IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN GLOBAL TRADE WATCH, Plaintiff, v. OFFICE OF THE U.S. TRADE REPRESENTATIVE, and U.S. DEPARTMENT OF STATE, Defendants.	)	Civil Action No. 01-00096 (RWR/JMF)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On October 25, 2000, plaintiff Global Trade Watch submitted identical requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, to defendants U.S. Department of State and Office of the U.S. Trade Representative ("USTR") to produce records relating to the claim filed by the United Parcel Service of America, Inc. ("UPS") against Canada under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Citing FOIA Exemption 1, 5 U.S.C. § 552(b)(1), the government has withheld ten responsive documents on the ground that they have been properly classified by the State Department pursuant to Executive Order 12958, 3 C.F.R. 333 (1995). After reviewing the Declaration of Margaret P. Grafeld ("Grafeld Declaration") submitted by the State Department, plaintiff has decided to seek the release of only seven of these records: (1) the UPS Statement of Claim (Document No. L5A/T1)

the pleading in which UPS sets forth the factual basis of its claim against Canada; and (2) the six accompanying attachments that have been withheld (Document Nos. L5B, L5C, L5D, L5E, L5F, and L5G).[1] Each withheld attachment is a letter from a UPS official to a Canadian government official written in the days leading up to the filing of the UPS Notice of Arbitration and Statement of Claim on April 19, 2000. See Grafeld Decl. at 16-18. These documents were forwarded by Canada to the State Department pursuant to the requirement of NAFTA Chapter 11 that a disputing NAFTA Party (here, Canada) provide the other signatory nations to NAFTA (the United States and Mexico) "written notice of a claim that has been submitted to arbitration" and "copies of all pleadings filed in the arbitration." NAFTA Art. 1127.[2]

UPS's Statement of Claim—essentially the equivalent of a complaint stating the basis for a lawsuit—is a document that should be available for public review. It is undisputed that the content of its Statement of Claim presents no national security issues; indeed, the Statement of Claim does not even involve the United States. Yet the State Department classified this document and several of its attachments as "confidential" for the sole reason that Canada allegedly transmitted the documents in confidence to the United States. If in fact Canada did forward these documents to the United States with a request for confidentiality, it did so only because UPS, a private U.S. corporation, asked the arbitral tribunal for a confidentiality order

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[1] As clarified in the Grafeld Declaration, Document Nos. L5A from the State Department and T1 from USTR are the same document: the UPS Statement of Claim. This document was classified by the State Department and is the only document that has been withheld by USTR. Grafeld Declaration ("Decl.") ¶ 14 at 10, 16; Declaration of Sybia Harrison ("Harrison Decl.") ¶¶ 7-14. It is unclear why USTR would not have the entire Statement of Claim, including attachments.

[2] The text of NAFTA is available on many web sites, including http://www.nafta-sec-alena.org/english/index.htm.

protecting the documents, a request that is still pending before the tribunal.[3] Neither the United States nor Canada has any interest in keeping UPS's Statement of Claim secret.

The State Department's refusal to release these documents flies in the face of FOIA, effectively transforming UPS, a private U.S. corporation, into an original classification authority, and directly contravenes the commitment made by all three NAFTA signatories on July 31, 2001 "to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal," subject to limited exceptions inapplicable here. See Free Trade Commission Interpretations, July 31, 2001 ¶ 2(a) (attached to Defendants' Motion to File Omitted Exhibit) (binding interpretation of NAFTA Chapter 11 adopted by the Free Trade Commission). Declaration of Mary Bottari ("Bottari Decl.") ¶ 8(a). As discussed below, neither FOIA Exemption 1 nor Executive Order 12958 justifies the classification of the UPS Statement of Claim or its attachments, and thus, plaintiff is entitled to summary judgment as a matter of law and to release of these documents under FOIA.

In addition, as discussed below, defendants have failed to establish that they are entitled to summary judgment regarding the adequacy of the search for responsive documents conducted by the two agencies. Not only have both the State Department and the USTR failed to produce all responsive documents or to conduct a reasonable search designed to locate all responsive documents, but the State Department's search was unreasonable on the additional ground that it used the date of plaintiff's FOIA request, October 25, 2000, as an arbitrary cut-off date for

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[3] Plaintiff has moved to strike in part the Grafeld Declaration, which is offered to justify the State Department's decision to classify these documents, on the ground that substantial portions of that Declaration fail to satisfy the requirements of Federal Rule of Civil Procedure 56(e). Nevertheless, plaintiff will address the Declaration's statements regarding Canada's alleged position on the confidentiality of the withheld documents.

retrieving responsive documents, even though the Department's search was completed almost eight months later and even though all responsive records that the agency has produced so far have come from a single office, the Office of the Legal Adviser, and thus records subsequent to the date of request could easily have been retrieved. Accordingly, this Court should order the State Department and the USTR to expand the scope of their respective searches, and, in the case of the State Department, to produce responsive documents up to the date of its new search.

BACKGROUND ON NAFTA CHAPTER 11

In order to place Global Trade Watch's FOIA request in context, some background information regarding NAFTA Chapter 11 and UPS's claim against Canada may be helpful.

In December 1993, Congress approved the North American Free Trade Agreement entered into on December 17, 1992 by the governments of the United States, Canada, and Mexico. The agreement took effect on January 1, 1994. 19 U.S.C. § 3311. One of the centerpieces of NAFTA is Chapter 11 on Investment, which grants an array of new and unprecedented rights and privileges to corporations of one NAFTA country that are investing in another NAFTA country. When a corporation believes that its investor rights under Chapter 11 have been violated by the host country, the corporation can challenge the offending policy using NAFTA's special Investor-State dispute resolution mechanism. This mechanism allows a private investor to pursue a case against a NAFTA government for an unlimited amount of monetary damages outside of the nation's domestic court system and in a private arbitral tribunal operating under the auspices of the World Bank or the United Nations. By comparison, the World Trade Organization provides only for State-State dispute resolution, not Investor-State dispute resolution. See NAFTA Chapter 11, Section B (Arts. 1115-1138); Bottari Decl. ¶ 2.

Chapter 11 sets out a number of grounds for submitting such a claim against the host country. For example, the foreign investor may file a claim against the host country if that host country (1) treated the foreign investor less favorably than its domestic investors, Art. 1102; (2) treated the investor less favorably than the best treatment given to investors of another NAFTA signatory nation or of nonsignatory nations, Art. 1103; (3) expropriated or nationalized the foreign investor's investment or took any other action that was "tantamount to" nationalization or expropriation, Art. 1110; or (4) if the host country's conduct failed to comply with the catch-all requirement that it afford investors of other NAFTA signatory nations "fair and equitable treatment" "in accordance with international law." Art. 1105; see Bottari Decl. ¶ 3(a)-(e). See generally International Institute for Sustainable Development, Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights 9-13, 25-36 (2001), available at http://www.iisd.org/trade/private_rights.htm [hereinafter "IISD Report"] (summarizing the legal protections for investors under Chapter 11). A disputing investor may choose to proceed under either the international arbitration rules of the World Bank's International Center for the Settlement of Investment Disputes or the United Nations Commission on International Trade Law. NAFTA Art. 1120, 1139; Bottari Decl. ¶ 3. These two arbitral bodies preceded NAFTA and were originally intended to handle cases involving private contractual disputes between a government and a corporate contractor, rather than serious questions of public policy. Bottari Decl. ¶ 3.

Since NAFTA's adoption seven years ago, Chapter 11 has proven to be one of its most controversial features, with investors invoking this dispute resolution mechanism to challenge a wide array of laws, regulations, jury awards, or other measures taken by NAFTA countries that

have reduced the profitability of the investors' investments in their host countries. In all three NAFTA countries, corporate investors have used these new investment protections to challenge a variety of national, state, and local-level environmental and public health laws and regulations, judicial decisions, federal procurement laws, and the governmental provision of services. See Bottari Decl ¶ 4 (citing examples of claims proceeding under Chapter 11).[4] Although the arbitral tribunals in Chapter 11 cases are limited to awarding monetary damages and restitution and cannot directly order a NAFTA country to rescind a challenged law, see NAFTA Arts. 1134-1135, the NAFTA nations are under tremendous pressure to do exactly that in order to shield themselves from costly damages awards. Bottari Decl. ¶ 5.

