

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

CLAIMANT'S AUTHORITIES

23 October 2020

DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300

CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
Tel. 212-350-2737

Counsel for Claimant

LIST OF AUTHORITIES

No.	Description
CA-138	<i>Tennant Energy, LLC v. Gov't of Canada</i> , PCA Case No. 2018-54, Procedural Order No. 4 (27 Feb. 2020)
CA-139	<i>Muhammet Çap and Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan</i> , ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015)
CA-140	<i>Corona Materials, LLC v. Dominican Republic</i> , ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections (31 May 2016)
CA-141	<i>Bach v. McNelis</i> , 207 Cal.App.3d 852 (1989)
CA-142	<i>Detroit Int'l Bridge Co. v. Gov't of Canada</i> , PCA Case No. 2012-25, Award on Costs (17 Aug. 2015)
CA-143	<i>Chemtura Corp. (formerly Crompton Corp.) v. Gov't of Canada</i> , PCA Case No. 2008-01, Award (2 Aug. 2010)
CA-144	<i>Int'l Thunderbird Gaming Corp. v. United Mexican States</i> , UNCITRAL, Arbitral Award (26 Jan. 2006)
CA-145	Ca. Civ. Code § 3289(a) (1986)
CA-146	Ca. Code Civ. P. § 685.010 (1983)

LEGAL AUTHORITY CA-138

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 4

The Arbitral Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms. Christel Y. Tham

27 February 2020

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	RELEVANT PROCEDURAL HISTORY	2
III.	SUMMARY OF THE PARTIES' ARGUMENTS	5
A.	CLAIMANT'S REQUEST FOR INTERIM MEASURES	5
1.	The Claimant's Position	6
2.	The Respondent's Position	8
3.	The Tribunal's Analysis and Decision	10
B.	RESPONDENT'S REQUEST FOR BIFURCATION	12
1.	The Respondent's Position	12
2.	The Claimant's Position	14
3.	The Tribunal's Analysis and Decision	17
C.	RESPONDENT'S MOTION FOR DISCLOSURE OF THIRD-PARTY FUNDING	18
1.	The Respondent's Position	19
2.	The Claimant's Position	20
3.	The Tribunal's Analysis and Decision	20
D.	RESPONDENT'S MOTION FOR SECURITY FOR COSTS	21
1.	Preliminary Matters	22
(a)	<i>The Tribunal's Authority to Order Security for Costs</i>	22
(b)	<i>Applicable Legal Standard</i>	26
2.	The Respondent's Request for Security for Costs	27
(a)	<i>The Respondent's Position</i>	27
(b)	<i>The Claimant's Position</i>	29
3.	Non-Disputing Parties' Submissions	31
(a)	<i>The United States' Submission</i>	31
(b)	<i>The United Mexican States' Submission</i>	32
4.	The Tribunal's Analysis and Decision	32
IV.	DISPOSITIF	37

I. INTRODUCTION

1. The present Order is made in an arbitration between Tennant Energy, LLC (the “**Claimant**”) and the Government of Canada (“**Canada**” or the “**Respondent**”), pursuant to Chapter 11 of the North American Free Trade Agreement (“**NAFTA**”) and the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976 (the “**UNCITRAL Rules**”).
2. The dispute between the Parties concerns the Respondent’s alleged breaches under Chapter 11, Section A of the NAFTA through the application of the 2011 Feed-in Tariff Program (the “**FIT Program**”) in respect of the Claimant’s alleged investment in Skyway 127 Wind Energy Inc. (“**Skyway 127**”), an enterprise incorporated in Ontario, Canada.
3. At issue in this Order are the following applications:
 - (a) The Claimant’s Request for Interim Measures, dated 16 August 2019 (the “**Request for Interim Measures**”), in which it requested that the Tribunal order (i) the disputing parties to preserve, index, protect, and scan documentation in their possession, custody, or control that is relevant to the dispute; and (ii) the Respondent to produce within 30 days the non-confidential documents on record in the *Windstream Energy LLC v. Government of Canada* case in their entirety to the Claimant, along with an index;
 - (b) The Respondent’s Request for Bifurcation, submitted on 23 September 2019 (the “**Request for Bifurcation**”) to address in a preliminary procedure the Respondent’s NAFTA Article 1116(2) time-bar jurisdictional objection; and
 - (c) The Respondent’s Motion for Security for Costs, and in the same submission, its Motion for the Disclosure of Third-Party Funding, dated 16 August 2019 (the “**Motion for Security for Costs**” and “**Motion for the Disclosure of Third Party Funding**”), in which it requested the Tribunal to order the Claimant to (i) issue security for costs in the amount of 6,934,001.95 CAD, by depositing the security into an escrow account arranged by the Permanent Court of Arbitration (the “**PCA**”) within 90 days of the order, or the arbitral proceedings will be discontinued; and (ii) disclose the existence of any third-party funding agreement that the Claimant has entered into to finance its claim in this arbitration, the name(s) and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimant may achieve in this arbitration, or pay an adverse costs order against the Claimant.

II. RELEVANT PROCEDURAL HISTORY¹

4. On 24 June 2019, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) which, *inter alia*, provided that these proceedings shall be governed by the UNCITRAL Rules, except as modified by the provisions of Chapter 11, Section B of the NAFTA, and set out the procedural calendar in its Annex 1. The procedural calendar provided for an “Initial Phase”, comprising of (i) the Parties’ submissions on bifurcation and any preliminary

¹ Given its nature, this Order will contain only recitals of the factual background and procedural history needed to resolve the issues arising in respect of various applications. These matters will be addressed in more detail in the Final Award, as appropriate, in light of the future pleadings of the Parties, which will follow in due course.

motions; (ii) the non-disputing Parties' submissions on questions of law related to the interpretation of the NAFTA on bifurcation; (iii) the Parties' responses to the non-disputing Parties' submissions; (iv) a hearing on the issues of bifurcation and preliminary motions, which would take place from 14 to 15 January 2020 (the "**Hearing**"); and (v) the Tribunal's decision on bifurcation and any preliminary motions. In addition, the procedural calendar set forth two subsequent alternative timetables applicable (i) should the proceedings not be bifurcated; or (ii) should the proceedings be bifurcated.

5. On 16 August 2019, the Respondent submitted its Motion for Security for Costs and Disclosure of Third-Party Funding ("**Motion for Security for Costs**"), accompanied by exhibits R-001 to R-013 and legal authorities RLA-001 to RLA-051.
6. On the same date, the Claimant submitted its **Request for Interim Measures**, accompanied by legal authorities CLA-001 to CLA-052.
7. On 23 September 2019, the Claimant submitted its Response to Canada's Motion for Security for Costs and Disclosure of Funding ("**Response to the Motion for Security for Costs**"), accompanied by legal authorities CLA-001 to CLA-070.
8. On the same date, the Respondent submitted its **Request for Bifurcation** and, in a separate filing, its Response to the Claimant's Request for Interim Measures ("**Response to the Request for Interim Measures**"), accompanied by exhibits R-001 to R-023 and legal authorities RLA-001 to RLA-088.
9. On 23 October 2019, the Claimant submitted its Response to the Request for Bifurcation ("**Response to the Request for Bifurcation**"), accompanied by exhibits C-001 to C-017 and legal authorities CLA-001 to CLA-071.
10. On 1 November 2019, the United States ("**U.S.**") submitted a letter to the Tribunal noting *inter alia* that it did not intend to make any submissions in connection with the request for bifurcation, but may wish to do so in connection with the Parties' preliminary motions. The U.S. proposed to inform the Tribunal and the Parties whether it will make such submissions by 27 November 2019, and file any such submissions by 6 December 2019. The U.S. also reserved its right to make oral submissions during the Hearing, pursuant to Article 1128 of the NAFTA.
11. On 2 November 2019, the Claimant wrote to the Tribunal (i) objecting to the U.S.' proposed procedural schedule and maintaining that any non-disputing Party submissions should be provided no later than 6 November 2019; and (ii) objecting to the U.S.' participation at the upcoming Hearing.
12. On 3 November 2019, the Tribunal invited the Respondent to comment on the U.S.' and the Claimant's correspondence of 1 and 2 November 2019, respectively, by 4 November 2019.
13. On 4 November 2019, Mexico submitted a letter to the Tribunal informing that it did not intend to make a submission on bifurcation, expressing its intention to attend the January 2020 hearing and reserving its right to make any oral submissions then, and joining the U.S. in its proposal to inform the Tribunal and the Parties whether it will make submissions on the Parties' preliminary motions by 27 November 2019, and file any such submissions by 6 December 2019.
14. On the same day, the Respondent wrote to the Tribunal arguing *inter alia* that (i) under the NAFTA, the non-disputing Parties have a right to make submissions on questions of

interpretation of the NAFTA and that their proposed timetable is reasonable; and (ii) the non-disputing Parties have a right under the NAFTA to attend hearings and make oral submissions.

15. On 5 November 2019, in reaction to the 4 November 2019 letter from Mexico, the Claimant wrote to the Tribunal requesting that it (i) set a new date, which shall be no later than 8 November 2019, for the filing of all remaining non-disputing Party submissions; and (ii) reaffirm its prior decision as reflected in Procedural Order No. 1 that the non-disputing Parties should not be allowed to attend the Hearing.
16. On 11 November 2019, the Tribunal wrote to the Parties and non-disputing Parties directing *inter alia* that (i) the non-disputing Parties inform the Tribunal by 13 November 2019 whether they will be making any submissions on the Parties' preliminary motions, and file any such submissions by 27 November 2019; (ii) the Parties file their responses, if any, to any non-disputing Party submissions, by 27 December 2019; and (iii) the non-disputing Parties shall be allowed to attend the Hearing, and make any oral submissions to the extent that they have given timely notice to the Parties in writing.
17. On 13 November 2019, the U.S. and Mexico informed the Tribunal that they expect to make submissions on questions of interpretation of the NAFTA in connection with the Parties' preliminary motions.
18. On 18 November 2019, the Respondent submitted a revised version of RLA-006, and sought the Tribunal's guidance on the agenda and time allocation for the Hearing.
19. On 20 November 2019, the Tribunal *inter alia* informed the Parties that it wished to hear oral submissions on the Respondent's request for bifurcation and all the Parties' preliminary motions during the Hearing, and requested the Parties to confer and jointly propose a draft hearing schedule by 6 December 2019.
20. On 27 November 2019, the U.S. and Mexico submitted their respective submissions on questions of interpretation of the NAFTA, pursuant to Article 1128 of the Treaty (the "**U.S.' Article 1128 Submission**" and "**Mexico's Article 1128 Submission**").
21. On 6 December 2019, the Parties submitted their respective proposed hearing schedules for the Hearing, as well as their comments with respect to the various disputed aspects.
22. On 27 December 2019, the Parties submitted their respective responses to the non-disputing Parties' submissions of 27 November 2019 (the "**Claimant's Response to the non-Disputing Parties' Submissions**" and "**Respondent's Response to the non-Disputing Parties' Submissions**").
23. On 28 December 2019, the Tribunal circulated to the Parties a final schedule for the Hearing.
24. On 3 January 2020, the Tribunal invited the non-disputing Parties to clarify by 7 January 2020 whether they intend to make any oral submissions at the Hearing and, if so, whether they have notified this in a timely manner to the Disputing Parties.
25. On 7 January 2020, the non-disputing Parties respectively informed the Tribunal and the Parties that the U.S., but not Mexico, intends to make oral submissions at the Hearing.
26. On 8 January 2020, the Tribunal circulated the final schedule and list of attendees for the Hearing.

