

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

**CHEMTURA CORPORATION
(formerly Crompton Corporation)**

Claimant / Investor

AND

GOVERNMENT OF CANADA

Respondent / Party

GOVERNMENT OF CANADA

SUBMISSION ON COSTS

February 15, 2010

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of Foreign Affairs and
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I. INTRODUCTION

1. Canada should be awarded its costs of arbitration and legal representation in this arbitration because the Claimant put forward speculative and unreasonable claims, and made these proceedings unnecessarily onerous for Canada.
2. Canada's costs are reasonable in light of the length of the proceedings and complexity of the issues the Claimant raised, and are fully supported herein. They should be granted in full.
3. This **Section I** sets out Canada's submission in overview. **Section II** of this submission outlines the applicable rules regarding the apportionment of arbitration and legal costs. Canada here demonstrates why it is appropriate in the circumstances for the Tribunal to award both its arbitration costs, and its costs of representation. **Section III** provides a detailed account of all costs and disbursements claimed by Canada. **Section VI** concludes this submission with Canada's prayer for relief.
4. Chemtura's claims forced Canada to divert scarce public resources for over a decade to respond to unreasonable complaints arising from the legitimate suspension of an environmentally harmful and toxic chemical (lindane), with demonstrated risks to human health and the environment.
5. Chemtura's claims in effect amounted to an implausible conspiracy theory based on the speculative impressions of its employees, who displayed reckless ignorance of basic technical evidence, and a willingness to misstate evidence where it served their purposes. Chemtura pursued its claim that Canada wrongfully suspended lindane use despite the conclusion by regulators around the world that lindane use is unsustainable. It pursued this arbitration despite ample evidence within its own knowledge – indeed, established by its own contemporary documents – that its basic claims were false. Among other things, Chemtura deliberately ignored the role of the Canola Council of Canada in organizing a voluntary industry withdrawal from lindane uses.

6. The Claimant put forward its allegations based on scattershot legal theories that flew in the face of established NAFTA jurisprudence – notably by seeking to radically lower the threshold for breach of Article 1105, notwithstanding the consistent recognition to the contrary by previous NAFTA tribunals, and by attempting to turn this Tribunal into a court of review of the merits of PMRA's scientific decision-making, a patent miscasting of the Tribunal's role.

7. In addition to being fundamentally flawed on the merits, the Claimant's procedural conduct made these proceedings far more burdensome and onerous than they need have been, further increasing Canada's costs. Among other things, the Claimant filed onerous documentary discovery requests - in effect, undertaking a vast fishing expedition in search of support for its conspiracy theories. Having put Canada to the task of producing thousands of records, Chemtura ignored virtually all of them in both its written and oral submissions, resorting to distortions and misstatements of the handful of documents upon which it sought to rely.

II. APPORTIONMENT OF COSTS

A. Overview

8. Under the UNCITRAL Rules, arbitration costs and legal costs must be dealt with separately. With respect to arbitration costs, the principle is that "costs follow the event". As Canada has demonstrated that Chemtura's claim is wholly without merit, an award of arbitration costs should be made in its favour.

9. With respect to the costs of legal representation, the Tribunal has discretion in determining whether—and to whom—to apportion such costs. Canada submits that, in this case, it should be awarded its legal costs. As with arbitration costs, the commonly applied principle in international arbitration is "loser pays" (or "costs follow the event") with respect to legal costs. This principle has been endorsed by most NAFTA Tribunals and should be followed here. Furthermore, an award of legal costs against the Investor is appropriate because a large part of these costs can be attributed to its unreasonable claims and conduct in these proceedings.

B. Applicable Rules and Principles

10. Article 1135 of NAFTA provides that when an arbitral tribunal makes a final award, it may award costs in accordance with the applicable arbitration rules. These proceedings are governed by the UNCITRAL Rules (the "Rules"). Article 40 of the Rules provides as follows:

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

11. Article 40 thus divides costs into two categories:

- (1) arbitration costs; and
- (2) costs of legal representation.

Canada submits that the Claimant should be required to pay both Canada's share of the arbitration costs and Canada's legal costs. Each category will be addressed in turn.

1. Arbitration costs

12. Article 40(1) provides that, in principle, the costs of arbitration should be borne by the losing party. The *S.D. Myers*¹ and *International Thunderbird*² tribunals both noted

¹ For convenience, Canada has attached behind tabs to this costs submission excerpts of the damages-related portion from the awards included in Canada's prior productions. The full texts of these cases can be found under the corresponding Annex in Canada's prior submissions, also referenced herein. *S.D. Myers, Inc. v. Canada*, (UNCITRAL), final award on costs, 30 December 2002, ¶ 15 at Tab 5 (for the full text of *S.D. Myers*, see Annex R-321).

that Article 40(1) emphasizes “success”, and establishes a presumption that the costs of arbitration should be borne by the unsuccessful party. The *Methanex* tribunal found that, in the absence of a compelling reason not to do so, an arbitral tribunal should follow this approach and award arbitration costs to the successful party.³ Canada submits that, on the assumption its position is accepted by the Tribunal in this arbitration, there is no reason to set aside the typical rule regarding arbitration costs. This is all the more true given the unmeritorious nature of Chemtura’s claims, as set out in the section that follows.

2. Costs of legal representation

13. With respect to the costs of legal representation, there is no requirement that “costs follow the event”. Article 40(2) provides the arbitral tribunal with discretion in apportioning such costs.⁴ However, it is a common practice in international arbitration to award legal costs to the successful party. Recognizing this, NAFTA tribunals have consistently endorsed the “loser pays” principle as the most appropriate means of guiding the exercise of the Tribunal’s discretion under Article 40 (2) of the UNCITRAL rules.

14. Tribunals tend to endorse this because it is equitable with regards to the outcome and because it serves to discourage vexatious and frivolous claims. In one of the earliest NAFTA cases, the *Azinian* tribunal noted that:

In ordinary circumstances it is common in international arbitral proceedings that a losing claimant is ordered to bear the costs of the arbitration, as well as to contribute to the prevailing respondent’s reasonable costs of

² *International Thunderbird Gaming Corporation v. Mexico* (UNCITRAL) Arbitral Award, 26 January 2006, ¶ 213 at Tab 6 (for the full text of *Thunderbird*, see Annex R-287).

³ *Methanex v. United States*, (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 Part V, ¶ 5 at Tab 2 (for the full text of *Methanex*, see Annex R-235).

⁴ *Thunderbird*, ¶ 213; *Waste Management Inc. v. Mexico* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 183 at Tab 7 (for the full text of *Waste Management*, see Annex R-300).

representation. This practice serves the dual function of reparation and dissuasion.⁵

15. The principle that “costs follow the event” was also used to guide the apportionment of legal costs in the *Pope and Talbot*,⁶ *Methanex*,⁷ *S.D. Myers*⁸ and *Mondev*⁹ cases. Although not all of these cases resulted in a specific award of legal costs that was because success had been shared more or less equally between the disputing parties.

16. In the *International Thunderbird* case, the claimant argued that the principle of “loser pays” should not apply to cases of investor-state arbitration. The Tribunal rejected this argument in no uncertain terms:

It is also debated whether “the loser pays” (or “costs follow the event”) rule should be applied in international investment arbitration. It is indeed true that in many cases, notwithstanding the fact that the investor is not the prevailing party, the investor is not condemned to pay the costs of the government. The Tribunal fails to grasp the rationale of this view, except in the case of an investor with limited financial resources where considerations of access to justice may play a role. Barring that, it appears to the Tribunal that the same rules should apply to international investment arbitration as apply in other international arbitration proceedings.

It may be added that Article 1135 of the NAFTA explicitly contemplates the possibility for a tribunal to award costs: “[a] tribunal may also award costs in accordance with the

⁵ *Azinian, Davitian, & Baca v. Mexico* (ICSID No. ARB (AF)/97/2) Award, 1 November 1999, ¶ 125 at Tab 1 (for the full text of *Azinian*, see Annex R-154).

⁶ *Pope & Talbot, Inc. v. Canada* (UNCITRAL) Award on Costs, 26 November 2002, ¶ 17 at Tab 4 (for the full text of *Pope & Talbot*, see Annex R-320).

⁷ *Methanex*, ¶ 10 at Tab 2.

⁸ *S.D. Myers*, ¶ 49 at Tab 5.

⁹ *Mondev International Ltd. v. United States* (ICSID No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 159 at Tab 3 (for the full text of *Monde*, see Annex R-238).

applicable arbitration rules.” The treaty does not contain any limitation in regard of the award of costs.¹⁰

17. In a similar vein, the tribunal in *Waste Management II* rejected the notion that tribunals in investor-state disputes should behave differently from other arbitral tribunals:

the Tribunal does not accept that there is any practice in investment arbitration (as there may be, at least *de facto* in the International Court and in interstate arbitration) that each party should pay its own costs. In the end the question of costs is a matter within the discretion of the Tribunal, having regard both to the outcome of the proceedings and to other relevant factors.¹¹

18. It is true that the *Azinian* tribunal, despite having recognized the prevailing practice of awarding costs to the successful party, chose a different approach, and elected not to make an award of legal costs to Mexico. The tribunal identified four factors that caused it to reach this decision:

- a) NAFTA arbitration was a novel and unfamiliar mechanism;
- b) The claimant had presented its case in an efficient and professional manner;
- c) The Respondent's conduct had in some ways invited litigation; and
- d) Given the financial position of the claimant, a third party almost wholly unconnected with the litigation would be forced to pay the costs on its behalf.¹²

19. In light of these four factors, the tribunal found that it was not reasonable to make an award of costs in favour of Mexico. However, these same factors were discussed and found to be substantially inapplicable by the arbitral tribunal in the *Thunderbird* case. Its reasons for dismissing these factors are instructive in the context of these proceedings.

¹⁰ *Thunderbird*, ¶¶ 214-215 at Tab 6.

¹¹ *Waste Management II*, ¶ 183 at Tab 7.

¹² *Azinian*, ¶ 126 at Tab 1.

20. The claimant in *Thunderbird* had argued that it should not be made to pay Mexico's legal costs despite having lost the arbitration, and pointed to the *Azinian* award as support for its position. However, the tribunal declined to follow *Azinian* because only one of the factors identified by that tribunal (item (b)) applied to the case before it. The tribunal rejected "novelty" as a relevant factor because NAFTA proceedings were by then much more familiar:

investment arbitration in general and NAFTA arbitration in particular have become so well known and established as to diminish their novelty as dispute resolution mechanisms. Thus, this factor is "no longer applicable when considering apportionment of costs in international investment disputes."¹³

21. The tribunal also rejected factors (c) (Respondent's conduct) and (d) (financial position of Claimant) because they were simply not applicable to the case at hand. The only factor listed in *Azinian* it retained as being relevant (but not decisive) was item (b), the efficiency and professionalism with which each party presented its case.

