UNDER CHAPTER ELEVEN OF THE NAFTA AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICE AMERICA, INC.

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

CANADA'S SUBMISSION ON CANADIAN UNION OF POSTAL WORKERS AND THE COUNCIL OF CANADIANS PETITION FOR INTERVENTION

MAY 28, 2001

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and International Trade
Trade Law Division (JLT)
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PART I: FACTS

1. The Canadian Union of Postal Workers and the Council of Canadians ("Petitioners") filed a petition on November 8, 2000 requesting standing as parties to the claim submitted by United Parcel Service, Inc. ("UPS"). In the alternative, the Petitioners ask that they be accorded intervener standing, including the "full right to present and test any of the evidence introduced in the proceedings". They also ask for the right to make submissions on jurisdiction, place of arbitration, and to have access to all submissions, including exhibits and expert reports.

2. The Petitioners filed an additional submission on May 10, 2001.[1]

3. By letter of March 16, 2001, Canada indicated that the Tribunal had discretion to add petitioners as *amici curiae.*

4. By letter of March 22, 2001, UPS indicated that it opposes the Petitioners' request.

5. In Procedural Order No. 2 the Tribunal asked for submissions from the disputing parties on this matter.

PART II: OVERVIEW

6. Canada supports greater openness in NAFTA Chapter Eleven proceedings and appreciates the contribution that transparency brings to building public confidence in the investor-state dispute settlement process.

7. At the same time, Canada recognizes the importance of ensuring uniformity and predictability in the rules and procedures governing the settlement of investor-state disputes.

8. There are a number of legal and technical issues raised by the question of whether

[1] Petition to the Arbitral Tribunal, Canadian Union of Postal Workers and of Council of Canadians, May 10, 2001 ("Petition"). **[Tab 1]**

and how NAFTA Chapter Eleven Tribunals should receive submissions from persons other than the disputing parties, and the non-disputing NAFTA Parties, including who should be given standing to participate as *amicus curiae* and the nature of such participation.

PART III: SUMMARY OF CANADA'S POSITION

9. The Tribunal has no jurisdiction to add the Petitioners as parties to the arbitration or to grant them rights of parties.

10. The Tribunal has discretion to receive written *amicus* briefs based on publicly available information.

11. In exercising its discretion, the Tribunal should consider whether:

    (a) There is a public interest in the arbitration;

    (b) The Petitioners have sufficient interest in the outcome of the arbitration;

    (c) The Petitioners' submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and

    (d) The Petitioners' submissions can be received without causing prejudice to the disputing parties.

12. The Tribunal should examine the circumstances of each Petitioner separately.

13. However, on the issue of jurisdiction, place of arbitration and procedural issues generally, there is no basis or reason for the Tribunal to receive submissions from the Petitioners.

PART IV: SUBMISSIONS

A. The Tribunal has No Power to Add Parties to the Litigation or to Grant them the Rights of Parties

14. NAFTA Article 1122 stipulates that each NAFTA Party consents to the submission of a claim to arbitration in accordance with the procedure set out in

the NAFTA.

15. NAFTA Chapter Eleven specifically defines its scope and coverage, and who can submit a claim to arbitration.[2] Together with the UNCITRAL Arbitration Rules ("UNCITRAL Rules") - which govern these proceedings - NAFTA Chapter Eleven also spells out the obligations, rights and privileges of the disputing parties.[3]

16. The Tribunal has a general authority under Article 15(1) of the UNCITRAL Rules to establish procedures governing the conduct of its arbitral proceedings.[4] However, this does not extend to adding parties to the arbitral proceedings.

17. Pursuant to NAFTA Article 1120(2), Article 15(1) of the UNCITRAL Rules applies to the extent it is not modified by NAFTA Chapter Eleven.[5]

18. Under NAFTA Chapter Eleven, the Tribunal cannot add the Petitioners as parties, nor accord to the Petitioners the substantive status, rights or privileges of a disputing party. This was recognized by *Methanex Corporation v. United States of America* ("*Methanex*"), another Chapter Eleven Tribunal that examined a request for intervention by non-governmental organizations in the proceedings.[6]

19. As the *Methanex* Tribunal explained in paragraphs 27, 29 and 30 of its Decision:

> 27. Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. A procedural provision, however, cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive

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[2] NAFTA Articles 1101, 1115, 1116 and 1117.
[3] NAFTA Articles 1119, 1120 and 1121.
[4] Article 15(1) of the UNCITRAL Rules provides that:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at each stage of the proceedings each party is given a full opportunity of presenting his case.