27. The Hearing took place from 14 to 15 January 2020 at the World Bank Main Complex Building, Building C, 1225 Connecticut Avenue N.W., Washington, D.C. 20036. Non-confidential portions of the Hearing were broadcast live to a separate conference room at the hearing venue accessible to the public.
28. On 4 February 2020, the Respondent requested leave from the Tribunal to submit the 27 January 2020 Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim in the *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35) case ("**Dirk Herzig v. Turkmenistan**") into the record, "and to allow the disputing parties, should the Tribunal wish, to make brief, concise written submissions on the relevance of the decision" to the Respondent's Motion for Security for Costs. The Respondent justified its request on the basis that the decision, which is directly relevant, had only been released that day and the Respondent thus could not have introduced it into the record any earlier.
29. On the same day, the Claimant objected to the Respondent's request, alleging that the "additional costs arising from Canada's requests, when coupled with the delay arising from the due process obligations owed to the disputing parties, are disproportionately high" and that in any event, the decision the Respondent seeks to introduce is irrelevant because "the test for ICSID Convention interim measures provisions differ from the terms of Art 26 of the 1976 UNCITRAL Arbitration Rules and the governing provisions in NAFTA Article 1134."
30. On 5 February 2020, the Respondent clarified that the decision that it sought to submit into the record could be found on IA Reporter, a publicly available website.
31. On 10 February 2020, the Tribunal granted the Respondent's 4 February 2020 request and invited the Parties to file submissions on the Decision in *Dirk Herzig v. Turkmenistan*.
32. On 17 February 2020, the Respondent submitted the Decision in *Dirk Herzig v. Turkmenistan* into the record, together with a written submission.
33. On 24 February 2020, the Claimant filed its written submission on the Decision in *Dirk Herzig v. Turkmenistan*.

III. SUMMARY OF THE PARTIES' ARGUMENTS

34. In this section, the Tribunal will review the Parties' and the non-disputing Parties' positions and arguments in respect of the applications before the Tribunal. Naturally, this section is not meant to serve as an exhaustive review of the Parties' and the non-disputing Parties' submissions on the applications at issue, but a summary of the arguments that are relevant to the Tribunal's analysis and findings. Regardless, the Tribunal has carefully considered all of the submissions made by the Parties and the non-disputing Parties, whether in writing or made orally during the Hearing.

A. CLAIMANT'S REQUEST FOR INTERIM MEASURES

35. In its Request for Interim Measures, the Claimant requests that the Tribunal (i) order the Parties to preserve and protect documentation in their possession, custody, or control that is relevant to the dispute (the "**Protected Documents**"), including in particular documents "relevant to the Investor, the Investment, and the award electrical power transmission access or contracts under the Ontario [FIT Program] and/or any related policies or

measures”;² and (ii) order the Respondent to produce non-confidential documentation on record in *Windstream Energy v. Canada* (the “**Windstream Documents**”).³ The Claimant also requests the Tribunal to order the reimbursement of its reasonable legal and other costs incurred in connection with its request for interim measures.⁴

36. The Respondent submits that the Tribunal should reject the Claimant’s request and reserves its right to claim the costs incurred in responding thereto.⁵

1. The Claimant’s Position

37. The Claimant submits its request for interim measures in the context of what it considers to be a systemic lack of transparency in Ontario’s administration of the FIT Program, perpetuated by, among other things, the suppression and destruction of relevant evidence. The Claimant asserts that this suppressed evidence, which only became publicly available through the release of information in the *Mesa Power v. Canada* and *Windstream v. Canada* arbitration proceedings, reveals the extent of Ontario’s unlawful conduct which resulted in the breaches of NAFTA the Claimant alleges in these proceedings. Moreover, the Claimant contends that information that is “relevant to [its] case and may reveal further unlawful behavior that harmed its investment” continues to be withheld, and its repeated requests to the Respondent to take steps to collect and preserve evidence related to the dispute were either ignored or rejected.
38. For these reasons, the Claimant considers the relief sought to be “necessary to preserve the *status quo*, ensure the availability of information necessary for [it] to make its claim fully and fairly, and enable [it] and [the Tribunal] to proceed without an asymmetry of relevant information relative to Canada.”⁶
39. The Claimant contends that NAFTA Article 1134 and Article 26 of the UNCITRAL Rules both provide that the Tribunal has the authority to order interim measures.⁷ Article 1134 of the NAFTA expressly provides that, in exercising such authority, the Tribunal may grant an “order to preserve evidence in the possession or control of a disputing party.”⁸ Similarly, the Claimant notes that the non-exhaustive list of categories of interim measures under Article 26(2) of the UNCITRAL Rules encompasses the relief it seeks.⁹ Accordingly, the Claimant argues that the Tribunal has the power to grant both of its requested interim measures.¹⁰
40. In addition, the Claimant submits that it is entitled to the interim measures requested because it has satisfied all the relevant criteria under the relevant rules,¹¹ namely “(a) a risk of serious or irreparable harm; (b) urgency; (c) no prejudgment of the merits of a case; and

² Request for Interim Measures, ¶ 2(a), FN 3.

³ Request for Interim Measures, ¶¶ 2, 36, referring to *Windstream Energy LLC v. Canada*, PCA Case 2013-22 (“*Windstream Energy v. Canada*”).

⁴ Request for Interim Measures, ¶ 37.

⁵ Response to the Request for Interim Measures, ¶¶ 3, 38-39.

⁶ Request for Interim Measures, ¶ 12.

⁷ Request for Interim Measures, ¶¶ 13, 16.

⁸ Request for Interim Measures, ¶ 13, quoting Article 1134 of the NAFTA.

⁹ Request for Interim Measures, ¶ 17, referring to *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (“*Biwater Gauff v. Tanzania*”), Procedural Order No. 1, 31 March 2006, ¶ 84 (CLA-45).

¹⁰ Request for Interim Measures, ¶ 17.

¹¹ Request for Interim Measures, ¶ 28.

(d) a *prima facie* case on the merits”.¹² In this regard, the Claimant notes that “in determining whether to grant interim measures, most tribunals also balance the harm the Investor is likely to suffer in the absence of interim measures against the harm likely to result to the respondent if the measures are granted”.¹³

41. First, the Claimant alleges that it will suffer a risk of serious and imminent harm if the Tribunal fails to grant the interim relief requested. In particular, the Claimant considers that “[t]here is a material risk that relevant Documents will be lost or destroyed given past patterns of conduct by the Ontario Government.”¹⁴ The Claimant also contends that “[w]ithout the *Windstream* documents in particular, neither the Investor nor the Tribunal will benefit from the information already available to Canada and one of the arbitrators from their participation [in that case].”¹⁵
42. Second, the Claimant submits that its request is urgent because, as in *Biwater Gauff v. Tanzania*, the requested documents must be preserved before the proceedings progress any further, in order to enable each Party to properly plead their case.¹⁶ The Claimant further claims that the urgency of its request is “further pronounced” with respect to the *Windstream* Documents because if it is not granted, only the Respondent and one arbitrator on the Tribunal will have access to this relevant information when considering the Parties’ motions and upcoming pleadings.¹⁷
43. The Claimant similarly rejects the Respondent’s claim that its request for the *Windstream* Documents is not urgent and can simply be made during the document production phase. In the Claimant’s view, given the *Windstream* Documents’ “obvious and potential relevance and materiality to the issues in dispute”,¹⁸ it is important that the Claimant and the entire Tribunal have access to this information as soon as possible, and “there is no additional burden in asking Canada to provide it at this time.”¹⁹
44. With respect to the third and fourth criteria, the Claimant contends that it “has demonstrated a strong *prima facie* case on the merits, [and] granting the relief requested would by no means prejudice the merits of the case.”²⁰ In addition, according to the Claimant, “the evidence in question is likely to be relevant to the substantive jurisdictional and merits issues that the Tribunal must decide,” and accordingly, “refusing to grant the relief requested would effectively prejudice those issues by the Tribunal choosing to leave itself in the position of adjudicating them without all relevant facts.”²¹
45. Finally, the Claimant argues that the harm it will suffer if its request is not granted “outweighs any potential burden on Canada by complying with the orders requested.”²²

¹² Request for Interim Measures, ¶ 20, referring to Gary Born, *International Commercial Arbitration* (2014), 2468 (CLA-44).

¹³ Request for Interim Measures, ¶ 20, referring to Gary Born, *International Commercial Arbitration* (2014), 2468 (CLA-44).

¹⁴ Request for Interim Measures, ¶ 29; Hearing Transcript, Day 1, 83:6-20.

¹⁵ Request for Interim Measures, ¶ 29(b).

¹⁶ Request for Interim Measures, ¶ 31, citing *Biwater Gauff v. Tanzania*, ¶ 86 (CLA-45).

¹⁷ Request for Interim Measures, ¶ 31; Hearing Transcript, Day 1, 82:12-16.

¹⁸ Request for Interim Measures, ¶ 32.

¹⁹ Request for Interim Measures, ¶ 31, referring to Transcript of the First Procedural Hearing, 129:7-17; *Biwater Gauff v. Tanzania*, ¶ 86 (CLA-45).

²⁰ Request for Interim Measures, ¶ 33, citing *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶ 55 (CLA-46).

²¹ Request for Interim Measures, ¶ 33, referring to *Biwater Gauff v. Tanzania*, ¶ 86 (CLA-45).

²² Request for Interim Measures, ¶ 34.

