24 September 2014

Canadian Judicial Council
Ottawa, Ontario, K1A 0W8
By email to info@cjc-ccm.gc.ca

Dear Sir/ Madam:

Re: Paul Crampton CJC

1. I wish to make a complaint about the conduct of Paul Crampton CJC.

2. The essence of the complaint is that Crampton CJC, by taking carriage of the action in *Hupacasath v Canada*¹ and by his evident position on individual impartiality due to pre-appointment public commentary, left a plausible basis for a reasonable, fair minded and informed person to conclude that Crampton CJC used his office to intercept a politically-sensitive case regarding which he was not impartial. Whatever administrative reasons may be offered to explain Crampton CJC’s decisions on case assignment and/ or recusal in the case, I submit that a plausible basis would remain in the circumstances for the reasonable person to suspect partiality.

3. The conduct relates to Crampton CJC’s decision in *Hupacasath v Canada*. I do not wish to challenge that decision in any way. I understand that the decision is under appeal and have no intention to affect the appeal.

4. Broken down, my complaint is that — on the exacting standard of impartiality that Crampton CJC applied to me as an expert for the Hupacasath First Nation (HFN) — it was inappropriate for him to have assigned the case to himself or to have not disqualified himself on grounds of partiality. In particular:

(a) a reasonable, fair minded, and informed person would consider it inappropriate for a judge to have assigned a case to himself or to have not disqualified himself where

(b) the judge is clearly of the view that an individual is partial where he or she, before being appointed as an expert whose duty is to assist the court impartially, engaged in public commentary in a relevant area of law and policy and

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¹ *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 (CanLII) [*Hupacasath v Canada*].
(c) the judge engaged in similarly relevant public commentary, taking a position broadly consistent with that of the Respondent in the proceeding, within a similar period prior to his judicial appointment.

5. Crampton CJC expressed the position in *Hupacasath v Canada* that an individual (myself) lacks impartiality where the individual, before serving as an expert, engaged in public commentary in a relevant area of law and policy. In particular, Crampton CJC concluded that I lacked impartiality on the basis that I engaged in commentary on investor-state arbitration, including in the Canada-China foreign investment promotion and protection agreement (CCIPPA), as aspects of Canada’s foreign investment law and policy. During the relevant portions of my cross-examination, in summary, I testified about this commentary that I thought investor-state arbitration should be judicialized to ensure its legitimacy; that Canada should follow Australia by not including investor-state arbitration in future trade agreements; that the CCFIPPA should undergo further public study before being ratified; that the lack of safeguards of judicial independence in investor-state arbitration may operate to Canada’s disadvantage in actual arbitrations; that investor-state arbitration should be reformed to resemble other international courts and tribunals; that I had opposed publicly the CCFIPPA out of a general concern about investor-state arbitration and a specific concern that Canada should not commit to investor-state arbitration when in the capital-importing position under the treaty; and that I felt obliged to speak out publicly on the CCFIPPA so that decision-makers were informed about the concerns and because I was one of few specialized researchers, outside of government and large law firms, who was in a position to understand the treaty and go on record about it.

6. This commentary and testimony was the primary basis, at least, relied on by Crampton CJC to conclude that I lacked impartiality.

7. By comparison, before his appointment to the Federal Court in 2009 (and then as its chief justice in 2011), then-Mr. Crampton engaged in public commentary relating to the same area of law and policy – that governing the treatment of foreign investors in Canada – on which I had commented. For example, Crampton CJCJ commented that Canada’s foreign investment law was part of an “outdated” and “protectionist” domestic economy; warned governments not to erect “fences that shield local market participants from global competitors”; encouraged the federal government to adopt competition law reforms undertaken in Australia; argued for reform of Canadian investment law to reduce the federal government’s role in reviewing foreign takeovers of Canadian companies; encouraged the federal government to make it more difficult for the Investment Review Division of Industry Canada “to extract undertakings” from foreign companies that purchase Canadian firms; and described the exercise of Industry Canada requiring foreign investors to give undertakings associated with a foreign takeover as “embarrassing” for Canadian lawyers who advise foreign investors. At the
time, Mr. Crampton was a practicing lawyer in competition and investment law who advised companies involved in foreign takeovers of Canadian firms.

8. A relevant difference between Mr. Crampton’s pre-appointment commentary and my own was that we adopted broadly opposite positions. Crampton CJC called for legal reforms that would advantage foreign companies by removing or limiting restrictions on foreign takeovers of Canadian companies. I called for reforms that would withhold from foreign investors a right of access to investor-state arbitration that is not available to Canadian companies and citizens. These positions are roughly consistent with the general position of the federal government and the Hupacasath First Nation, respectively, in the *Hupacasath v Canada* proceeding.

9. While this complaint may appear to be merely a grievance about the pot calling the kettle black, I submit that there is a fundamental principle of judicial independence at stake. An informed observer would be aware from an early stage that the action in *Hupacasath v Canada* involved matters of public controversy about foreign investment law and policy in Canada. With this in mind, the accumulation of factors identified in paragraph 4 above provided a plausible basis for disqualification and went beyond a mere trifling concern that Crampton CJC could not judge impartially. The factors outlined in paragraph 4 called for Crampton CJC – especially in light of his own approach to individual impartiality due to pre-appointment public commentary – to have assigned the *Hupacasath v Canada* case to another judge or to have disqualified himself from the case because it involved controversial matters of Canada’s foreign investment law and policy.

I. Crampton CJC’s conduct: case assignment/ non-recusal

10. I assume that Crampton CJC in effect assigned the *Hupacasath v Canada* case to himself based on my understanding of a chief justice’s powers of case assignment at a first-instance court. It is my understanding that cases at the Federal Court would be assigned to individual judges by an administrative officer under the direction and supervision of the chief justice of the court. I do not wish to challenge the general case assignment role of a chief justice in this respect. Yet I think it important that the public not be given a plausible basis to suspect that a chief justice has used his office, whether via case assignment powers or otherwise, to take carriage himself of a politically-sensitive case in circumstances where he may reasonably be perceived to lack impartiality.

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2 For example, the case dealt largely with the Canada-China FIPPA which had attracted public attention after the release of its text in late September 2012, the federal government reportedly received an exceptional number (tens of thousands) of submissions in the public consultation for the FIPPA’s environmental assessment, and the FIPPA has since not been ratified reportedly due to disagreement in federal Cabinet.