[5] NAFTA Article 1120(2) provides that:

The applicable arbitration rules shall govern the arbitration except to the extent modified by this section.

[6] *Methanex Corporation* v. *United States of America*, Decision of the Tribunal on Petition from Third Persons to Intervene as "Amici Curiae", January 15, 2001 ("Decision"). **[Tab 2]**

> status, rights or privileges of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA.[7] The issue is whether Article 15(1) grants the Tribunal any lesser procedural power in regard to non-party third persons, such as the petitioners here.
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> [...]
>
> 29. The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure, and such matters cannot fall within Article 15(1) of the UNCITRAL Rules.
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> 30. However, in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 of NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged. 8

20. As the *Methanex* Tribunal found, it would not make sense to give third parties greater rights than the other NAFTA Parties have under NAFTA Article 1128.

21. The decision of the *Methanex* Tribunal is also consistent with the approach at Common Law, which provides that neither arbitration tribunals nor the courts have the power to compel a party to arbitrate with a non-party.

22. For example, the English case of *Oxford Shipping Co. Ltd.* v. *Nippon Yusen Kaisha*[9] stands for the proposition that in the absence of the consent of all parties, an arbitrator has no power to order that a dispute referred to arbitration under an arbitral agreement be heard or determined with any other dispute involving a stranger. This is the case even in circumstances where the disputes are closely

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[7] NAFTA Article 1128 provides that:
On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

[8] *Ibid.* In keeping with this view, the *Methanex* Tribunal indicated at paragraph 36 of its Decision that the Petitioners could not adduce the evidence of any factual or expert witnesses.

[9] [1984] 3 All E.R. 835 (Q.B.)

related and a consolidated hearing would be convenient.

23. The only circumstances in which the Tribunal can add a party to an arbitration is where more than one claim has been submitted under NAFTA Article 1120 and the claims raise common questions of law or fact.

24. Pursuant to NAFTA Article 1126(2), the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties,

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

25. In order to be eligible to join a claim as a party, one must already be a disputing party in another claim. The Petitioners have not submitted a claim under NAFTA Chapter Eleven.

B. The Tribunal has Discretion to Receive Written *Amicus* Submissions

26. Pursuant to NAFTA Article 1128, only non-disputing NAFTA Parties can intervene as a matter of right in NAFTA Chapter Eleven arbitrations. Both NAFTA and the UNCITRAL Rules are otherwise silent on the participation of *amici*.

27. However, as noted above, Article 15(1) of the UNCITRAL Rules gives the Tribunal procedural discretion with respect to the conduct of the arbitration, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.[10]

28. In the *Methanex* case, the Tribunal concluded that the receipt of written *amicus* briefs fell within the discretion accorded to it under Article 15(1) of the UNCITRAL Rules. In deciding to consider accepting *amicus* briefs, the

[10] *Supra*, note 4.

Methanex Tribunal relied on the practice of the Iran-US Claims Tribunal and the World Trade Organisation ("WTO"). It also noted that where *amicus* participation was allowed it should be done in a manner that safeguards the equal treatment of the parties. As a result it decided that only written *amicus* briefs would be allowed.[11]

29. The *Methanex* Tribunal also stated that:

> [S]ince *amicus* have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any right at all) they are to be treated by the Tribunal as any other members of the public.[12]

30. The *Methanex* Tribunal therefore concluded that materials may be disclosed only as allowed in the consent order on confidentiality, or otherwise lawfully.[13]

31. Canada agrees that the Tribunal has discretion to receive *amicus* briefs where appropriate.

C. Criteria for Determining Whether to Accept *Amici* Briefs

32. In the context of NAFTA Chapter Eleven, the *Methanex* Tribunal examined the following factors in considering whether to accept the requests for intervention:

(a) Whether the submissions from the petitioners could assist the Tribunal and provide assistance or material that the parties to the dispute would not otherwise bring that would help the Tribunal decide the dispute;

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[11] As the Methanex Tribunal explained at paragraphs 31, 32 and 33 of is Decision (*Supra* note 6):