With respect to the *Windstream* Documents in particular, the Claimant notes that they are “already organized, indexed, and within Canada’s possession” and “the FTC Notes of interpretation bind it to have already made [those] Documents public already.”²³ It further points out that “producing the requested Documents now could reduce the need for either disputing party to seek to engage in costly third-party discovery requests in U.S. courts.”²⁴

2. The Respondent’s Position

46. The Respondent largely agrees with the Claimant that in order to determine whether interim measures are necessary pursuant to Article 26(1) of the UNCITRAL Rules the Tribunal must consider whether “(i) *prima facie*, there is a reasonable possibility that the disputing party advancing the motion would prevail in the case; (ii) the disputing party would likely suffer harm not adequately reparable by an award of damages without the order; (iii) the disputing party’s potential harm without the order substantially outweighs the harm that the other disputing party would likely incur from the order; and (iv) the condition of urgency is met.”²⁵ The Respondent contends that since the Claimant has failed to meet its burden of satisfying each of these elements the Tribunal should decline both of the Claimant’s requests.²⁶
47. With respect to the Claimant’s requested order for Canada to preserve, index, protect, and scan documents, first, the Respondent submits that the Claimant has failed to satisfy its burden to prove, *prima facie*, that it has a reasonable possibility of prevailing in this case. In this respect, the Respondent reiterates that the Claimant’s claims are time-barred under Article 1116(2) of the NAFTA, and that any information that may be obtained during this arbitration is not necessary to rule on the time-bar issue.²⁷
48. Second, the Respondent argues that the Claimant “has failed to demonstrate it will suffer any harm if the tribunal refuses to grant an order for the preservation and protection of documents.”²⁸ The Respondent submits that it “has already put in place robust procedures to preserve and protect documents that may be relevant to this dispute”, and which “effectively render Tennant’s request unnecessary.”²⁹ For example, the Respondent explains, the Archives and Recordkeeping Act in force since September 2007, and Ontario’s Corporate Policy on Recordkeeping of July 2011 and March 2015 (“**Recordkeeping Policy 2015**”), all have as one of their main objectives the management and preservation of public records.³⁰ In particular, Ontario’s Corporate Policy on Recordkeeping of 2015, *inter alia*, expressly prohibits ministries from destroying records in their possession that may be subject to a legal proceeding until they are notified that the matter has been concluded.³¹

²³ Request for Interim Measures, ¶ 34.

²⁴ Request for Interim Measures, ¶ 35.

²⁵ Motion for Security for Costs, ¶¶ 14-16; Response to the Request for Interim Measures, ¶ 2.

²⁶ Response to the Request for Interim Measures, ¶ 3.

²⁷ Statement of Defence, ¶ 46; Request for Bifurcation, ¶¶ 1, 10-22; Response to the Request for Interim Measures, ¶ 6, *referring to* Article 1116(2) of the NAFTA; Hearing Transcript, Day 1, 96:6-11.

²⁸ Response to the Request for Interim Measures, ¶ 15.

²⁹ Response to the Request for Interim Measures, ¶¶ 7-8; Hearing Transcript, Day 1, 96:12-97:23.

³⁰ Response to the Request for Interim Measures, ¶¶ 8-10, *referring to* Archives and Recordkeeping Act, 2006, S.O. 2006, c. 34, Sched. A (**R-015**); Government of Ontario, Minister of Government Services, Corporate Policy on Recordkeeping, 25 July 2011 (**R-016**); Government of Ontario, Ministry of Government and Consumer Services, Corporate Policy on Recordkeeping, March 2015 (**R-017**).

³¹ Response to the Request for Interim Measures, ¶ 10, *referring to* Ontario Corporate Policy on Recordkeeping 2015, ¶ 28 (**R-017**).

49. In relation to the records managed by the Independent Electricity System Operator (“**IESO**”), the entity that was merged with the Ontario Power Authority (“**OPA**”),³² the Respondent alleges that pursuant to domestic freedom of information legislation, this entity has a legal obligation to preserve records.³³ In confidential submissions, the Respondent detailed the steps that had been taken to preserve records.
50. An order for the preservation of documents, in the Respondent’s view, is therefore unnecessary in this case.³⁴
51. Third, the Respondent maintains that it would be unduly burdensome to index and scan the Protected Documents at this stage given the breadth of the Claimant’s request and the fact that its Request for Bifurcation is still pending.³⁵
52. Fourth, the Respondent alleges that the Claimant has failed to demonstrate urgent circumstances justifying its request, since its allegations in support of such urgency relate to past events occurring long before the filing of its Notice of Intent.³⁶ In this regard, the Respondent contends that since there is no evidence of destruction of documents relevant to this dispute, the urgency requirement has not been met.³⁷
53. Regarding the Claimant’s request for an order for the production of the *Windstream* Documents, the Respondent submits that, first, “the Claimant has failed to satisfy its burden of demonstrating a *prima facie* ‘reasonable case’ in its underlying claim,” reiterating the arguments it put forward in relation to the Claimant’s request for the preservation of the Protected Documents.³⁸
54. Second, the Respondent contends that “there is no risk of harm if the Tribunal denies the Claimant’s request for production of the *Windstream* Documents at this stage of the arbitration.”³⁹ This is because the *Windstream* Documents are not relevant to the Respondent’s time-bar objection, and the Claimant has not provided any reason justifying a departure from the timelines and procedures for document production set out in Procedural Order No. 1. These importantly include, the Respondent contends, procedures that assist with determining the relevance and materiality of the *Windstream* Documents, and narrowing the scope of documents to be produced in this proceeding, in accordance with the International Bar Association (“**IBA**”) Rules on the Taking of Evidence in International Arbitration.⁴⁰ In the Respondent’s view, the Claimant has not provided any basis for it to circumvent the requirement to justify the relevance and materiality of its document requests, and acceding to the Claimant’s request would accordingly be “procedurally

³² Response to the Request for Interim Measures, ¶ 8. *See also* Statement of Defence, ¶¶ 5-11.

³³ Response to the Request for Interim Measures, ¶ 11, *referring to* Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c F.31, s. 10.1 (**R-018**).

³⁴ Response to the Request for Interim Measures, ¶¶ 14-15, *citing Nova Group Investments B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, Decision on Claimant’s Request for Provisional Measures, 29 March 2017, ¶ 243.

³⁵ Response to the Request for Interim Measures, ¶ 17; Hearing Transcript, Day 1, 97:24-98:5.

³⁶ Response to the Request for Interim Measures, ¶ 18, *referring to* Request for Interim Measures, ¶¶ 6-8; Hearing Transcript, Day 1, 98:14-99:3.

³⁷ Response to the Request for Interim Measures, ¶ 20.

³⁸ Motion for Security for Costs, ¶ 25; Response to the Request for Interim Measures, ¶ 23; Hearing Transcript, Day 1, 99:9-11.

³⁹ Response to the Request for Interim Measures, ¶¶ 24-33; Hearing Transcript, Day 1, 99:12-101:3.

⁴⁰ Response to the Request for Interim Measures, ¶¶ 26-33.

unfair” and “lead to the Claimant unilaterally benefitting from an early production of documents.”⁴¹

55. Third, in the Respondent’s view, it would be unduly burdensome for it to produce the *Windstream* Documents at this stage of the arbitration, “particularly since [they] are not relevant to Canada’s time bar objection, and because the Claimant has not proven the relevance and materiality of the documents requested to its claim.”⁴²
56. Fourth, the Respondent argues that “[t]here are no urgent circumstances requiring the Tribunal to order Canada to produce the *Windstream* Documents.” In this respect, the Respondent maintains that the Claimant “provides no evidence that any relevant and material documents are necessary in order for the Tribunal to rule on Canada’s jurisdictional objection on time bar, nor has it provided any evidence that such documents have been or will be suppressed or destroyed during the course of this arbitration.”⁴³

3. The Tribunal’s Analysis and Decision

57. The Claimant is seeking (i) an order that the Respondent produce the *Windstream* Documents at this stage of the arbitration; and (ii) an order that the Parties preserve, index and protect the Protected Documents. It is undisputed that the Tribunal has authority to grant the interim measures sought pursuant to Article 1134 of the NAFTA and Article 26(1) of the UNCITRAL Rules.⁴⁴
58. Article 26(1) of the UNCITRAL Rules provides *inter alia* that the Tribunal may make any interim measures it deems “necessary” in respect of the subject-matter of the dispute. While Article 26(1) does not make explicit the criteria which the Tribunal should apply in determining whether an interim measure is “necessary”, the Tribunal notes that the Parties largely agree that the requesting party would be required to show that there is, amongst others, a risk of serious or irreparable harm and that the condition of urgency is met.⁴⁵
59. Turning to the Claimant’s request that the Respondent produce the *Windstream* Documents at this stage of the arbitration, the Tribunal is not persuaded that it is necessary for the Tribunal to order an early production of these documents, which would require the Tribunal to depart from the timelines and procedures for document production set out in PO 1. In the Tribunal’s view, the Claimant’s request that the *Windstream* Documents be produced is in essence a discovery request which may be made at the document production stage.
60. In particular, the Tribunal fails to see any risk of serious or irreparable harm to the Claimant if the *Windstream* Documents are not produced now. The Claimant has not provided any reason for the *Windstream* Documents to be treated differently from any other document requests which would require proof of the various requirements for document production in accordance with the IBA Rules on the Taking of Evidence in International Arbitration, including relevance and materiality.

⁴¹ Response to the Request for Interim Measures, ¶ 33.

⁴² Response to the Request for Interim Measures, ¶ 35, *referring to* Request for Bifurcation, ¶¶ 26-28; Statement of Defence, ¶ 27.

⁴³ Response to the Request for Interim Measures, ¶ 36; Hearing Transcript, Day 1, 101:21-24.

⁴⁴ Request for Interim Measures, ¶ 13-14; Response to the Request for Interim Measures, ¶ 2.

⁴⁵ Request for Interim Measures, ¶ 20; Response to the Request for Interim Measures, ¶ 2.

61. In this regard, the Claimant has made no attempt to argue that the *Windstream* Documents are relevant and material with reference to its pleaded claims.⁴⁶ Instead, the thrust of the Claimant's argument was that the documents have to be produced urgently because, without them in the Claimant's possession, only the Respondent and one of the three arbitrators will have knowledge of them.⁴⁷ It is unclear to the Tribunal how that would result in serious or irreparable harm to the Claimant if the *Windstream* Documents, assuming they are relevant and material, are produced only at the discovery stage.
62. The Tribunal is also unable to agree with the Claimant that there are urgent circumstances requiring the Tribunal to order the Respondent to produce the *Windstream* Documents now.
63. The Respondent has stated at the Hearing that it has in its possession electronic copies of the *Windstream* Documents.⁴⁸ Further, the *Windstream* Documents which the Claimant is now seeking are documents that were produced and are on the record of the *Windstream* arbitration. The Claimant does not dispute that these documents are securely held by PCA in its archives.⁴⁹ In other words, it is clear that there are presently two available sources of the *Windstream* Documents, namely the Respondent's internal records and the PCA's archives.
64. In the event that the Tribunal were to conclude at a later stage that *Windstream* Documents are to be produced in this arbitration, and for whatever reason the *Windstream* Documents held by the Respondent are lost, there is nothing which prevents the Claimant from requesting access to the *Windstream* Documents stored in the PCA's archives. In this regard, the Tribunal notes that the Respondent has unambiguously waived any objections to the PCA producing the *Windstream* Documents if that were the case.⁵⁰ The Tribunal is therefore not satisfied that the requirement of urgency is met.
65. As for the Claimant's request that the Tribunal orders that the Parties preserve, index and protect the Protected Documents, the Tribunal is similarly not persuaded that such an order is necessary at this stage.
66. The Respondent has explained⁵¹ that it has put in place procedures to preserve and protect documents that may be relevant to the dispute.
67. Having been informed, in confidential session, of the steps that the Respondent has put in place to protect and preserve the Protected Documents, the Tribunal is satisfied that these steps are sufficient. It is also unclear to the Tribunal what further steps the Respondent could take to preserve and protect the Protected Documents. Consequently, the Tribunal is not convinced that there is a risk of serious or irreparable harm or that the condition of urgency is met.
68. The Tribunal further notes that both Parties have stated unambiguously that it is important for Parties to take active steps to preserve evidence relevant to this case. The Tribunal expects the Parties to continue to be mindful of the need to ensure that relevant evidence is preserved and remains available.