22. The reasoning in *Thunderbird* is apposite to the present arbitration. NAFTA has been in force for over 15 years and there have been numerous Chapter 11 awards rendered in that time. Elements (c) and (d) are not applicable here. Furthermore, it therefore cannot be said that NAFTA arbitration constitutes a "novel" dispute settlement mechanism.

23. Of the factors mentioned by the *Azinian* tribunal, the only one that may be of relevance here is factor (b), the professionalism and efficiency with which the parties presented their respective cases. This factor is not, by itself, decisive, although it is a pertinent consideration. As confirmed by the discussion that follows, this factor applied to the present case favours a full costs award to Canada.

¹³ *Thunderbird*, ¶ 218 at Tab 6.

C. Application to the Present Case

24. Canada has demonstrated that the Claimant's claim is wholly without merit. The Claimant should therefore be required to bear the full costs of arbitration. However, in the event that the Tribunal reaches a different conclusion and finds that Canada has only been partially successful, it would be appropriate to apportion costs between the parties in proportion to their relative success.

25. The same reasoning applies with respect to Canada's costs of legal representation. Although the Tribunal is not—unlike with arbitration costs—required to award Canada its legal costs if it prevails, it should nonetheless do so. Arguments in favour of providing Canada its full costs fall into two broad categories:

- (1) Chemtura put forward claims in this arbitration that were speculative and unreasonable. As explained above, the general practice of NAFTA tribunals is to grant full costs in such circumstances. This deters parties from bringing unmeritorious claims.
- (2) Chemtura moreover pursued its claims in a manner that made the proceeding unnecessarily onerous. This further underlines the equities of granting Canada its full costs.

26. Canada will expand on both of these two points below.

1. The Claimant's case was speculative and unreasonable

a) Chemtura relied on conspiracy theories

27. Chemtura's claims boiled down to a speculative conspiracy theory regarding the PMRA's treatment of lindane. Chemtura in effect alleged that the leadership of a highly specialized, scientific public agency, and the dozens of PMRA professionals involved in the evaluation and re-evaluation of the pesticide lindane, collectively conspired over a ten year period to eliminate lindane in the absence of any scientific evidence.

28. Chemtura had no evidentiary basis for this theory other than the speculative impressions of senior employees, who in the hearing demonstrated reckless disregard for basic technical facts, and a willingness to wilfully distort the record when it served their purposes.¹⁴

29. Chemtura put forward these claims in the face of extensive evidence that lindane had been found to present unacceptable health and environmental risks, not only in Canada, but around the world, including in its own home jurisdiction. As Canada's PMRA witnesses repeatedly noted, PMRA's employees had no personal stake in the outcome of their review, reaching their conclusions according to a scientific process.¹⁵

30. With regard to the Voluntary Withdrawal Agreement ("VWA"), Chemtura's claims that the PMRA conspired to force the removal of lindane use on canola depended on ignoring ample evidence – including evidence established by Chemtura's own contemporary documents – demonstrating that the main remaining use of lindane was voluntarily withdrawn, not by the diktat of the PMRA, but on the initiative of Chemtura's own customers, the Canadian canola industry, who saw their continued reliance on the pesticide lindane as a serious threat to one of their main markets.¹⁶

31. Nor was it reasonable to allege the PMRA's prejudice against lindane or against the Claimant specifically, citing as evidence the timing of the registration of one version

¹⁴ See for example Mr. Ingulli's admission that he had no idea US EPA had by 2001 raised significant concerns regarding the occupational exposure risks relating to the use of lindane as a seed treatment (Hearing Transcript, p.222:13-19 and p.225:15-18); his willingness to critique PMRA's Special Review despite admitting lack of any knowledge of their scientific process and his own technical ignorance (Hearing Transcript, p.201:5-8, p.202:2-6 and 19-25, pp.203:6-204:1, p.207:9-15, p.209:13-210:2, p.216:3-7 and p.218:9-11); and his misrepresentation regarding reference to Chemtura's Dupree study on occupational exposure to PMRA at his meeting with Claire Franklin of 4 October 2000 (Hearing Transcript, p.223:10-224:5, p.224:14-24 and pp.252:7-253:16).

¹⁵ See Hearing Transcript, Vol. 3, p. 657 (John Worgan); See also Second Affidavit of John Worgan, ¶¶ 21-24; First Report of Dr. Lucio Costa, ¶ 49. Also see Hearing Transcript, Vol. 2, pp. 501-2 (Cheryl Chaffey).

¹⁶ As confirmed among other places in an internal Chemtura email from Bill Hallatt to Rick Turner and others dated 19 October 1998 (Exhibit TZ-34).

of Chemtura's lindane replacement products.¹⁷ In the first place, a conspiracy against lindane is hardly demonstrated by complaints about the time taken to register lindane replacements.

32. Chemtura's complaint of unfair treatment in relation to replacement product registrations was in any event disingenuous. The PMRA registered the two replacement products Chemtura actually proposed to PMRA in connection with the VWA on a fast-track basis, over a year before any competitor product, and in the result the Claimant dropped its registration demands when confirming its agreement to the VWA.¹⁸ As for the timing of review of its later-submitted "all-in-one" version, the record demonstrates that the Claimant submitted this formulation two years later than the two fast-tracked versions of its product Gaucho; that even this submission was incomplete; and that once the PMRA had all of the information required to conduct a normal review, the product was approved within the typical time of PMRA's self-imposed submissions policy.¹⁹

¹⁷ This argument was referenced by the Tribunal at the final hearing for closing argument (Hearing Transcript, p.1448:16-23).

¹⁸ Chemtura did not at the time suggest that these registrations were merely a "stop gap", admitting in contemporary internal documents that the registration of these two versions meant that PMRA had complied with any "condition" Chemtura sought to impose concerning replacement products. Chemtura mentioned only Gaucho 75ST and 480FL in its early October 1999 correspondence with PMRA, before dropping the issue of replacement products altogether. See Canada's Post-hearing Brief, ¶¶ 180-181.

¹⁹ The Claimant's own Appendix A to its Post-hearing Brief establishes that having failed to file the Gaucho CSFL submission until March 2000, it failed to provide such basic supporting data as acute toxicology until 26 October 2000, without which the review could not proceed (¶ 48). The Appendix also concedes that on that same date the Claimant made a formulation change, which required delivery of further data, holding up the initial phase of the review to at least 21 February 2001 (¶ 68). The Claimant's comment to the effect that it did not wish this change to delay its submission was disingenuous, as it knew such changes in fact prompt further review. After completing further B and C-level screening within a reasonable time, including the delivery of further information by the Claimant, PMRA began its Level D review in May 2001, and had completed this detailed review by May 2002, corresponding to the PRMA's Management of Submission Policy. As Ms. Chalifour testified, the Claimant's allegation the submission sat untouched for a year is false: in fact, the PMRA's file management system recorded the last PMRA scientist who considered the file, out of many, in April 2002 (Hearing Transcript, Day 4, pp. 1112-1113; Hearing Transcript, Closing Argument, pp. 1560:14 to 1561:10). As Mr. Kibbee testified at the hearing, in a passage cited in the Claimant's Appendix A, "I apologize that this isn't all laid out in my Affidavit...having had a chance to review all of particularly Suzanne Chalifour's exhibits I have a better understanding of everything that transpired...in order to really understand, it's important that you go through all of the exhibits, particularly the Suzanne Chalifours, and look at the actual review process and do that in consultation with somebody who really understands the review process..." (Hearing Transcript, pp. 391:14 – 392:10). Although he went on to complain the process took too long in his view, his prefacing remarks are revealing.

Chemtura's conspiracy theory also illogically suggested a personal interest on the part of PMRA employees in the outcome of the replacement product market where none existed.

b) Chemtura's claims lacked common sense and were mutually contradictory

33. Reflecting the basic unreasonableness of Chemtura's theory of the case, Chemtura's allegations often lacked common sense. The Claimant among other things relied on the contention that the PMRA – the public agency charged with the task of ensuring the safe registration of pesticides in Canada – required the “cover” of an alleged trade issue to initiate the re-evaluation of a World War II-era chemical, whose uses had been progressively withdrawn and restricted since the 1970s, not only in Canada, but around the world.²⁰

34. The Claimant's allegations were also rife with mutual contradictions. Among these was its charge that the PMRA “defended” the use of lindane in international fora, but also advanced its agenda to eliminate lindane uses in Canada.²¹ Chemtura saw the PMRA's registration of lindane replacement products as evidence of this alleged conspiracy, but also complained that PMRA did not move fast enough to register its lindane replacement product, thereby breaching Chemtura's alleged expectations.²² Chemtura vehemently argued that the 26 November 1998 letter evidenced no agreement on Chemtura's part to voluntarily withdraw its lindane registrations on canola, and that the only relevant agreement was its letter of 27 October 1999.²³ Yet the 27 October 1999

²⁰ See Hearing Transcript, p.80:8-14. The Claimant also among other things alleged that the PMRA agreed to allow lindane use on canola to be re-established in Canada, *irrespective* of whether the PMRA had determined in its ongoing Special Review, that lindane use was unsafe.

²¹ See for example, Hearing Transcript, p.19:9 (Somers) (“defended”) and (“agenda”); Hearing Transcript, p.25:3-4 (Somers).

²² See Claimant's Memorial, ¶¶ 205, 207, 211, 222 and 225-229. Also see Claimant's Reply, ¶¶ 182-189 and ¶ 200.

²³ See Hearing Transcript, p.35:14-17 and p.36:22-24 (Somers).

letter said nothing about the registration of replacement products. Chemtura therefore cited the 26 November 1998 letter as evidence of its agreement with PMRA.²⁴

c) Chemtura must have known from the start that its key allegations of fact were untrue

35. The Claimant's case was all the more unreasonable given that many of its core allegations were demonstrably false based on Chemtura's own contemporary internal documents. Chemtura therefore put forward and maintained positions in the arbitration that it must have known all along were untrue. Examples abound:

- Chemtura alleged that the PMRA was the “driving force” of the Voluntary Withdrawal Agreement, when its own contemporary documents affirmed that the VWA was not regulatory action but rather the express wish of a grower group;²⁵
- Chemtura alleged that the PMRA “forced” Chemtura to enter into the VWA, when its own documents confirmed that “PMRA will do nothing without our agreement”;²⁶ and
- Chemtura for the past ten years has disputed that lindane use presents “undue” risks to human health and the environment, when its own internal documents in 1998 confirmed that lindane is a persistent organic pollutant;²⁷ that the main lindane industry research body CIEL (now defunct) would only support uses that did not lead to release of “undue” quantities into the environment;²⁸ that use of lindane as a seed treatment led to

²⁴ See Canada's Post-hearing Brief, ¶¶177-178. In another basic contradiction, Chemtura alleged it never voluntarily agreed to the withdrawal of its lindane products for use on canola and had been forced to do so by PMRA; but that it withdrew its registrations only on the basis of the conditions it agreed with PMRA on 27 October 1999, which PMRA allegedly failed to respect.