> 31. The Tribunal considers that allowing a third person to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules. The wording of the subparagraph numbered [2] of Article 15(1) suffices, in the Tribunal's view, to support its conclusion, but its approach is supported by the practice of Iran-US Claims Tribunal and the World Trade Organization.
> 32. ... For present purposes, the authoritative guide to the exercise of the Iran-US Claim Tribunal's discretion under Article 15(1) and this award demonstrates that the receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving states and non-parties.
> 33. ... For present purposes, the WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-party third persons, even in a juridical procedure affecting the rights and obligations of state parties; and further it also demonstrates that the receipt of such submissions confers no rights, procedural or substantive , on such persons. **[Tab 2]**

[12] *Ibid* at paragraph 46. **[Tab 2]**

[13] *Ibid* at paragraphs 46 and 47. **[Tab 2]**

(b) Whether there is a public interest in the arbitration given the subject-matter;

(c) Whether the Chapter Eleven process would benefit from being perceived as more open or transparent;

(d) Whether submissions by the petitioners would add significantly to the overall costs of the arbitration; and

(e) Maintaining the equality of the disputing parties. [14]

33. Weighing all these factors, the *Methanex* Tribunal held that it could accept written submissions from the petitioners but found it premature to make a final determination and postponed its decision until later in the arbitration.[15]

34. In the *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*[16], the WTO Appellate Body examined the following to determine whether to accept *amicus* submissions:

(a) The nature of the interest in the dispute;

(b) How the *amicus* brief could help achieve a satisfactory settlement of the matter in accordance with the rights and obligations of the WTO Members under the DSU and the other covered agreements; and

(c) How the *amicus* brief will make a contribution that will not be repetitive of what was submitted by the parties to the dispute.

35. Canadian courts have examined similar elements:

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[14] *Ibid* at paragraphs 48,49 and 50. **[Tab 2]**

[15] *Ibid.* At paragraph 53 of its Decision the *Methanex* Tribunal ordered as follows:
For the reasons set out above, pursuant to Article 15(1) of the UNCITRAL Arbitration Rules, the Tribunal declares that it has the power to accept *amicus* written submissions from the petitioners; whilst it is at present minded to receive such submissions subject to procedural limitations still to be determined by the Tribunal (to be considered with the Disputing Parties), it will make a final decision whether or not to receive them at a later stage of these arbitration proceedings; and accordingly the Petitions are accepted by the Tribunal to this extent, but otherwise rejected. **[Tab 2]**

[16] WT/DS135/9, AB-2000-11, November 7, 2000, Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review ["Asbestos"]. **[Tab 3]**

(a) Does there exist a justiciable public interest? (What is the nature of the case?)

(b) Is the proposed intervener directly affected by the outcome? (Having an interest in or preoccupation in the subject-matter alone is unlikely to be sufficient);

(c) Will the submission assist the court in determining a factual or legal issue?

(d) Will the participation assist the court in bringing a different perspective? (The submission should not merely reiterate a Party's positions.);

(e) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(f) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(g) Are the interests of justice better served by the intervention?

(h) Can the Court hear and decide the case on its merits without the proposed intervener?

(i) Will the proposed intervener make a useful contribution without causing prejudice to the parties?[17]

36. The factors that a NAFTA Tribunal should take into account in deciding whether to receive *amicus* briefs from the Petitioners can be summarized as follows:

(a) Is there a public interest in the arbitration ?

(b) Do the Petitioners have sufficient interest in the outcome of the arbitration?

(c) Will the Petitioners' submissions assist in the determination of a factual or legal issue related to the arbitration by bringing a different perspective or

[17] See the annotation to Rule 109 of the Federal Court Rules in Sgayias, D. , Kinnear, M, Rennie, D. and Saunders, B, *Federal Court Practice 2001*, (2000) Thompson Canada Ltd., ("Sgayias") at pp. 406-412. **[Tab 4]**

particular knowledge to the issues on which they wish to make submissions ?

(d) Can the Petitioners' submissions be received by the Tribunal without causing prejudice to the disputing parties? [18]

37. The burden of proof lies on each of the Petitioners to demonstrate that it meets the relevant criteria. Their circumstances must be examined separately and the Tribunal must determine which of the Petitioners, if any, should be permitted to submit *amicus* briefs. [19]

a. Public Interest

38. The community at large must have some pecuniary interest, or some interest by which its legal rights or liability are affected, for there to be a public interest in NAFTA Chapter Eleven arbitrations.

