remedy the deficiency in its laws or administration by means which are for it to determine, taking into account its constitutional system and its international obligations. International tribunals do not strike down or invalidate national laws or decisions, and (having regard to Article 1135) this is true *a fortiori* of Chapter Eleven tribunals.

49. Similar considerations apply to the increasing number of interstate mechanisms for the interpretation and application of international treaty standards. The Marrakesh Agreement Establishing the World Trade Organization<sup>58</sup> includes an Understanding on Rules and Procedures Governing the Settlement of Disputes between the member countries (the “DSU”). The DSU creates an integrated dispute settlement system that governs the resolution of disputes arising under all of the Multilateral Trade Agreements of the WTO. These disputes, like those arising under NAFTA, may involve “a diverse array of government actions”. Another example is the United Nations Convention on the Law of the Sea of 1982.<sup>59</sup> That treaty establishes a comprehensive legal framework to regulate all ocean space, its use and resources. Part XV of the Convention establishes a general system for the settlement of disputes that might arise with respect to the interpretation and application of the Convention. If parties to a dispute fail to reach a settlement by peaceful means of their own choice, they are obliged to accept the compulsory dispute settlement

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<sup>57</sup> PCIJ Ser A No 1 (1923), at p. 25.

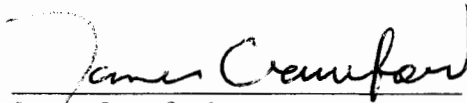
<sup>58</sup> UNTS No. 31874. There are 83 States parties to the WTO (including Canada).

procedures entailing binding decisions, subject to certain limitations and exceptions contained in the Convention.

50. For these reasons it is incorrect to assert that the advent of investment treaties providing for investor-State dispute settlement is “unprecedented”. But in any event it is not the case, in my opinion, that Chapter Eleven of NAFTA has “resulted in a considerable surrender of sovereignty by the State-parties to such agreements” (Affidavit, para. 58), if by sovereignty is meant legitimate authority rather than the avoidance of any form of accountability. NAFTA is consensual in nature; States parties can withdraw on six months’ notice.<sup>60</sup> They unquestionably retain their sovereignty, and with it the power to take specific action, even if in certain cases injured parties may have to be compensated as a result.

51. To repeat, virtually any international commitment undertaken by a State will affect its ability to legislate and will thereby impact on local interests. This is the point of seeking international coordination, cooperation and standard setting in areas as diverse as human rights, the environment, criminal law and investment protection. The disciplines of NAFTA Chapter Eleven should be seen in this context.

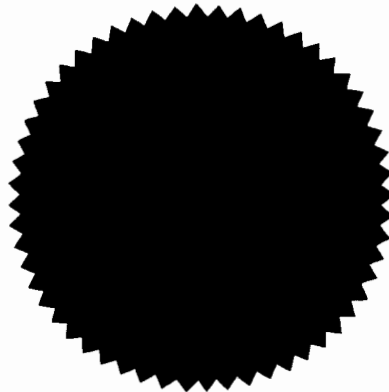
Sworn before me at the City of Cambridge )  
in the United Kingdom )  
on 15/07/2004 )

  
James Crawford



Peter Coleman Fletcher  
Notary Public in and for Cambridge, England

My Commission expires at death



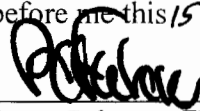
<sup>59</sup> UNTS vol. 1833 p.3. There are 145 parties to the 1982 Convention (including Canada).

<sup>60</sup> This is a rather short withdrawal period for a treaty of the significance of NAFTA. A normal withdrawal provision would provide for 12 months notice: 2 years is not unusual. Cf. Vienna Convention on the Law of Treaties, 23 May 1969, Art. 56(2).