3 Canadian Judicial Council, *Ethical Principles for Judges*, “Impartiality” (Principles 1 to 3).
11. This is commensurate with general principles and commentary in the Canadian Judicial Council’s Ethical Principles for Judges that, for example, “judges have the duty to uphold and defend judicial independence”, that “[j]udges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons”, and that a judge “should disqualify him or herself if aware of any interest or relationship which, to a reasonable, fair minded and informed person, would give rise to reasoned suspicion of lack of impartiality”.4

12. I would not ordinarily question a decision of a chief justice or his office to assign a case to the chief justice or not to disqualify the chief justice. What distinguishes the present case – and takes it beyond an expectation of perfection or some other unrealistic standard5 – is that Crampton CJC adopted a standard of impartiality in evaluating my impartiality as an expert that called for him to take greater care regarding his own conduct in this case. Put differently, the usual considerations in case assignment are inadequate where a chief justice himself may reasonably be said to be partial based on the standard of impartiality to which he clearly adheres.6 As elaborated below, Crampton CJC clearly took the position in Hupacasath v Canada that pre-appointment public commentary in a relevant area of law or policy gives rise to partiality.

II. Crampton CJC’s evident standard of impartiality

13. In Hupacasath v Canada, I provided a pro bono opinion on international investment law after having been selected as an expert by the Hupacasath First Nation. Crampton CJC rejected my evidence largely on the basis that I was partial. I do not wish to challenge his characterization of my substantive evidence or any other aspect of his decision in this complaint. I point to his decision in the case only to identify Crampton CJC’s approach to impartiality on the part of an individual, whether expert or judge, whose overriding duty to the court is to act impartially. In turn, his decision provides evidence to the reasonable observer of Crampton CJC’s own state of mind on how pre-appointment commentary undermines impartiality.

14. Crampton C.J.C. characterized my expert evidence in these terms:7

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5 Canadian Judicial Council, Ethical Principles for Judges, “Impartiality” (Comment A.4).
6 See generally Canadian Judicial Council, Ethical Principles for Judges, …. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment….
7 Hupacasath v Canada, supra note 1, paras. 37-38 and 42. The full text of the decision is attached as Appendix A.
The Respondents submitted that Mr. Van Harten’s evidence should be accorded reduced weight because he has been a vocal critic of the type of investor state arbitration provisions that are included in the CCFIPPA and because he has frequently and publicly voiced his opposition to ratification of the CCFIPPA.

Given that HFN acknowledged and did not dispute these allegations, I am inclined to agree with the Respondents’ position, primarily on the basis that Mr. Van Harten’s ability “to assist the Court impartially,” as required by the Court’s Code of Conduct for Expert Witnesses, SOR/2010-176, would appear to be somewhat compromised.

Given Mr. Van Harten’s acknowledged partiality, and given that I generally found Mr. Thomas to be more neutral, factually rigorous and persuasive, I generally accepted his evidence over Mr. Van Harten’s when they did not agree. In any event, I found that Mr. Van Harten’s evidence did not materially assist HFN to demonstrate that the potential impact of the CCFIPPA on its Aboriginal interests is appreciable and non-speculative, as required to trigger a duty to consult. To a large extent, this was due to the fact that his assertions on key issues were baldly stated and unsubstantiated.

Beyond the above excerpt, Crampton C.J.C. did not provide any reasons for his conclusion that my impartiality was “somewhat compromised” and that I had “acknowledged partiality”. I elaborate below on his basis for reaching these conclusions by examining the relevant submissions of the Respondent and HFN as referred to by Crampton CJC in the above excerpt. I also demonstrate that Crampton CJC’s statement that my partiality was acknowledged by the HFN was erroneous and suggest that, if anything, this error provides a further basis for a reasonable person to doubt Crampton CJC’s impartiality.

III. My sworn impartiality as an expert

When I filed my expert opinion with the court, I certified that I had read and agreed to be bound by the Code of Conduct for Expert Witnesses in the schedule to the Federal Courts Rules. In doing so, I understood myself to be swearing to uphold, as the Code says, my general and overriding duty “to assist the Court impartially on matters relevant to [my] area of expertise”.8

8 The Code of Conduct for Expert Witnesses provides under the heading “General Duty to the Court” : “1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise. 2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.” The Code of Conduct along with my opinion and other related documentation filed with the court is attached as Appendix B.
17. At the time I provided this certificate alongside my expert opinion, I recall reflecting on the importance of providing objective assistance to the court derived from my knowledge of international investment law. I was familiar with this role based on my work and training as a law clerk and then executive assistant/legal advisor to a senior judge and commissioner of two public inquiries. My outlook as an expert was informed by this past experience and I took my responsibility under the Code seriously. As an aside, by concluding that I was partial, Crampton CJC may be said to have indicated implicitly that I had not conducted myself with integrity when I submitted my certificate and opinion to the court. If this conclusion is implicit in his decision, I note that it was reached without an opportunity for me to reply to any concerns about my impartiality and commitments under the Code. That said, I see this aspect of the case as relating more to Crampton CJC’s decision and the general role of expert witnesses in our legal process than to his conduct and so do not elaborate on it in this complaint.

IV. The basis for Crampton CJC’s conclusions that I was not impartial

18. As indicated in the excerpt reproduced on p 6 above, Crampton CJC based his conclusion that I was partial on the following:

(a) the Respondent’s submission that I had been “a vocal critic of the type of investor state arbitration provisions that are included in the CCFIPPA” and that I had “frequently and publicly voiced [my] opposition to ratification of the CCFIPPA”; and

(b) the HFN’s alleged acknowledgment and non-dispute of these allegations by the Respondent.

19. I discuss below this basis for Crampton CJC’s conclusion in order to outline his approach to impartiality and to provide a reference point for evaluating his conduct in relation to the case.

20. Incidentally, Crampton CJC also described the substantive content of my evidence on international investment law as less neutral, factually rigorous and persuasive than that of the Respondent’s expert in the field, J. Christopher Thomas, and stated that my “assertions on key issues were baldly stated and unsubstantiated”. Crampton CJC did not provide any specifics regarding this conclusion. However, I do not wish to challenge this or any other aspect of his decision in this complaint but rather highlight simply that Crampton CJC in this aspect of his judgment did not connect his standard of impartiality to the substance of my evidence.

(a) The Respondent’s submission that I not impartial
21. The Respondent submitted that I was not impartial because I had expressed critical views about investor-state arbitration and the CCFIPPA in past public commentary. Crampton CJC accepted this submission, and by implication relied on the Respondent’s supporting evidence, to conclude that I was partial. For this reason, I review the Respondent’s evidence in detail below. In section IV(b) of this complaint, I show that it was erroneous for Crampton CJC to have stated that the HFN acknowledged and did not dispute the Respondent’s submission that I was not impartial.

   i. The Respondent’s evidence on pre-appointment public commentary

22. To support its claim that I was partial, the Respondent relied on two types of evidence. The first was three opinion articles I wrote between 2009 and 2012 and testimony relating to these articles during my cross-examination. The second was my disclosure, at the time I submitted my opinion, that I had criticized the CCFIPPA after its text was made public in September 2012. I discuss this second item in section IV(b) below.