²⁵ Email from Bill Hallatt to Rick Turner and others dated 19 October 1998 (Exhibit TZ-34).

²⁶ Email from Bill Hallatt to Rick Turner and others dated 19 October 1998 (Exhibit TZ-34); See also Annex R-335, internal report by Rob Dupree dated 23 July 1999: “in general everyone is still on board. Additional meeting planned for Oct. 5 to re-assess if all stakeholders are still committed to voluntary withdrawal. This is an all or nothing agreement; if one company bails out and decides to continue selling their product the deal is off and all stakeholders will pull out of the agreement” and Annex R-338, internal email from Rob Dupree to Al Ingulli *et al.*: “MRA is not taking any action to cancel these registrations, this is a voluntary agreement by all registrants”

²⁷ Email from Bill Hallatt to Rick Turner dated 28 November 1998 (Exhibit CC-44).

²⁸ Letter to Health Canada from Wolfgang Biegel, President of CIEL, 24 February 1998 (Exhibit CC-16A).

environmental pollution,²⁹ and that its own senior management did not expect lindane to pass on scientific review.³⁰

36. Chemtura went further than ignoring its own internal contradictory evidence, relying on misstatements of the record. Among other things, Mr. Ingulli advised the Tribunal that an outdated occupational exposure study had been submitted to the PMRA 'in error' by a misguided junior Chemtura employee, and did not reflect the then current use patterns in Canada.³¹ As Dr. Franklin subsequently confirmed, Mr. Ingulli himself suggested that Mr. Dupree should send the study to PRMA and encouraged the Agency to rely on it.³² Moreover, the Claimant's counsel for their part repeatedly relied on partial quotes from documents to distort their meaning.³³

37. The unreasonable, self-contradictory and unfounded nature of Chemtura's factual allegations all confirm the equity of granting Canada its full costs of representation.

²⁹ Email from R. Turner to Ray Cardona *et al.*, dated 21 July 1998 (Second Expert Report of Dr. Lynn Goldman, Tab 60) stating that "lindane is volatile when applied to soil".

³⁰ Email from Al Ingulli to David Ash dated 19 April 1999 (Second Expert Report of Dr. Lynn Goldman, Tab 58).

³¹ Hearing Transcript, p.224:17-24 and 252:7-253:6 (Ingulli).

³² Hearing Transcript, p.1044:1-10 (Franklin).

³³ Among many instances, Claimant's counsel repeatedly cited the first few lines of Exhibit 55 of the Claimant's Reply (8 January 1999 email from Wendy Sexsmith to other PMRA staff referring to the "demise of lindane") to allege the Special Review was simply a sham, when the full text of the email referred exclusively to the VWA. Counsel referred extensively to Exhibit 33 of the Claimant's Reply (2 October 1998 memorandum), omitting to state every time what that document says on its face: that PMRA was not in a position to recommend cancelling a lindane use without concerted action on lindane, citing as a mechanism the consideration of lindane for a North American Regional Action Plan. In practice, this led to a decade-long public review process, with a lindane NARAP adopted by the NAFTA Parties only in 2006 – the opposite of "prejudging" lindane's cancellation (see Annex R-48, NARAP Resolution of 30 November 2006). Claimant's counsel alleged that a note by PMRA's Science Management Committee at Exhibit JW-61 "admits of absolutely no doubt about the outcome" of this so-called "de novo" review [the REN] (Hearing Transcript, p.1427:9-2). In fact, the note confirms that PMRA had initiated a follow-up review of lindane, including revisiting the occupational risk assessment and taking in new data from Chemtura. Questioning whether the Claimant would insist on a full review given that its own home regulator had just suspended the remaining uses of lindane in the US, PMRA's main considered option was to "*Continue with the review of lindane to determine whether the updated outcome is consistent with initial decision* and in order to have assessments on file for future reference re: international activities" (our emphasis). This is the exact opposite of Claimant's counsel's characterization of the document.

d) The legal theories upon which Chemtura put forward in its case were also unreasonable and wrong

38. Chemtura's claims were also unreasonable from a purely legal point of view.

39. Chemtura proposed a reading of Article 1105 that was plainly at odds with consistent Tribunal decision-making in the NAFTA context at least since the 2001 Free Trade Commission Note of Interpretation, in that it sought to lower dramatically the threshold for a breach of the customary international minimum standard of treatment ("MST"). The Claimant alleged it was merely following NAFTA jurisprudence concerning Article 1105, but inserted into previous rulings a series of qualifiers that wrongly transformed MST into a domestic administrative law review.

40. Chemtura moreover argued the Tribunal should find that the PMRA's substantive decision on lindane was wrong, in effect asking the Tribunal to substitute its views for those of a highly-specialized domestic scientific agency, and to find Canada in breach of Article 1105 in consequence — a clear misstatement both of the role of Chapter 11 tribunals, and of the applicable legal standard.³⁴

41. Lacking any secure legal theory, Chemtura also adopted a scattershot approach to Article 1105, formulating its arguments under any conceivable heading in the hope that one might perhaps stick. This significantly increased Canada's burden, as it was obliged to follow Chemtura in responding to multiple permutations of its Article 1105 arguments.

42. Indeed, the 1105 argument upon which Chemtura placed the most emphasis (legitimate expectations) simply reinforced the speculative nature of Chemtura's claims. Chemtura's reliance on a doctrine of "legitimate expectations" was misplaced under Article 1105, given that this argument has arisen out of treaty interpretations of free-standing "fair and equitable treatment" clauses, rather than on an analysis of customary international law Minimum Standard of Treatment. Yet Chemtura went further, extending the alleged scope of "legitimate expectations" beyond any recognized standard,

³⁴ Claimant's Post-Hearing Brief, ¶¶ 35-39.

arguing that the Tribunal should give legal force to the Claimant's subjective impressions of exchanges that took place thirty years after its investment was made.³⁵

43. In short, Chemtura's legal claims misstated extensive NAFTA precedent and were otherwise highly speculative. Having put Canada to the expense of responding to such claims, Chemtura should now be obliged to cover Canada's resulting costs in full.

e) Chemtura's theory of damages was speculative and counter-factual

44. Presumably the main motivation for Chemtura in putting forward its claims was to seek compensation in damages. It indeed claimed an exorbitant sum (originally approximately \$83M, subsequently reduced to \$78.5M in the Reply). Yet here again, its claims were patently speculative and unreasonable.

45. Chemtura's damages theory depended not on what the Canadian government did or did not do with regard to lindane, but rather on the Claimant's speculation as to what the US EPA *might* have done, had the Canadian decision on lindane been favourable. In addition to being impossibly remote, the claim flew in the face of the record of dealings between Chemtura and US EPA from 1998 to 2006, which demonstrated the US Agency's health and environmental concerns, its consistent refusal to grant a registration or tolerance for lindane use on canola, and its ultimate decision to withdraw support for even the few remaining agricultural uses of lindane.³⁶

³⁵ As Canada has noted, to the extent the doctrine of "legitimate expectations" has been recognized at all (and Canada does not agree that the doctrine forms part of customary international law), it has been in instances where an objective representation was made to a prospective investor contemplating investment, which induced the investment, and which the State making the representation subsequently repudiated.

³⁶ As confirmed by the evidence of Dr. Goldman and by the Claimant's own internal documents: the EPA's assessments expressed concerns about worker exposure, dietary risk and aggregate risk (Second Expert Report of Dr. Lynn Goldman, Tabs 12, 14 and 16). In addition, a tolerance and registration was not forthcoming due to outstanding data requirements on lindane residues in Canada raw and processed agricultural commodities (Tab 20), mouse oncogenicity (Tab 21), a plant metabolism study (Tabs 3, 28, 33, 34, 37 and 44); and anaerobic soil metabolism study (Tabs 33, 35, 36, 37, 38 and 40) and a seed leeching study.

46. Moreover, Chemtura's damages claim assumed away not only the PMRA's decision to withdraw support for lindane, but every single negative market factor affecting potential lindane sales as of 1999 – including the UK ban, the EU ban and the U.S. ban, and indeed the ultimate worldwide ban on lindane use in agriculture.³⁷

47. Having put forward damages claims on such a speculative and unreasonable basis, the Claimant should be held responsible for Canada's costs of representation as Respondent.

2. The Claimant made the proceeding unnecessarily onerous

48. The Claimant should also pay Canada's costs of representation because it made this proceeding much more onerous for Canada than it need otherwise have been, in several respects.

49. As described below, the Claimant in the first place delayed for years in pursuing its claim. Canada also invited the Claimant to withdraw its claims entirely without cost implications, but the Claimant simply ignored this opportunity. The Claimant thereafter pursued an enormous and speculative documentary fishing expedition, failing thereafter to cite virtually any of the thousands of documents Canada produced. The Claimant made further unnecessary work for Canada by abusing the provisions of the Confidentiality Order and by its unreasonable position regarding the Agreed Statement of Facts.

50. In all of these ways, the Claimant added to Canada's time and effort in defence of this claim, underscoring the equities of granting Canada its full costs of representation.

a) Chemtura delayed for years in pursuing its claim

51. The Claimant issued its first Notice of Intent in connection with this matter on 6 November 2001, claiming breaches of Articles 1102, 1105, 1106 and 1110 due to the

³⁷ Canada has employed the term "ban" because it is regularly employed in scientific review documents relating to lindane: *see e.g.* Annex R-36, p.51; Annex R-37, p.30.

termination of its lindane products on canola. It subsequently amended its claim on 4 April 2002, adding two further claims under Articles 1103 and 1104. It issued a third Notice of Intent on 19 September 2002 regarding non-canola lindane uses.

52. Having launched all of these claims in 2001-2002, the Claimant failed to proceed expeditiously with this arbitration until 2007. Canada repeatedly engaged the Claimant between 2002-2007 to determine its intentions. In accordance with Article 1118, Canada held consultations with the Claimant on 20 March 2002. Canada held a further meeting with the Claimant on 20 January 2003, to discuss procedural issues. After that, it was not until February 2005 that the Claimant issued its Notice of Arbitration concerning the suspension of remaining lindane product registrations (an event that had occurred in February 2002). In June 2005, Canada again met with the Claimant to discuss procedural issues, at which time the Claimant assured Canada of its intention to proceed with the arbitration. Yet following this meeting, it was not until October 2006 that the Claimant advised it would soon be nominating its party-appointed arbitrator. The first procedural hearing in this matter was finally held in January 2008.