⁴⁶ Request for Interim Measures, ¶¶ 29(a), 32; Hearing Transcript, Day 1, 89:24-90:19.

⁴⁷ Request for Interim Measures, ¶ 31; Hearing Transcript, Day 1, 82:12-23, 85:23-86:2, 87:8-17.

⁴⁸ Hearing Transcript, Day 1, 109:8-9.

⁴⁹ Hearing Transcript, Day 1, 86:20-87:2.

⁵⁰ Hearing Transcript, Day 1, 120:6-121:4.

⁵¹ Response to the Request for Interim Measures, ¶ 8 to 15.

69. For the reasons set out above, the Claimant's request for interim measures is dismissed.

B. RESPONDENT'S REQUEST FOR BIFURCATION

1. The Respondent's Position

70. The Respondent requests that, for reasons of fairness and procedural efficiency, the Tribunal should bifurcate the proceedings and address as a preliminary question its jurisdictional objection concerning Article 1116(2) of the NAFTA.⁵² Under this objection, the Respondent submits the Claimant's claims are time-barred because it knew, or should have known, about the alleged loss or damage more than three years before it submitted its claim to arbitration (*i.e.*, before 1 June 2014).⁵³ The Respondent does not propose that the Tribunal address its other jurisdictional objections in a preliminary phase because they may be more closely intertwined with the merits of the dispute.⁵⁴
71. The Respondent submits that Article 21(4) of the UNCITRAL Rules grants the Tribunal the discretion to bifurcate the proceedings and at the same time "creates a clear presumption in favour of bifurcating jurisdictional questions."⁵⁵ Not only have NAFTA Chapter 11 tribunals "frequently decided questions of jurisdiction as a preliminary matter", the Respondent also points out that such "questions of jurisdiction" often include time-bar issues.⁵⁶ In deciding whether or not to bifurcate the proceedings into a separate jurisdictional phase, the Respondent asserts that tribunals have been guided by the principles of fairness and efficiency⁵⁷ and have considered whether the jurisdictional objection(s) at stake (i) are *prima facie* serious and substantial; (ii) can be examined without prejudging or entering the merits; and (iii) if successful, could dispose of all or an essential part of the claims.⁵⁸

⁵² Request for Bifurcation, ¶¶ 1, 29; Hearing Transcript, Day 1, 128:13-19.

⁵³ Statement of Defence, ¶¶ 28-39; Hearing Transcript, Day 1, 128:20-130:8.

⁵⁴ Request for Bifurcation, ¶ 5.

⁵⁵ Request for Bifurcation, ¶¶ 6, 8, citing *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13 ("*Resolute v. Canada*"), Procedural Order No. 4 - Decision on Bifurcation, 18 November 2016, ¶ 4.3 (RLA-052); *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17 ("*Mesa Power v. Canada*"), Procedural Order No. 2, 18 January 2013, ¶ 16 (RLA-053); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL ("*Glamis Gold v. Unites States*"), Procedural Order No. 2 (Revised), 31 May 2005, ¶¶ 9, 12(b) (RLA-054); *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, UNCITRAL ("*Pey Casado v. Chile II*"), Decision on Respondent's Request for Bifurcation, 27 June 2018, ¶¶ 100-101 (RLA-055); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Procedural Order No. 4 - Decision on the Respondent Application for Bifurcation, 19 April 2017, ¶ 70 (RLA-056). See also Hearing Transcript, Day 1, 131:20-132:7.

⁵⁶ Request for Bifurcation, ¶ 7, referring to *Resolute v. Canada*, ¶ 4.6 (RLA-052).

⁵⁷ Request for Bifurcation, ¶¶ 7-8, referring to *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2 ("*Lighthouse v. Timor-Leste*"), Procedural Order No. 3 – Decision on Bifurcation and Related Requests, 8 July 2016, ¶ 19 (RLA-059); *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 38 (RLA-071); *Glamis Gold v. United States*, ¶ 11 (RLA-054).

⁵⁸ Request for Bifurcation, ¶ 9, referring to *Resolute v. Canada*, ¶ 4.3 (RLA-052); *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 10 (RLA-060); *Global Telecom Holding S.A.E. v. Government of Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 – Decision on

72. The Respondent affirms that bifurcation is appropriate in this arbitration as its Request for Bifurcation satisfies the mentioned three criteria. With respect to the first criterion, the Respondent submits that in examining whether it has been met, a tribunal is “only required to be satisfied that the objections are not frivolous or vexatious.”⁵⁹ In this regard, the Respondent asserts that its objection is serious as “it goes to the very basis of the Tribunal’s authority to hear [the Claimant’s claims].”⁶⁰ According to the Respondent, the limitation period enshrined in Article 1116(2) has been strictly applied by NAFTA Chapter 11 tribunals, and expressly recognized as “an integral aspect of the NAFTA Parties’ consent to arbitration.”⁶¹ Since the Claimant did not submit its claim within the required three-year period, the Respondent has not consented to arbitration this claim.⁶²
73. The Respondent submits that the jurisdictional objection in question is also substantial.⁶³ In this respect, the Respondent maintains that its objection applies to all of the “four categories of wrongful actions” challenged by the Claimant under Article 1105 of the NAFTA,⁶⁴ namely the Respondent’s (i) unfair manipulation of the award of access to the electricity transmission grid; (ii) unfair manipulation of the dissemination of program information under the FIT Program; (iii) unfair manipulation of the awarding of Contracts under the FIT Program; and (iv) improper destruction of necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.⁶⁵
74. According to the Respondent, the evidence already existing on the record demonstrates that these actions all took place more than three years before the Claimant filed its Notice of Arbitration (*i.e.*, before 1 June 2014), and based on publicly available information the Claimant knew, or should have known, about these alleged breaches before 1 June 2014.⁶⁶ For this reason, the Respondent submits that no further briefing on the part of the Claimant is necessary for the Tribunal to determine whether or not to bifurcate the proceedings.⁶⁷
75. As evidence that the Claimant knew or should have known about the first three categories of alleged wrongful actions, the Respondent points to *inter alia* the notice of arbitration submitted by Mesa Power Group, LLC (“**Mesa Power**”) against Canada on 4 October 2011, which “included nearly identical allegations to [the first three categories of alleged “wrongful actions”] put forward by the Claimant.”⁶⁸ In the Respondent’s view, if Mesa Power “had sufficient knowledge to make these allegations in 2011 based on information

Respondent’s Request for Bifurcation, 14 December 2017, ¶ 100 (**RLA-075**); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 – Decision on Bifurcation, 28 June 2018, ¶ 49 (**RLA-061**); and *Bay View Group LLC and the Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 2 on Bifurcation, 28 June 2019, ¶¶ 9, 36 (**RLA-076**). *See also* Hearing Transcript, Day 1, 132:8-133:8.

⁵⁹ Request for Bifurcation, ¶ 11, *citing Resolute v. Canada*, ¶ 4.4 (**RLA-052**); Hearing Transcript, Day 1, 133:10-20.

⁶⁰ Request for Bifurcation, ¶ 12.

⁶¹ Request for Bifurcation, ¶¶ 12-14, *citing Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63 (**RLA-081**).

⁶² Request for Bifurcation, ¶ 13, *referring to Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120 (**RLA-002**); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, ¶ 229 (**RLA-003**).

⁶³ Request for Bifurcation, ¶ 15.

⁶⁴ Request for Bifurcation, ¶ 16, *referring to* Notice of Arbitration, ¶¶ 90-91.

⁶⁵ Notice of Arbitration, ¶¶ 90-91.

⁶⁶ Request for Bifurcation, ¶¶ 15, 22. *See also* Hearing Transcript, Day 1, 135:16-141:19.

⁶⁷ Hearing Transcript, Day 1, 204:25-205:6.

⁶⁸ Request for Bifurcation, ¶¶ 17-18; Hearing Transcript, Day 1, 143:24-144:3.

that was publicly available at the time, there is no reason why Tennant could not have done the same given the nearly identical nature” of its claims.⁶⁹

76. Specifically with respect to the Claimant’s knowledge of the alleged loss or damage giving rise to its claims, the Respondent maintains that at the latest, the Claimant knew, or should have known, of said loss or damage by 12 June 2013, the date on which the Ontario Minister of Energy directed the OPA to “not procure any additional MW under the FIT Program for Large FIT projects,” such as the one proposed in Skyway 127’s application.⁷⁰ This date, the Respondent emphasizes, is far beyond the limitation period provided under the NAFTA.
77. Turning to the second criterion, the Respondent submits that the Tribunal should grant its request for bifurcation because it will not be required to prejudge or enter into the merits of the case to decide on the time-bar objection.⁷¹ According to the Respondent, the facts applicable to the time-bar objection do not substantially overlap with those relevant to the merits because the Tribunal “needs only determine the dates on which the Claimant first had, or should have had knowledge of the measures alleged to violation NAFTA Chapter Eleven and the resulting loss or damages.”⁷² Moreover, the Respondent contends “the evidentiary inquiry required to rule on Canada’s time bar objection is limited”⁷³ because its objection may be sufficiently demonstrated on the basis of the facts alleged in the Notice of Arbitration and public information.⁷⁴
78. In addition, the Respondent notes that while the *Mesa Power* tribunal reversed its decision to bifurcate proceedings because it subsequently found one of the jurisdictional objections to be extremely intertwined with merits, that case is entirely different because the objection at issue pertained to the timelines of the claims pursuant the so-called “cooling-off period” under Article 1120(1) of the NAFTA, and not the time-bar under Article 1116(2).⁷⁵
79. Finally, in relation to the third criterion, the Respondent submits that if the Tribunal upholds its objection under Article 1116(2) of the NAFTA, “it would dispose of [the Claimant’s] claim in its entirety”⁷⁶ and “result in substantial savings in time and costs for both [Parties].”⁷⁷ In this regard, the Respondent disputes the Claimant’s claim that it will need to seek the production of documents from the Respondent to substantiate its position with respect to the time-bar objection, especially since the salient issue here is the Claimant’s own knowledge regarding its claims, and the point in time that it gained, or should have gained, such knowledge.⁷⁸

2. The Claimant’s Position

80. The Claimant agrees that Article 21(4) of the UNCITRAL Rules allows for the consideration of jurisdictional questions as a preliminary question, but emphasizes that the

⁶⁹ Request for Bifurcation, ¶ 19; Hearing Transcript, Day 1, 141:20-143:7.

⁷⁰ Request for Bifurcation, ¶ 21 referring to Statement of Defence, ¶ 19.