Despite the enormous potential social, political, and monetary ramifications of many of these international disputes, the investors' challenges to their NAFTA host countries' laws and regulations have frequently been submitted to and litigated before Chapter 11 arbitral tribunals with little to no public input—or even public awareness—because, contrary to the U.S. government's oft-expressed commitment to transparency both at the time of NAFTA's adoption and since, these arbitrations have not proceeded in an open manner, and copies of the investors' claims and other submissions to the arbitral tribunals have not readily been made available to the public. Bottari Decl. ¶ 6. As a recent New York Times article summed up:

Their meetings are secret. Their members are generally unknown. The decisions

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[4] See also IISD Report, Annex 2 (summarizing the Chapter 11 claims known as of March 2001); Public Citizen, NAFTA's Chapter 11 Investor-to-State Cases: Bankrupting Democracy 8-37 (2001) (same); Anthony DePalma, Nafta's Powerful Little Secret, N.Y. Times, Mar. 11, 2001, Section 3, at 1 (summarizing several controversial Chapter 11 claims); RC Longworth, Laws Skirted Using NAFTA Clause Lets Firms Sidestep Labor, Environment Rules, Chi. Trib., July 5, 2001, at 1 (same), available at 2001 WL 4090873. The Public Citizen report will soon be available at http://www.tradewatch.org.

> they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.

DePalma, note 4 supra, Section 3, at 1.

The UPS Chapter 11 claim against Canada has so far proven to be no exception. UPS, an American corporation, contends in its Chapter 11 claim against Canada that it does not receive treatment comparable to that received by the package and courier delivery service of Canada Post, a Canadian Crown Corporation. UPS argues that Canada Post uses its monopoly on mail service, including its infrastructure, to cross-subsidize its courier service, to the detriment of UPS. UPS seeks at least $160 million in damages. Bottari Decl. ¶ 4(e); Harrison Decl., Exh. 6 (UPS's Notice of Arbitration). Pursuant to Article 1120, UPS has chosen to proceed under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), available at http://www.uncitral.org/en-index.htm. See Notice of Arbitration at 1 (Harrison Decl., Exh. 6) (invoking UNCITRAL arbitration rules). Both UPS's Notice of Intent to Submit a Claim to Arbitration, see NAFTA Art. 1119, submitted on January 19, 2000, and its Notice of Arbitration, see id. 1126(10); UNCITRAL Art. 3, submitted on April 19, 2000 with its Statement of Claim, summarize the bases for UPS's claims against Canada and have been made available to the public. See http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp#UPS. UPS's Statement of Claim, however, which sets forth the factual basis of its claims in greater detail, has not yet been released to the public. See UNCITRAL Art. 18 (describing required elements of a Statement of Claim).

Whatever one might ultimately conclude about the merits of NAFTA Chapter 11, what

cannot be disputed is that its investor-state dispute resolution mechanism presents substantial issues regarding state sovereignty, governmental accountability, and the balance to be struck in an increasingly global economy between laws that regulate public health, the environment, and the provision of goods and services, on the one hand, and the rights of private foreign investors, on the other. It is therefore vitally important that submissions made to NAFTA Chapter 11 arbitral tribunals and the decisions of these tribunals be made readily accessible to the public so that the public can monitor and evaluate the operation of this controversial remedy; see how its tax dollars are being spent (as damage awards by Chapter 11 tribunals are ultimately paid out of the public purse); can apply pressure on the NAFTA countries to make modifications to the agreement as needed; and so that the American public can gauge whether it is in its best interests for the United States to incorporate the same or similar dispute resolution mechanisms in future international agreements. Bottari Decl. ¶ 8.[5] In other words, release of the UPS Statement of Claim would advance "[t]he basic purpose of FOIA," which "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). That Chapter 11 submissions should be available to the public is not only Global Trade Watch's judgment; as discussed in Part I(B)(2), below, the signatories to NAFTA themselves have publicly recognized the importance of openness in these proceedings.

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[5] For example, Chapter 11's controversial investor-state provisions promise to become a major point of contention in the negotiations over the Free Trade Area of the Americas, a proposed expansion of NAFTA to thirty-one additional countries of the Western Hemisphere. Bottari Decl. ¶ 8(b); see Foreign Investment Protection May Become Trade Issue, Congress Daily, July 23, 2001, available at 2001 WL 24848687; Jane Bussey, Nations Divided on Free Trade Draft, Miami Herald, July 14, 2001, available at 2001 WL 25257178.

For these reasons and because FOIA requires its release, plaintiff Global Trade Watch seeks the production of the UPS Statement of Claim, along with the withheld attachments.

ARGUMENT

I. FOIA EXEMPTION 1 DOES NOT AUTHORIZE THE WITHHOLDING OF THE UPS STATEMENT OF CLAIM AND ATTACHMENTS BECAUSE THESE DOCUMENTS ARE NOT PROPERLY CLASSIFIED PURSUANT TO EXECUTIVE ORDER 12958.

As the Supreme Court often has emphasized, FOIA was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (citation omitted), as well as "to balance the public's need for access to official information with the Government's need for confidentiality." Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 144 (1981). To that end, the limited exemptions set forth in 5 U.S.C. § 552(b) "are explicitly made exclusive, and must be narrowly construed." Rose, 425 U.S. at 361 (citations omitted); accord Department of the Interior v. Klamath Water Users Protective Ass'n, 121 S. Ct. 1060, 1065 (2001) ("[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass") (citation omitted). The statute's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." United States Dep't of State v. Ray, 502 U.S. 164, 173 (1991); accord Campbell v. United States Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998), as amended.

Summary judgment is available to an agency when it "proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." Miller v. United States Dep't of State, 779 F.2d 1378, 1382 (D.C. Cir. 1985). To discharge this burden, "the agency 'must

prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" Id. at 1382-83 (quoting National Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)); accord Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam). "FOIA compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exemptions apply." Goldberg v. United States Dep't of State, 818 F.2d 71, 76 (D.C. Cir. 1987). This includes Exemption 1 cases, in which the district court is obligated to conduct a de novo review of the classification decision, with the burden on the agency claiming the exemption. Id. at 77; see 5 U.S.C. § 552(a)(4)(B) (requiring de novo review). Indeed, Congress amended FOIA in 1974 for the express purpose of "clarifying its intent that courts act as an independent check on challenged classification decisions." Goldberg, 818 F.2d at 76; Ray v. Turner, 587 F.2d 1187, 1210 (D.C. Cir. 1978) (Wright, J., concurring) ("The statutory requirement that review be de novo is intended to 'prevent it from becoming meaningless judicial sanctioning of agency discretion.'") (citing S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)).

FOIA Exemption 1 exempts from disclosure any documents that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." § 552(b)(1); see also Krikorian v. Department of State, 984 F.2d 461, 464 (D.C. Cir. 1993). An agency may invoke this exemption only if it complies with the classification procedures established by the relevant executive order and withholds only such material as complies with the substantive criteria contained in that order. King v. United States

Dep't of Justice, 830 F.2d 210, 214 (D.C. Cir. 1987); Lesar v. United States Dep't of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980).

Executive Order 12958, 3 C.F.R. 333 (1995) [hereinafter "Executive Order" or "EO"] is the governing Executive Order. That order specifies the following conditions for classifying information:

> (1) an original classification authority is classifying the information;
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> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
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> (3) the information falls within one or more of the categories of information listed in section 1.5 of this order; and
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> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

EO 12958 § 1.2(a). If there is "significant doubt about the need to classify information," the Executive Order prohibits classification. Id. § 1.2(b). Neither the third nor fourth substantive requirement for classifying information is satisfied here.

A. The UPS Statement of Claim and Attachments Do Not Fall Within the Classification Categories Listed in Section 1.5 of Executive Order 12958.

The government claims that the UPS Statement of Claim and withheld attachments fall within two classification categories listed in Section 1.5 of the Executive Order: (b) foreign government information, and (d) foreign relations or foreign activities of the United States. See Memorandum of Points and Authorities in support of Defendants' Motion for Summary Judgment ("Defendants' Memorandum") at 13-15; Grafeld Decl. ¶¶ 19-25. In fact, however, these withheld documents fit neither category of information.

