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21 March, 2002

Dear Sir and Madam

NAFTA UNCITRAL Investor-State Claim
Pope & Talbot Inc and the Government of Canada

1. On 20 February 2002 Counsel for the Investor drew the attention of the Tribunal to certain matters relating to travaux preparatoires in relation to NAFTA. On 1 March 2002 he requested the Tribunal to order Canada to provide copies forthwith of any travaux preparatoires, negotiating history or any other document related to the negotiation of the NAFTA or any parts of it, that has not yet been disclosed to this Tribunal and the Investor.

2. The history of this matter, so far as made known to the Tribunal, appears to be as set out hereafter.

3. On 5 May 1997 Counsel for the Investor was told by the Co-ordinator, Access to Information and Privacy for DFAIT that "there are no minutes or records of NAFTA negotiating meetings nor any mutually agreed negotiating texts, which have been or can be released publicly." This sentence appears to be ambiguous. However section 10 of the Access to Information Act provides that the notice to the requestor either state that the record does not exist or gives "the specific provision of this Act on which the refusal was based or ... the provision on which a refusal could reasonably be expected to be based if the record existed." Since

no such provisions were stated the Tribunal concludes that the letter must be read as a denial that any of the requested material existed.

4. In the course of the hearing on 14 November 2000 the Presiding Arbitrator asked about travaux preparatoires, Mr Appleton referred to the letter cited above, and Counsel for Canada stated that he had not been able to find any (Tr. Nov 14 2000 pp 2-4).

5. In the course of the hearing on the Damage Phase in response to a question about legislative history Counsel for Canada referred to the post agreement statements of implementation by Canada and the United States (Tr. Nov 14, 2001 pp 497-498).

6. In his letter of 20 February Counsel for the Investor went on to refer to two other NAFTA awards under Chapter 20 one of which specifically refers to Canada as relying on the travaux preparatoires of the NAFTA, the other to the negotiating history. According to the Investor's Counsel in his letter of 1 March 2002 the proceedings in the NAFTA Chapter 20 Cross-Border Trucking Services arbitration ruled on Article 1102.

7. In his response of 22 February Counsel for Canada did not dispute the accuracy of the transcript references though he put them into a wider context. The Tribunal accepts that Counsel for Canada did not seek to mislead the Tribunal in his statements made in the course of the hearings in November 2000 and November 2001.

8. Nevertheless two issues at least remain. So far as (at least) Chapter 20 proceedings are concerned Canada has apparently founded their arguments on what is contained in what were there described as travaux preparatoires. It therefore seems clear that there are at least some travaux preparatoires in existence in relation to NAFTA. All such should be produced to the Tribunal, at least insofar as they might bear on Chapters 11, 18 and 20.

9. What also appears to this Tribunal to be significant is this. It has been furnished with a copy of certain submissions in <u>Methanex Corporation .v. United States of America</u> (which is directly concerned with Article 1105 of NAFTA). In the course of one from Methanex dated 18 September 2001 at page 6, the following is stated: "In fact, the word "customary" was actually deleted from one of the negotiating texts of NAFTA. Mr Guillermo Aguilar Alvarez, one of the principal Chapter 11 negotiators for Mexico, recalls that one of the proposed revisions of what became Article 1105 or its equivalent used the phrase "customary international law". (The United States almost certainly has a copy of this text; however, it has chosen to withhold it from this Tribunal). When Mexico resisted the use of the term "customary", the United States negotiators pointed out that deleting the word would expand the coverage of Article 1105 by bringing in other legal obligations including independent treaty obligations between or among the NAFTA Parties. Mexico had no objection to incorporating such obligations into Article 1105, and the three countries eventually agreed to the present text of NAFTA Article 1105. Mr Aguilar Alvarez has publicly taken this position concerning the scope of Article 1105 (see Exhibit 2) and will provide a formal

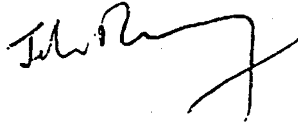
statement to the Tribunal if requested." The Tribunal has not been provided with Exhibit 2, and asks Canada to make it available to the Tribunal.

10 This appears to the Tribunal a clear indication that there were in the course of the negotiations leading up to the agreement which constituted NAFTA as it stands important discussions as to the terms of Article 1105 including a very importantly different version of Article 1105.

11. In the circumstances the Tribunal feels bound to request Canada to produce a record of discussions leading up to agreement upon the final text of Article 1105 of NAFTA, whether such record consists of negotiating drafts or any other matters and to state whether Canada accepts that there were discussions and and/or negotiations leading up to the final text of NAFTA along the lines suggested by Methanex' Counsel in the passage cited. To the extent that Canada is itself unable to furnish such information it is asked to seek from the United States and Mexico confirmation or otherwise as to the accuracy of the statement by Mr Alvarez of Mexico as reported in the passage from the Methanex letter dated September 18, 2001.

12. The Tribunal is now considering various questions raised in relation to Article 1105 and a prompt reply would be helpful.

Yours faithfully



Lord Dervaird
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