23. Importantly, all of my public commentary on investor-state arbitration and the CCFIPPA, including that relied on by the Respondent and Crampton CJC, dated from before I provided my opinion in *Hupacasath v Canada* in early 2013. After my appointment as an expert, I refrained from public commentary on issues related to the case.

24. The Respondent’s position that I was not impartial, with associated assertions about my past public commentary, were outlined in its Memorandum of Fact and Law:

   For many years, Associate Professor Van Harten has been a vocal critic of the investor state arbitration chapter of NAFTA, which he considers to be an illegitimate system. Much of his academic writing has been focused on seeking reforms of the international arbitration process generally, which he likewise considers to be fundamentally flawed [footnote 231]. Since the CCFIPPA was made public in September 2012, he has frequently and

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9 The three opinion articles are attached as Appendix C.
10 See para. 154 of the Respondent’s Memorandum which is attached as Appendix G. The Respondent appears not to have discussed this submission in the hearings before Crampton CJC based on my review and word search (for my surname) of the transcripts, which are attached as Appendix I. I make no complaint about the Respondent’s submission on this point note as an aside that the Respondent misrepresented my position on investor-state arbitration. For the record, my main criticism of this form of international adjudication since 2007 has been that investor-state arbitration in NAFTA or any other treaty uniquely delegates to arbitrators – who lack basic safeguards of judicial independence – the power to resolve finally core matters of public law with little or no review in any court and without the usual reciprocity of arbitration enabling each side to bring claims against the other. In turn, I have commented that an adjudicative process lacking independence is flawed and will lack legitimacy for affected parties and the public. I have also argued that arbitrators should be replaced with judges based on the model of other domestic and international bodies that resolve individual claims against states in their sovereign capacity.
publicly voiced his opposition to ratification of the CCFIPA, and sees it as his role to inform public debate [footnote 232]. While these views should not disqualify Associate Professor Van Harten as an expert, they do raise an issue with respect to his impartiality. By contrast, Mr. Thomas had never publicly expressed his views about the CCFIPA before being retained by Canada to examine the agreement and provide his assistance to this court [footnote 233].

25. To support its submission that I was partial – especially in the sentences preceding footnotes 231 and 232 above – the Respondent relied on two parts of my cross-examination. In those portions, in summary, I testified to my views that:

- investor-state arbitration should be judicialized to ensure its legitimacy,
- Canada should follow Australia by not including investor-state arbitration in future trade agreements,
- the CCFIPPA should undergo further public study before it is ratified,
- the lack of safeguards of judicial independence in investor-state arbitration may operate to Canada’s disadvantage in actual arbitrations,
- investor-state arbitration should be reformed to resemble other international courts and tribunals,
- I had opposed publicly the CCFIPPA out of a concern about investor-state arbitration and out of a more specific concern that Canada should not commit to investor-state arbitration where Canada is in the capital-importing position under the treaty (as in the case of the CCFIPPA), and
- I felt obliged to speak out publicly on the CCFIPPA so that decision-makers were informed about the concerns and because I was one of few specialized researchers, outside of government and large law firms, who was in a position to understand the treaty and go on record about it.

26. I have provided this summary of the evidence as to my views as a basis for comparing the public commentary of Crampton CJC on similarly-relevant areas of Canada’s law and policy on foreign investment, within a similar period before his judicial appointment, as discussed in section VI(a)(ii) below.

27. I reproduce at length below the portions of my cross-examination that were relied on by the Respondent to support its submission that I was partial. As indicated in each excerpt, I have included additional portions of the cross-examination to contextualize the cited portions.
28. For its submissions marked by footnote 231 in the excerpt on pages 9-10 above, the Respondent relied on these portions of my cross-examination:

Cross-examination of Van Harten – page 10: lines 28-37

Q [Mr. Timberg] Okay. Thank you. And then over the page at page 2 in the paragraph [of an opinion article on a NAFTA case involving Danny Williams and Newfoundland and Labrador] you state:

Danny wins, above all, because he challenges an illegitimate system. NAFTA Chapter 11 is illegitimate because the arbitrators are not independent like judges.

And it's your opinion that the NAFTA Chapter 11 is legitimate -- is illegitimate?

[Following from here are lines 28-37, relied on by the Respondent in footnote 232 above] A It's my opinion that the investor-state arbitration mechanism, because it lacks requirements of legitimacy for a judicial process including provisions for openness, independence, and accountability, is something that should be criticized, yes. And when I speak of NAFTA Chapter 11 here, my purpose is to highlight that it's the investor-state arbitration process within NAFTA Chapter 11. That's my -- that's my aim.

Cross-examination of Van Harten – pages 20 (line 1) to 25 (line 12)

MR. TIMBERG: Q So I'd like to show you another newspaper article. This is still pre the Canada-China FIPA. This is dated August 15th, 2011. It's published in the Hamilton Spectator. The title is "The Carlisle Quarry and NAFTA Free Trade Agreement Lets International Investors Bypass Laws in Our Courts." And do you recognize this article?

A Yes.

Q And you prepared this. At page 2, six paragraphs down, you state:

More importantly, Canada must stop signing trade deals that allow for investor-state arbitration. If Canadian companies need these protections abroad, they can negotiate them directly in their contract to the foreign governments. No major deal in a developing country would go through today without an elaborate contract that includes its own dispute settlement provisions.

Is it your personal opinion that Canada must stop signing international trade deals that allow for investor-state arbitration?
A Well, this is another op ed. Typically in an op ed you use somewhat colloquial language. I refer to trade deals because typically I find the public has a better understanding of what a trade deal is than, you know, an investment treaty.

But my position is as a principal [sic: principled] position I think investor-state arbitration should be a judicialized process and that it's inappropriate to continue to consolidate investor-state arbitration until it's a judicialized process. Others would take a different view and they would say, well, we think it should [sic: “not”] be judicialized. In fact, I find these days it's increasingly widely accepted that the situations of conflict of interest and overlapping roles and so on with respect to the arbitrators is out of hand and is a serious problem.

I'll just mention last week I was in Helsinki at a meeting that was attended by various experts, people from various organizations, some who would be conventionally associated with the state position or non-governmental organization or with the investor sort of business perspective, and there was just a widespread acceptance in the room that something needs to be done about the arbitration process.

Now -- but the point I was trying to make is that others might have a different gauging of it. They might say, look, there are problems with investor-state arbitration. I think probably Mr. Thomas and I aren't really that far away from each other on that point, but they would say, but let's keep going with the existing arrangements and hope that states bring in reforms to address some of these problems in time. I'm just of the view that the reforms are really quite important and the problem serious enough that it's just necessary to say that states should stop signing up to treaties that provide for investor-state arbitration, and, you know, some states have in recent years adopted that position, others have not.