## **List of Exhibits**

- Exhibit A            *Curriculum vitae* of James Crawford
- Exhibit B            Free Trade Commission, Notes of Interpretation of Certain Chapter  
11 Provisions, 31 July 2001
- Exhibit C            Free Trade Commission, Joint Statement, 7 October 2003
- Exhibit D            Free Trade Commission, Statement on non-disputing party  
participation in Chapter 11 proceedings, 7 October 2003
- Exhibit E            Statement of Canada on Open Hearings in NAFTA Chapter Eleven  
Arbitrations

This is Exhibit "A" referred to in the  
affidavit of James Crawford sworn  
before me this 15<sup>th</sup> day of July, 2004



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Peter Coleman Fletcher

Exhibit A

## CURRICULUM VITAE

(a)

**CRAWFORD, James Richard**

Born, Adelaide, 14 November 1948

### **Tertiary Education**

Adelaide University, 1966-1971; BA (English & History-Politics), 1971; LLB (first class honours), 1971; Stow Scholar. Australian Shell Scholar, 1971. Graduate Student, University College, Oxford, 1972-4; DPhil (Oxon), 1977; LLD (Cantab, 2004).

### **Professional Qualifications**

Barrister and Solicitor of the High Court of Australia (1977).

Barrister of the Supreme Court of New South Wales (called 6/11/1987); Senior Counsel (appointed 7/11/97).

Barrister, Gray's Inn (called March 1999); Member of Matrix Chambers, Gray's Inn, London.

### **Employment**

1. University of Adelaide. Lecturer, August 1974-7; Senior Lecturer, 1977-82; Reader, 1982-3; Professor of Law (personal chair), 1983-6.

2. Australian Law Reform Commission. Commissioner (full-time) 1982-84.

3. University of Sydney. Challis Professor of International Law, 1986-92; Dean, Faculty of Law, 1990-92.

4. University of Cambridge. Whewell Professor of International Law; Professorial Fellow of Jesus College (1992--); Co-Director, Lauterpacht Research Centre for International Law (1995-7), Director (1997-2003); Chair, Faculty Board of Law (2003--).

### **Governmental and Inter-governmental Bodies**

Australian Law Reform Commission. Commissioner (part-time) 1984-90 (reappointed in 1987, 1988 & 1989).

Australian National Commission for UNESCO. Member 1984-8.

Australia, Constitutional Commission. Member, Advisory Committee on the Australian Judicial System 1985-87.

Member, Admiralty Rules Committee (Australia) 1989-92.

Member, United Nations International Law Commission (1992-2001, re-elected 1996).

### **Committees, Professional Associations**

International Law Association: Director of Studies (Austrian Branch) (1988-91); Member, International Committee on State Immunity (1979-82; 1987-95); Director of Studies (1991-7).

Australasian Universities Law Schools Association: President (1985).

Institut de Droit International: Associate (elected 1985); Member (1991--).

Maritime Law Association of Australia and New Zealand (Honorary Member)

Hague Academy of International Law, Member of the Curatorium (elected 1999)

British Academy, Fellow (elected 2000)

### **Legal Professional Practice**

Engaged as counsel in the following cases:

#### Before the International Court of Justice:

1. *Certain Phosphate Lands in Nauru (Nauru v Australia)* ICJ Rep 1992 p240 (counsel for Nauru) (settled in August 1993).
2. *Territorial Dispute (Libya v Chad)* ICJ Rep 1994 p 6 (counsel for Libya).
3. *East Timor Dispute (Portugal v Australia)* ICJ Rep 1995 p 90 (counsel for Australia).
4. *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* (counsel for Iran) (withdrawn pending settlement negotiations; settled 1996: see ICJ Rep 1996 p 9).
5. *Request for an Investigation of the Situation (New Zealand v France)* ICJ Rep 1995 p 288 (counsel for Pacific Island States seeking to intervene: Samoa, Solomon Islands, Federated States of Micronesia, Marshall Islands)
6. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, ICJ Rep 1996 p 66 (counsel for Solomon Islands)
7. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Rep 1996 p 226 (counsel for Solomon Islands)
8. *Land and Maritime Dispute (Cameroon v Nigeria)* ICJ Rep 1996 p 13 (Interim Measures) (counsel for Nigeria); ICJ Rep 1998 p 275.
9. *Case concerning the Oil Platforms (Islamic Republic of Iran v United States of America)* (senior counsel for Iran) ICJ Reports 1996 p 803.
10. *Gabcikovo-Nagymaros Barrage System (Hungary v Slovakia)* ICJ Rep 1997 p 7 (senior counsel for Hungary)
11. *Case concerning Sipidan and Ligitan (Malaysia v Indonesia)* (counsel for Malaysia)