39. The Petitioners submit that the claim initiated by UPS under NAFTA Chapter Eleven has policy implications that extend beyond the delivery of postal and courier services and may include health care, education, auto insurance, energy, municipal and other services where some degree of public service monopoly exists.[20]

40. As noted above, Canada recognizes that there is public interest in Chapter Eleven disputes.

b. Interest in the Outcome of the Arbitration

41. The Petitioners must have sufficient interest in the outcome of the arbitration. An interest in the development of the NAFTA "jurisprudence", or in the subject

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[18] The Federal Court, Trial Division in *Canada (Attorney General)* v. *S.D. Myers, Inc,*. [2001] F.C.J. No. 567 ("*Myers*") reduced to three criteria which petitioners must satisfy (paragraph 18):
They must have an interest, that is a direct legal interest, in the outcome of the litigation; their right will be seriously affected by the litigation; and they will bring to the court a point of view different from those of the parties. The court further stated that the intervention must constitute an enhancement to the proceedings, not a distraction, and it is not permitted to redefine or expand upon the issues which have been legitimately brought before the court by the parties to the action. **[Tab 5]**

[19] *Ibid.* **[Tab 5]**

[20] Petition, *supra* note 1 at paragraphs 35 – 44.

matter of the dispute, is not enough. The Petitioners must be directly affected by the outcome.[21]

42. The Petitioners submit that their request for intervention should be accepted on the basis that they have a direct interest in the case and its outcome:

a) They have a "direct interest" in the claim as they may be adversely affected by the award, (e.g., the lay-off of Canada Post employees as a result of a negative award, loss or deterioration of the postal service);[22]

b) Their interest in the broader public policy implications of the dispute;[23] and

c) Their interest in ensuring judicial oversight by Canadian courts to these NAFTA proceedings.[24]

c. Assistance in Determining a Factual or Legal Issue

43. The Petitioners should only be allowed to submit *amicus* briefs in respect of those issues on which they can assist the Tribunal by bringing a perspective, or particular knowledge or insight, that is different from that of the disputing parties.[25]

44. The Petitioners cannot introduce new issues to the litigation and should accept the parameters of the case as defined by the disputing parties. They should not take the case away from the disputing parties.[26]

45. Furthermore, in Canada's view, there is no basis to accept submissions by *amici* on jurisdictional issues.

46. The Petitioners seek the right to make submissions concerning the jurisdiction of the Tribunal and, once they gain access to the pleadings, on whether the matters

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[21] *Myers*, *supra* note at paragraph 18.
[22] Petition, *supra* note 1 at paragraphs 22 to 28.
[23] *Ibid* at paragraph 35.
[24] *Ibid* at paragraphs 59 and 60.
[25] *Myers*, *supra* note 18 at paragraph 18; See also Sgayias, *supra* note 17. **[Tab 5]**
[26] *Ibid.* **[Tab 5]**

raised by the disputing investor are within the jurisdiction of the Tribunal.[27]

47. The Petitioners in particular seek to intervene on the following issues:

(a) Article 1502(3)(d) is beyond the scope of investor-state claim;[28]

(b) UPS adopts an overly broad interpretation of Article 1105;[29]

(c) the practices complained of by UPS do not represent the exercise of any "regulatory, administrative or other governmental authority" that Canada has delegated to Canada Post[30]; and

(d) concerns regarding the application of UNCITRAL Rules and the New York Convention to disputes arising under NAFTA investment provisions.[31]

48. With respect to the issue of jurisdiction, including whether NAFTA Article 1502(3)(d) is within the terms of NAFTA Chapter Eleven, the Petitioners effectively seek leave to make submissions on the interpretation of NAFTA Chapter Eleven.