Canada is one of the ones that have not, and I'm -- it would be a good thing, in my view, if Canada, you know, as a point of principle, stopped consolidating the investor-state arbitration mechanism and as a point of sort of national interest didn't commit to investor-state arbitration especially in any treaties when Canada is host to substantial assets from the other countries in the capital importing position because there seem to be some very important outstanding issues that haven't been resolved yet as to how those risks and liabilities are going [Following from here are pages 20 (line 1) to 25 (line 12), relied on by the Respondent in footnote 232 above] to be handled and how well they've been managed.

Q Okay. So --
A Did you want me to speak to the contractual? You read to me about the role of contracts, and I could just quickly highlight the --

Q No, I haven't asked a question about that.

A Oh, I am sorry. I thought that was part of your interest.

Q You state at the bottom of this paragraph:

Canada should have abandoned investor-state arbitration then. Following Australia, it should do so now. If not, Canadians need to know that the wrong-headed decision to allow these unfair lawsuits against democratic choice continues to rest squarely with the federal government.

So just to be clear, it's your view that the Canadian government should abandon investor-state arbitration? That's your position?

A My position is in order to support an international judicial process to resolve these sorts of disputes, we need to replace investor-state arbitration with -- well, I've actually -- would call it simply an international investment court, but some kinds of judicialization reforms to allow for international adjudication to protect investors, also, I suggest, to hold them to certain basic responsibilities. I would like to see that happen as well, but I understand this is sort of a long-term -- you know, a long-term vision and that it's going to take some time to get there.

Q All right. So you are acknowledging that that would be a new policy decision to change the means by which international arbitrators are appointed?

A I would accept it would be a change of decision to do what Australia did and come out with a statement that going forward we are not going to include investor-state arbitration in future trade agreements, yes.

Q And it's your position that the government of -- it was wrong -- it was wrong-headed of the Government of Canada to include investor-state arbitration provisions in the Canada-China FIPA also?

A I think -- actually, I reflected on this issue a bit about the Canada-China FIPA, and my initial reaction was, as I said, I mean, I have this principal [sic: principled] objection to investor-state arbitration, but from a Canadian point of view I've always sort of accepted the realist point that for Canada's other -- which applies in relation to Canada's other FIPAs, that Canada has an economic interest in having these mechanisms in place
to provide the maximum protection to Canadian investors abroad that presumably the government wants even though I think the role of investor-state arbitration in that respect is sometimes overstated when you look at the evidence and what some of the alternative options are that are available to protect investors.

And so for that reason, I always sort of thought, well, I'm not -- there's no need for me to say anything about Canada's other FIPAs, and they are just not very significant agreements from a Canadian point of view in terms of Canada as a host state; Canada as a state that is assuming risk and liabilities like being sued by foreign investors. So when the Canada-China FIPA came along, I really sort of reflected on that and I -- I think came down in the view that my position was, with respect to the Canada-China FIPA, different people have different views about this FIPA and the role of investor-state arbitration in it and the decision to be in a sense the leading developed country in the world in terms of locking ourselves into investor-state arbitration when we are in the capital importing position. And I came down on what I think should happen and the position I -- you know, I tried to, you know, focus on was that there should be sort of an open and thorough review of all of the issues and the different perspectives before Canada makes the long-term decision to conclude this FIPA. And I was informed in that respect by my knowledge of what the Australian government had done and what the South African government has done before they reached their decisions to re-evaluate the role of investor-state arbitration.

Q So to summarize, when you read about the Canada-China FIPA when it was announced, made public, last September 2012, your position was to call for that it should not be ratified, that there should be a full public debate before it gets put into full force and effect?

A Yeah, I wanted to see more public study of it to allow for a more informed evaluation of the FIPA, yeah. That's right.

Q Okay.

A Do you want this document back?

MR. TIMBERG: Yeah. Maybe we can get that marked as the next for identification purposes only.

EXHIBIT B FOR IDENTIFICATION: Article from the Hamilton Spectator, August 15, 2011, titled "The Carlisle Quarry and NAFTA Free Trade Agreement Lets International Investors Bypass Laws in Our Courts"
MR. TIMBERG: Q I'd like to show you another article that you published. This is dated October 26th, 2011, Waterloo Region Record. Its title is "Canada should do a better job negotiating trade deals. Gus Van Harten." Do you recognize this document? It also states --

A Not off the bat but let me give it a read, and I'm sure it will come back. Okay. I recall now. This op ed was parallel to an article I wrote, a study I did, for the Macdonald-Laurier Institute which talked about Canada's experience both as a respondent state under NAFTA and the experience of Canadian investors under NAFTA and other -- and FIPAs, and sort of highlighted some of the potential concerns that may arise from that record about how the lack of institutional safeguards of independence in the arbitration process might be to Canada's disadvantage.

I don't want to make strong claims about this because there's really not enough data to make -- you know, draw any conclusions. But Canada's experience, especially the experience of Canadian investors, has been very, very negative, and, in fact, there's even information on the record that in some cases the arbitrators, you know, have sort of -- well, in one case in particular which I talk about -- I'll just say I talk about this in that article, longer article, for the Macdonald-Laurier Institute. And as I recall the Macdonald-Laurier Institute drafted an op ed which -- I'm not sure if I drafted it, or they drafted it, but they certainly promoted it. And, in fact, I think that -- yeah, they would have published this on Troy Media, and it would have been picked up in this newspaper, the Waterloo Region Record.

And I want to stress, by the way, in no op ed that I've ever written have I ever had any responsibility in the title of the op ed. That's always -- I've never asked about that. I always assume that was editorial discretion. So I've never done anything to write the titles.

Q All right. So you recognize this now?

A Yes, I do recognize this article, yes.

Q Okay. So I'd just like to go to the very last paragraph. You state:

Canada should seek to reform investor-state arbitration under NAFTA Chapter 11 and adopt a revised model and ongoing trade negotiations with the European Union.

So is it your opinion that Canada should reform the investor-state arbitration provisions in NAFTA Chapter 11?

A Well, what I was recommending in the Macdonald-Laurier Institute article was that Canada take what it did in the Canadian agreement on
internal trade and do the same thing in the Canada EU free trade agreement if that agreement were to provide for investor-state arbitration because my understanding is that the reforms that were made to the person to government arbitration process in Canada's agreement on internal trade were adopted after federal provincial discussions. The arbitration mechanism itself is based on the arbitration mechanism in Chapter 11 of NAFTA, but Canada's agreement on internal trade is actually a really good example of how you can bring in reforms oriented at judicialization that are pragmatic, that are doable, and you could actually put them in one bilateral treaty without having to go so far as to create a whole new court and all the rest of it. So –

Q So that's a different -- that would be a different option, a different mechanism, that could be promoted in your opinion?