12. *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (counsel for Rwanda)
13. *Case concerning the Legality of Use of Force (Federal Republic of Yugoslavia v. Canada)* (counsel for Canada)
14. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)* (counsel for Croatia)
15. *Case concerning Certain Property (Liechtenstein v. Germany)* (senior counsel for Liechtenstein)
16. *Case concerning Pulau Batu Puteh (Malaysia v Singapore)* (senior counsel for Malaysia)
17. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (counsel for Palestine)

Before other international tribunals

1. *Islamic Republic of Iran v United States of America, Cases Nos. A15(IV) and A24* Award No. 590-A15(IV)/A24-FT, 28 December 1998) (Iran-United States Claims Tribunal, Full Tribunal) (counsel for Iran).
2. *Prosecutor v. Blaškić (Objection to the Issue of Subpoenae duces tecum)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) (1997) 110 ILR 606, on appeal, *ibid.* 668) (counsel for the Prosecutor).
3. *Tradex Hellas SA v Albania* (1996, 1999) 5 ICSID Reports 43 (ICSID Tribunal) (senior counsel for Albania)
4. *Case concerning Southern Blue-fin Tuna (Australia & New Zealand v Japan)* Order for interim measures of protection, International Tribunal for the Law of the Sea, 26 August 1999 38 ILM 1624 (1999), 117 ILR 148; Annex VII arbitration, Washington, May 2000, 119 ILR 508 (Part XV arbitration) (senior counsel for Australia), .
5. *Islamic Republic of Iran v United States of America, Case No. A30* (Iran-United States Claims Tribunal, Full Tribunal, pending) (counsel for Iran).
6. *Eritrea/Ethiopia Boundary Commission* (Boundary Commission under the auspices of the Permanent Court of Arbitration, 2001) (counsel for Eritrea) 41 ILM 1057
7. *Eritrea/Ethiopia Compensation Commission* (Commission under the auspices of the Permanent Court of Arbitration, 2001) 42 ILM 1027, 1056 (counsel for Eritrea) 42 ILM 1056
8. *The Volga (Russia v Australia) (Prompt Release)* (International Tribunal for the Law of the Sea), 42 ILM 159, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)
9. *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Request for Provisional Measures)* ((International Tribunal for the Law of the Sea, 2003) (leading counsel for Malaysia)

Plus counsel for applicant or respondent in numerous arbitrations (ICC, UNCITRAL, etc.)

Experience as judge/arbitrator:

Judge, OECD Administrative Tribunal (1993, reappointed 1996, 1999, 2002)

*Dabhol Power Company v State of Maharashtra* (ad hoc arbitration under UNCITRAL Rules, 1995) (interim award on jurisdiction and arbitrability, 7 February 1996; subsequently settled by consent order) (President of the Tribunal)

*Larsen v Hawaiian Kingdom* (presiding arbitrator; ad hoc arbitration under the auspices of the Permanent Court of Arbitration, award terminating arbitration, February 2001), 119 ILR 566

*Newfoundland/Nova Scotia, Maritime Boundary Arbitration* (member of Tribunal, appointed by the Government of Canada) first phase, Fredericton, Award of 17 May 2001; second phase, Award of 26 March 2002: <http://www.boundary-dispute.ca/>

*Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision of 3 July 2002, 41 ILM 1037, 125 ILR 43 (member of *ad hoc* Committee)

*Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002, 42 ILM 85; 125 ILR 98 ([www.state.gov/documents/organization/14442.pdf](http://www.state.gov/documents/organization/14442.pdf)) (member of Tribunal)

*Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) (President), Decision on Preliminary Objection, 24 July 2002; ([http://www.worldbank.com/icsid/cases/waste\\_united\\_eng.PDF](http://www.worldbank.com/icsid/cases/waste_united_eng.PDF)), 41 ILM 1315; Award, 30 April 2004 (President of Tribunal)

*Yaung Chi Oo Trading Pte. Ltd. v. Government of Myanmar* (ASEAN Case No. ARB 01/1, member of Tribunal), Final Award, 31 March 2003, 42 ILM 540 (member of Tribunal)

*Case concerning the MOX Plant, Republic of Ireland v. United Kingdom* (Arbitration under UNCLOS Annex VII) 42 ILM 1118 (party-appointed arbitrator for Republic of Ireland)

*SGS Société Générale de Surveillance SA v Republic of the Philippines* (ICSID Case No. ARB/02/6) decision on jurisdiction and admissibility, 29 January 2004, <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf> (member of Tribunal)

*JacobsGibb Limited v The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/12) (party-appointed arbitrator, pending)

*EnCana Corporation v Government of the Republic of Ecuador* (LCIA-administered Arbitration UN3481) (President of the Tribunal)

Expert witness:

1. *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 Australian Law Reports 299 (Federal Court of Australia, Wilcox J).
2. *Schexnider v McDermott International Inc* (DC, La (WD), 1988, Civil Action No 81-2358) (evidence on oath for plaintiff).
3. *Simoneaux v McDermott International Inc* (SC, La, 1989) (evidence on deposition for plaintiff).
4. *Propend Pty Ltd v Singh & Commissioner for the Australian Federal Police* (UK High Court, Laws J, 1996, CA, 1997, leave to appeal to the House of Lords refused) (evidence on oath for defendant, evidence upheld on appeal), 111 ILR 611.
5. Adviser to and Expert Witness on behalf of the Department of Justice, Government of Canada, *Reference re Secession of Quebec* (Canada, Supreme Court), 115 ILR 536.

6. *Citoma Trading Ltd v Federative Republic of Brazil*, Court of Appeal, 1999, on appeal from *JH Rayner (Mincing Lane) Ltd & ors v Cafenorte SA Importadora & ors* [1999] 1 All ER (Comm) 120.
7. Expert Witness on behalf of the Department of Justice, Government of Canada, *Democracy Watch and another v Attorney-General of Canada* (Ontario Superior Court of Justice, Court file 01-CV-211576)

**B. Counsel before national courts**

*R v Lyons and others*, [2002] 4 All ER 1028 (HL) (junior counsel for the Appellants)

Miscellaneous:

Legal Adviser to the Crown Prince of Jordan, Israel Jordan Treaty of Peace, Araba Crossing Point, 26 October 1994: (1995) 34 ILM 43.

Retained by Shipping Conference Services to advise foreign shipping companies on application of Australian legislation to conference trades (1988-93, 1996, 2000).

**Books**

*The Creation of States in International Law* (Oxford, Clarendon Press, 1979) i-xxviii, 1-498.

*The Rights of Peoples* (editor) (Clarendon Press, Oxford, 1988; paperback, 1992) i-x, 1-236.

*The Law of the Sea in the Asia Pacific Region* (editor, with DR Rothwell) (Nijhoff, Dordrecht, 1995) ix + 282 pp.

(coedited with Philip Alston) *The Future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000) i-xxx, 1-530.