⁷¹ Request for Bifurcation, ¶¶ 23-25, referring to *Pey Casado v. Chile II*, ¶ 106 (RLA-055); *Resolute v. Canada*, ¶ 4.9 (RLA-052); *Lighthouse v. Timor-Leste*, ¶ 25 (RLA-059).

⁷² Request for Bifurcation, ¶ 24.

⁷³ Request for Bifurcation, ¶ 24.

⁷⁴ Request for Bifurcation, ¶ 25.

⁷⁵ Hearing Transcript, Day 1, 154:4-155:8.

⁷⁶ Request for Bifurcation, ¶ 27; Hearing Transcript, Day 1, 157:21-159:4.

⁷⁷ Request for Bifurcation, ¶ 27.

⁷⁸ Hearing Transcript, Day 1, 205:24-206:1.

Tribunal has the discretion not to do so when “is unlikely to bring about increased efficiency in the proceedings.”⁷⁹ Since none of the three criteria that would support bifurcating proceedings have been satisfied in this case,⁸⁰ including that it should bring about increased efficiency, the Claimant submits that the Respondent’s request should be rejected.⁸¹

81. First, the Claimant submits that the Respondent’s time-bar objection is frivolous.⁸² Relying on the decision on bifurcation in *Glamis Gold v. United States*, the Claimant asserts that in considering the Respondent’s Request for Bifurcation the Tribunal “should take [the Claimant’s] claim as alleged.”⁸³ In this case, the Claimant points out, it has clearly explained in its Notice of Arbitration that it only obtained knowledge of the Respondent’s alleged breaches less than three years before it submitted its Notice of Arbitration on 1 June 2017.⁸⁴
82. In particular, the Claimant explains that nearly all of the facts on which its claims are based are derived from the submissions and other case-related documents in the *Mesa Power v. Canada* and *Windstream Energy v. Canada* cases, which were only publicly disclosed after 1 June 2014.⁸⁵ This includes, for the example, (i) the claims in *Mesa Power v. Canada* on 4 June 2014; (ii) the terms of the Green Energy Investment Agreement (“GEIA”), which were disclosed as a part of the proceedings in *Mesa Power v. Canada* between 4 June 2014 and 30 April 2015; (iii) the transcript of the hearing in *Mesa Power v. Canada* on 30 April 2015; and (iv) the award in *Windstream Energy v. Canada* on 6 December 2016.⁸⁶
83. According to the Claimant, it only found out about the “wrongful actions” it alleges the Respondent undertook after the hearing transcripts and the post-hearing briefs in *Mesa Power v. Canada* were published in December 2014.⁸⁷ Through testimony that was provided by one of the witnesses in the *Mesa Power v. Canada* case, for example, the Claimant claims that it found out for the first time that preferential treatment and protection was given to International Power Canada, a Canadian company, which resulted in the Claimant’s loss of a multi-million dollar FIT contract.⁸⁸ In this regard, the Claimant clarifies that it was not simply the loss of the FIT Contract that forms the basis of its claims, but the reasons for this loss, which was only revealed later through the disclosure of the above-mentioned documents.⁸⁹ Similarly, the Claimant points out that the Respondent’s alleged destruction of material evidence only came to light as a result of certain relevant documents published in 2015 within the context of the *Mesa Power v. Canada* and *Windstream Energy v. Canada* cases.⁹⁰

⁷⁹ Response to the Request for Bifurcation, ¶¶ 1-2, referring to *Glamis Gold v. Unites States*, ¶ 12(c) (RLA-054); *Resolute v. Canada*, ¶ 4.3, (RLA-052).

⁸⁰ Response to the Request for Bifurcation, ¶ 3, referring to *Glamis Gold v. Unites States*, ¶ 12(c) (RLA-054); *Resolute v. Canada*, ¶ 4.3, (RLA-052). See Request for Bifurcation, ¶ 9.

⁸¹ Response to the Request for Bifurcation, ¶ 4.

⁸² Response to the Request for Bifurcation, ¶¶ 6, 18.

⁸³ Response to the Request for Bifurcation, ¶ 5, referring to *Glamis Gold v. Unites States*, ¶ 12(a) (RLA-054); Hearing Transcript, Day 1, 170:25-171:3.

⁸⁴ Response to the Request for Bifurcation, ¶¶ 5-18.

⁸⁵ Response to the Request for Bifurcation, ¶ 9; Hearing Transcript, Day 1, 178:7-12.

⁸⁶ Response to the Request for Bifurcation, ¶ 7, referring to Notice of Arbitration, ¶ 117. See also Hearing Transcript, Day 1, 178:1-12.

⁸⁷ Response to the Request for Bifurcation, ¶¶ 12-15, referring to *Mesa Power Group v. Canada*, Claimant’s Post-Hearing Brief, 18 December 2014, ¶ 1 (C-017).

⁸⁸ Hearing Transcript, Day 1, 166:10-167:17.

⁸⁹ Hearing Transcript, Day 1, 180:9-11.

⁹⁰ Response to the Request for Bifurcation, ¶ 16.

84. The Claimant also disputes the Respondent's claim that because *Mesa Power* had sufficient knowledge to bring its claim and file its Notice of Arbitration in 2011, the Claimant should similarly have had the knowledge to file its current claim then. According to the Claimant, while the two cases arise out of the same factual matrix, namely Ontario's FIT Program, the claims in both cases, and the alleged wrongful conduct, are entirely different.⁹¹ Indeed, the Claimant notes, the critical facts that form the basis of its claims cannot be found in *Mesa Power's* Notice of Arbitration because they were not public at the time, and were only disclosed later in the arbitration, through witness testimony and documents that were submitted by Canada.⁹²
85. Second, the Claimant submits that granting the Respondent's request for bifurcation would not materially reduce the time and costs of these proceedings.⁹³ In this respect, the Claimant reiterates that because Respondent's time-bar objection lacks merit, regardless of whether the Tribunal addresses it as a preliminary question, "there will be a merits hearing of some scope in this case."⁹⁴ Similarly, if the Respondent's time-bar objection is upheld only with respect to part of the claims, there will still be a need to undertake a merits phase. In addition, the Claimant noted that should the Tribunal decide to bifurcate the proceedings, the initial phase would not be significantly shorter since the Claimant intends to both seek document production and submit witness testimony for purposes of the time-bar issue.⁹⁵ For these reasons, the Claimant submits that bifurcating the proceedings would in fact unnecessarily increase the costs and duration of proceedings.⁹⁶
86. Finally, in the Claimant's view, the Respondent's time-bar objection is closely intertwined with the merits of the case and will require the Tribunal to delve inappropriately into merits issues.⁹⁷ The Claimant points out that all of its claims relate to "surreptitious actions taken by government officials outside the public purview" and, as such, the questions of if and when these actions occurred and were disclosed to the public would have to be dealt with both in determining the Respondent's time-bar objection and the Claimant's claims.⁹⁸ Furthermore, the Claimant underscores that the tribunal in *Mesa Power v. Canada*, decided to reverse its decision to bifurcate proceedings because it considered that one of the jurisdictional objections which pertained to the timelines of the claims pursuant the so-called "cooling-off period" under Article 1120(1) of the NAFTA could not be decided "without substantially engaging in the facts of the dispute."⁹⁹ As in *Mesa Power v. Canada*, the Claimant considers that addressing the question of when the Claimant first knew or should have known about the alleged breaches and corresponding losses and damages requires delving into the merits of the Claimant's claims, thereby making it inappropriate for the Tribunal to consider the Respondent's time-bar objection as a preliminary question.¹⁰⁰

⁹¹ Hearing Transcript, Day 1, 209:21-210:13.

⁹² Hearing Transcript, Day 1, 209:21-210:13.

⁹³ Response to the Request for Bifurcation, ¶¶ 19-25.

⁹⁴ Response to the Request for Bifurcation, ¶ 20.

⁹⁵ Hearing Transcript, Day 1, 187:3-18, 200:23-201:16.

⁹⁶ Response to the Request for Bifurcation, ¶¶ 21-25.

⁹⁷ Response to the Request for Bifurcation, ¶¶ 26-34.

⁹⁸ Response to the Request for Bifurcation, ¶¶ 28-29.

⁹⁹ Response to the Request for Bifurcation, ¶¶ 30-34, quoting *Mesa Power v. Canada*, Procedural Order No. 3, ¶¶ 73, 76 (CLA-001). See also Hearing Transcript, Day 1, 211:9-20.

¹⁰⁰ Response to the Request for Bifurcation, ¶ 34; Hearing Transcript, Day 1, 198:3-199:23.

3. The Tribunal's Analysis and Decision

87. In the exercise of its discretion to bifurcate, the Tribunal is guided by three relevant considerations. These considerations are (i) whether the jurisdictional objection is frivolous; (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and (iii) whether the objection concerns issues intertwined with the merits of the arbitration.¹⁰¹
88. Having considered the Parties' submissions on this issue, the Tribunal has decided to dismiss the Respondent's request for bifurcation on the ground that it is premature.
89. The Tribunal has been directed to paragraph 91 of the Claimant's Notice of Arbitration dated 1 June 2017 ("NOA").¹⁰² Paragraph 91 of the NOA refers to "four categories of wrongful actions" purportedly committed by the Respondent, namely (i) the unfair manipulation of the award of access to the electricity transmission grid; (ii) the unfair manipulation of the dissemination of the FIT Program information; (iii) the unfair manipulation of the awarding of the FIT Program Contracts; and (iv) the improper destruction of necessary and material evidence by senior officials in the Government of Ontario. However, the NOA simply does not contain sufficient particulars of each category of wrongdoing which would allow the Tribunal to take a view, one way or another, on whether the Tribunal can determine the Respondent's jurisdictional objection without entering into the merits.
90. The Respondent has requested that the Tribunal bifurcate the proceedings to consider the Respondent's jurisdictional objection that the Claimant allegedly failed to meet the conditions precedent for submitting a claim to arbitration pursuant to Article 1116(2) of the NAFTA. According to the Respondent, the NOA was filed more than three years after the Claimant first acquired, or should have acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage as a result of that breach and as such, the claim is time-barred.¹⁰³
91. Before the Tribunal can make an assessment of whether to bifurcate the proceedings, the Tribunal will need to know what evidence it will likely have to consider in determining the Respondent's jurisdictional objection and whether the Tribunal will be substantially engaging in the facts of the dispute when considering that evidence. However, until the Tribunal is informed of the specific breach in question which the Respondent now contends is time-barred, the Tribunal does not know what evidence will likely be adduced or the evidence it will likely have to consider in assessing *when* the Claimant acquired, or should have acquired, knowledge of that breach. Consequently, the Tribunal is unable to decide at this stage whether an inquiry into the Respondent's jurisdictional objection will be best conducted with the merits phase when the Tribunal will have the benefit of the entire record or whether the jurisdictional objection should be heard as a preliminary issue. The Tribunal needs to see the Claimant's claims in more detail before it can decide whether the proceedings can be bifurcated. The Tribunal cannot decide whether to bifurcate the proceedings or not if there is no specificity to the claims. For these reasons, the Respondent's request for bifurcation is premature.