1. Section 1.5(b)—Foreign Government Information

a. The Nature of the Information at Issue

The Executive Order defines "Foreign Government Information" in relevant part as follows:

> information provided to the United States Government by a foreign government or governments . . . with the expectation that the information, the source of the information, or both, are to be held in confidence.

EO 12958, § 1.1(d)(1). The government relies on the Grafeld Declaration to argue that the UPS Statement of Claim and its six withheld attachments qualify as foreign government information subject to classification under section 1.5(b) because they were transmitted by Canada to the United States with a request that they be treated as confidential. Defendants' Memorandum at 14; Grafeld Decl. ¶ 22. In so justifying its classification of these documents on this basis, the State Department attempts to fit a square peg into a round hole.

The UNCITRAL arbitration rules require that the claimant submit a Statement of Claim setting forth the statement of facts supporting its claim. UNCITRAL Art. 18. Obviously, UPS's Statement of Claim was prepared by UPS, the claimant, not by Canada. The six attached letters classified by the State Department likewise were prepared by UPS, not Canada. None of the information at issue here therefore can reasonably be deemed to be foreign government information any more than information generated by a private Canadian company that winds up in U.S. government files can be said to constitute U.S. government information. In no sense do these documents contain information generated or supplied by Canada, or even sensitive information gleaned by Canada from confidential sources.

The State Department's entire rationale for classifying the documents depends on the fact

that Canada forwarded the UPS documents to the United States. Yet in transmitting the Statement of Claim and attachments to the United States, Canada was essentially acting as a courier performing an administrative act required by NAFTA. NAFTA requires a disputing Party, or NAFTA signatory (here, Canada), to deliver to the other NAFTA Parties, or signatories (the United States and Mexico):

> (a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted, and
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> (b) copies of all pleadings filed in the arbitration.

NAFTA, Art. 1127. UPS's Statement of Claim falls within this mandatory delivery requirement. The disputing Party, Canada, serves as nothing more than a conduit for transmitting an investor's Statement of Claim to the other NAFTA signatories. Canada's transmission of the UPS Statement of Claim to the United States was not "part of a diplomatic exchange of information with the United States," see Defendants' Memorandum at 14, but rather was a clerical, nondiscretionary act required by NAFTA. See Declaration of Steven Shrybman ("Shrybman Decl."), Exh. 1 (Aug. 3 letter from Canadian official to Shrybman stating that the UPS Statement of Claim had been shared with the other NAFTA nations "pursuant to Canada's obligation under Article 1127 of the NAFTA"); Bottari Decl. ¶ 12 & Exh. 3 (Mar. 2, 2000 cover letter from Canada transmitting UPS's Notice of Intent to Submit a Claim to Arbitration under Chapter 11 and citing NAFTA Article 1127 as requiring this transmission).

It is important to distinguish Canada's unconditional obligation under Article 1127 to deliver to the United States a copy of UPS's Statement of Claim with the entitlement of the nondisputing signatories to NAFTA (United States and Mexico) to receive additional information from Canada under NAFTA Article 1129, which the government cites here. See

Defendants' Memorandum at 17-18; Grafeld Decl. at 20. Article 1129 provides that a NAFTA signatory (e.g., the United States or Mexico) is "entitled to receive from the disputing Party, at the cost of the requesting Party: (a) the evidence that has been tendered to the Tribunal, and (b) the written argument of the disputing parties." NAFTA Art. 1129, ¶ 1. In contrast to the absence of restrictions imposed upon a NAFTA signatory in receipt of notice of a claim and pleadings under Article 1127, however, "a Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing party." Id. Art. 1129, ¶ 2. So if the United States wished to review the evidence, witness statements, and the like submitted to a Chapter 11 panel in a case in which the United States was not a disputing Party, it would have to make an affirmative request of Canada, pay the fees, and honor any restrictions governing the information's release to which Canada, the disputing Party, itself was bound. Article 1127, which governs delivery of the UPS Statement of Claim, places no similar restrictions upon the receiving Party, here the United States.[6]

The government's argument here—that the UPS Statement of Claim is transformed into "foreign government information" by the simple expedient of Canada's having transmitted it to the United States—is based upon a principle that knows no limits. Under the government's

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[6] Thus, Article 1129 arguably would govern Document Nos. L9 and L9A, submissions by Canada to the tribunal that were classified by the State Department, see Grafeld Decl. 25-26, because these submissions are not "pleadings" (as Canada's answer to the claim, or Statement of Defence, see UNCITRAL Art. 19, would be) but rather, contain arguments by Canada. Moreover, in contrast to the UPS Statement of Claim and attachments, Document Nos. L9 and L9A were actually prepared by Canada, as is Document No. L7A, a classified enclosure to a letter transmitted in confidence from Canada to the United States and Mexico. Grafeld Decl. at 22-24. All three of these documents therefore would qualify as foreign government information if transmitted with the requisite expectation of confidentiality. Because of these differences between the postures of these three additional documents and the UPS Statement of Claim, plaintiff has withdrawn its request for the release of Document Nos. L7A, L9, and L9A.

logic, if Canada transmitted the Yellow Pages to the State Department with a request for confidentiality, the State Department would be bound to classify the Yellow Pages. To the best of counsel's knowledge, no court decision upholding the classification of information under Exemption 1 has involved information transmitted by a foreign government to the United States that the foreign government played no part in preparing, gathering, or communicating—not to mention information that all concede is not sensitive in content. Compare, e.g., Krikorian, 984 F.2d at 465 (information about foreign governments containing frank internal discussions of foreign relations matters that was communicated to the U.S. government by foreign governments is properly classified under Exemption 1); Baez v. United States Dep't of Justice, 647 F.2d 1328, 1335-36 (D.C. Cir. 1980) (materials provided by foreign intelligence agencies that requested secrecy properly classified where the information would disclose intelligence sources or methods or would reveal the FBI's relationship with a foreign intelligence agency); Southam News v. U.S. Immigration & Naturalization Serv., 674 F. Supp. 881, 884-85 (D.D.C. 1987) (two letters from foreign government officials to U.S. officials given in confidence and implicating national security interests properly withheld under Exemption 1).

b. Canada's Alleged Expectation of Confidentiality

For UPS's Statement of Claim (and attachments) to be deemed "foreign government information," the documents must also have been provided to the United States government with the expectation that the information would be held in confidence. EO 12958, § 1.1(d)(1). Plaintiff has moved to strike those portions of the Grafeld Declaration that purport to establish that Canada requested the U.S. government to hold the documents in confidence, because the Declaration fails to comply with the requirements of Federal Rule of Civil Procedure 56(e). See

Memorandum in Support of Plaintiff's Motion to Strike in Part the Declaration of Margaret P. Grafeld ("Plaintiff's Memorandum in Support of Motion to Strike").

Even if this Court does not grant the motion to strike, the Grafeld Declaration still fails to present evidence demonstrating that the withheld documents were provided by Canada with an expectation of confidentiality. According to the Declaration, the State Department classified the UPS Statement of Claim and attachments shortly after they were received under cover of a letter dated May 1, 2000. Grafeld Decl. at 18-19. The only basis for the classification decision, then, was the May 1, 2000 cover letter, and not any of the letters or communications from Canada that allegedly followed the commencement of this litigation, see id. at 19-21, and not Canada's alleged "undertaking" to the tribunal that it would maintain some undefined category of documents relating to this arbitration confidential. See id. at 20.[7] That May 1, 2000 cover letter was released to plaintiff pursuant to this FOIA request. Harrison Decl. ¶ 12 & Exh. 6. It states:

> Please find enclosed a courtesy copy of the Investor's Notice of Arbitration and Statement of Claim with respect to the above-noted matter. Please note that the Statement of Claim has not yet been made public and should therefore be treated as confidential.