*The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) xxviii + 384pp.; also published in French as *Les articles de la C.D.I. sur la responsabilité de l'État. Introduction, texte et commentaires* (Pedone, Paris, 2003), xvi & 461

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**Editorial**

Editor, *Adelaide Law Review*, Vol 3 No 3 (1969); Vol 5 Nos 2-4 (1974-6); Vol 6 Nos 1-3 (1977-8).

Joint Editor, "The Aborigine in Comparative Law", (1987) 2 *Law and Anthropology* (Austria) i-viii, 1-457.

Consultant Editor, Japanese Study Group (Y Onuma & others) on Grotius, *De Iure Belli ac Pacis*: published as Y Onuma, *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford, Clarendon Press, 1993) xvii + 421.

Editor, International Law Association, *Report of the 64th Biennial Conference, Queensland, 19-25 August 1990* (ILA, London, 1991)

Co-Editor, International Law Association, *Report of the 65th Biennial Conference, Cairo, 21-26 April 1992* (ILA, Cairo, 1993)

Co-Editor, International Law Association, *Report of the 67th Biennial Conference, Helsinki, 11-18 August 1996* (ILA, London, 1997)

Co-Editor, Cambridge Studies in International and Comparative Law, Cambridge University Press (1994, continuing)

Editor, *British Yearbook of International Law* (1994-99); Senior Editor (2000--).

Member of Editorial Panel, *World Trade Review* (2002--)

Co-editor, *ICSID Reports* (2002--)

### **Awards**

University of Adelaide, Bonython Prize (1980).

American Society of International Law, Award for Pre-eminent Contribution to Creative Scholarship (1981) (for *The Creation of States in International Law*).

### **Official Reports**

1. ALRC 24, *Foreign State Immunity* (AGPS, Canberra, 1984) i-xxiv, 1-168 (Commissioner in Charge). The Summary of Recommendations and Draft Legislation appended to the Report is reproduced in (1984) 23 *International Legal Materials* 1398-1418. Legislation to implement the Report was enacted: Foreign States Immunities Act 1985 (Cth), reproduced in (1986) 25 *International Legal Materials* 715-24.

2. ALRC 31, *The Recognition of Aboriginal Customary Laws* (AGPS, Canberra, 1986) Summary volume: i-xvii, 1-104; Vol 1: i-xxxix, 1-507; Vol 2: i-xvi, 1-415 (Commissioner in Charge).

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4. Constitutional Commission, Australian Judicial System Advisory Committee, *Report* (AGPS, Canberra, 1987) (Member).

5. ALRC 48, *Criminal Admiralty Jurisdiction and Prize* (AGPS, Canberra, 1990) (Commissioner in Charge) i-xvi, 1-210.

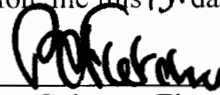
#### **Commissioned Reports/Published Opinions:**

1. "The Original Status of Aboriginal Peoples in North America" (paper commissioned by the Public Inquiry into the Administration of Justice and Aboriginal People, Manitoba, 1991).
2. (with P Sands), "Legal Aspects of a Nuclear Weapons Convention" in Canberra Commission on the Elimination of Nuclear Weapons, *Background Papers* (Canberra, 1996) 275-302.
3. (with P Sands), "The Availability of Article 11 Agreements in the Context of the Basel Convention's Recyclable Ban Amendment" (paper commissioned by the International Council on Metals and the Environment, Ottawa, July 1997) (pp 1-60)
4. (with A Pellet & G Hafner), "Republic of Cyprus: Eligibility for EU Membership" (A/52/481, S/1997/805, 17 October 1997)
5. "State Practice and International Law in Relation to Unilateral Secession", in AF Bayefsky, *Self-Determination in International Law. Quebec and Lessons Learned* (Kluwer, The Hague, 2000) pp. 31-61;
6. Response to Experts Reports of the Amicus Curiae", *ibid.* pp. 153-171.
7. "The International Criminal Court and Bilateral Agreements Sought by the United States under Article 98(2) of the Statute" (with P Sands & R Wilde) ([http://www.lchr.org/international\\_justice/Art98\\_061403.pdf](http://www.lchr.org/international_justice/Art98_061403.pdf))