¹⁰¹ *Glamis Gold v. United States*, ¶ 12(c) (RLA-054).

¹⁰² Request for Bifurcation, ¶ 16.

¹⁰³ Request for Bifurcation, ¶ 1.

92. Having dismissed the Respondent's request for bifurcation, the Parties are to proceed with the procedural timetable set out in PO 1 for the scenario where the proceedings are *not* bifurcated.
93. However, given the Tribunal's finding that the Respondent's request for bifurcation is premature, the Tribunal makes the following modifications to the procedural timetable:
- (a) The Claimant is to set out in full its detailed pleading on the issue of jurisdiction in its Memorial and specifically on the issue of time-bar which has been raised by the Respondent. In accordance with the procedural timetable set out in PO 1, this Memorial is due to be filed 90 days from the date of this Procedural Order (*i.e.* **Wednesday, 27 May 2020**).
 - (b) Should the Respondent wish to pursue bifurcation of the proceedings after having had sight of the Claimant's Memorial, the Respondent is to file its detailed objections on jurisdiction and a request for bifurcation within 45 days from the date of the Claimant's Memorial (*i.e.* **Monday, 13 July 2020**).
 - (c) If the Respondent files a request for bifurcation in accordance with (b) above, the Claimant is to file its response to the Respondent's request for bifurcation within 21 days from the date of that request (*i.e.* **Monday, 3 August 2020**).
 - (d) After receiving the above submissions, the Tribunal will decide **on the papers without a hearing** on whether the proceedings should be bifurcated. In this regard, the Tribunal notes that it has had the benefit of extensive arguments by Parties on the issue of bifurcation and the oral arguments made at the Hearing in particular have been of assistance to the Tribunal. In the interests of expediency and to save time and costs for all Parties, the Tribunal is confident that it can address a second bifurcation request without a further hearing.
 - (e) The Tribunal will issue the relevant procedural directions after it has come to a decision on the Respondent's second bifurcation request, including any adjustments to the procedural timetable where necessary.
 - (f) Should the Respondent choose *not* to pursue bifurcation of the proceedings after having had sight of the Claimant's Memorial, the timelines will continue to run in accordance with the procedural timetable set out in PO 1.

C. RESPONDENT'S MOTION FOR DISCLOSURE OF THIRD-PARTY FUNDING

94. The Respondent has submitted a motion requesting that the Tribunal order the Claimant to "[d]isclose the existence of any third-party funding agreement that [the Claimant] entered to finance its claim in this arbitration, the name(s) and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that [the Claimant] may achieve in this arbitration, or pay an adverse costs order against [the Claimant]."¹⁰⁴

¹⁰⁴ Motion for Security for Costs, ¶ 46(b).

95. The Claimant requests that the Tribunal reject the Respondent's motion and order the Respondent to reimburse the costs the Claimant has incurred in connection with its response to the motion.¹⁰⁵

1. The Respondent's Position

96. The Respondent submits that, in accordance with relevant investment treaty case law, "it is necessary to order Tennant to disclose the existence and terms of any third-party funding agreement it entered into to finance its claim in this arbitration."¹⁰⁶ Referring to the cases of *García Armas v. Venezuela* and *Muhammet Çap v. Turkmenistan*, the Respondent points out that the tribunals in those cases ordered the claimants to reveal the nature of their third-party funding arrangement, based on, *inter alia*, the tribunal's duty to protect the integrity of the arbitral proceedings,¹⁰⁷ the principle of transparency,¹⁰⁸ and the relevance of such information in evaluating requests for security for costs.¹⁰⁹ In the present case, the Respondent submits, the same reasons apply to justify an order for disclosure of such information, in addition to the need to identify potential conflicts of interest.
97. In particular, the Respondent argues that the existence of a third-party funding agreement between the Claimant and a funder, which the Claimant has effectively admitted exists,¹¹⁰ "would increase the chances that Tennant cannot comply with an adverse costs order."¹¹¹ This would especially be the case if the funder is not bound to pay an adverse costs order, and even if it is bound to do so, third-party funders are not parties to the arbitration, and investment tribunals cannot order a third-party funder to pay an Adverse Costs Order that is made against the Claimant.¹¹² This therefore creates the risk of a situation where a cost order is rendered ineffective and the Respondent State is effectively forced to pay the bill, which undermines the equality of the parties and the integrity of the arbitration.¹¹³
98. The Respondent further argues that the disclosure of certain key terms in the funding arrangement, to the extent that they may exist, is especially relevant for evaluating requests for security for costs.¹¹⁴ These terms include those which reflect (i) a funder's level of interest in the Award; (ii) whether a funder paid the Claimant's arbitration fees; (iii) whether a funder has the responsibility to pay an adverse costs order; and (iv) a funder's termination rights.¹¹⁵

¹⁰⁵ Response to the Motion for Security for Costs, ¶¶ 65-66.

¹⁰⁶ Motion for Security for Costs, ¶ 41.

¹⁰⁷ Motion for Security for Costs, ¶ 41, referring to *Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6 ("*Muhammet Çap v. Turkmenistan*"), Procedural Order No. 3, 12 June 2015, ¶ 9 (RLA-044); *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08 ("*García Armas v. Venezuela*"), Procedural Order No. 9, Decision on Provisional Measures, 20 June 2018, ¶ 250 (revised RLA-006).

¹⁰⁸ Hearing Transcript, Day 1, 21:18-21.

¹⁰⁹ Motion for Security for Costs, ¶ 41, referring to *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 ("*RSM v. Saint Lucia*"), Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶ 86 (RLA-019); Hearing Transcript, Day 1, 23:20-27:2.

¹¹⁰ Hearing Transcript, Day 1, 18:24-25.

¹¹¹ Motion for Security for Costs, ¶ 42.

¹¹² Hearing Transcript, Day 1, 18:8-11.

¹¹³ Hearing Transcript, Day 1, 18:20-23, 22:9-12.

¹¹⁴ Hearing Transcript, Day 1, 23:20-24:1.

¹¹⁵ Hearing Transcript, Day 1, 25:1-30:16, ICCA-Queen Mary Taskforce, *Report on Third-Party Funding*, Chapter 4, ¶ A.1, April 2018 (CLA-065).

99. Finally, the Respondent maintains that it is “necessary for Tennant to reveal the existence of any third-party funding agreement to address potential conflicts of interest arising in this arbitration”, as required under Article 4.6 of the Terms of Appointment and Article 9 of the UNCITRAL Rules, and in accordance with the IBA Guidelines on Conflict of Interest in International Arbitration, 2014.¹¹⁶

2. The Claimant’s Position

100. The Claimant submits that the Tribunal should reject the Respondent’s motion for third-party funding disclosure because the source of its funding “is irrelevant to the issues in dispute.”¹¹⁷
101. In relation to the Respondent’s concerns regarding possible conflicts of interest, the Claimant asserts that, at the Tribunal’s request, it would be willing to disclose the identity of any funder exclusively to the Tribunal in order that it may “determine whether any conflict of interest exists and, if necessary, make any necessary disclosures to the parties.”¹¹⁸ The Claimant maintains that it is not, however, willing to disclose this information to the Respondent. In the Claimant’s view, the Respondent’s true motive for requesting this information is not to identify potential conflicts of interest but rather “to know the financial condition of the funder itself so they know what they can go after.”¹¹⁹
102. In addition, the Claimant submits that the Respondent’s concern regarding the level of financial interest a potential funder might have in the outcome of this proceeding is unwarranted because any such interest would not alter the fact that the Claimant “is the party at interest in this proceeding and has demonstrated that it is the owner of the investment that Canada treated unlawfully.”¹²⁰
103. The Claimant also considers Respondent’s request to disclose the terms of any third-party funding agreement to be unwarranted. In the Claimant’s view, such agreements are confidential and often contain proprietary information, and accordingly, their disclosure may be required only in “exceptional circumstances, where the precise terms of that agreement are relevant.”¹²¹ However, such exceptional circumstances are absent in this case, and therefore the terms of any third-party funding agreement should remain confidential.¹²²

3. The Tribunal’s Analysis and Decision

104. The Tribunal considers that it has the authority to order the disclosure requested if doing so would preserve the integrity of the arbitral process. The Claimant does not appear to dispute this.

¹¹⁶ Motion for Security for Costs, ¶¶ 43-44; Hearing Transcript, Day 1, 22:18-23:3.

¹¹⁷ Response to the Motion for Security for Costs, ¶ 59.

¹¹⁸ Response to the Motion for Security for Costs, ¶ 60, *referring to* ICCA-Queen Mary Taskforce, *Report on Third-Party Funding*, Chapter 4, ¶ A.1, April 2018 (CLA-065); Hearing Transcript, Day 1, 38:11-39:8.

¹¹⁹ Hearing Transcript, Day 1, 38:15-21.

¹²⁰ Response to the Motion for Security for Costs, ¶ 61; Hearing Transcript, Day 1, 46:4-10.

¹²¹ Response to the Motion for Security for Costs, ¶ 62; Hearing Transcript, Day 1, 40:14-41:5, 42:7-23.

¹²² Response to the Motion for Security for Costs, ¶ 63, *referring to* *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15 (“*South American Silver v. Bolivia*”), Procedural Order No. 10, 11 January 2016, ¶¶ 79-81 (RLA-013).

105. The Claimant has also stated that it is willing to disclose the identity of any third-party funder to the Tribunal to address any concerns about a conflict of interest.¹²³
106. Having considered the Parties' submissions on this issue, the Tribunal has decided that the Claimant should make the following disclosures to the Tribunal and the Respondent by **Thursday, 12 March 2020**:
- (a) the identity of any third-party funder;
 - (b) any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the Claimant in this arbitration. Any such terms should be quoted in full in the Claimant's disclosure; and
 - (c) where no such terms set out at (b) above exist, the Claimant is to inform the Tribunal and the Respondent of that fact.
107. Where any of the following changes are made to the third-party funding arrangement in the course of this arbitration, the Claimant is to notify the Tribunal and the Respondent of the same within two weeks from the date of change:
- (a) any change to the identity of the third-party funder, including termination of the third-party funding arrangement; or
 - (b) any change to the terms relating to the payment of adverse costs orders against the Claimant in this arbitration.
108. Any such disclosures by the Claimant to the Tribunal and the Respondent as set out at paragraphs 106 and 107 above shall be designated "Confidential Information" in accordance with the Confidentiality Order dated 24 June 2019. For the avoidance of doubt, these disclosures need not be made available to the general public.
109. The Tribunal's decision is based on the following factors. First, the existence of third-party funding agreements can be relevant to the Tribunal's assessment of applications for security for costs.¹²⁴ The Tribunal notes that the Claimant has not denied that there is a third-party funder for its claims in this arbitration. It would have been easy for the Claimant to do so if there was no such funder.
110. Secondly, and in any event, the Tribunal considers that transparency as to the existence of a third-party funder is important to determine whether any conflict of interest exists.
111. Having ordered that the Claimant make the disclosures as set out at paragraphs 106 and 107 above, the Tribunal now turns to consider the Respondent's motion for security for costs.