53. As Canada noted upon filing its Counter-Memorial, October 2008 was the first time Canada had the opportunity officially to put forward a response to the Claimant's allegations, first stated in 2001.

54. The start-and-stop fashion in which the Claimant proceeded meant that over the course of six years (from 2001 to 2007) lawyers from the Trade Law Bureau were repeatedly obliged to pick up and then put aside this file, as the Claimant revived its intention to pursue the matter, only to let it once again fall away. Given the uncertainty whether this matter would be pursued at all, Canada hesitated to invest substantial resources to prepare a response which might prove useless. Nonetheless, over these several years, several different counsel reviewed and became familiar with this matter

only to find their time wasted, moving on to other responsibilities before their knowledge could be put to any use.³⁸

55. Chemtura's delay also rendered the process substantially more difficult to pursue, once the arbitration finally proceeded. By 2007, many relevant files were nearly a decade old, and witnesses were scattered. PMRA personnel had to spend considerable time reviewing contemporary documents in the file to recall the detail of work carried out years before. Canada was also obliged to ask several people to come out of retirement – including Mr. Jim Reed, who tragically died of cancer in October 2009. Canada also called out of retirement Dr. Franklin, and Wendy Sexsmith, who participated in the hearing notwithstanding that she had for several months been affected by illness.

56. NAFTA Chapter 11 does not contain any express mechanism to address a Claimant's failure to pursue its claims in a reasonably diligent manner. However, Chemtura's delay and its resulting impact reinforce the equities of granting Canada its full costs.

b) Chemtura ignored Canada's offer that it withdraw its claim without cost

57. Canada also sought to avoid unnecessary expense by inviting the Claimant to withdraw its claims without cost penalty, once Canada finally had the opportunity to publicly state its case in its Counter-Memorial.

58. In its Counter-Memorial, Canada placed on the record extensive evidence of PMRA's good-faith scientific review of lindane, including the motivations prompting its review; the application in that review of standard PMRA policies; and the extensive opportunities Chemtura was granted to review and challenge PMRA's substantive decision concerning lindane. This evidence was supported by key technical witnesses

³⁸ Among these counsel were Matthew Kronby, Arun Alexander, Roland Legault, Kevin Thompson, Chris Cochlin, and Lori Di Pierdomenico.

from PMRA and by the independent assessment of expert witnesses, Dr. Costa and Dr. Goldman.

59. Canada also provided extensive evidence in its Counter-Memorial – supported by testimony from relevant Canola Council of Canada representatives – confirming that the Voluntary Withdrawal Agreement for lindane use on canola was industry-sponsored, and which PMRA was asked to facilitate on the basis that it was a voluntary industry arrangement.

60. In short, Canada's Counter-Memorial confirmed that the Claimant's key contentions – to the effect that the PMRA conducted a scientifically fraudulent review of lindane, or to the effect that PMRA devised and forced the VWA on Chemtura – were entirely without substance.

61. Canada therefore invited the Claimant to withdraw its claims with prejudice on 4 November 2008, in exchange for which Canada undertook to refrain from seeking its costs.³⁹ This offer was made notwithstanding the substantial cost and effort Canada had already incurred in preparing its Counter-Memorial and indeed in prior procedural steps since 2001.

62. Chemtura ignored Canada's offer and pushed ahead with its claim, obliging Canada to commit considerable public resources to defend the case all the way through to a hearing, to post-hearing submissions, and indeed to the present costs submission.

63. Canada's reasonable offer of November 2008, and the Claimant's failure to respond, should be taken into account in granting Canada its full costs.

³⁹ Canada has also attached to this costs submission various correspondence illustrating procedural events, in particular where such correspondence may not have originally been copied to the Tribunal. Canada has not systematically attached Procedural Orders on the understanding that these will be readily available to the Tribunal. See letter to Greg Somers of Ogilvy Renault, LLP from Meg Kinnear, 4 November 2008 at Tab 11.

c) Chemtura made unjustified documentary discovery claims

64. Having failed to respond to Canada's offer to settle, the Claimant went on to present extremely onerous requests for documentary discovery. Canada responded to these requests in good faith and at substantial cost and expense, only to have the Claimant virtually ignore the vast majority of documents produced by Canada.

(1) The Claimant obliged Canada to undertake extremely onerous and ultimately pointless document production (December 2008 – March 2009)

65. In the first round of documentary production, the Claimant put forward 106 separate requests. These 106 document requests were in substantial part improperly formulated or irrelevant, contravening paragraph 42 of Procedural Order No. 1 and Art. 3.3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules"). Canada had already provided responsive evidence with its Counter-Memorial in relation to many of the Claimant's queries. The Claimant often misstated the evidence in framing its requests.⁴⁰ Its requests were repetitive and overlapping, and typically overbroad and unspecific. Many of the reasons for individual requests failed to adequately establish materiality and relevance. All in all, the 106 requests constituted a speculative fishing expedition, contrary to the spirit and the letter of the IBA Rules.

66. Canada nonetheless sought to be as responsive as possible to the Claimant's demands, despite its objections in principle. This was in order to ensure a production process as free as possible of controversy, and to confirm that Canada had nothing to hide in relation to the Claimant's conspiracy theories. Through December 2008 and January 2009, Canada worked diligently to assemble responsive documents, producing 6,089 pages on 23 January 2009.

⁴⁰ E.g. requests #1, 25, 38, 54, 68, 76, 82, and 88.

67. To the extent the Claimant identified specific follow-up requests in its letter of 16 February 2009, Canada on 26 February 2009 spontaneously produced a further 572 pages.⁴¹ Canada did so to avoid any obligation on the Tribunal's part to rule on follow-up comments which Canada could address. Further to Canada's productions, the Claimant indeed designated "No ruling required" on 34 of its original requests for documents.⁴²

68. Yet given the extent of the Claimant's original requests, and their referenced deficiencies, there were inevitably some to which Canada felt obliged to object. The Claimant in this way placed an additional burden upon the Tribunal to review and determine which might be admissible.

69. In its Procedural Order No. 4 dated 18 March 2009, the Tribunal went on to deny 23 of the Claimant's outstanding requests. In 20 other instances the Tribunal simply asked Canada to confirm the completeness of its original production.⁴³ Although it could have simply done so to the best of its knowledge, Canada nonetheless conducted further searches, at the expense of including documents of only marginal relevance. Canada in this way produced to the Claimant a further 1,569 pages on 30 March 2009.

70. In all, over the course of three rounds of production, Canada produced 8,230 pages of documents to the Claimants.

71. Canada for its part submitted 40 requests for documents of the Claimant. Most of these requests were for specific documents relating to damages (since the Claimant had relied in its calculation primarily on the evidence of an internal unaudited email), or for documents concerning the Claimant's interactions with the US EPA. Following a letter seeking clarification on the Claimant's responses to Canada's document requests on 3 February 2009, the Claimant initially produced documents pursuant to only half of Canada's requests, obliging Canada to file additional justifications in response on 16

⁴¹ Letter to Tribunal Members from Christophe Douaire de Bondy, 26 February 2009 at Tab 14.

⁴² Letter to Tribunal Members from Greg Somers of Ogilvy Renault LLP, 5 March 2009 at Tab 16.

⁴³ The Tribunal granted a further 28 requests to the extent specified by the Claimant in its Replies to the Respondent's objections/responses.

February 2009.⁴⁴ On invitation of the Tribunal to respond to Canada's supplemental production⁴⁵, the Claimant responded on 5 March 2009 identifying document requests that were rendered moot by Canada's clarification and production of further documents.⁴⁶ The Claimant however, also made gratuitous statements to the effect that Canada attempted to expand five of its own document requests. On the Tribunal's prompting⁴⁷, Canada duly responded to this recent allegation with a detailed explanation that its comments of 16 February 2009 sought to emphasize the particularity of its original requests where the Claimant had refused production on the basis that the request was insufficiently specific.⁴⁸ In its Procedural Order No. 4 of 18 March 2009, the Tribunal ordered production from the Claimant on all of these outstanding requests, including the requests that the Claimant had unnecessarily challenged.⁴⁹

72. The Claimant's document requests were not only unduly onerous and poorly conceived; they were also largely without any utility. Having put Canada to the trouble of producing a total of 8,230 pages (or 1285 documents), the Claimant in the end only cited to 33 of Canada's documents in its Rejoinder and at the hearing, i.e. less than 3% of the documents Canada produced.

73. Moreover, the Claimant made very poor use of even this handful of documents, citing them partially or taking them out of context, in a clumsy attempt to misstate or distort the evidentiary record. To cite only a few examples:

⁴⁴ Letter to Tribunal Members from Christophe Douaire de Bondy, 16 February 2009 at Tab 13.

⁴⁵ See email from Nadine Meynent of Lévy Kaufmann-Kohler to Greg Somers, *et al.* of Ogilvy Renault, LLP and Christophe Douaire de Bondy, *et al.*, 3 March 2009 at Tab 15.

⁴⁶ See letter from Greg Somers of Ogilvy Renault, LLP to Tribunal Members, 5 March 2009 at Tab 16.

⁴⁷ See email from Dr. Jorge Vinales of Lévy Kaufmann-Kohler to Christophe Douaire de Bondy *et al.*, 9 March 2009 at Tab 17.

⁴⁸ See letter from Christophe Douaire de Bondy to Tribunal Members, 11 March 2009 at Tab 18.

⁴⁹ Six were granted to the extent that documents covered by such requests had not already been produced and 13 to the extent specified by Canada in its Replies to the Claimant's objections/responses.

- The Claimant selectively cited Canada's Draft Briefing on Technical HCH for the UNECE LRTAP⁵⁰ to support a claim that Canada as of 1997-1998 was still "advocating" the use of lindane in international fora. Yet as was obvious on the face of this document and related negotiation documents, Canada to the contrary, recognized there were many questions being raised regarding remaining lindane uses; sought to ensure its international commitments were consistent with its domestic legal framework; and agreed that its remaining uses of lindane could be maintained only subject to a domestic review (i.e. the Special Review).
- The Claimant selectively quoted the first few words of an email from Wendy Sexsmith to the PMRA staff dated 8 January 1999, referencing the "demise of lindane", to suggest that by this point the PMRA was engaged in a conspiracy to eliminate this pesticide.⁵¹ Yet the email plainly states on its face that Ms. Sexsmith was referring to the canola industry agreement to voluntarily withdraw their use of lindane, due to the threat it posed to their business, and not to any scientific ruling on lindane by PMRA. Indeed Ms. Sexsmith had no substantive involvement in the PMRA's Special Review or REN.
- The Claimant referenced a Memorandum to Assistant Deputy Minister, Lindane Review Board, 12 January 2006⁵² in support of a claim that PMRA's lindane REN was merely a sham, with a foregone result.⁵³ As Canada noted at the hearing⁵⁴, the document in fact notes PMRA's intention to complete a new re-evaluation of all risks associated with lindane use; to consider the recommendations of the Board of Review; and to engage in consultations with the Claimant. In other words, the document established exactly the opposite of the Claimant's allegations.