49. Questions regarding purely the interpretation of NAFTA Chapter Eleven are not matters upon which the Tribunal should receive *amicus* briefs. To permit the Petitioners to make submissions on this issue would accord to them the substantive rights of NAFTA Parties under NAFTA Article 1128, which is beyond the power of the Tribunal.[32]

50. In any event, the Petitioners do not have any particular or unique expertise in interpreting international treaty obligations that would assist the Tribunal beyond

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[27] Petition, supra note 1 at subparagraph 1(v).
[28] Petition, supra note 1 at paragraphs 36, 40, 41 and 42.
[29] *Ibid* at paragraphs 37, 38 and 39.
[30] *Ibid* at paragraphs 43.
[31] *Ibid* at paragraph 50 to 57.
[32] Decision, *supra* note 6 at paragraph 27:

A procedural provision, however, cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA. The issue is whether Article 18(1) [of the UNCITRAL Rules] grants the Tribunal any lesser procedural power in regard to non-party third persons, such as the petitioners here. **[Tab 2]**

that which is offered by the disputing parties and the Tribunal itself.[33]

51. The Tribunal should therefore only consider receiving *amicus* briefs at the merits phase of the arbitration and only in respect of factual and legal issues that Petitioners are not precluded from raising and with respect to which submissions may assist the Tribunal.

52. With respect to the Petitioners' concerns regarding the application of the UNCITRAL Rules and the New York Convention, *amicus* briefs would not be of assistance in resolving the dispute as these are not issues in the arbitration and, in any event, are beyond the jurisdiction of the Tribunal.

53. The Petitioners also seek the right to make submissions concerning the place of arbitration.[34]

54. Place of arbitration is an issue that is reserved to the disputing parties to resolve either by agreement or through submissions to the Tribunal, which would decide the matter with reference to various factors, including the convenience of the disputing parties.[35]

55. Since the Tribunal has no jurisdiction to add the Petitioners as parties to the arbitration, or to grant them rights of parties, there is no basis or reason for the Tribunal to receive submissions from the Petitioners on place of arbitration.

d. No Prejudice to the Disputing Parties

56. If the Tribunal is inclined to accept *amicus* submissions, they should be written so as to minimize the burden on the disputing parties and avoid disrupting the

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[33] *Myers, supra* note at paragraph 20. **[Tab 5]**
[34] Petition, *supra* note at paragraph 1(V).
[35] NAFTA Article 1130(2) provides that:
The selection of the place of arbitration must be in accordance with the UNCITRAL Arbitration Rules.
Article 16(1) of the UNCITRAL Rules provides:
Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the Tribunal, having regard to the circumstances of the arbitration.
Paragraph 22 of the UNCITRAL Notes on Organizing Arbitral Proceedings sets forth prominent factors influencing the choice of the place of arbitration.

arbitration.[36]

57. For example, in addition to limiting *amicus* briefs to issues raised by the disputing parties, they should not exceed twenty pages in length.

58. As well, in accordance with the requirements of procedural equality and fairness in Article 15(1) of the UNCITRAL Rules, the disputing parties should be given the opportunity to respond to *amicus* briefs.[37]

PART V: RELIEF SOUGHT

59. Canada respectfully submits that the Tribunal:

(a) Dismiss the Petitioners' application to be added as parties to the arbitration; and

(b) Dismiss the Petitioners' application to make submissions concerning the Tribunal's jurisdiction, place of arbitration and procedural issues generally.

60. Canada further respectfully further submits that:

(a) The Tribunal has discretion to receive written *amici* briefs prepared on the basis of publicly available information as permitted under the confidentiality order which will govern the arbitration;

(b) The Tribunal should exercise its discretion on whether to receive written *amici* briefs in accordance with the criteria developed by international tribunals and domestic courts for deciding the issue; and

(c) The Tribunal should only consider receiving written *amici* briefs at the merits phase of the arbitration.

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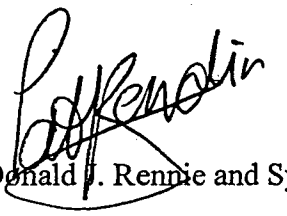
[36] According to the *Methanex* Tribunal (Decision, *supra* note 6 at paragraph 37):
It would always be the Tribunal's task, assisted by the Disputing Parties, to adopt procedures whereby any burden in meeting written submissions from a Petitioner was mitigated or extinguished.
To that end, the *Methanex* Tribunal directed the Petitioners to make their submissions in writing, in a form and subject to limitations decided by the Tribunal. **[Tab 2]**

[37] This would be consistent with the limitations imposed by the Appellate Body in *Asbestos* case (*supra* note 16) and the Tribunal in the *Methanex* case (*supra* note 6).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED in the City of Ottawa, in the Province of Ontario, Canada this 28th day of May, 2001.



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