Harrison Decl., Exh. 6. This bland statement simply describes the current state of affairs—that the UPS Statement of Claim has not yet been made public—and thus should be treated as confidential. It is not an exhortation by the government of Canada to the government of the

[7] Indeed, the arbitrators were not selected for months following UPS's submission of its claim in April 2000, so any undertaking by Canada to the tribunal would have been made long after the State Department classified the Statement of Claim. See Bottari Decl. ¶ 13 & Exh. 4 (Aug. 29, 2000 e-mail from Canadian official to U.S. official stating that a presiding arbitrator had not yet been appointed to the panel hearing UPS's claim); Shrybman Decl., Exh. 1 (Aug. 3 letter from Canadian official stating that the tribunal had not yet been established); Grafeld Decl. at 25-26 (describing withheld submission dated September 11, 2000 from Canada to the tribunal, which was likely one of Canada's first such submissions).

United States to hold the document in confidence.[8]

Neither the recent July 27, 2001 letter from Canada allegedly stating that it wishes the United States to protect the confidentiality of an unspecified selection of documents relating to the UPS arbitration, see Grafeld Decl. at 20-21, nor the oral communications in which Canada allegedly expressed a similar desire, see id.; Letter from Carolyn McKee at 2 (Aug. 30, 2001), attached as Exh. 2 to the Declaration of Bonnie I. Robin-Vergeer ("Robin-Vergeer Decl.") (confirming that the remaining communications from Canada regarding confidentiality, other than the July 27, 2001 letter, were made orally), have any bearing on whether the Statement of Claim was actually "provided to" the United States back in May 2000 with the required expectation of confidential treatment.[9] It bears mention, however, that the timing of the July 27, 2001 letter is highly suspect. The letter was written by the Principal Counsel of Canada's Trade Law Division and sent to the State Department's Legal Adviser—in other words, lawyer to lawyer—more than a year after the Statement of Claim was forwarded to the United States. Not coincidentally, the letter was sent at a time when the State Department was preparing the Grafeld Declaration and when defendants' counsel at the Justice Department was preparing her motion for summary judgment and supporting legal memorandum. Given its timing, the July 27, 2001 letter suggests an effort to shore up for litigation purposes a weak claim that the Statement of

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[8] Moreover, as explained in Section B, below, Canada has no independent interest in maintaining the confidentiality of the UPS Statement of Claim, but has suggested confidential treatment (if, indeed, it has done that) only because UPS wants this document to be kept secret.

[9] As explained in the memorandum in support of plaintiff's motion to strike, the undersigned counsel requested Ms. McKee, defendants' counsel, to furnish a copy of this July 27, 2001 letter, but she declined on the ground that this letter also was classified. Ms. McKee has offered to provide a copy to this Court for in camera review. See Plaintiff's Memorandum in Support of Motion to Strike at 10-11; Robin-Vergeer Decl., Exh. 2, at 1.

Claim was transmitted by Canada in confidence. The letter also represents bootstrapping at its worst: the defendants describe the July 27, 2001 letter as demonstrating that the Canadian government has requested confidential treatment for the Statement of Claim, see Grafeld Decl. at 20-21, but then refuse to provide the actual letter because the letter is classified as well. Robin-Vergeer Decl., Exh. 2.

In short, the UPS Statement of Claim and attachments do not represent the type of information that the Executive Order contemplates as "foreign government information," and the government has failed to establish that Canada provided these documents with an expectation that they would be held in confidence.

2. Section 1.5(d)—"Foreign Relations or Foreign Activities of the United States"

The government also argues that the Statement of Claim satisfies the classification category described in Section 1.5(d) of Executive Order EO 12958. That section provides: "Information may not be considered for classification unless it concerns . . . (d) foreign relations or foreign activities of the United States, including confidential sources." EO 12958, § 1.5(d). While the release of the Statement of Claim may (arguably) have an impact on the foreign relations or foreign activities of the United States (although plaintiff disputes this), the actual information contained in the withheld documents does not concern the foreign relations or foreign activities of the United States. In fact, the information in the Statement of Claim and attachments has nothing to do with the "relations" or "activities" of the United States, here or abroad. Thus, the prerequisite for engaging in a "damage to the national security" analysis, see EO 12958, § 1.2(a)(4)—that the information fall within one of the classification categories of Section 1.5—has not been met.

The State Department's own treatment of this FOIA request confirms that category 1.5(d) is inapposite. The State Department denied plaintiff's request for a fee waiver in connection with this FOIA request. Grafeld Decl., Exh. 2, at 2. Plaintiff appealed that decision administratively, arguing that the "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Id., Exh. 3, at 2 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). The State Department denied that agency appeal, see id., Exh. 4, because the information plaintiff sought had nothing to do with the United States:

> As you can understand, when the public pays, as is true in situations when fee waivers are granted for the processing of Freedom of Information Act requests, it must be shown that the subject matter of the requested records concerns "the operations or activities of the government," and that disclosure is "likely to contribute significantly to public understanding" of those operations or activities.
>
> Based on the information you have provided and other information available to us, it does not appear that you have met this criterion. Your Freedom of Information Act Request seeks "all records submitted to or by" the Department of State relating to the UPS NAFTA arbitration and provides as examples of the records you seek copies of documents filed within the arbitration tribunal, including the initial statement of claim submitted by UPS. It is our understanding that the United States government is not a disputing party to this case nor has the United States government submitted anything to the tribunal in this case. Consequently, any records currently in the possession of the Department that may be responsive to your request would include only documents created by UPS or Canada. Such records reveal nothing about the "operations or activities" of the United States government and disclosure of such records is not likely to contribute significantly to public understanding of those "operations or activities."

Id., Exh. 4, at 1-2 (emphasis added). For the same reason that these records reveal nothing about the operations or activities of the United States, the information in these records similarly does

not "concern" the "foreign relations or foreign activities of the United States."[10]

B. The Release of the UPS Statement of Claim and Attachments Cannot Reasonably Be Expected to Result in Damage to the National Security

1. The Relevance of the Content of Information to be Classified

Even if this Court determines that the UPS Statement of Claim and Attachments fall within one or both of classification categories 1.5(b) and (d), the government nonetheless has failed to establish that the disclosure of these documents "reasonably could be expected to result in damage to the national security," the final requirement for classification specified in section 1.2(a)(4) of the Executive Order. According to the Executive Order:

> "[d]amage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information.

EO 12958, § 1.1(l). In other words, an agency cannot classify a document without taking into account the actual content of that document and the likely consequences of its release. Even the State Department concedes that it classifies information received from foreign governments only when it determines "that the documents are of such significance as to warrant classification." Grafeld Decl. at 19. Here UPS's Statement of Claim contains nothing "sensitive," "valuable," "useful," or even relevant to U.S. national security interests. There is thus no "logical connection between the information and the claimed exemption." Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982); see also Lesar, 636 F.2d at 481, and accordingly, no basis for classifying the documents.

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[10] The search and production costs were sufficiently low that plaintiff was not charged a fee for the processing of its FOIA request at the State Department and accordingly, does not challenge the denial of the fee waiver here.

Because the Statement of Claim contains no sensitive information to redact, the defendant agencies have decided to withhold the document in its entirety, despite FOIA's requirement that agencies undertake to release reasonably segregable portions of withheld documents.[11] See 5 U.S.C. § 552(b); Krikorian, 984 F.2d at 466 ("We have made clear that '[t]he segregability' requirement applies to all documents and all exemptions in the FOIA.'") (citation omitted). In other words, because the actual content of the UPS Statement of Claim furnishes no basis for classification, the State Department has been forced to resort to the very "exemption by document approach" that has been repeatedly condemned by the D.C. Circuit, even in the national security context. See Ray, 587 F.2d at 1197 (citations omitted); see also Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("The focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.") (quoting Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977)).

To be sure, agency declarations provided in the national security context merit "substantial weight," Campbell, 164 F.3d at 30, but as the D.C. Circuit has recognized, "deference is not equivalent to acquiescence." Id. Here, in classifying the Statement of Claim and attachments, the State Department relied only on the harm that it claims would ensue from

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[11] In a supplemental release of documents on August 7, 2001, see Grafeld Decl. ¶¶ 13-14 & Exh. 7, the State Department produced the cover page of the Statement of Claim and publicly available attachments to that document, including a report by the United States General Accounting Office. The Declaration fails to explain why the State Department may permissibly segregate and release the cover page and an attachment to a document Canada allegedly requested be treated as confidential, but must withhold the Statement of Claim itself in its entirety, despite the fact that the document replicates, at least to some extent, information contained in UPS's publicly available Notice of Intent and Notice of Arbitration.

the mere act of disclosing these records, without regard for their contents. See Grafeld Decl. ¶ 22. Yet "an affidavit that contains merely a 'categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.'" Campbell, 164 F.3d at 30 (citing PHE, Inc. v. Department of Justice, 983 F.2d 248, 250 (D.C. Cir. 1993)); King, 830 F.2d at 219 (affidavits cannot support summary judgment if they are "too vague or sweeping").