⁵⁰ Exhibit 17, Claimant's Reply. Also *see* Exhibits 19 (Briefing Note on Lindane for the Negotiation of the UNECE LRTAP POPs Protocol, Geneva, December 14-15, 1997) and 21 (Briefing Note on the Inclusion of Lindane in the UNECE LRTAP POPs Protocol, Prepared for the Third Negotiating Session, October 1997).

⁵¹ Exhibit 55, Claimant's Reply.

⁵² Exhibit 1, Claimant's Reply.

⁵³ *See* Claimant's Reply, ¶ 33.

⁵⁴ *See* Hearing Transcript, p.1475:4-1476:15 (Douaire de Bondy).

74. This type of use of Canada's document production by the Claimant simply reinforces the equities of granting Canada its full costs. As set out in the detailed description that follows Section III of this submission, the document production phase of the arbitration cost Canada \$861,365.68 in total, and from this \$694,138.87 in counsel's time alone.

(2) The Claimant needlessly sought to introduce additional documents in July 2009

75. Having put Canada through an onerous and ultimately pointless production process, the Claimant on 17 July 2009, i.e. only weeks from the evidentiary hearing, accused Canada of having failed to produce various documents which the Claimant had separately received through Canada's domestic *Access to Information Act* (ATIA) process, and sought leave to introduce them into the record.

76. In presenting this accusation, the Claimant confirmed what Canada's counsel had long assumed – that the many, very onerous document requests being made to Canada through the ATIA relating to lindane came from none other than the Claimant itself. Under Canada's ATIA process, the identity of the requesting party is not divulged by ATIA staff, and counsel has no control over the timing of response to such requests. Ironically, pursuant to paragraph 8 of the Confidentiality Order, Canada had in 2008 alerted the Claimant and the Tribunal to the many ATIA requests brought to its attention by that point.⁵⁵ Response to these requests had caused Canada to expend additional resources, which Canada does not claim here, but that were substantial. For example, in relation to requests directed at DFAIT, the department hired two consultants to review over 100,000 pages of documents resulting in a cost of \$15,531.81. After putting DFAIT

⁵⁵ As Canada noted in its correspondence of 27 February 2008, 1 ATIA request had been filed with the Department of Justice on 18 December 2003, 8 ATIA requests were filed with the Department of Foreign Affairs and International Trade (DFAIT) on 11 April 2007, 4 ATIA requests were made to Environment Canada on 12 April 2007, and 13 ATIA request were filed with Health Canada on December 6 and 7, 2007. Two further ATIA requests were made to the Department of Foreign Affairs and International Trade on April 11 and 13, 2008, and were brought to the attention of the Claimant and Tribunal by Canada on 28 April 2008.

staff to task of reviewing thousands of documents, the requesting party abandoned three of these requests (amounting to 102,750 pages), refusing to pay the related fees.

77. The Claimant's complaint was objectionable given that it had been in possession of some of the cited documents as early as 19 May 2009.⁵⁶ The Claimant had either been carelessly dilatory, or had deliberately waited until after Canada had filed its Rejoinder on 10 July 2009 before raising the issue, seeking to foreclose any written comment by Canada on the cited documents.

78. Inspection of the documents further confirmed that Chemtura's complaint of non-disclosure had no substance. As Canada noted in its response of 24 July 2009, of the nine (9) documents the Claimant cited, Canada had in fact produced two in its February 2009 production, well before the filing of the Claimant's Reply.⁵⁷ Claimant's counsel had apparently not even bothered to double-check the truth of its allegations before raising the issue with the Tribunal. Claimant's counsel's lack of familiarity with documents produced by Canada months before, further to Chemtura's own document requests, was revealing. Otherwise, three of the nine cited documents had been withheld from Canada's productions on the basis of privilege – a designation which the Claimant had failed to challenge following Canada's comments on privilege of 26 February 2009. This designation was reflected in their delivery to the Claimant through the ATIA process in a redacted form.⁵⁸ The balance was of questionable relevance or, in one case, reproduced points covered by other produced documents.⁵⁹

79. The Claimant's motion in July 2009 in fact sought to impugn the sufficiency of Canada's substantial prior production – a point Chemtura made explicitly – rather than to

⁵⁶ As Canada noted in its July 24, 2009 letter to the Tribunal, Attachments 2-4 were released on May 19, 2009, Attachment 5-7 on May 22nd and Attachment 1, 8 and 9 on June 3rd. See letter from Christophe Douaire de Bondy to Tribunal Members, 24 July 2009 at Tab 21.

⁵⁷ These were Attachments 6 and 8.

⁵⁸ The privileged documents were the Claimant's Attachments 2, 3 and 4, all of which contained substantial ATIA redactions.

⁵⁹ The former were Attachments 1, 7 and 9, and the latter, Attachment 5.

introduce documents truly crucial to the arbitration. While the Tribunal allowed in the documents, it reserved on costs, expressly noting Canada's argument that this did not call into question the sufficiency of Canada's original production.

80. The purely tactical nature of the Claimant's request was confirmed in that, following an established pattern, the Claimant made little or no reference to these documents at the September 2009 evidentiary hearing.

(3) The Claimant raised further production issues leading up to the September 2009 hearing

81. The Claimant sent a further email on 5 August 2009 suggesting that Canada could not rely on Dr. Goldman's testimony without producing all of the documents referenced in her first expert report⁶⁰ The Claimant did so while acknowledging that some of the materials Dr. Goldman referenced were already in the record. Moreover, Dr. Goldman's first report had been delivered to the Claimant on 20 October 2008. The Claimant had therefore waited 10 months, well past the production phase of the arbitration, and on the eve of the hearing, to put forward its demand.

82. Canada responded to the Claimant's message the next day, with copies of the requested documents.⁶¹ Canada noted that of the 27 documents requested, 16 were already in the record and therefore already in the Claimant's possession, custody and control. Furthermore, all remaining documents were publicly available on the website of the EPA, the US government and in one case, the EU Commission. Canada also pointed out that it had been open to the Claimant to request these documents in the document production phase of this arbitration which commenced in December 2008. Nevertheless, Canada presented the Claimant with these documents in the spirit of co-operation and arbitral efficiency.

⁶⁰ See email from Greg Somers of Ogilvy Renault LLP to Christophe Douaire de Bondy, 5 August 2009 at Tab 22.

⁶¹ See email from Jennifer George (GOC) to Alison Fitzgerald *et al.* of Ogilvy Renault, LLP, 6 August 2009 at Tab 22.

83. Again, the Claimant made little or no reference to these documents at the September 2009 evidentiary hearing.

(4) The Claimant raised and dropped yet another similar accusation against Canada after the evidentiary hearing

84. The Claimant on 2 December 2009, just before the hearing for closing arguments of 17 December, again complained to Canada that it had received various documents through the ATIA process that in its view should have been produced in the arbitration. As the Claimant admitted, it had since at least 2007 put forward multiple requests to the Government of Canada for access to documents concerning lindane.⁶² Out of 4000 documents produced to Chemtura in the latest round of ATIA disclosure, the Claimant attached 78 pages it alleged were relevant to requests in the arbitration, but which Canada had not disclosed.

85. On the face of this request, the Claimant in effect was confirming that 3922, or 98.05%, of the most recently-delivered ATIA documents, either had already been produced by Canada or were not relevant to its document requests in the arbitration.

86. Moreover, upon receiving this notice from the Claimant, Canada verified its original productions, and determined that, of the 78 pages of which the Claimant complained, 65 had already been produced to the Claimant in response to its arbitration requests, in one of Canada's three productions of January – March 2009. As for the balance of the documents – 13 pages – Canada repeatedly asked the Claimant to confirm the request under which the Claimant alleged them to be relevant. The Claimant; however, failed to provide any response.⁶³

⁶² See email from Greg Somers of Ogilvy Renault, LLP to Christophe Douaire de Bondy, 2 December 2009 at Tab 23.

⁶³ See emails from Christophe Douaire de Bondy to Greg Somers of Ogilvy Renault, LLP, 6 December 2009 at Tab 23.

87. It was obvious that Chemtura had not even bothered to check Canada's previous productions, before putting forward this latest complaint. Claimant's failure to recognize these documents from Canada's arbitration productions also suggested that Claimant's counsel had not even bothered to review the documents Canada sent through the production process, in the first place.

88. All of which simply underscores Chemtura's pointless escalation of the costs of Canada's representation, and the equities of granting Canada its full costs.

d) Chemtura made inappropriate use of the confidentiality provisions governing the arbitration

89. Canada's costs were also increased in that it was obliged to challenge the Claimant's abuse of confidentiality designations under the governing Confidentiality Order.

90. The Claimant initially attempted to redact and shield from public view, not simply any business confidential information in its Memorial, but any reference to evidence disfavoured to the allegations. This included redacting reference to the Claimant's 100% ownership of Gustafson Inc. – the company that in September 1997 tipped off the US EPA to the presence of lindane on canola imports from Canada, in an effort to remove lindane from the U.S. seed treatment market in favour of its replacement product (an insecticide-only version of Gaucho). Chemtura also sought to hide from public knowledge, among other things, the amounts it claimed from Canada in the arbitration.

91. Having noted these abuses of the confidentiality designation, Canada was obliged to review the Claimant's redactions in detail, and ultimately raise the issue with the Tribunal in a letter of 2 July 2008.⁶⁴ The Claimant in a response of 17 July 2008 already withdrew six of its original redactions.⁶⁵ The Tribunal ultimately agreed with Canada in its Procedural Order No.3 of 8 August 2008 that a further eight more the Claimant had

⁶⁴ See letter from Meg Kinnear to Members of the Tribunal, 2 July 2008 at Tab 8.