A Yeah. To adjust investor-state arbitration to model it on the reforms that Canada adopted internally in the agreement on internal trade, and I was sort of trying to highlight Canada's own experience as something that might be appealing to the federal government if you would look at, you know, Canada has already done this internally. It's not like we would -- we would be, you know, trailblazing per se.

Q Right. But so is it your opinion that Canada should reform the investor-state arbitration provisions in NAFTA Chapter 11?

A It's my opinion that Canada should adopt a reformed approach to investor-state arbitration to ensure that it's a judicialized process like other international courts and tribunals that deal with these kind of disputes. This investor-state arbitration process really stands out as very different from other international courts and tribunals for that judicialization reason.

Q And then you'll also agree that -- is it your opinion also that Canada should not ratify the Canada-China FIPA due to your concerns about investor-state arbitration provisions contained therein?

A Well, again, I tend to approach this in two ways: First of all, I think about it from the sort of principled point of view that I've elaborated as an academic for a number of years, and it is increasingly accepted that states need to look at the investor-state arbitration mechanism. It's a problem. Model it on the W2 [sic: WTO] appellate body. Model it on some other international judicial body, but look at this arbitration mechanism and fix some of these problems because it is getting embarrassing, some of the -- you know, some of the situations that unfortunately come to light, and so that is my principal [sic: principled] position, and I try to maintain that principal [sic: principled] position for all states because I write to an international audience and so on.
But when I'm in Canada, when I think of Canada's interests, it's a little bit different. And I do agree that it's not a good idea for Canada even from the sort of Canadian perspective. Not speaking of the international perspective here. From the Canadian perspective it's a very -- you know, it's an issue that deserves serious attention before we take this step of locking ourselves in long term to investor-state arbitration while in the capital importing position, while being a host to substantial foreign-owned assets under the treaty.

29. For its submissions prior to footnote 232 in the excerpt on page 9-10 above, the Respondent relied on these portions of my cross-examination:

Cross-examination of Van Harten – pages 24 (line 26) to 25 (line 12)

[This excerpt was included in the excerpt immediately above from the last Q (“And then you’ll also agree…”) to the end of that excerpt].

Cross-examination of Van Harten – page 30 (lines 4 to 14)

Q Yeah. I just -- but your concern [in writing an open letter about the CCFIPPA] was that you wanted to put your view on the record, and you were concerned that in the future if there's a public inquiry that you would have --

A Yeah.

Q -- made a public statement and that someone would have to answer some awkward questions.

A Yeah, I recall -- my recollection is -- first of all, you may or may not know I worked on a couple of public inquiries in the past.

Q M'mm-hmm.

A And early on when I looked at the FIPA one of the things that came to mind was we just had the Occidental Petroleum Number 2 case against Ecuador with the award of, you know, about $2 billion. That was recent, very recent. There were other things. The Ping An lawsuit against Belgium for -- you get different reports of the amount, but it's, you know, 2 or $3 billion by a Chinese investor. It's the first really significant Chinese investor claim under one of these treaties, and it's also significant because obviously China has only emerged as a major capital exporter since about 2008 or 2009. And so one of the things that I thought of was, in fact, this kind of Danny Williams-type scenario that we were speaking
about earlier, this constitutional conundrum that is still latent under NAFTA.

It has never really been resolved to my knowledge, at least on the public record, who is actually going to be responsible if a province is found by its actions to have breached one of these treaties, and the federal government -- because let's say it's for $2 billion -- says, well, we are not going to pay. What is going to happen then? That was on my mind, and I thought to myself that is a situation that could very well lead to a public inquiry and having worked on a public inquiry, I sort of had thought to myself, wouldn't it be helpful for the staff to have someone pop up and say, this is part of the record. I let decision-makers know what at least some of the concerns are when there was still time to reconsider whether to ratify the treaty and trigger the long-term lock-in period of the treaty because -- and I should just add one other point.

I'm sorry if I'm going on, but just to add one other point is, in the literature in this field I would highlight in particular work by Lauge Poulsen and Emma Aisbett. They talk about why states enter into these kinds of treaties, and they talk about it from the point of view of bounded rationality as a concept, meaning the decision-making of states, when they enter into the treaties, often doesn't carry the full awareness of the treaties' risks and liabilities at the time. Their awareness of the risks and liabilities occur when there is an acute event that's very serious, and that is typically the bringing of a major claim by one of these companies, and we see -- by a foreign company and by a foreign investor under the treaty. And we can point to the experience of some countries like South Africa when it was sued for its black economic empowerment legislation. All of a sudden a light seemed to have gone on in the government as to what they'd agreed to.

I've been told anecdotes about one country when it was sued for the first time had to ask for a copy of the treaty from the lawyers for the foreign investor. Not to say that that is necessarily the widespread situation that states were not fully aware of what they were doing when they lined up these treaties going back to about 1990 before any of the claims had really come and awards were on the public record. Other than one award, the awards don't really start coming until the late 1990s. That's all reflected in that literature, that awareness, that the states tend to realize what kind of risks and liabilities they have assumed almost when it's too late, when they can't change their decision because they find out, my goodness, we've concluded one of these treaties, and then they look closely at the terms of the treaty, and they find it has a 15-year minimum term and then even after that, it continues to apply for another 10 or 15 years to existing investments.
And when I looked at the Canada-China FIPA it was the first time -- I mean, as I mentioned, the Canada-China FIPA and NAFTA are distinct because they apply to substantial amounts of incoming investment and thus carry a level of risk and liability that Canada's other treaties that provide for investor-state arbitration -- the 24 or so FIPAs and the three free trade agreements -- do not carry. But the Canada-China FIPA is actually unique because it combines that effectiveness of the international legal obligations because of the position of Canada as the capital importing country with a long-term lock-in period of 15 years plus one year's notice after the first 15 years prior to termination and then the continued, you know, survivor -- or sometimes they are called "hangover clauses," or after termination continues to apply to existing investors.

[Following from here are lines 4-14, relied on by the Respondent in footnote 233 above] So it's those -- those features that I think led me to say, well, I almost feel like there aren't that many specialized researchers who know this field really well in Canada who are outside of the government and outside of the big law firms who are really in a position to go on record about this. I sort of felt to myself I'm going to go on record about it, and I would like to ensure that at least the decision-makers know what they are doing before they get into this decision.

30. These are all of the portions of my cross-examination that were relied on by the Respondent and Crampton CJCJ to support the conclusion that I was partial.11

31. It is not clear to me whether it was appropriate for Crampton CJC to have taken this approach to the impartiality of an expert based on pre-appointment commentary. Indeed, as an aside, it seems strange to me that one would expect an expert in international investment law not to have expressed views on the appropriateness of investor-state arbitration given that the system was put into widespread use only in the last 10 to 15 years and has evoked widespread controversy in academic, practitioner, and public debate.12

32. These issues aside, the important point about Crampton CJC’s conclusions on my impartiality for the present complaint is what they convey about Crampton CJC’s own state of mind and potential pre-judgment, given his own pre-appointment commentary, when he took and maintained carriage of the *Hupacasath v Canada* case.