Moreover, in contrast to previous Executive Orders, the current Executive Order eschews the reflexive classification of "foreign government information." The Executive Order signed by President Carter, for example, specifically states: "Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security." Executive Order 12065, § 1-303, 43 Fed. Reg. 28949 (1978). The superseding Executive Order promulgated by President Reagan maintained this presumption of national security damage. See Executive Order 12356, § 1.3(c), 47 Fed. Reg. 14874 (1982) ("Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security."). Even under these broader classification regimes, the mere transmission of information by a foreign government in confidence, without more, would have been an insufficient basis for classification. As the D.C. Circuit explained in interpreting the meaning of the presumption of damage from disclosure of foreign government information in Executive Order 12065:

> [W]e agree that the fact that certain information has been received from a foreign government "in confidence" does not, by itself, compel automatic classification of the document. Section 1-302 makes clear that, even for foreign government documents, a classification decision requires an additional determination by the

> original classification authority that unauthorized disclosure reasonably could be expected to cause "at least identifiable damage" to the national security.

Carlisle Tire & Rubber Co. v. United States Customs Serv., 663 F.2d 210, 217 (D.C. Cir. 1980); cf. United States Dep't of Justice v. Landano, 508 U.S. 165 (1993) (rejecting presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources under Exemption 7(D)).

But now the presumption that foreign government information should be classified has been eliminated. The Clinton Executive Order abandons the presumption of damage and treats foreign government information no differently than any of the other categories of potentially classifiable material. See EO 12958, § 1.1(d) (definition of foreign government information), § 1.2 (classification standards), § 1.5 (classification categories). As President Clinton declared upon signing the Executive order in April 1995:

> [W]e will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. . . . And, we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.

President's Statement on Signing the Executive Order on Classified National Security Information, 31 Weekly Comp. Pres. Doc. 633 (Apr. 17, 1995); see also Summers v. Department of Justice, 140 F.3d 1077, 1082 (D.C. Cir. 1998) ("Significantly, the newer [Clinton] order is less restrictive, reflecting what it refers to as 'dramatic changes' in national security concerns in the late 1980's following the United States' victory in the Cold War.").

In accordance with President Clinton's commitment to "sharply reduc[ing] the permitted level of secrecy within our Government," President's Signing Statement, supra, Executive Order 12958 does not permit classification if the only basis for classification is that a foreign country

relayed information to the United States with the expectation that the information be held in confidence. That is simply to restate the definition of "foreign government information." Instead, the original classifying authority must determine that disclosure of the information would cause the requisite harm to national security. In this case, there is nothing about UPS's Statement of Claim—a document that undeniably would have been a public record if filed as a lawsuit in a court within the United States and that undeniably would have been subject to release under FOIA if transmitted to the U.S. government by UPS, rather than by Canada—that suggests its disclosure would portend the requisite damage to the national security.[12]

2. The Absence of Any Independent Interest on the Part of Canada or the United States in Keeping the UPS Statement of Claim Secret

a. Public Statements by Canada and the United States in Support of Transparency

It is undisputed that Canada has no independent interest in keeping the Statement of Claim and attachments confidential; only UPS has that interest. The only reason Canada has asked the U.S. government to hold the claim in confidence is because UPS has asked the arbitral tribunal for a confidentiality order regarding these documents. Grafeld Decl. at 19-20. Indeed,

[12] In Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998), the Ninth Circuit held that a letter transmitted in confidence from the British Foreign Office to the United States Justice Department was improperly classified because the letter was "innocuous" and the supporting agency declarations, as does the Grafeld Declaration here, focused only on the possible damage that could be caused by the act of disclosing a letter between foreign governments, without regard for the letter's particular contents. Indeed, the case for Exemption 1 is even weaker here than in Weatherhead because UPS's Statement of Claim and attachments were not even prepared by Canada. The Ninth Circuit's decision in Weatherhead, however, was vacated as moot by the Supreme Court. See United States v. Weatherhead, 528 U.S. 1042 (1999).

according to defendants, Canada has opposed UPS's request for confidentiality.[13] By its own admission, Canada has no interest in keeping UPS's Statement of Claim confidential. In an August 3, 2000 letter, Sylvie Tabet, Counsel, Canada Trade Law Division, responded to a request for release of UPS's Statement of Claim by Steven Shrybman, counsel to the Canadian Union of Postal Workers and the Council of Canadians, who petitioned to intervene in the UPS arbitration. Shrybman Decl. ¶ 1. She explained in part:

> 1. To date, no tribunal has been established to hear this dispute. Consequently, no submissions or pleadings have been filed except for the Statement of Claim. I wrote to counsel for UPS on several occasions to request that the Statement of Claim be made public. Unfortunately, to date, UPS has opposed the release of the Statement of Claim. This matter will be raised with the Tribunal once it is constituted.
>
> 2. As noted above, UPS takes the position that its Statement of Claim should be treated as confidential as it allegedly contains confidential business information.

Shrybman Decl. ¶ 2 & Exh. 1 (emphasis added). This letter makes clear that the reason Canada has not released the Statement of Claim to the public is because UPS has opposed its release and not because Canada has any independent interest in its confidentiality.

The letter also makes clear that UPS wishes its Statement of Claim to be kept secret only because it believes that the pleading contains business information that UPS would prefer to keep confidential. Yet neither the State Department nor the USTR has asserted FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), and UPS has not intervened in this case to

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[13] The defendants' memorandum represents that Canada has opposed UPS's request for confidentiality, see Defendants' Memorandum at 3, 16 n.6, though the Grafeld Declaration does not actually describe Canada's position on UPS's request. See Grafeld Decl. at 19-20.

assert that the Statement of Claim contains confidential business information. The applicability of Exemption 1 to FOIA, which covers records authorized "to be kept secret in the interest of national defense or foreign policy," § 552(b)(1), should not be determined based on the preferences of a private U.S. corporation whose only interest lies in protecting its commercial information. By acceding to Canada's alleged request for confidentiality, which, if made, was based only upon UPS's request for confidentiality, the State Department, in essence, has transformed UPS into an original classification authority.

In a number of different forums, both the United States and Canadian governments have expressed their strong commitment to the openness and transparency of Chapter 11 investor-state disputes—culminating in an authoritative interpretation issued this past July of NAFTA Chapter 11 that would require the public release of precisely the kind of documents at issue here. See Free Trade Commission Interpretations, July 31, 2001 (attached to Defendants' Motion to File Omitted Exhibit). The refusal to release the UPS Statement of Claim is at odds with that commitment.

The Canadian Union of Postal Workers and the Council of Canadians have petitioned to intervene in the UPS arbitration. Shrybman Decl. ¶ 1. In its response to that petition, Canada reiterates that it "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." Shrybman Decl., Exh. 3 ¶ 6, at 1.[14] Canada claims that it supports greater openness in Chapter 11 proceedings and that it is pressing UPS for

[14] The significance of the fact that this submission, along with several others to the UPS arbitral tribunal, have not been subject to any so-called "confidentiality undertaking" and, in fact, are in plaintiff's possession, is discussed below.

greater transparency in this arbitration. Shrybman Decl. ¶ 3. The head of Canada's NAFTA Chapter 11 Unit of the Trade Law Division has reaffirmed that if a general principle of confidentiality for commercial arbitrations exists at all, "it should have no application in the context of NAFTA Chapter 11 arbitral proceedings." Fulvio Fracassi, NAFTA Chapter 11: Confidentiality and NAFTA Chapter 11 Arbitrations, 2 Chi. J. Int'l L. 213, 213 (2001).