⁶⁵ See letter from Greg Somers of Ogilvy Renault, LLP to Members of the Tribunal, 17 July 2008 at Tab 9.

maintained notwithstanding Canada's objections were also inappropriate. The Tribunal ordered the removal of the designation in relation to, *inter alia*:

- portions of Mr. Paul Thomson's witness statement and exhibits regarding Chemtura's meetings with PMRA officials and their representatives at the outset of the Special Review, in which the PMRA explained its process and addressed health and environmental concerns relating to lindane; and
- two exhibits of Mr. Alfred Ingulli, the first of which confirmed Chemtura's contemporary knowledge that the PMRA would not be imposing any fines in relation to the 1 July 2001 deadline,⁶⁶ the second, Mr. Ingulli's handwritten note from his 4 October 2000 meeting with the PMRA, confirming that PMRA had raised "worker exposure" as one of three PMRA concerns, over a year before the lindane Special Review results were released.⁶⁷

92. The Tribunal was subsequently required to clarify that the Claimant's confidentiality designation of its damages claims was not in accordance with the Confidentiality Order. In a communication of 15 August 2008, the Tribunal directed the Claimant to remove these redactions as well.⁶⁸

93. Again at the Reply stage, the Claimant adopted a very heavy-handed approach to redactions for confidentiality. Canada was obliged to write the Claimant explaining its objections, on 16 June 2009.⁶⁹ Having been challenged again by Canada, the Claimant

⁶⁶ Exhibit B32, Claimant's Memorial.

⁶⁷ Exhibit B52, Claimant's Memorial.

⁶⁸ See letter from Gabrielle Kaufmann-Kohler of Lévy Kaufmann-Kohler to Greg Somers of Ogilvy Renault, LLP, *et al.* and Meg Kinnear *et al.*, 15 August 2008 at Tab 10.

⁶⁹ See letter from Christophe Douaire de Bondy to Greg Somers of Ogilvy Renault, LLP, 16 June 2009 at Tab 19.

agreed to reverse its latest designations on consent.⁷⁰ Yet this came only after Canada had been obliged to review the Claimant's redactions in detail.

e) Chemtura made the Agreed Statement of Facts process a waste of time

94. The Claimant also made the Agreed Statement of Facts process a waste of time. In the summer of 2009, anticipating paragraph 37 of Procedural Order No.1, which set a delivery date of 7 August 2009, Canada prepared a draft. At the procedural hearing of 17 July 2009, the Claimant volunteered to produce its own version. By 30 July, having received nothing, Canada wrote asking the Claimant to fulfil its undertaking, failing which it would assume the Claimant had abandoned the process. The following day, on 31 July, the Tribunal issued Procedural Order No.5, extending the submission of the Agreed Statement of Fact from August 7 to August 21, 2009. The Claimant at the same time provided a draft, which Canada proceeded to review and amend.

95. Over the week of 17 August 2009, Canada and the Claimant engaged in several exchanges of drafts, ultimately ending in stalemate.

96. While the Claimant suggested (in removing Canada's amendments and additions) that it was simply seeking to "reduce the text in the hope of arriving at an agreement as to some facts", it in effect simply stripped away any facts unfavourable to its allegations. This was despite that these facts were incontrovertible. Among the points Chemtura removed were reference to the 1997 Canadian Arctic Contaminants Assessment Report; Canada's June 1998 signature of the Aarhus Protocol; Chemtura's 100% ownership of Gustafson, Inc.; the contents of the 26 November 1998 letter; the steps of the Board of Review process; and the issuance of a deficiency note regarding Chemtura's Gaucho CSFL submission.

⁷⁰ See email from Greg Somers of Ogilvy Renault, LLP to Christophe Douaire de Bondy, 25 June 2009 at Tab 20.

97. Had Canada accepted the Claimant's approach, the result would have been a grossly biased account, the exact opposite of what the parties were seeking to achieve through the Agreed Statement of Facts. As a result, at the hearing and in its Post-hearing Brief, Canada was required to reiterate factual issues that might instead have been put forward on an agreed basis.

98. The Claimant's unreasonable behaviour in this regard provides still another rationale for granting Canada its full costs of representation.

3. PMRA as a public regulator has expended enormous agency resources on the review of lindane, in response to the Claimant's unreasonable allegations

99. In the present submission, Canada is seeking only its costs of arbitration and of legal representation. Yet the equity of granting such cost is best considered in light of the very significant time the PMRA has been obliged to devote to lindane. The PMRA's efforts concerning lindane included:

- Conducting the Special Review, including scientific evaluations in four separate areas from 1999-2001, amounting to approximately 2 full person-years by scientific evaluators.⁷¹ The toxicology review alone took up 108 person-days or five working months.⁷²
- Participating in the Board of Review (2003-2005) at the cost of approximately 800 person-days.⁷³
- Responding to Chemtura's nine separate Federal Court proceedings, between 2001 and 2006, at the expense of 80 person-days.
- Conducting a second full review of lindane (the lindane REN), between 2006 and 2009, at the cost of 1160 person-days by specialised evaluators.⁷⁴

⁷¹ First Affidavit of John Worgan, ¶ 112.

⁷² First Affidavit of Cheryl Chaffey, ¶ 72.

⁷³ These and the following figures are PMRA internal estimates, based on staffing allocations in the relevant periods.

- Engaging in a full year of intensive exchanges with Chemtura regarding its comments on the draft REN of April 2008, including a face-to-face meeting of January 2009 involving eight PMRA scientists.⁷⁵
- Undertaking detailed and protracted document production related to 13 requests regarding lindane pursuant to the federal *Access to Information Act* (ATIA), resulting in the review of over 14 thousand pages of documents.
- Preparing detailed responses to Chemtura's claims in the context of the present arbitration (2006-2009), particularly through the participation of Cheryl Chaffey, Wendy Sexsmith, John Worgan, Dr. Claire Franklin, Suzanne Chalifour, Jim Reid, and Dr. Peter Chan. PMRA personnel expended in the range of 1100 person-days on the arbitration alone.

100. The estimated total cost of PMRA staff time related to the Claimant's multiple lindane-related claims (i.e. the Federal Court proceedings, the Board of Review, the REN and the NAFTA arbitration) amounts to approximately 3,180 person-days – or in monetary terms, roughly \$1,316,000.

101. As Canada has emphasized, the PMRA has finite resources. Time spent on the evaluation or re-evaluation of a particular pesticide or responding to claims such as those in the present arbitration equates to time taken away from its review of other products. All of the time spent by PMRA in the review and re-evaluation of pesticides is intended to benefit the Canadian public – to ensure access to products that meet criteria of safety, merit and value, across the spectrum of public need. Chemtura's unreasonable and stubbornly-repeated refusal to accept PMRA's good faith scientific conclusions concerning lindane, in effect hijacked a limited public resource for over a decade, to the substantial detriment of the Canadian public.

⁷⁴ See John Worgan's Second Affidavit, ¶ 93.

⁷⁵ See John Worgan's Second Affidavit, ¶¶ 37-83.

102. While Canada is not claiming PMRA's costs, they provide a further equitable rationale for granting Canada its full costs of representation.

III. COSTS INCURRED BY CANADA

103. Article 38 of the UNCITRAL Rules provides an exhaustive list of what costs may be awarded by an arbitral tribunal:

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award.
The term "costs" includes only:

- a. The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- b. The travel and other expenses incurred by the arbitrators;
- c. The costs of expert advice and of other assistance required by the arbitral tribunal;
- d. The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- e. The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and
- f. Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

A. Arbitration Costs

104. To date, the disputing parties have shared the costs of arbitration (items (a) and (b)) equally. Canada has expended \$477,602.07. The Investor should be ordered to reimburse Canada in this amount and bear the remainder of the arbitration costs, the amount of which will be determined when the proceedings are complete.

B. Legal Costs

105. Canada incurred significant costs under the rubrics outlined in items (d) and (e), including legal fees, expert fees, and associated expenses for each, as well as disbursements. These costs are outlined in detail in Annexes I-II. Where appropriate, Canada has also attached the relevant invoices.

C. Legal Fees

106. Canada was represented in this arbitration by lawyers employed by the Government of Canada. Over the life of this matter, these lawyers were:

- Arun Alexander
- Christina Beharry
- Danny Bertao
- Christophe Douaire de Bondy
- Chris Cochlin
- Lori Di Pierdomenico
- Adam Douglas
- Carolyn Elliott-Magwood
- Nick Gallus
- Meg Kinnear
- Matthew Kronby
- Stephen Kurelek
- Roland Legault
- Céline Lévesque
- Mark Luz
- Ian Philp
- Yasmin Shaker
- Sylvie Tabet
- Kevin Thompson

107. Based on the time records of the Trade Law Bureau, Canada calculates that the total time spent on this case by the above lawyers from October 2006 to December 2009 (the main period of activity on this file) was 23,156.13 hours. A detailed breakdown of this figure can be found in the table attached as "Annex I". This total includes time spent meeting with clients, assembling and reviewing documentary evidence, undertaking legal research and analysis, identifying and working with fact and expert witnesses, drafting

and reviewing written pleadings, addressing procedural matters and appearing before the arbitrators. Counsel for Canada was also assisted by paralegals, students and technical support staff.

108. The above total reflects both the nature of the dispute and the conduct of the Claimant. Responding to the multitude of claims alone would have required a considerable number of hours. In order to adequately respond to Chemtura's allegations, Canada's legal team was required to investigate and present evidence concerning:

- the regulatory scheme for pesticides in Canada, notably the PMRA's re-evaluation process;
- the international scientific status of the pesticide lindane;
- the PMRA's specific steps to review lindane in the Special Review;
- the PMRA's participation in the Board of Review;
- the PMRA's actions in the multi-year REN that followed, and in the year-long follow up with the Claimant regarding its comments on the REN;
- the organisation of the canola market in Canada and specific steps taken by Canadian canola market associations to respond to the lindane crisis;
- the regulatory scheme for pesticides in the United States, as administered by the US EPA;
- the nearly ten-year interaction between US EPA and the Claimant concerning lindane, from 1998 to 2006; and

- international actions to restrict the use of lindane, including Canada's participation in these steps, notably from 1997 to the present.

109. As Canada has detailed above, this substantial effort was undertaken in response to scattershot claims that were factually unreasonable, based on ignoring or misstating the relevant record, were linked to legal theories contrary to NAFTA precedent and based on a highly speculative theory of damages. The Claimant also made this matter procedurally more onerous than it need have been, for example, through its vast and pointless document requests.

110. Canada's costs are claimed only as of October 2006, given changes as of that time in the recording of lawyers dockets, and given that this roughly corresponds to the re-launching of this arbitration by Chemtura. This means that Canada's costs of legal representation are already discounted to exclude, in particular, Canada's initial review and follow-up further to the Claimant's Notice of Intent of 2001, participation in related consultations under NAFTA Article 1118, further analysis and client contact upon each of the successive amendments to the Claimant's original Notice of Intent and subsequent Notices of Arbitration, and procedural discussion prior to the nomination of the Claimant's arbitrator.