D. RESPONDENT'S MOTION FOR SECURITY FOR COSTS

112. The Respondent has submitted a motion requesting that the Tribunal order the Claimant to issue security for costs in the amount of 6,934,001.95 CAD, by depositing the security into

¹²³ Response to the Motion for Security for Costs, ¶ 60; Hearing Transcript, Day 1, 49:14-17.

¹²⁴ See e.g., *García Armas v. Venezuela* (revised **RLA-006**).

an escrow account arranged by the PCA within 90 days of the order, or the arbitral proceedings will be discontinued.¹²⁵

113. In the alternative, the Respondent requests that the Tribunal order the Claimant to issue “(i) security for costs for the procedural and jurisdictional phase of the proceedings, at this stage [(i.e. 1,477,098.91 CAD)]; and (ii) security for costs for the remaining phases of the arbitration (5,456,903.04 CAD) at a later date in its decision on the request for bifurcation or its decision on jurisdiction, should the arbitration proceed to merits and damages.”¹²⁶
114. The Claimant requests that the Tribunal reject the Respondent’s motion for security for costs and order the Respondent to reimburse the Claimant the costs incurred in connection with the Claimant’s response to the said motion.¹²⁷

1. Preliminary Matters

(a) *The Tribunal’s Authority to Order Security for Costs*

115. The Parties disagree as to whether the Tribunal has the authority to issue an order for security for cost under the NAFTA and the UNCITRAL Rules.¹²⁸

i. The Respondent’s Position

116. The Respondent asserts that the Tribunal possesses such authority under Article 26(1) of the UNCITRAL Rules.¹²⁹ According to the Respondent, Article 26(1), the purpose of which is to protect the integrity of the arbitral proceedings, “grants the Tribunal a wide measure of discretion to order interim measures, including security for costs”.¹³⁰ In addition, in the Respondent’s view, the amendments to the 2010 UNCITRAL Arbitration Rules “do not detract in any way from the authority granted by the 1976 Rules to order Security for Costs” because they “simply make explicit powers that were implicit” under Article 26(1) of the 1976 UNCITRAL Arbitration Rules.¹³¹
117. In support of its position, the Respondent also points out that many tribunals have affirmed their authority to order security for costs, including under the 2010 UNCITRAL Arbitration Rules and the ICSID Convention.¹³² These tribunals have exercised their authority to order security for costs for various reasons, including (i) the failure of claimants to prove their solvency and the existence of a third-party funding agreement which did not cover the payment of an adverse award on costs, as in the *García Armas v. Venezuela* case;¹³³ and (ii)

¹²⁵ Motion for Security for Costs, ¶ 46.

¹²⁶ Motion for Security for Costs, ¶ 40.

¹²⁷ Response to the Motion for Security for Costs, ¶¶ 65-66.

¹²⁸ Motion for Security for Costs, ¶¶ 10-13; Response to the Motion for Security for Costs, ¶¶ 3-23.

¹²⁹ Motion for Security for Costs, ¶¶ 10-13; Hearing Transcript, Day 2, 228:12-229:15.

¹³⁰ Motion for Security for Costs, ¶¶ 10-13, *referring to* Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (2006), ¶ 206 (**RLA-008**); *García Armas v. Venezuela*, ¶ 187 (revised **RLA-006**); David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Second Edition (Oxford University Press, 2012), pp. 517-518 (**RLA-10**); *Islamic Republic of Iran and United States of America*, 1983 Tribunal Rules, Decision No. DEC 116-A15(IV)/A24-FT, 18 May 1993 (**RLA-11**).

¹³¹ Hearing Transcript, Day 2, 231:3-12.

¹³² Motion for Security for Costs, ¶ 10; Hearing Transcript, Day 2, 229:13-25.

¹³³ Motion for Security for Costs, ¶ 11, *referring to* *García Armas v. Venezuela*, ¶¶ 193, 194, 224, 226, 231, 250, and 261 (revised **RLA-006**).

the claimant's impecuniosity and record of non-compliance with costs orders, and the existence of a third-party funding agreement, as in the *RSM v. Saint Lucia* case governed by the ICSID Convention.¹³⁴

118. The Respondent adds that *Invesmart v. Czech Republic* is the only public case in which a tribunal has addressed a security for costs application solely under the UNCITRAL Rules. In that case, the Respondent stresses that while the tribunal found that it did not have the power to order security for costs under the UNCITRAL Rules, "there are no public details from the Procedural Order in that case explaining why the Tribunal thought that it lacked [such authority]".¹³⁵
119. Furthermore, the Respondent argues that the Tribunal may exercise its authority under Article 26(1) of the UNCITRAL Rules because it is not modified by Article 1134 of the NAFTA in relation to this motion. In this respect, the Respondent maintains that none of the provisions of Section B, including Article 1134 of the NAFTA, modify the Tribunal's authority under Article 26(1) of the UNCITRAL Rules.¹³⁶
120. In any event, the Respondent submits that Article 1134 of the NAFTA authorises tribunals to order interim measures to preserve and protect both existing and contingent rights, such as a favourable costs order.¹³⁷ In support of this interpretation, the Respondent points out that Article 1134 includes, as examples of interim measures, orders to preserve evidence, which can be made to protect contingent rights on the future production of evidence.¹³⁸
121. Moreover, the Respondent contends that "the basic rules of treaty interpretation require the Tribunal to take into account the unanimous agreement of the NAFTA Parties on the proper interpretation of Article 1134", namely that NAFTA tribunals have authority to order security for costs, subject to applicable arbitration rules, and "to accord the NAFTA Parties' interpretation considerable weight because it is consistent with the relevant context."¹³⁹
122. Specifically, the Respondent contends that "[w]here the NAFTA Parties express concordant views on how to interpret NAFTA, they create subsequent agreement and subsequent practice within the meaning of VCLT Article 31.3."¹⁴⁰ For this reason, NAFTA tribunals have accorded considerable weight to the concordant views of NAFTA Parties, expressed through their submissions to investor-State tribunals, including non-disputing Party submissions.¹⁴¹

¹³⁴ Motion for Security for Costs, ¶ 11, referring to *RSM v. Saint Lucia*, ¶ 86 (RLA-019).

¹³⁵ Hearing Transcript, Day 2, 230:17-21.

¹³⁶ Motion for Security for Costs, ¶¶ 12-13.

¹³⁷ Hearing Transcript, Day 2, 231:17-25.

¹³⁸ Hearing Transcript, Day 2, 232:2-7.

¹³⁹ Respondent's Response to the non-Disputing Parties' Submissions, ¶¶ 2, 8. See also Hearing Transcript, Day 2, 233:9-234:8.

¹⁴⁰ Respondent's Response to the non-Disputing Parties' Submissions, ¶¶ 5-6.

¹⁴¹ Respondent's Response to the non-Disputing Parties' Submissions, ¶ 5, referring to *Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, 28 January 2008, ¶¶ 181-189 (RLA-063); *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/1, Award, 19 June 2007, ¶¶ 100, 106-107 (RLA-065); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, Award on Damages, 10 January 2019, ¶ 378 (RLA-100).

ii. *The Claimant's Position*

123. In contrast, the Claimant submits that neither the NAFTA nor the UNCITRAL Rules authorize the Tribunal to order security for costs.¹⁴²
124. According to the Claimant, an order for security for costs “is not an interim measure envisaged by the drafters of NAFTA Article 1134”,¹⁴³ which limits the interim measures a tribunal may order to those that preserve a right or ensure the Tribunal’s jurisdiction is made fully effective. This is because, the Claimant argues, “no party has a right to a costs award”,¹⁴⁴ and the issue of security for costs has no bearing on the Tribunal’s jurisdiction.¹⁴⁵
125. Moreover, the Claimant submits that the Tribunal “should be very cautious in accepting” the Respondent’s argument that it should give considerable weight to the fact that all three NAFTA Parties agree that Article 1134 authorizes tribunals to order security for costs.¹⁴⁶ In this regard, the Claimant notes that the “overwhelming number of NAFTA Tribunals” have “exercised judicial restraint in not confirming that the various Article 1128 Submissions, taken together with the positions of the responding Party in the same or other dispute, constitute a subsequent practice.”¹⁴⁷
126. In the Claimant’s view, subsequent practice is only one of several elements to be considered under Article 31 of the Vienna Convention on the Law of Treaties, and should not be outweighed nor taken in isolation from other sources of treaty interpretation.¹⁴⁸ Moreover, commentators have argued that the written pleadings of states in investor-state disputes are not, and should not be, sufficient to “establish concordant, common, and consistent subsequent practice supporting new content of treaty law”¹⁴⁹ because it would, among other things, be contrary to the “principle of independence and impartiality of justice, which includes the principle that no one can be judge of its own cause.”¹⁵⁰

¹⁴² Response to the Motion for Security for Costs, ¶¶ 3-23.

¹⁴³ Response to the Motion for Security for Costs, ¶¶ 3-9.

¹⁴⁴ Response to the Motion for Security for Costs, ¶ 7, referring to C. Kee, *International Arbitration and Security for Costs – A Brief Report on Two Developments*, 17 Am. Rev. Int’l Arb. 273, 276 (2006), (CLA-066); *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Decision on Provisional Measures, ¶¶ 21-23, 26-27 (CLA-053); and *Eskosol SPA in liquidazione v. Italy*, ICSID Case No. ARB/15/50 (“*Eskosol v. Italy*”), Decision on Respondent’s Request for Provisional Measures, 12 April 2017, ¶¶ 33-35 (RLA-041). See also Hearing Transcript, Day 2, 284:4-285:9.

¹⁴⁵ Response to the Motion for Security for Costs, ¶ 8, referring to *Eskosol v. Italy*, Decision on Respondent’s Request for Provisional Measures, 12 April 2017, ¶¶ 33-35 (RLA-041); Claimant’s Response to the non-Disputing Parties’ Submissions, ¶¶ 9-11.

¹⁴⁶ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 35.

¹⁴⁷ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 36, referring to Patrick Dumberry, *The Fair and Equitable Treatment Standard* (Wolters Kluwer, 2013), Chapter II, Part I: “The Meaning of Article 1105”, pp. 82-83 (CLA-093).

¹⁴⁸ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 37.

¹⁴⁹ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 42, citing to Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (Oxford: Oxford University Press, 2013), pp.144-145 (CLA-097).

¹⁵⁰ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 45, citing to Gabrielle Kaufmann-Kohler, “Interpretive Powers of the Free trade Commission and the Rule of Law” *Fifteen Years of NAFTA Chapter 11 Arbitration*. (2011) JurisNet, at 175 (CLA-098). See also Hearing Transcript, Day 2, 278:11-279:17.