#### **Governmental Nominations and Conferences**

1. Member of the Australian delegation to UNESCO General Conference, Sofia, October 1985. See *UNESCO General Conference*, Report of the Australian Delegation (AGPS, Canberra, 1986) 36-43.
2. Australian nominee as a conciliator included in the list maintained by the Secretary-General for the purpose of constituting the conciliation commission provided for by the Annex to the Vienna Convention on the Law of Treaties 1969.
3. Adviser, Australian delegation to the United Nations General Assembly, Sixth Committee, 43rd Session, 1988; 44th Session, 1989; 45th Session, 1990; 46th Session, 1991.
4. Member, International Law Commission (1992-2001):
  - ◆ Responsible for drafting the Working Group Report (*ILC Yearbook* 1992 vol II pt 2, 58-80) and Draft Statute (1993) on an International Criminal Court. For the text of the latter see (1994) 33 ILM 253. Chair of the Working Group (1994): see Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group* (A/CN.4/L.491/Rev.2 & Add.1-2, 14, 18, 19 July 1994): see *ILC Ybk 1994/II* (2) 18-74; text also in A Watts, *The International Law Commission 1949-1998. Volume II: The Treaties* (Oxford, Oxford University Press, 2000) 1454-1552.
  - ◆ Responsible for drafting Report on Working Methods of the Commission, published in *ILC Report 1996*, Annex I.
  - ◆ Special Rapporteur on State Responsibility (1997-2001):
    - First Report on State Responsibility (A/CN.4/490 & Add. 1-5, 1998)
    - Second Report on State Responsibility (A/CN.4/498 & Add. 1-4, 1999)

This is Exhibit "B" referred to in the  
affidavit of James Crawford sworn  
before me this 15<sup>th</sup> day of July, 2004



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Peter Coleman Fletcher

Exhibit B

**Note of Interpretation of Certain Chapter 11 Provisions  
(NAFTA Free Trade Commission, July 31, 2001)**

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

**A. Access to documents**

1. 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 tribunal.
2. In the application of the foregoing:
  - a. 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 tribunals, apart from the limited specific exceptions set forth expressly in those rules.
  - b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
    - i. confidential business information;
    - ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
    - iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
  - c. 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.
  - d. 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.

3. 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.

**B. Minimum Standard of Treatment in Accordance with International Law**

4. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
5. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
6. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

**Closing Provision**

The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement.

Done in triplicate at Washington, D.C., on the 31st day of July, 2001, in the English, French and Spanish languages, each text being equally authentic.

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For the Government of the United States of America

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Robert B. Zoellick  
United States Trade Representative

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For the Government of the United Mexican States

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Luis Ernesto Derbez Bautista  
Secretary of Economy

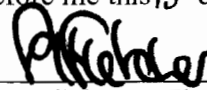
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For the Government of Canada

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Pierre S. Pettigrew  
Minister for International Trade

This is Exhibit "C" referred to in the  
affidavit of James Crawford sworn  
before me this 15<sup>th</sup> day of July, 2004



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Peter Coleman Fletcher

**NAFTA FREE TRADE COMMISSION JOINT STATEMENT**  
**Montreal, October 7, 2003**  
**“Celebrating NAFTA at Ten”**

*The Honourable Pierre S. Pettigrew, Canada's Minister for International Trade; Fernando Canales, Mexico's Secretary of Economy; and Ambassador Robert B. Zoellick, United States Trade Representative, are pleased to release the following Joint Statement, which outlines the overall results of the October 7, 2003, meeting of the NAFTA Free Trade Commission, in Montréal, Québec, Canada.*

As we near the tenth anniversary of the entry into force of the North American Free Trade Agreement (NAFTA), it is important to evaluate its impact on our three countries. The evidence is clear -- the NAFTA has been a great success for all three Parties. It is an outstanding demonstration of the rewards that flow to outward-looking, confident countries that implement policies of trade liberalization as a way to increase wealth, improve competitiveness and expand benefits to consumers, workers and businesses. We remain committed to ensuring that the NAFTA continues to help us to strengthen the North American economy through a rules-based framework for doing business in an increasingly integrated market.