111. Since they relate to legally distinct proceedings, Canada has also not included its substantial costs of representation related to the PMRA's participation in the extensive Board of Review hearing, which included three rounds of written submission and 9 days of hearing, involving extensive fact and expert evidence.⁷⁶ Nor has Canada included its substantial costs of representation relative to the nine separate Federal Court actions brought by Chemtura in connection with the facts at issue in this matter, all of which it ultimately withdrew and none of which were successful.⁷⁷

⁷⁶ See Canada's Counter Memorial at ¶ 392.

⁷⁷ The full account of these proceedings is set out in Appendix C to Canada's Counter-Memorial.

112. The cost of Counsel's time in this arbitration has been assessed by applying the "billable rate" used by the Department of Justice in its cost recovery process. Like its counterpart in private practice, the billable rate established by the Justice Department is intended to capture all of the costs associated with providing legal services, including the cost of office space and equipment and administrative support. This rate varies according to the position in question, and ranges from \$133.30 for paralegals to \$269.30 for the senior-most lawyer (Meg Kinnear). In all cases, the rate is substantially below the going market rate for the services being provided. Canada was free to retain private outside counsel, and the proposed billable rates are far below the going market rate for such services. The amount represented by the billable rate method therefore represents an assessment of the cost of Canada's legal representation that is very generous to the Claimant. As outlined in Annex II, using this method the total cost to Canada of legal representation was \$4,022,397.84 CAD.

D. Legal Readers

113. As noted above, Canada chose to employ in-house legal services to defend this arbitration. However, it also retained the services of outside counsel to comment on its memoranda. Given that Canada has kept its legal costs to a minimum by using Government of Canada lawyers, this represents a reasonable expense. The cost of outside counsel over the life of the file was \$137,074.45 CAD. The fees paid to legal readers are listed in Annex II, under "Disbursements".

E. Expert Costs

114. Canada also required the services of various experts to address the Claimant's technical allegations. In addition, the Claimant's damages claim raised complex valuation issues that required specific expertise. These experts not only refuted the claims made by the Claimant but also provided valuable information to the Tribunal in their areas of expertise, often on issues that were not addressed, or insufficiently addressed, by the Claimant and that were necessary to the resolution of the case.

115. For each of the expense listed below, invoices can be found attached to these submissions.⁷⁸

a) Navigant Consulting

116. Claimant engaged the services of LECG, to provide a valuation of the damages allegedly incurred by Chemtura. LECG produced a valuation that was based on inaccurate and implausible assumptions. In order to respond to these assumptions, Canada retained the services of Navigant Consulting. Navigant prepared two extensive reports and Mr. Kaczmarek testified before the tribunal. The cost to Canada was \$1,012,308.06 CAD.

b) Dr. Lynn Goldman

117. Canada retained Dr. Lynn Goldman, Professor at the department of Environment Health Sciences at John Hopkins Bloomberg School of Public Health, to provide her expert opinion on the US EPA issues relevant to this case. In particular, responding to allegations put forward by Chemtura, she gave her expert understanding of US EPA regulatory processes concerning the review of restricted pesticides and the US EPA's response to the Claimant's attempts to secure a U.S. tolerance and registration for lindane use on canola. In addition to providing two expert reports, Dr. Goldman appeared as a witness at the hearing. The cost to Canada for her service was \$43,520.70 CAD.

c) Dr. Lucio Costa

118. Canada retained the services of Dr. Lucia Costa, an eminent toxicologist, who confirmed that PMRA's Special Review had proceeded in a scientific manner and had reached scientific conclusions and that, to the extent there was any difference of view between the PMRA and the Board of Review, this difference was within the four corners of reasonable scientific debate. Dr. Costa also reviewed the PMRA's lindane REN

⁷⁸ See detailed documentary evidence to support the expense figures claimed in this section provided in the separate binder of Canada's Supporting Documents Concerning Costs, included with this submission.

process and conclusions and confirmed that the PMRA had taken account of the Board of Review's recommendations, considered new data provided by the Claimant, and had conducted a scientific re-evaluation process, reaching scientifically valid conclusions. Dr. Costa devoted many hours to prepare two expert reports as well as appearing as a witness at the hearing. His statements and his testimony were required to counter the Claimant's allegations that the PMRA had withdrawn support for lindane based on an improper scientific review process. The cost to Canada for Dr. Costa's reports and testimony was \$315,465.57 CAD.

F. Additional Disbursements

a) Travel Costs

119. Canada is claiming travel costs in the amount of \$24,226.10 CAD. This amount includes the costs of attending the initial procedural hearing in Washington, D.C. and two subsequent trips to Washington, D.C. to meet with experts. Also included in Canada's travel costs are two trips to Seattle to meet with experts, trips to Calgary and Winnipeg for meetings with witnesses and the travel and accommodation costs associated with the presence of witnesses in Ottawa for the hearing on the merits (Tony Zatylny and JoAnne Buth).

b) General Services and Supplies

120. Canada incurred costs for services and supplies needed to pursue this arbitration. Canada incurred some of these costs in-house, while private firms provided other services, including printing, photocopying, courier and demonstrative evidence. The total amount for these expenses is \$223,474.92 CAD.

IV. PRAYER FOR RELIEF

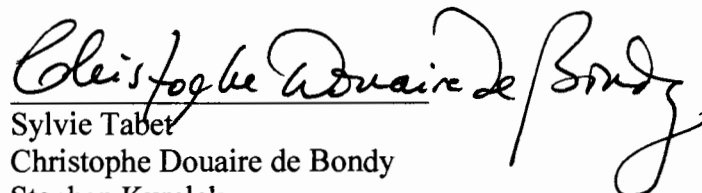
121. For all of the reasons set out in the present costs submission, Canada respectfully requests that the Claimant be ordered to pay the following:

- Canada's share of the arbitration costs paid thus far in the amount of \$477,602.07, as well as any further costs, to be determined at the end of the arbitration; and
- Canada's costs of legal representation and assistance, in the amount of \$4,022,397.84.
- Canada's disbursements including cost of expert representation, in the amount of \$1,756,069.80.

The amount for the costs of legal representation is broken down in the table found below:

| SUMMARY OF COSTS | | |
|-------------------------|------------|-----------------------|
| | USD | CAD |
| Arbitration Costs | | \$477,602.07 |
| Legal Fees | | \$4,022,397.84 |
| Disbursements | | \$1,756,069.80 |
| TOTAL | | \$6,256,069.71 |

THE WHOLE RESPECTFULLY SUBMITTED THIS 15th DAY OF FEBRUARY 2010.



Sylvie Tabet
Christophe Douaire de Bondy
Stephen Kurelek
Mark Luz
Yasmin Shaker
Christina Beharry
Department of Foreign Affairs and
International Trade
Trade Law Bureau
125 Sussex Drive
Ottawa, Ontario
CANADA K1A 0G2
Tel: 613-944-1590

Index to Submission on Costs

| SHORT FORM | FULL TITLE AND CITATION | TAB | REFERENCE IN THE RECORD |
|------------------------------------|--|------------|--|
| | Case Law | | |
| <i>Azinian - Award</i> | <i>Azinian, Davitian, & Baca v. Mexico</i> (ICSID No. ARB(AF)/97/2) Award, 18 October 1999 | 1 | R-154 |
| <i>Methanex - Award</i> | <i>Methanex v. United States</i> , (UNCITRAL), Final Award, part V | 2 | R-235 |
| <i>Mondev - Award</i> | <i>Mondev International Ltd. v. United States</i> (ICSID No. ARB(AF)/99/2) Award, 11 October 2002 | 3 | R-238 |
| <i>Pope & Talbot</i> | <i>Pope & Talbot, Inc. v. Canada</i> (UNCITRAL) Award on Costs, 26 November 2002 | 4 | R-320 |
| <i>S.D. Meyers – Final Award</i> | <i>S.D. Myers, Inc. v. Canada</i> , (UNCITRAL), Final Award on costs, 30 December 2002 | 5 | R-321 |
| <i>Thunderbird - Award</i> | <i>International Thunderbird Gaming Corporation v. Mexico</i> (UNCITRAL) Arbitral Award, 26 January 2006 | 6 | R-287 |
| <i>Waste Management II - Award</i> | <i>Waste Management Inc. v. Mexico</i> (ICSIDA No. ARB(AF)00/3) Award, 30 April 2004 | 7 | R-300 |

| SHORT FORM | FULL TITLE AND CITATION | TAB | REFERENCE IN THE RECORD |
|---------------|---|-----|-------------------------------|
| | Correspondence | | |
| | Letter to Tribunal from Meg Kinnear dated July 2, 2008 | 8 | |
| | Letter to Tribunal from Greg Somers dated July 17, 2008 | 9 | |
| | Letter to Parties from Greg Somers dated August 15, 2008 | 10 | |
| | Letter to Greg Somers from Meg Kinnear dated November 4, 2008 | 11 | |
| | Letter to Greg Somers from Christophe Douaire de Bondy dated February 3, 2009 | 12 | |
| | Letter to Tribunal from Christophe Douaire de Bondy dated February 16, 2009 | 13 | |
| | Letter to Tribunal from Christophe Douaire de Bondy dated February 26, 2009 | 14 | |
| | Email from Tribunal to the Parties dated March 3, 2009 | 15 | |
| | Letter to Tribunal from Greg Somers dated March 5, 2009 | 16 | |
| | Email from Secretary to the Tribunal to the Parties dated March 9, 2009 | 17 | |
| | Letter to Tribunal from Christophe Douaire de Bondy dated March 11, 2009 | 18 | |
| | Letter to Greg Somers from Christophe Douaire de Bondy dated June 16, 2009 | 19 | |
| | Email to Christophe Douaire de Bondy from Greg Somers dated June 25, 2009 | 20 | |

| SHORT FORM | FULL TITLE AND CITATION | TAB | REFERENCE IN THE RECORD |
|-----------------------|---|------------|--|
| | Correspondence | | |
| | Letter to Tribunal from Christophe Douaire de Bondy dated July 24, 2009 | 21 | |
| | Email exchange between Greg Somers and Jennifer George dated August 6, 2009 | 22 | |
| | Email exchange between Greg Somers and Christophe Douaire de Bondy dated December 6, 2009 | 23 | |
| | Disbursements – See Separate Binder | | |