Statements by the United States in favor of transparency in these NAFTA Chapter 11 proceedings have been equally robust. In the Statement of Administrative Action submitted by the President to Congress during legislative consideration of NAFTA, the Administration argued that "[o]ne of the NAFTA's key achievements is its extensive provisions providing for transparency in the promulgation of rules and regulations. Proposed changes in laws, regulations, procedures and administrative rulings must generally be published in advance, and an opportunity provided for interested parties to comment." H.R. Doc. No. 103-159, Vol. 1, at 687 (1993); id. at 700 ("In virtually every chapter, specific and open procedures are required."). The United States has pursued a policy of openness in Chapter 11 proceedings to which it is a party and has recognized, as it must, that documents submitted to Chapter 11 tribunals are subject to FOIA. See 5 U.S.C. § 3312(a) (nothing in NAFTA amends or repeals any existing federal statutes).

In the pending Methanex Corp. v. United States Chapter 11 case, for example, see Bottari Decl. ¶ 4(c) (summarizing Methanex's claim), the United States entered into an agreement, later entered as a procedural order by the NAFTA tribunal, which permits the Statement of Claim and other documents to be released into the public domain by either party, subject to redaction of trade secret information. See Methanex Corp. v. United States, Procedural Order Regarding

Disclosure and Confidentiality ¶ 3, at 2 (Sept. 7, 2000) (attached as Exhibit 1 to the Bottari Declaration); see also Bottari Decl. ¶ 7. The preamble to the Order declares:

> Respondent United States of America believes that arbitrations under Chapter 11 of the North American Free Trade Agreement (the "NAFTA") should be fully transparent, with immediate public access to all documents submitted to the Tribunal (except, where appropriate, for information that is exempt from disclosure by law).

Bottari Decl. ¶ 7 & Exh. 1, at 1. The Order also specifically contemplates that appropriate disclosures will be made by the United States pursuant to FOIA. Id., Exh. 1 ¶ 13, at 4-5.[15] Likewise, it has been reported that the United States has released under FOIA submissions made to the tribunal considering the Loewen Group, Inc. v. United States Chapter 11 claim against the United States. International Institute for Sustainable Development, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment 52 (1999), available at http://www.iisd.org/trade/chapter11.htm; William Glaberson, Nafta Invoked

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[15] Similarly, in a submission to the Methanex tribunal last year, the United States argued, in the context of supporting petitions for amicus curiae status:

> Section B [of NAFTA] provides support for the argument that the Parties to the NAFTA intended investor-State dispute resolution under Chapter Eleven to differ significantly from traditional private commercial arbitration. Indeed, unlike private arbitration, Chapter Eleven arbitration is subject to both Article 1126(10) and Article 1137(4) (together with Annex 1137.4), which demonstrate that the State Parties expected the substance of each Chapter Eleven dispute and most awards to be made available to the public.

Statement of Respondent United States of America Regarding Petitions for Amicus Curiae Status, at 12 (Oct. 27, 2000) (emphasis added); see also Submission of the Government of Canada ¶ 2 (Nov. 10, 2000) (supporting petitions for amicus curiae status and reiterating Canada's support for "the open and public conduct of arbitral hearings and likewise, the disclosure of arbitral submissions and Tribunal orders and awards to the general public to the fullest extent possible"). Both of these governmental submissions in the Methanex Chapter 11 arbitration are available at http://www.naftaclaims.com.

to Challenge Court Award in U.S., N.Y. Times, Jan. 28, 1999, Section C-4, at 6; see also Bottari Decl. ¶ 4(d) (summarizing Loewen's claim).

b. The July 31, 2001 NAFTA Chapter 11 Clarification on Transparency Adopted by All Three NAFTA Nations

The troubling absence of transparency and opportunity for public participation in Chapter 11 disputes is not compelled either by NAFTA or the UNCITRAL Arbitration Rules under which this arbitration is proceeding. The UNCITRAL arbitration rules address the confidentiality of oral hearings, but not the confidentiality of pleadings and other submissions to the tribunal. See UNCITRAL Art. 25(4) ("Hearings shall be held in camera unless the parties agree otherwise."). The three NAFTA signatory nations recently recognized exactly that. On July 31, 2001, the Free Trade Commission, a body comprised of cabinet-level representatives from the three NAFTA countries and charged with the responsibility of supervising the implementation of NAFTA and resolving disputes regarding the agreement's interpretation or application, see NAFTA Art. 2001, issued an interpretation of NAFTA Chapter 11 transparency that bears directly on this FOIA request. The clarification states in relevant part:

> 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 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.[16]
>
> 2. In the application of the foregoing:

[16] NAFTA Annex 1137.4, incorporated by reference in Article 1137(4), states that when either the United States or Canada is the disputing Party, either they or the disputing investor may make an arbitration award public, whereas, where Mexico is the disputing Party, the applicable arbitration rules would apply to the publication of an award.

> (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;
>
> . . . .
>
> (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

See Free Trade Commission Interpretations, July 31, 2001 (attached to Defendants' Motion to File Omitted Exhibit); see also Joint Statement of the NAFTA Free Trade Commission at 2 (July 31, 2001), available at http://192.239.92.165/releases/2001/07/01-59.htm; News Release, Pettigrew Welcomes NAFTA Commission's Initiatives to Clarify Chapter 11 Provisions (Aug. 1, 2001), available at http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp#Notes.

Seemingly, this controlling interpretation of Chapter 11—in which all three NAFTA nations affirmatively commit to releasing precisely such documents as the UPS Statement of Claim—would show that disclosure of the Statement of Claim not only would not cause damage "to the national defense or foreign relations of the United States," but would advance the very promise publicly announced by the United States government. Defendants' only answer to this is that the UPS Statement of Claim and withheld attachments fall within exception (iii) quoted above for "information which the Party must withhold pursuant to the relevant arbitral rules" because Canada allegedly gave an "undertaking" to the tribunal not to disclose some unspecified

selection of documents relating to the arbitration pending a ruling by the tribunal on UPS's request for a confidentiality order. Defendants' Memorandum at 16 n.6; Grafeld Decl. at 20.

Leaving aside the fact that the Grafeld Declaration fails to satisfy Federal Rule of Civil Procedure 56(e) in attempting to establish that Canada made any such undertaking, see Plaintiff's Memorandum in Support of Motion to Strike at 8, the existence of such an undertaking would fail to establish that the Statement of Claim constitutes information that the Party "must withhold" under the relevant arbitral rules. No arbitral rule is cited (or exists) that requires Canada to keep the Statement of Claim confidential, and there is no order by the arbitral tribunal that demands confidentiality. The absence of any agreement or understanding in this arbitration regarding the confidentiality of submissions to the tribunal is further evidenced by the fact that the petition to intervene in the arbitration submitted by the Canadian Union of Postal Workers and the Council of Canadians and the responses to that petition submitted by UPS, Canada, the United States, and Mexico, apparently have not been subject to any confidentiality order or "undertaking," and, in fact, have been shared with the plaintiff. Shrybman Decl. ¶ 6.

Even if Canada's alleged "undertaking" to keep some fraction of the arbitration documents confidential constituted an "arbitral rule" (which it does not), and even if the tribunal ultimately rules that the UPS Statement of Claim should be kept confidential by the disputing parties (which it has not), these events do not govern whether the United States—which is not even a party to the UPS arbitration—is required to release the document under FOIA, a federal statute. Regardless of whether arbitrations do or should proceed behind closed doors, federal courts in the United States have reflected their disdain for "secret law," PHE, 983 F.2d at 252; Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 556 (1st Cir. 1992),

by refusing to permit participants in arbitration proceedings to withhold submissions or pleadings filed in these proceedings from disclosure.

In Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385 (D.D.C. 1992), for example, Public Citizen sought access under FOIA to the USTR's submissions to panels convened pursuant to the General Agreement on Tariffs and Trade (GATT) and to GATT panel decisions. The USTR denied the request, arguing that GATT rules prohibited disclosure. The district court rejected that argument and ordered disclosure under FOIA. As the court observed: "The GATT provisions themselves do not justify defendant's withholding either the panel submissions or the panel decisions. The GATT procedural rules favor confidentiality of these materials, but do not require it." Id. at 388. In any event, the court reasoned, the GATT (like NAFTA) is not a Senate-ratified treaty and therefore lacks the status of statutory law. "The provisions of FOIA, a federal statute, thus prevail over GATT, and the panel submission and decision in the possession of federal agencies must be released promptly upon receipt of a proper FOIA request unless protected by a specific exemption under 5 U.S.C. § 552(b)." Id.