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11 To make the excerpts more readable, I have added additional portions of the testimony which preceded the portions relied on by the Respondent. I have used square brackets to indicate transcription errors.
12 For example, the Respondent’s expert (Mr. Thomas) had also expressed public views on the subject, taking a position similar to mine regarding the absence of judicial review for questions of law in investor-state arbitration. Cross-examination of Mr. Thomas, pp 30 (line 38) to 33 (line 16), attached as Appendix F.
ii. Crampton CJC’s pre-appointment public commentary

33. As indicated above, the evidence relied on by the Respondent and Crampton CJC to conclude that I was partial referred primarily to three opinion articles in which I commented on and criticized investor-state arbitration or the CCFIPPA.13 All of these articles preceded my appointment as an expert; one by almost four years.14

34. In the years before his appointment as a judge,15 Crampton CJC also engaged in public commentary and criticism on Canada’s law and policy on foreign investment. At the time, Crampton CJC was a practising lawyer with a large law firm in Toronto, specializing in competition and investment law. His role included advising companies involved in foreign takeovers of Canadian firms about requirements of Canadian law, including Canadian foreign investment law.

35. While in this role, then-Mr. Crampton engaged in public commentary. For example, in July 2008 – less than two years before his appointment to the Federal Court in 2009 – he provided this comment and criticism in an opinion article in the Globe and Mail:16

Last week’s final report of the Competition Policy Review Panel provides a long overdue blueprint for helping Canada evolve beyond our outdated, 19th century, protectionist economic framework. The panel’s vision of a more market-oriented system would force Canadian businesses to sharpen the skills they need to compete in increasingly global markets, encourage beneficial foreign investment, and ultimately help us to reclaim our place near to the top of the list in the “standard of living” rankings of OECD countries.

Governments and policy makers in other countries increasingly recognize that the path to greater productivity and a brighter future for their children is not one lined with fences that shield local market participants from global competitors….

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13 The three articles are attached as Appendix C.
14 G Van Harten, “Counterpoint: Danny Chavez” Financial Post (9 January 2009); see Appendix C.
15 Crampton CJC was appointed to the Federal Court on November 26, 2009 and as chief justice of the Federal Court on December 15, 2011.
16 Paul Crampton, “A critical step forward” The Globe and Mail (2 July 2008), attached as Appendix D. There are other instances beyond this example in which Crampton CJC called for changes to laws or policies in Canada that would have operated in favour of foreign investors; e.g. J. McFarland, “The Americanization of Canada’s Competition Act” The Globe and Mail (11 February 2009) in which then-Mr. Crampton was quoted as criticizing proposed reforms to Canada’s Competition Act. I have identified these examples based on a non-exhaustive search but on request could do a further search of Crampton CJC’s pre-appointment commentary.
And if we are prepared to be really serious about helping our businesses to become more globally competitive, why not give some real power to any new competitiveness council or commission that may be established? Australia has shown us how this can be done….

Turning to some of the panel's other recommendations, the proposed amendments to the Investment Canada Act will be widely welcomed, as they would significantly narrow and increase the predictability of a non-transparent regime that has mixed support in the business community and arguably has had little positive impact on Canada. In addition to significantly reducing the number of transactions that would be subject to review, the amendments would require the Minister of Industry to conclude that a proposed transaction would be contrary to Canada's national interest, before being able to disallow a transaction. This would help to improve significantly the external perception of Canada as a place to invest and make it more difficult for the Investment Review Division of Industry Canada to extract undertakings in a number of cases each year. This latter exercise sometimes has been embarrassing for the Canadian advisors involved, as investors have had difficulty identifying any principled basis for the undertakings being sought. The lasting perception left with investors is neither flattering nor consistent with our perception of what it means to be a G7 country. It is hoped that the panel's recommendations will be endorsed by the government and be reflected in amendments in the not-too-distant future.…

36. In this article, in summary, Mr. Crampton commented on Canada’s law and policy on foreign investment as follows:

- he criticized Canada’s economy as “outdated” and “protectionist”;

- he called for a more “market-oriented system” and warned governments not to erect “fences that shield local market participants from global competitors”;

- he encouraged the federal government to adopt reforms undertaken in Australia;

- he argued for reform of the Investment Canada Act to reduce the federal government’s role in reviewing foreign takeovers of Canadian companies;

- he encouraged the federal government to make it more difficult for the Investment Review Division of Industry Canada “to extract undertakings” from foreign companies that purchase Canadian firms; and
• he described the exercise of Industry Canada requiring foreign investors to give undertakings associated with a takeover as “embarrassing” for Canadian lawyers who advise foreign investors.

37. This public commentary related to the same area of law and policy – that governing the treatment of foreign investors in Canada – as my own commentary on investor-state arbitration and the CCFIPPA. Notably, Crampton CJC’s conclusion that I was partial was based not only on my pre-appointment commentary about the CCFIPPA but also my commentary on the general role of investor-state arbitration in numerous treaties concluded by Canada and other countries. As such, I suggest it is difficult to conclude that a reasonable person would see my pre-appointment commentary as significantly more narrow than Crampton CJC’s commentary on the law and policy of foreign investment in Canada. It is also not surprising that Crampton CJC, unlike me, had not commented publicly on the CCFIPPA given that the CCFIPPA was concluded and its text released after Crampton CJC’s appointment to the bench but before my appointment as an expert.

38. From an early stage after the HFN filed its claim in *Hupacasath v Canada*, an informed observer would be aware that the case required the court to decide aspects of whether the federal government could or should ratify the CCFIPPA and in doing so expand Canada’s obligations to protect foreign investors via investor-state arbitration. An informed observer would also be aware that the *Investment Canada Act* and Canada’s other laws and policies applying to foreign investment are closely connected to the CCFIPPA and to investor-state arbitration. For instance, the CCFIPPA includes provisions on the *Investment Canada Act* that may be interpreted and applied by investor-state arbitrators. The CCFIPPA would preclude future steps by Parliament to make the *Investment Canada Act* more restrictive, consistent with the tenor of Crampton CJC’s commentary. Like other treaties that provide for investor-state arbitration, the CCFIPPA would restrict in broad terms the permissible treatment of foreign investors by governments, legislatures, and courts in Canada. Both the *Investment Canada Act* and investor-state arbitration are clearly directly relevant to foreign investors’ position in Canada.