| ANNEX I - COST OF LEGAL REPRESENTATION | | | |
|--|--------------|-------------------------|--------------|
| | | Lawyers Fees | |
| Description | Hours | Rate | Fees |
| PHASE 1 - Initial Pleadings and Procedural Hearing (October 2006 to June 1, 2008): receive and review Notices of Arbitration, meet with clients; participate in initial procedural hearing, interview witnesses and experts, collect and review documents, conduct legal research, receive and review Memorial, begin Counter-Memorial. | | | |
| Christina Beharry (LA-01)* | 174.25 | \$172.40 | \$30,040.70 |
| Christophe Douaire de Bondy (LA-2B) | 539.50 | \$227.80 | \$122,898.10 |
| Chris Cochlin (LA-01)* | 173.00 | \$172.40 | \$29,825.20 |
| Lori Di Pierdomenico (LA-2A) | 806.50 | \$208.80 | \$168,397.20 |
| Carolyn Elliot Magwood (LA-01) | 789.50 | \$172.40 | \$136,109.80 |
| Meg Kinnear (LA3B) | 179.47 | \$269.30 | \$48,331.27 |
| Steve Kurelek (LA-2A) | 338.50 | \$208.80 | \$70,678.80 |
| Céline Lévesque (LA-2B) | 23.00 | \$227.80 | \$5,239.40 |
| Yasmin Shaker (LA-2A)* | 37.50 | \$208.80 | \$7,830.00 |
| Sylvie Tabet (LA-2B) | 293.50 | \$227.80 | \$66,859.30 |
| Kevin Thompson (LA-01)* | 17.00 | \$172.40 | \$2,930.80 |
| | | | |
| Paralegals (EC-04) | 674.17 | \$133.30 | \$89,866.86 |

| | | Lawyers Fees | |
|---|--------------|-------------------------|--------------|
| Description | Hours | Rate | Fees |
| PHASE 2 - First Written Submissions: (June 2, 2008 to October 28, 2008): meet with clients and witnesses; review file, Memorial, conduct legal research, meet with experts, draft Counter- Memorial. | | | |
| Christina Beharry (LA-01)* | 739.25 | \$172.40 | \$127,446.70 |
| Christophe Douaire de Bondy (LA-2B) | 978.25 | \$227.80 | \$222,845.35 |
| Carolyn Elliot Magwood (LA-01) | 690.95 | \$172.40 | \$119,119.78 |
| Nick Gallus (LA-2A)* | 7.50 | \$208.80 | \$1,566.00 |
| Meg Kinnear (LA3B) | 246.83 | \$269.30 | \$66,471.32 |
| Steve Kurelek (LA-2A) | 858.50 | \$208.80 | \$179,254.80 |
| Céline Lévesque (LA-2B) | 141.00 | \$227.80 | \$32,119.80 |
| Yasmin Shaker (LA-2A)* | 735.50 | \$208.80 | \$153,572.40 |
| | | | |
| Paralegals (EC-04) | 1288.25 | \$133.30 | \$171,723.73 |
| Students | 29.98 | \$111.50 | \$3,342.77 |

| | | Lawyers Fees | |
|---|--------------|-------------------------|--------------|
| Description | Hours | Rate | Fees |
| PHASE 3 - Document Production (October 29, 2008 to May 14, 2009): Review and analyze file documents in connection with production requests; organize client documents for production; prepare submissions to Tribunal re objections and refusals; prepare responses to additional document production; take steps with client, witnesses and expert in anticipation of Reply/Rejoinder. | | | |
| Christina Beharry (LA-01)* | 531.00 | \$172.40 | \$91,544.40 |
| Christophe Douaire de Bondy (LA-2B) | 798.58 | \$227.80 | \$181,916.52 |
| Carolyn Elliot Magwood (LA-01) | 425.75 | \$172.40 | \$73,399.30 |
| Meg Kinnear (LA3B) | 0.50 | \$269.30 | \$134.65 |
| Steve Kurelek (LA-2A) | 776.00 | \$208.80 | \$162,028.80 |
| Céline Lévesque (LA-2B) | 48.50 | \$227.80 | \$11,048.30 |
| Ian Philp (LA-01)* | 75.00 | \$172.40 | \$12,930.00 |
| Yasmin Shaker (LA-2A)* | 757.00 | \$208.80 | \$158,061.60 |
| Sylvie Tabet (LA-2B) | 13.50 | \$227.80 | \$3,075.30 |
| | | | |
| Paralegals (EC-04) | 1177.00 | \$133.30 | \$156,894.10 |
| Students | 11.50 | \$111.50 | \$1,282.25 |
| Technical Support | 81.17 | \$111.50 | \$9,050.46 |

| | | Lawyers Fees | |
|--|--------------|-------------------------|--------------|
| Description | Hours | Rate | Fees |
| PHASE 4 - Second Written Submissions (May 15, 2009 to July 10, 2009): Review Reply, prepare Rejoinder, conduct legal research, meeting with clients, experts and witnesses. | | | |
| Christina Beharry (LA-01)* | 435.75 | \$172.40 | \$75,123.30 |
| Christophe Douaire de Bondy (LA-2B) | 439.00 | \$227.80 | \$100,004.20 |
| Adam Douglas (LA-01)* | 45.50 | \$172.40 | \$7,844.20 |
| Carolyn Elliot Magwood (LA-01) | 232.98 | \$172.40 | \$40,165.75 |
| Steve Kurelek (LA-2A) | 384.00 | \$208.80 | \$80,179.20 |
| Céline Lévesque (LA-2B) | 113.00 | \$227.80 | \$25,741.40 |
| Mark Luz (LA-2A)* | 114.00 | \$208.80 | \$23,803.20 |
| Ian Philp (LA-01)* | 300.00 | \$172.40 | \$51,720.00 |
| Yasmin Shaker (LA-2A)* | 300.00 | \$208.80 | \$62,640.00 |
| Sylvie Tabet (LA-3A) | 32.50 | \$248.20 | \$8,066.50 |
| | | | |
| Paralegals (EC-04) | 442.50 | \$133.30 | \$58,985.25 |
| Technical Support | 14.00 | \$111.50 | \$1,561.00 |

| | | Lawyers Fees | |
|--|--------------|-------------------------|--------------|
| Description | Hours | Rate | Fees |
| PHASE 5 - Preparation for Hearing - Hearing (July 11, 2009 to September 8, 2009): meet with the client; meet with fact and expert witnesses; prepare documents briefs; participate in pre-trial procedural conference, prepare hearing submissions, all other necessary preparation, attendance at hearing. | | | |
| Christina Beharry (LA-01)* | 393.33 | \$172.40 | \$67,810.09 |
| Christophe Douaire de Bondy (LA-2B) | 521.00 | \$227.80 | \$118,683.80 |
| Carolyn Elliot Magwood (LA-01) | 193.00 | \$172.40 | \$33,273.20 |
| Steve Kurelek (LA-2A) | 451.00 | \$208.80 | \$94,168.80 |
| Céline Lévesque (LA-2B) | 78.50 | \$227.80 | \$17,882.30 |
| Mark Luz (LA-2A)* | 178.00 | \$208.80 | \$37,166.40 |
| Ian Philp (LA-01)* | 142.50 | \$172.40 | \$24,567.00 |
| Yasmin Shaker (LA-2A)* | 332.00 | \$208.80 | \$69,321.60 |
| Sylvie Tabet (LA-3A) | 88.50 | \$248.20 | \$21,965.70 |
| | | | |
| Paralegals (EC-04) | 483.75 | \$133.30 | \$64,483.88 |
| Technical Support | 133.00 | \$111.50 | \$14,829.50 |

| Description | Hours | Lawyers Fees Rate | Fees |
|---|--------|-------------------------|--------------|
| PHASE 6 - Post-Hearing Submissions - Closing Arguments (September 9, 2009 to December 17, 2009): meet with clients, telephone calls and correspondence, conduct legal research, review transcripts, draft closing statement, prepare related presentations, draft Post-hearing Brief, attend hearing for closing statements. | | | |
| Christina Beharry (LA-01)* | 495.50 | \$172.40 | \$85,424.20 |
| Christophe Douaire de Bondy (LA-2B) | 483.50 | \$227.80 | \$110,141.30 |
| Carolyn Elliot Magwood (LA-01) | 47.50 | \$172.40 | \$8,189.00 |
| Steve Kurelek (LA-2A) | 351.50 | \$208.80 | \$73,393.20 |
| Céline Lévesque (LA-2B) | 127.50 | \$227.80 | \$29,044.50 |
| Mark Luz (LA-2A) | 116.00 | \$208.80 | \$24,220.80 |
| Yasmin Shaker (LA-2A)* | 475.00 | \$208.80 | \$99,180.00 |
| Sylvie Tabet (LA-3A) | 30.00 | \$248.20 | \$7,446.00 |
| | | | |
| Paralegals (EC-04) | 302.00 | \$133.30 | \$40,256.60 |
| Technical Support | 20.50 | \$111.50 | \$2,285.75 |

| Description | Hours | Lawyers Fees Rate | Fees |
|---|-----------|-------------------------|-----------------------|
| PHASE 7 - Submission on Costs (December 18, 2009 to February 15, 2010): meet with clients, related telephone calls and correspondence, review history of file, conduct legal research, draft costs submission. | | | |
| Christina Beharry (LA-01)* | 138.00 | \$172.40 | \$23,791.20 |
| Christophe Douaire de Bondy (LA-2B) | 24.00 | \$227.80 | \$5,467.20 |
| Steve Kurelek (LA-2A) | 10.00 | \$208.80 | \$2,088.00 |
| Yasmin Shaker (LA-2A)* | 93.50 | \$208.80 | \$19,522.80 |
| | | | |
| Paralegals (EC-04) | 136.42 | \$133.30 | \$18,184.79 |
| | | | |
| Subtotal | 23,156.13 | | \$3,830,855.09 |
| GST @ 5% | | | \$191,542.75 |
| Total Fees | | | \$4,022,397.84 |
| | | | |

* Note: Some lawyers are not employed by the Department of Justice but rather by the Department of Foreign Affairs. In those cases, marked by an asterisk (*) in this section, the classification of the individual has been converted to the equivalent position within the Department of Justice for the purpose of establishing the appropriate billable rate.

| ANNEX II - DISBURSEMENTS | | |
|---------------------------------|----------------------|---------------------------|
| | Disbursements | |
| Description | US Funds | CDN Funds Paid Out |
| DISBURSEMENTS: | | |
| Arbitration Fees | | \$477,602.07 |
| Navigant | | 1,012,308.06 |
| Dr. Costa | \$282,754.75 | \$315,465.57 |
| Dr. Goldman | \$38,064.66 | \$43,520.70 |
| Legal Readers | \$119,636.05 | \$137,074.45 |
| FTI Consulting | \$76,362.82 | \$79,045.20 |
| Printing | | \$144,429.72 |
| Travel | | \$24,226.10 |
| | | |
| Total Disbursements | | \$2,233,671.87 |