Since January 1, 1994, when the NAFTA entered into force, three-way trade amongst our countries has reached over US \$621 billion, more than double the pre-NAFTA level. Foreign Direct Investment by other NAFTA partners in our three countries more than doubled to reach US\$299.2 billion in 2000.

The NAFTA story is about more than impressive trade and investment figures. January 1, 2004 will also mark ten years since the North American Agreement on Environmental Co-operation and the North American Agreement on Labour Co-operation entered into force. These successful agreements have helped to ensure that the economic integration promoted by the NAFTA is accompanied by better environmental performance and efforts to improve working conditions.

When the NAFTA Free Trade Commission last met in May 2002, we instructed our officials to review the prospects of additional trilateral work that could stimulate further trade between our three countries, to allow the realization of the full potential of a more integrated and efficient North American economy.

On the basis of work achieved to date, we have today agreed on a series of actions to further stimulate trade and investment between our three countries, and we have directed our officials to continue to review opportunities for further trilateral work.

We reviewed the recommendations of the Investment Experts Group (IEG), which we had tasked with examining the operation of the investment chapter of the NAFTA. We agreed on statements and recommended procedures regarding submissions from non-

disputing parties and a standard form for Notices of Intent to Submit a Claim to Arbitration. These will enhance the transparency and efficiency of the investment chapter's investor-state dispute settlement process. Copies of these statements are attached. Much of the work that led to the IEG's recommendations was informed by input from interested stakeholders, including input received at the NAFTA Trilateral Multi-stakeholder Consultations that were held in Montreal this past May. The Council of the Commission for Environmental Cooperation -- our environmental counterparts -- and the Joint Public Advisory Committee (JPAC), provided important input on the organization of these consultations. We directed the IEG to continue its work seeking ways to improve the implementation of the Chapter, including, where appropriate, an examination of investment provisions in other agreements.

We were pleased to note that trade in North America for most non-agricultural goods is no longer hindered by tariffs. However, we noted that certain export-related transaction costs still impede possibilities for even more vigorous growth in trilateral trade. We asked the NAFTA Trade in Goods Committee to commence a study of our most-favoured-nation tariffs, in order to determine whether harmonizing these tariffs could further promote trade by reducing export-related transaction costs. We asked the NAFTA Rules of Origin Working Group to pursue further liberalization of the NAFTA rules of origin. We instructed officials to initiate the necessary consultations with domestic industries to determine which products could be covered by this exercise and to report to our Deputies at their next meeting.

Ministers discussed the impending liberalization of international textile and apparel trade at the end of 2004 and steps that could be taken to prepare our industries for an increasingly competitive global market.

We have accepted the recommendation of the NAFTA Temporary Entry Working Group to provide temporary entry to actuaries and plant pathologists. We have agreed that each Party will complete its domestic procedures to admit professionals in these two occupations and the Parties will implement this change trilaterally on February 1, 2004. We asked the Temporary Entry Working Group to develop trilaterally-agreed procedures for adding and deleting professions in Appendix 1603.D.1 (Professionals) of the NAFTA. We were pleased to accept the Mutual Recognition Agreement that has been signed by the accounting professions of Canada, Mexico and the United States. We hereby encourage our respective competent authorities to implement it in a manner consistent with the NAFTA. This agreement will facilitate the recognition of credentials within the three NAFTA countries. By facilitating the cross-border trade in services, this type of agreement contributes to achieving the objectives of the NAFTA, and we encourage other bodies of professionals to complete the agreements that are being negotiated to develop mutually acceptable standards and criteria for licensing and certification of professional service providers.