Likewise, in United States v. Panhandle Eastern Corp., 118 F.R.D. 346 (D. Del. 1988), a federal district court allowed the disclosure of documents relating to an international arbitration proceeding that were sought in a civil discovery dispute. In that case, the United States sought discovery of documents related to an international arbitration held in Switzerland. The defendant requested a protective order, arguing that the rules of the International Chamber of Commerce required that arbitration documents be kept confidential. The court denied the protective order, finding that the rules were not applicable, that there was only an undocumented

"general understanding" among the parties to the arbitration that arbitration documents would be kept confidential, and because the party resisting disclosure fails to provide specific examples of the harm that disclosure would entail. Id. at 350. Likewise, a "general understanding" regarding confidentiality, if that, is the very most that exists in the UPS arbitration, as there is neither a confidentiality order nor a confidentiality agreement restricting the release of documents, see Shrybman Decl. ¶ 4, and a number of submissions to the panel are publicly available. And similarly, the U.S. government's arguments regarding the harm that would ensue from disclosure here fall equally flat.

Finally, the government contends that disclosure of the Statement of Claim can reasonably be expected to damage the national security because, as a result of this FOIA request, the Canadian government has declined to provide the United States a copy of a document needed to defend the United States' interests in another investor-state arbitration, but has allowed U.S. officials only to view the document. Defendants' Memorandum at 16 (citing Grafeld Decl. at 21-22). Again, plaintiff has moved to strike this portion of the Grafeld Declaration for failure to comply with Rule 56(e). See Plaintiff's Memorandum in Support of Motion to Strike at 12-13. Even assuming that the Declaration is sufficient to establish that this withheld-document incident occurred, it hardly establishes that "disclosure of the information" would damage the national security or relations between the United States and Canada, but instead suggests further bootstrapping. If the allegation is true, Canada chose not to provide the United States a copy of a document before any disclosure has been ordered in this case. NAFTA was adopted with FOIA as a backdrop; all three NAFTA nations have known that FOIA governed the disclosure of information in U.S. agency hands long before plaintiff made the instant request. Indeed, as noted

above, the United States has already released documents pursuant to FOIA in other Chapter 11 disputes, so if Canada was going to withhold a document out of fear that it would become subject to FOIA, that fear should have materialized before plaintiff asked for the UPS Statement of Claim. In any case, disclosure of the UPS Statement of Claim cannot be expected to diminish the United States's ability to obtain similar documents from Canada in the future, because, as explained above, Canada is required under NAFTA to provide the other NAFTA signatories with copies of pleadings filed in Chapter 11 arbitrations. See NAFTA Art. 1127.

Thus, the argument for national security damage based on the withheld document proves far too much: if Canada is skittish regarding the effect of a Freedom of Information law in the United States, that apprehension obviously could affect its willingness to provide the United States any document on any subject at any time. That Canada allegedly has chosen, in advance of any court-ordered disclosure, to withhold from the United States a copy of a document involving some unrelated matter cannot serve to establish damage from the release of the Statement of Claim here. To hold otherwise is effectively to give Canada the power to veto the operation of FOIA and override the will of Congress—even in cases, such as here, where the withheld documents concern matters of significant public interest, but are otherwise innocuous.

Thus, this Court should grant summary judgment for plaintiff on this issue and order defendants to produce the UPS Statement of Claim and the withheld attachments.

II. THE STATE DEPARTMENT AND USTR'S SEARCHES FOR RESPONSIVE RECORDS WERE INADEQUATE.

A. The Adequacy of the Searches Conducted by Defendants

"To win summary judgment on the adequacy of a search, the agency must demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant

documents.'" Nation Magazine v. United States Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (citations and internal quotation marks omitted); accord Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Summary judgment would require "an affidavit reciting facts which enable the District Court to satisfy itself that all appropriate files have been searched." Church of Scientology of California v. IRS, 792 F.2d 146, 151 (D.C. Cir. 1986). Such an affidavit "would presumably identify the searched files and describe at least generally the structure of the agency's file system which makes further search difficult." Id. An appropriate affidavit also would "set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials . . . were searched." Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); accord Western Center for Journalism v. IRS, 116 F. Supp. 2d 1, 8 (D.D.C. 2000); see also Steinberg v. United States Dep't of Justice, 23 F.3d 548, 551-52 (D.C. Cir. 1994) (finding agency declaration inadequate for failing "to describe in any detail what records were searched, by whom, and through what process"). "[I]f the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam) (citation omitted).

Neither the Grafeld Declaration nor the Harrison Declaration complies with these standards. The Harrison Declaration for USTR is utterly devoid of detail. It simply states that Ms. Harrison sent a memorandum to all agency individuals with responsibility regarding NAFTA and investment issues and asked for documents responsive to plaintiff's FOIA request. Harrison Decl. ¶¶ 6-7. The declaration does not describe the agency's record systems; the names of the individuals, or, at least, the departments or divisions of the agency searched; or whether all

of the individuals who received the memorandum actually conducted searches or even acknowledged or responded to the memorandum. The low number of responsive documents produced by the agency responsible for managing the United States government's trade policy—three, in all—alone suggests that the search conducted was inadequate. In any event, the Harrison Declaration is insufficient to establish the adequacy of the USTR search.

The State Department's search was equally deficient. The Grafeld Declaration states that a search was conducted only of the Office of the Legal Adviser, the source of all documents ultimately retrieved by the Department, and the Bureau of Western Hemisphere Affairs, which located no responsive documents. Grafeld Decl. ¶ 11. No search was actually conducted of the Bureau of Economic and Business Affairs ("Bureau") because the Bureau stated, in response to a query, that it did not have responsive documents. Id. In addition, because the Bureau stated that the Office of the Legal Adviser would be the repository for responsive documents, the State Department also declined to search the Central Foreign Policy Records. Id.

The Grafeld Declaration is insufficient in form and substance. As to form, the Declaration fails to describe even generally the structure of the State Department's extensive record systems, to set forth the search terms it used for the search, or to describe the type of search performed. The agency declaration fails to describe in any detail "what records were searched, by whom, and through what process." Steinberg, 23 F.3d at 551-52. As for substance, the State Department, at a minimum, should have conducted an actual search of the Bureau's files, the Central Foreign Policy Records, and the record systems maintained for the American Embassies in Canada and Mexico and the U.S. Mission in Geneva.

The inadequacy of the agencies' respective searches is demonstrated by the fact that in

response to an identical FOIA request made of the United States Department of Commerce, that agency produced two responsive State Department documents that contained directions that they be forwarded on to USTR. Yet neither the State Department nor USTR produced or identified these documents in response to the FOIA requests at issue here. See Bottari Decl. ¶¶ 10, 14 & Exhs. 2, 5.

The first document is a cable dated April 26, 2000 from the American Embassy in Ottawa to the State Department in Washington, D.C., the American Embassy in Mexico, the Department of Commerce, the U.S. Mission in Geneva, and to an "ALCAN" collective (the members of this collective are not listed). The cable discusses UPS's Claim Against Canada, which had been filed on April 19, 2000. The cable directs "State" to "pass" the cable on to USTR. Bottari Decl. ¶ 14(a) & Exh. 5. The second is a cable dated January 18, 2000 from the American Embassy in Ottawa to the State Department in Washington, D.C., the American Embassy in Mexico, the U.S. Mission in Geneva, and to an "ALCAN" collective (the members of this collective are not listed). The cable discusses UPS's plan to submit notice on January 18 of its intent to file a Chapter 11 claim against Canada. The cable directs "State" to pass the cable on to USTR. Bottari Decl. ¶ 14(b) & Exh. 5.

That the State Department and the USTR failed to retrieve these cables strongly suggests that their searches were inadequate. See, e.g., Krikorian, 984 F.2d at 468 (remanding for further consideration of the adequacy of the State Department's search where the plaintiff found responsive Department documents that the Department had failed to locate); Weisberg, 705 F.2d at 1351 ("[E]vidence that relevant records have not been released may shed light on whether the agency's search was indeed adequate."); Southam News, 674 F. Supp. at 889-91 (the agencies'

failure to produce a document created by one agency and sent to the other indicates that their searches were not conducted in a manner reasonably calculated to locate responsive documents).