39. In light of Crampton’s CJC’s approach to impartiality in *Hupacasath v Canada*, a reasonable observer would have a plausible basis to suspect that Crampton CJC was not impartial in matters central to the case. Both Crampton CJC and I had engaged in public commentary, sometimes using

17 In particular, it would be clear to an informed observer that the case required an assessment of the content and implications of the CCFIPPA and a determination of whether the CCFIPPA should be ratified in light of the HFN’s constitutional rights. e.g. D. Moore, “Canada-China FIPA Challenge By Hupacasath First Nation Rejected” *The Canadian Press* (27 August 2013).

strong or polemical language, before our appointment as expert or judge and
before our corresponding assumption of a duty to act impartially on the
court’s behalf. We both offered views on the approach that the federal
government should take on the law and policy of foreign investment in
Canada.

40. A relevant difference in our commentary was that we took broadly contrary
positions. Crampton CJC called for legal reforms that would advantage
foreign companies by removing or limiting restrictions on foreign takeovers of
Canadian companies. I called for reforms that would withhold from foreign
investors a right of access to investor-state arbitration that is not available to
Canadian companies and citizens. Put differently, Crampton CJC’s pre-
appointment commentary may reasonably be said to support the Respondent’s
position in favour of allowing ratification of the CCFIPPA whereas my
commentary may reasonably be said to support the HFN’s position against
ratification until after aboriginal peoples were consulted to some degree.

41. I have focused on Crampton CJC’s pre-appointment commentary not because
I consider his approach to reflect an appropriate or realistic standard by which
to measure the impartiality of a judge or expert. Rather, I have focused on this
commentary because Crampton CJC clearly took the position that pre-
appointment commentary gives rise to individual partiality. It is fair and
reasonable to say that Crampton CJC did not meet the same standard –
assuming that a judge must be as free of apparent bias as an academic expert –
in light of his own pre-appointment commentary. In turn, Crampton CJC
conducted himself inappropriately, by his standard of impartiality, by taking
and maintaining carriage of the case when its sensitivity for Canada’s law and
policy on foreign investment was a matter of public notoriety. I submit that
this provides a sufficient basis for a reasonable person to have plausible
concerns about the integrity of the judicial process for resolving the HFN’s
constitutional rights in relation to the CCFIPPA.

(b) The HFN’s alleged acknowledgement and non-dispute of my partiality

42. As discussed above, Crampton CJC based his conclusion that I was partial on
the Respondent’s submissions and evidence. However, Crampton CJC also
stated that the HFN “acknowledged and did not dispute [the Respondent’s]
allegations” and that my evidence was undermined by the “acknowledged”
partiality.19

43. Had the HFN in fact acknowledged and not disputed the Respondent’s
position that I was partial, this would provide a further basis for Crampton
CJC to have concluded that I was partial. In turn, it might alleviate concerns
about his own conduct due to the standard of impartiality to which he adheres.

19 Supra note 8.
44. Yet Crampton CJC’s statements were inaccurate on this point. Crampton CJC misrepresented the HFN’s position on my impartiality and, incidentally, did not mention at all the HFN’s opposing submissions on the impartiality of the Respondent’s expert, Mr. Thomas. If anything, Crampton CJC’s inaccurate reference to the HFN’s alleged acknowledgment and non-dispute of my partiality support the concern that he was not impartial in his handling of the case.

i. The HFN’s submissions on the impartiality of myself and the Respondent’s expert

45. The Hupacasath First Nation dealt with the issue of my impartiality and that of the Respondent’s expert, Mr. Thomas, in its Reply submission. According to the HFN:

45. The expert opinion of Professor Van Harten is provided in order to assist the Court in understanding how the CCFIPPA operates and what actions or legislative measures may be subject to its provisions. The fact that Professor Van Harten has been a critic of investor-state arbitration in his academic work should properly have no bearing on the weight to be given to his opinion in this case, particularly when his decision to maintain academic objectivity by refusing paid work in the arbitration field is contrasted with the background and work of Canada's expert….

46. In this submission, the HFN did not acknowledge but rather disputed directly and expressly the Respondent’s position that I was partial due to past criticism of investor-state arbitration. This contradicts Crampton CJC’s statement in his decision – reproduced on page 6 of this complaint – that the HFN “acknowledged and did not dispute” the Respondent’s submissions that I was not impartial.

47. Further, the HFN contrasted my background as an academic who has chosen not to seek income in the arbitration field to that of Mr. Thomas. In his cross-examination, Mr. Thomas testified that there were times in the previous five years when over half his income came from work as an investor-state arbitrator. In his decision, Crampton CJC did not mention at all the HFN’s submission on Mr. Thomas’ impartiality – in response to the Respondent’s submissions on my impartiality – due to his paid work in investor-state arbitration.

48. The only other submission by the HFN on my impartiality occurred at the hearing before Crampton CJC when the following exchange occurred between the HFN’s counsel, Mr. Underhill, and Crampton CJC [emphasis added]:

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20 HFN Reply Submission (28 May 2013), para 45, attached as Appendix H.
21 Cross-examination of Mr. Thomas, pp 69 (line 28) to 70 (line 46), attached as Appendix F.
MR. UNDERHILL: In paragraph 77 in his [Van Harten’s] background and looking at, you know, his specialty in investment trade law and arbitration. So I won’t take you through that. And I don’t understand Canada to quarrel with his qualifications in that respect, so I don’t think I need to belabour those points. The only issue they take, as you will have seen from their argument, is that perhaps less weight should be given because he is, you know, an acknowledged and well-known critic of investor state arbitration more generally. And in my respectful submission, there is little merit to that point. Simply because an academic takes a particular position does not properly affect the weight of the questions he is being asked in this particular opinion.

CHIEF JUSTICE: Was there also a wrinkle about him actually having commented publicly and adversely against the CC –

MR. UNDERHILL: I don’t understand Canada’s argument to advance that particularly strenuously. I took from Canada’s argument that you should give less weight to it because he’s being an open critic of investor state arbitration more generally.

CHIEF JUSTICE: All right.

MR. UNDERHILL: And, you know, Professor Van Harten did readily acknowledge on the point you just raised that he does see his role as an academic to educate the public and to speak out on these sorts of issues, and he has done so. There’s no question about that.

CHIEF JUSTICE: I guess the issue would be if Canada is pushing the second point, I think it would go more to neutrality than anything else.

MR. UNDERHILL: Yeah, yeah, yeah. Well, and again, really at the end of the day what Professor Harten – Professor Van Harten, I’m sorry, is doing in this opinion for you is trying to describe how the FIPPA works.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And the cases, the claims have been brought under it, and with great respect, you know, the explanations are not undermined in any way by that. They allege lack of neutrality.