We welcomed the establishment of a North American Steel Trade Committee, which will meet for the first time on November 21 in Mexico City. The objective of the Committee is to promote continued cooperation among the three governments on international steel

policy matters; to serve as a consultative mechanism for regular exchanges of information and review of progress on matters of mutual interest or concern; and reduce remaining distortions in the North American steel market. We look forward to receiving reports of the Committee's work. We have attached a separate statement on the establishment of this Committee.

We have accepted the recommendation of the NAFTA Advisory Committee on Private Commercial Disputes, and we encourage the competent authorities to adopt in each of our countries the "UNCITRAL Model Law on International Commercial Conciliation." This will facilitate the effective resolution of private commercial disputes by establishing a harmonized legal framework within the NAFTA region.

Looking beyond the NAFTA region, we also discussed the essential role that further trade and investment liberalization plays in the promotion of economic growth and poverty reduction worldwide, and the leadership that our three countries are showing in this regard.

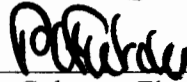
Despite the setback at the WTO Ministerial Conference in Cancun, we agreed that the Doha Round of multilateral trade negotiations continues to hold tremendous prospects for the world economy; especially for developing countries. We call on Members to re-double their efforts to build bridges and find consensus in the months ahead. We agreed on the need to re-energize the multilateral process and move forward with multilateral trade liberalization that benefits all participants. We also agreed to seize all opportunities to rebuild momentum, including at the APEC Leaders' and Trade Ministers' meetings in Thailand later this month.

At the same time, we reaffirmed our commitment to the Free Trade Area of the Americas (FTAA) process and the successful conclusion by January 2005 of negotiations on a comprehensive, ambitious multilateral agreement including both market access and common rules. As we approach the November 20-21, 2003 FTAA Ministerial meeting in Miami, we will continue to work with our Hemispheric partners to achieve the promise that the FTAA holds for growth and economic development through enhanced economic integration.

We approved the publication of a trilateral brochure on NAFTA, which can be found at the three Ministries' web sites.

Finally, we agreed that the United States will host the next NAFTA Commission meeting, at the Ministerial level, next year.

This is Exhibit "D" referred to in the  
affidavit of James Crawford sworn  
before me this 5<sup>th</sup> day of July, 2004



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Peter Coleman Fletcher

Exhibit D

**Statement of the Free Trade Commission on non-disputing party participation**

**A. Non-disputing party participation**

1. No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party (a “non-disputing party”).
2. Nothing in this statement by the Free Trade Commission (“the FTC”) prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.
3. Considering that written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation of the Chapter, and in the interests of fairness and the orderly conduct of arbitrations under Chapter 11, the FTC recommends that Chapter 11 Tribunals adopt the following procedures with respect to such submissions.

**B. Procedures**

1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the “applicant”) will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.
2. The application for leave to file a non-disputing party submission will:
  - (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
  - (b) be no longer than 5 typed pages;
  - (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
  - (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
  - (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
  - (f) specify the nature of the interest that the applicant has in the arbitration;
  - (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
  - (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and
  - (i) be made in a language of the arbitration.

3. The submission filed by a non-disputing party will:
  - (a) be dated and signed by the person filing the submission;
  - (b) be concise, and in no case longer than 20 typed pages, including any appendices;
  - (c) set out a precise statement supporting the applicant's position on the issues; and
  - (d) only address matters within the scope of the dispute.
4. The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.
5. The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.
6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:
  - (a) the non-disputing party submission would assist the 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.
7. The Tribunal will ensure that:
  - (a) any non-disputing party submission avoids disrupting the proceedings; and
  - (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.
9. The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.
10. Access to documents by non-disputing parties that file applications under these procedures will be governed by the FTC's Note of July 31, 2001.

Exhibit E

**Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations**

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.