The Harrison Declaration is so conclusory that plaintiff cannot begin to suggest why USTR failed to uncover these cables. Review of the Grafeld Declaration, on the other hand, suggests that the State Department failed to identify these documents (and presumably others) in part because of its failure to search the Bureau's record system, Central Foreign Policy Records, and the record systems for the American Embassies in Canada and Mexico and the U.S. Mission in Geneva. As the Grafeld Declaration states, the Central Foreign Policy Records is the principal records system of the Department of State. Grafeld Decl. ¶ 10. The Declaration offers no explanation for the Department's failure to search there, other than the fact that the Office of the Legal Adviser was expected to contain responsive documents. Id. ¶ 11. Yet FOIA law is clear that an agency cannot limit itself to searching only the record system "most likely" to contain the requested information. Oglesby, 920 F.2d at 67; see also Campbell, 164 F.3d at 28 ("[A]n agency 'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'"). Detailed State Department descriptions of its Central Foreign Policy Records suggest that the file would have been a promising source of responsive documents, as it includes "ALL documents of a substantive nature . . . that establish, discuss, or define foreign policy" and includes telegrams, written documents, correspondence, memoranda, and the like. See U.S. Department of State Records Disposition Schedule, Chapter 6, Bureau of Administration Records (describing the Central Foreign Policy File), available at

http://www.foia.state.gov/schedules/a06.pdf.[17] Presumably, this record system would have included cables such as those produced by the Commerce Department.

So, too, was the State Department's failure to conduct an actual search of the Bureau's documents unreasonable. A number of the files maintained in the Economic and Business Affairs Records concern NAFTA, telegrams and correspondence regarding NAFTA, and international trade issues. See U.S. Department of State Records Disposition Schedule, Chapter 20, Economic and Business Affairs Records, available at http://www.foia.state.gov/schedules/a20.pdf.

Finally, the fact that the American Embassy in Ottawa generated both of the above cables and sent them in both instances to the American Embassy in Mexico and the U.S. Mission in Geneva (plus whatever other entities or divisions are included in the "ALCAN" collective), suggests that a search "reasonably calculated to uncover all relevant documents," at a minimum, would have encompassed these embassies/missions.

Accordingly, this Court should order both defendants to conduct new and more comprehensive searches for responsive records.

B. The State Department Date-of-Request Cut-Off

Finally, the search conducted by the State Department was unreasonable as a matter of law because it applied an arbitrary search cut-off date of October 25, 2000, the date of plaintiff's

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[17] The State Department's Frequently Asked Questions section of its FOIA web site states: "The Central Foreign Policy file contains all telegrams sent or received by the State Department and selected internal memoranda, written correspondence, diplomatic notes, congressionals, memorandums of conversations and documents from other agencies." U.S. Department of State, Freedom of Information Act Electronic Reading Room, FAQs (Frequently Asked Questions) 3 available at http://www.foia.state.gov/faqs.asp ("State Department FAQs").

FOIA request, see Grafeld Decl. ¶ 5 & Exh. 1, even though the Department did not actually process the search until almost eight months later, on June 11, 2001. See Grafeld Decl. ¶ 10 & Exh. 6. The Grafeld Declaration itself does not acknowledge that the State Department applied a date-of-request cut-off, but in its first letter to Global Trade Watch acknowledging its FOIA Request, dated February 14, 2001, the State Department stated:

> The cut-off date for retrieving documents is the date of the requester's letter. Accordingly, no documents which originated after the date of your letter will be retrieved.

Grafeld Decl., Exh. 2, at 1.[18] This statement accords with the State Department's general policy, as stated on its web site: "The Department has established that the cutoff date for retrieving records is the date of the initial request letter. . . . [R]equesters who want to 'update' a request in order to receive records created after the date of the initial request must file a new request." State Department FAQs 5, available at http://www.foia.state.gov/faqs.asp. In other words, requesters who want documents with dates that at least approach the date their FOIA requests are processed have to return to the end of the State Department's lengthy FOIA request queue. Moreover, even if the requester continually submits new requests, it can never obtain the agency's current records on a topic because the cut-off will always exclude the most recent records from the agency's response.

The State Department's date-of-request cut-off policy cannot be squared with the D.C. Circuit's decision in McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983), aff'd in relevant part and

[18] This State Department letter was sent after plaintiff filed the complaint in this action on January 18, 2001.

vacated in part upon reh'g, 711 F.2d 1076 (D.C. Cir. 1983).[19] There the court addressed the CIA's use of a date-of-request cut-off to exclude from its FOIA response records that were created after the date of the FOIA request. The court rejected the CIA's argument that records created after the date of the request are not subject to FOIA. Id. at 1102-03. Even though the court took for granted the fact that the CIA—like the State Department here—was experiencing inordinate delays in processing FOIA requests—the court held that the cut-off date was improper unless the agency could show that it was not feasible for the agency to use a later cut-off date that more closely approached the date of processing. See id. at 1104-05. Indeed, the extensive delay between the date of the request and the date of the CIA's response rendered the agency's cut-off policy that much more unreasonable. Id. at 1103.

The court explained that the "same standard of reasonableness that has been applied to test the thoroughness and comprehensiveness of agency search procedures is equally applicable to test the legality of an agency rule establishing a temporal limit to its search efforts." Id. at 1101. In other words, it explained, a date-of-request cut-off "is only valid when the limitation is consistent with the agency's duty to take reasonable steps to ferret out requested documents." McGehee emphasized that "the agency bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation." Id.

The State Department did not deviate from its cut-off policy in this case; every document it produced predated October 25, 2000. See Defendants' Memorandum at 6 n.2 (listing the

[19] The validity of the State Department's date-of-request cut-off policy is also being challenged in an appeal now pending in the D.C. Circuit, which will be argued on November 13, 2001. See Public Citizen v. Department of State, No. 00-5387 (D.C. Cir.).

documents released); Bottari Decl. ¶ 16. Yet the Department failed to acknowledge, much less attempt to justify, the use of this cut-off in this case. The State Department's reliance on a generic date-of-request cut-off is particularly unreasonable here, where all twenty documents it identified as responsive, see Grafeld Decl. ¶ 10 & Exh. 6, came from a single source, the Office of the Legal Adviser. The Department searched the files of the attorneys preparing and receiving the submissions in the UPS and other Chapter 11 arbitrations and then arbitrarily stopped at October 25, 2000. Its refusal to search the remainder of the file for documents created in the days leading up to June 11, 2001—the date the agency finally responded—cannot be justified.

Nor is there any doubt that the Office of the Legal Adviser (and possibly other offices) has responsive records created after October 25, 2000. For example, the May 1, 2001 petition to intervene submitted by the Canadian Union of Postal Workers and the Council of Canadians, as well Canada's and UPS's May 28, 2001 responses to that petition, see Shrybman Decl. ¶¶ 1, 5 & Exhs. 2, 3, are responsive to the FOIA request and were created between October 25, 2000 and June 11, 2001. The same can be said for two procedural orders issued by the UPS arbitral tribunal on April 17, 2001. See http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp#UPS. Given the flurry of submissions to the tribunal in the past several months, and inevitable correspondence, memoranda, and cables regarding these submissions, the State Department likely has a number of responsive documents that it has arbitrarily withheld pursuant to its date-of-request cut-off policy.

Accordingly, in addition to ordering the State Department and USTR to expand the scope of their searches, this Court should order the State Department to search for responsive records that were created up to the date of its new search. If the Court declines to order the State

Department to conduct a more comprehensive search, then it should at least order it to conduct a search of the same records systems for documents created up to the date of this new search.

CONCLUSION

For the foregoing reasons, this Court should deny defendants' Motion for Summary Judgment and grant plaintiff's Cross-Motion for Summary Judgment. Accordingly, this Court should (1) order that the Department of State and the USTR release the UPS Statement of Claim and the six withheld attachments (Document Nos. L5A/T1, L5B, L5C, L5D, L5E, L5F, and L5G); (2) order the State Department and the USTR to conduct new and more comprehensive searches for responsive records; and (3) order the State Department to search for records created up to the date of its new search.

Respectfully submitted,

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