So I turned up Professor Van Harten’s opinion just to touch on – and we started to have a discussion about this this morning, and it picks up on the point I was making about the relatively recent phenomenon that’s continuing to expand, and in doing this I’m trying to address the really thorny question that you and I discussed this morning about the past experience and what can be taken from that and how that factors in....
49. This exchange reinforces that it was inaccurate for Crampton CJC to characterize the HFN as having acknowledged and not disputed the Respondent’s position that I was partial due to my past criticism of investor-state arbitration. Mr. Underhill rejected this claim as having “little merit”. The exchange also reinforces the conclusion that it was inaccurate for Crampton CJC to state that the HFN acknowledged and did not dispute the Respondent’s allegation that I was partial due to my past criticism of the CCFIPPA. On this, Mr. Underhill stated for the HFN that any issue of neutrality was not relevant to the descriptive nature of my opinion in the case. Clearly, Mr. Underhill did not acknowledge directly and expressly that I was partial due to past criticism of the CCFIPPA. At most, Mr. Underhill’s statements may be construed as an indirect acknowledgment of my partiality if one assumes that, by his statement that my evidence was descriptive, Mr. Underhill implicitly accepted the Respondent’s challenge to my neutrality. I suggest that this is a dubious assumption when viewed against the background of the HFN’s written submission and in light of the brevity and ambiguity of the exchange at the hearing.

50. On this basis, I submit that it was inaccurate for Crampton CJC to state that the HFN acknowledged and did not dispute the Respondent’s claim that I was partial. In turn, a reasonable person – informed of Crampton CJC’s approach to impartiality and his own record of pre-appointment commentary – would not be reassured by Crampton CJC’s erroneous reliance on the HFN’s alleged acknowledgement and non-dispute to support his conclusion that my ability to assist the Court impartially was somewhat compromised and that my evidence was undermined by acknowledged partiality.22

51. Further, a reasonable person would not be reassured by Crampton CJC’s declining even to mention – alongside his conclusion that my pre-appointment commentary was relevant to my impartiality – the HFN’s written submission in their Reply that my “decision to maintain academic objectivity by refusing paid work in the arbitration field is contrasted with the background and work of Canada's expert [Mr. Thomas]”.

52. If relevant at all to the present complaint, then, I submit that the above inaccuracies and omission in Crampton CJC’s reasons for his decision give further support for the concern that he did not conduct himself appropriately in taking and maintaining carriage of the case.

   **ii. My disclosure of past criticism of the CCFIPPA**

53. At the outset of my expert opinion, I disclosed that I had criticized the CCFIPPA and investor-state arbitration and outlined my views as follows:23

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22 *Supra* note 8.

23 Opinion of Mr. Van Harten, pp 3-4, attached as Appendix B.
I should disclose that, although I support the use of international adjudication to resolve major or sensitive disputes involving the treatment and activities of foreign investors, I have criticized publicly and actively the Canada-China investment treaty (or FIPPA) due to what I see as its problems relative to other investment treaties concluded by Canada and due to my broader concerns about the lack of institutional safeguards of independence in international investor-state arbitration. Briefly, my concerns about the Canada-China FIPPA include the lack of provision for general market access by Canadian investors to China (in contrast to NAFTA and other FIPPAs), the lack of reciprocity in the limited market that is afforded, the apparently extensive lack of de facto reciprocity in the FIPPA’s protections against discrimination, the scaled-back transparency in the investor-state arbitration process (relative to NAFTA and other FIPPAs), the de facto non-reciprocity of investor protection due to Canada’s capital-importing position (relative to other FIPPAs), and the relative fiscal risks and legal constraints assumed by Canada under the treaty’s arbitration mechanism (relative to other FIPPAs). That said, I am conscious that a wider set of costs and benefits arising from the FIPPA must be weighed by government decision-makers and thus have focused my own criticism on the need for a thorough, public, and independent review of claims about the FIPPA to inform decision-makers at all levels before a decision is taken on whether the FIPPA should be finalized long-term by Canada.

54. I included this statement to be open about my past commentary and the reasons for my criticism. I assumed that a judge would accept that an academic in law, much like a lawyer or judge, is capable of playing multiple roles with integrity, including those of critic or advocate alongside those of objective advisor or decision-maker. I would frame this as an expectation, borrowing from the Council’s *Ethical Principles for Judges*, that an academic expert, to be considered impartial, should remain “free to entertain and act upon different points of view with an open mind” rather than the unrealistic standard that he or she should “have no sympathies or opinions”.  

55. When he referred to the HFN’s acknowledgement and non-dispute of the Respondent’s submission that I was partial, it is possible that Crampton CJC meant to refer to my own disclosure as reproduced above. Even assuming this mistaken attribution, however, it would be untenable to conclude that, by disclosing my past criticism, I acknowledged that I was partial. At the time I submitted my opinion, I certified that I would uphold my duty to assist the court impartially. It would be nonsensical to interpret my disclosure of past commentary on the CCFIPPA and investor-state arbitration as an acknowledgement that I was unable to assist the court impartially when, contemporaneously on filing my opinion, I swore to do precisely that.

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24 [Canadian Judicial Council, *Ethical Principles for Judges*, “Impartiality” (Comment A.4)].
V. Conclusion

56. I request that the Canadian Judicial Council review this complaint in depth and determine whether it was inappropriate for Crampton CJC to assign the *Hupacasath v Canada* case to himself or otherwise take and maintain carriage of the case where:

(a) Crampton CJC was clearly of the view that an expert is partial where he has engaged in pre-appointment public commentary on a relevant area of law and policy and

(b) Crampton CJC had engaged in pre-appointment public commentary, from a broadly contrary perspective, on similarly relevant areas of Canada’s law and policy within a similar period before his appointment to the Federal Court in November 2009.

57. I also request that the Council acknowledge that a reasonable, fair minded, and informed person in the circumstances would think it appropriate for a judge to meet the same standard of individual bias as that adopted by the judge himself for an expert and that such a person would have a sufficient basis to apprehend partiality on the part of Crampton CJC. I suggest that it is important to give this reassurance to the public, including members of the Hupacasath First Nation, to make clear that the Canadian judiciary does not tolerate any reasonably plausible use of the judicial office to keep politically-sensitive cases in safe hands.

58. Thank you for your consideration of this complaint.

Yours truly,

[Signature]

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ATTACHMENTS (in electronic form via email)

Appendix A: *Hupacasath v Canada* decision
Appendix B: Certificate and expert opinion of Mr. Van Harten
Appendix C: Opinion articles by Mr. Van Harten
Appendix D: Opinion article by then-Mr. Crampton
Appendix E: Cross-examination of Mr. Van Harten
Appendix F: Cross examination of Mr. Thomas
Appendix G: Respondent’s Memorandum
Appendix H: HFN’s Reply submission
Appendix I: Hearing transcripts