127. In any event, the Claimant disputes the Respondent's suggestion that an order to preserve evidence, which is an interim measure expressly included in the scope of Article 1134, protects a contingent right to the disclosure of evidence, and that therefore Article 1134 must be interpreted to authorize a tribunal to issue interim measures that protect both existing and contingent rights. In the Claimant's view, "an order to preserve evidence in the possession or control of a disputing party", as referenced in Article 1134, protects "immediate and definite" rights by protecting the integrity of the arbitration process and prevent the aggravation of the dispute.¹⁵¹ The right to request the production of documents, the Claimant argues, is also confirmed in Article 24(3) of the UNCITRAL Rules, and corroborated by Article 26 which authorizes the Tribunal to order interim measures for document production.¹⁵²
128. In light of the above, the Claimant considers that the NAFTA Parties' reading of Article 1134 would be tantamount to an amendment to the provision, which can only be done under NAFTA Article 2202(2) and approved in accordance with the "applicable legal procedures of each Party",¹⁵³ and not simply through subsequent practice or agreement.¹⁵⁴
129. The Claimant further submits that the UNCITRAL Rules do not empower the Tribunal to order security for costs because there is no provision therein which explicitly addresses such an interim measure.¹⁵⁵ In the Claimant's view, the Tribunal's authority under Article 26(1) does not encompass measures that are not related to the subject-matter of the dispute, including orders for security for costs, which are procedural in nature.¹⁵⁶ Indeed, the Claimant considers that Article 26(2), which authorizes a tribunal to order security for the costs of interim measures, supports the position that Article 26(1) only authorizes tribunals to grant interim measures that have as an object concrete rights or property in dispute "and not a hypothetical final cost award."¹⁵⁷
130. The Claimant adds that the amendments made to Article 26(1) by the 2010 UNCITRAL Rules support the interpretation that security for costs may not be granted under the 1976 version of the rules.¹⁵⁸ The Claimant underlines that the drafters of the 2010 UNCITRAL Rules, revised Article 26 to remove the requirement that interim measures be "in relation to the subject-matter of the dispute" and to include new language specifically authorizing interim measures to "[p]rovide a means of preserving assets out of which a subsequent award may be satisfied."¹⁵⁹
131. The Claimant also disputes the Respondent's reliance on decisions by ICSID tribunals, given that the relevant provisions of the ICSID Convention do not contain the limitation in Article 26 of the UNCITRAL Rules that interim measures must be "in relation to the

¹⁵¹ Claimant's Response to the non-Disputing Parties' Submissions, ¶ 49.

¹⁵² Claimant's Response to the non-Disputing Parties' Submissions, ¶ 48.

¹⁵³ Claimant's Response to the non-Disputing Parties' Submissions, ¶¶ 38-40.

¹⁵⁴ Hearing Transcript, Day 2, 279:18-25.

¹⁵⁵ Response to the Motion for Security for Costs, ¶ 11.

¹⁵⁶ Response to the Motion for Security for Costs, ¶¶ 8, 13, *referring to* Court of Appeal for Ontario, *Inforica Inc. v. CGI Info. Sys & Mgt Consultants Inc.*, [2009] ONCA 642, (CLA-054); Claimant's Response to the non-Disputing Parties' Submissions, ¶¶ 20-21; Hearing Transcript, Day 2, 285:12-21.

¹⁵⁷ Response to the Motion for Security for Costs, ¶ 14; Claimant's Response to the non-Disputing Parties' Submissions, ¶ 22.

¹⁵⁸ Response to the Motion for Security for Costs, ¶¶ 16-18, *referring to* Report of Working Group II (Arbitration and Conciliation), U.N. Commission on International Trade Law (UNCITRAL), 47th Sess., at U.N. Doc. A/CN.9/641 (2007), ¶ 48 (CLA-069).

¹⁵⁹ Response to the Motion for Security for Costs, ¶ 16. *See also* Hearing Transcript, Day 2, 291:16-292:22.

subject-matter of the dispute.”¹⁶⁰ Moreover, the Claimant argues that the decisions by the tribunals in *Paushok v. Mongolia* and *South American Silver v. Bolivia* are not relevant precedents, as the former did not address its power to award security for costs and the latter was governed by the 2010 UNCITRAL Rules.¹⁶¹ Additionally, according to the Claimant, the *García Armas v. Venezuela* case is “inapposite” because in that case, the parties did not contest the tribunal’s authority to order interim measures and the application was made both under the UNCITRAL Rules and the ICSID Additional Facility Rules.¹⁶²

(b) Applicable Legal Standard

132. The Parties’ positions differ as to the applicable legal standard for granting security for costs.
133. The Respondent submits that the applicable legal standard was articulated by the tribunal in *García Armas v. Venezuela*, which was governed by the UNCITRAL Rules.¹⁶³ The test, which was drawn from Article 26(3) of the 2010 UNCITRAL Rules and which the tribunal considered to reflect the international consensus, comprised the following elements (i) whether there is, *prima facie*, a reasonable prospect that the Tribunal will issue an award in favour of the Respondent, including its costs of legal representation; (ii) whether harm not adequately reparable by an award of damages may be caused if the measure is not ordered; (iii) whether such harm would substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (iv) whether the measure requested is of such urgency that it cannot be postponed until the issuance of the award.¹⁶⁴
134. The Respondent also does not consider it necessary to demonstrate that the applicant has submitted its request under “exceptional circumstances.”¹⁶⁵ While some tribunals have held that an order for security for costs is appropriate only in “exceptional circumstances,” the Respondent argues that there is no basis under Article 26(1) to assert that this is a necessary requirement not least because in contrast to Article 29 of the UNCITRAL Rules, Article 26(1) does not refer to exceptional circumstances.¹⁶⁶ Moreover, the Respondent points out, Article 1134 of the NAFTA does not refer to “exceptional circumstances” and that no tribunal conducting its proceedings under the NAFTA has applied the discussed requirement.¹⁶⁷ The Respondent adds that the Tribunal should reject the “exceptional circumstances” standard because it would expose the Respondent to an asymmetrical risk that an adverse costs order against the Claimant would remain unpaid, and lead to unequal treatment of the disputing Parties in violation of Article 15(1) of the UNCITRAL Rules.¹⁶⁸
135. The Claimant, by contrast, contends that a security for cost order may be only obtained in “exceptional circumstances”,¹⁶⁹ because “of the fundamentally significant and disruptive

¹⁶⁰ Response to the Motion for Security for Costs, ¶ 20 referring to Articles 47 and 39 of the ICSID Convention.

¹⁶¹ Response to the Motion for Security for Costs, ¶¶ 21-23.

¹⁶² Response to the Motion for Security for Costs, ¶ 22 referring to *García Armas v. Venezuela*, ¶ 186 (revised **RLA-006**).

¹⁶³ Motion for Security for Costs, ¶¶ 16-19.

¹⁶⁴ Motion for Security for Costs, ¶ 16, referring to *García Armas v. Venezuela*, ¶ 191 (revised **RLA-006**); Hearing Transcript, Day 2, 236:8-20.

¹⁶⁵ Motion for Security for Costs, ¶¶ 20-23.

¹⁶⁶ Motion for Security for Costs, ¶ 21; Hearing Transcript, Day 2, 237:4-15.

¹⁶⁷ Motion for Security for Costs, ¶ 22.

¹⁶⁸ Hearing Transcript, Day 2, 237:16-238:1.

¹⁶⁹ Response to the Motion for Security for Costs, ¶¶ 24-25.

impact that occurs upon the Claimant.”¹⁷⁰ The Claimant argues that even the tribunals in *García Armas v. Venezuela* and *RSM v. Saint Lucia* – the only two tribunals that have ordered security for costs – relied on the “exceptional circumstances” standard to justify their decision.¹⁷¹

2. The Respondent’s Request for Security for Costs

(a) The Respondent’s Position

136. The Respondent affirms that its Request for Security for Costs satisfies the applicable legal standard.¹⁷² In relation to the first limb of the *García Armas v. Venezuela* test, the Respondent submits that it has a *prima facie* reasonable possibility of prevailing in this case.¹⁷³ On jurisdiction, the Respondent maintains that the Claimant’s claim is manifestly time-barred, reiterating its arguments of its objection under Article 1116(2) of the NAFTA.¹⁷⁴ Furthermore, the Respondent contends that the Claimant’s “allegations regarding spoliation of documents do not even relate to the Claimant or its project, as required by NAFTA Article 1101(1).”¹⁷⁵ With respect to the merits, the Respondent submits that since the tribunal in *Mesa Power v. Canada* has already dismissed claims that are “substantially no different” from the Claimant’s claim, the Claimant’s claims should be deemed frivolous.¹⁷⁶
137. Concerning the second limb of the test, the Respondent submits that it could suffer harm not adequately reparable by a costs order if security for costs is not provided.¹⁷⁷ The Respondent submits that the Claimant’s “corporate history leading up to the present indicates that it is impecunious and has been unsuccessful in many previous business ventures.”¹⁷⁸ The Respondent notes that based on its “diligent investigation” and “extensive research”, “[i]t seems” that the Claimant “no longer operates”, “has no website[, no] publicly identifiable business establishment[, no] apparent source of revenues from any business activities [and] [n]o public information indicates that it holds financial assets.”¹⁷⁹ In addition, the Respondent points out that the Claimant appears to have a third-party

¹⁷⁰ Hearing Transcript, Day 2, 286:16-287:1.

¹⁷¹ Response to the Motion for Security for Costs, ¶ 26, referring to *García Armas v. Venezuela*, ¶¶ 250-251 (revised **RLA-006**); *RSM v. Saint Lucia*, ¶¶ 52, 75 (**RLA-019**); Hearing Transcript, Day 2, 294:1-295:1.

¹⁷² Motion for Security for Costs, ¶ 24; Hearing Transcript, Day 2, 285:22-289:4.

¹⁷³ Motion for Security for Costs, ¶¶ 25-27.

¹⁷⁴ Motion for Security for Costs, ¶ 26, referring to Statement of Defence, ¶¶ 2, 28-39; Hearing Transcript, Day 2, 243:22-245:2.

¹⁷⁵ Motion for Security for Costs, ¶ 26.

¹⁷⁶ Motion for Security for Costs, ¶ 27. The Respondent underlines that the wording in the notice of arbitration in *Mesa Power v. Canada* and the one in this case overlaps significantly (Motion for Security for Costs, ¶ 27, Annex III).

¹⁷⁷ Motion for Security for Costs, ¶¶ 28-31.

¹⁷⁸ Motion for Security for Costs, ¶ 30, referring to Tennant Consulting, LLC, Limited Liability Company Articles of Organization, 10 September 2001 (**R-008**); Wine Destinations, LLC, Limited Liability Company Restated Articles of Organization, 5 March 2002 (**R-009**); Tennant Travel Services, LLC, Limited Liability Company Restated Articles of Organization, 27 November 2002 (**R-010**); Tennant Energy, LLC, Amendment to Articles of Organization of a Limited Liability Company, 20 April 2015, (**R-011**).

¹⁷⁹ Motion for Security for Costs, ¶ 30; Hearing Transcript, Day 2, 248:6-13.

funder “which this Tribunal has no jurisdiction to compel payment of an Adverse Costs Order and who may have no responsibility to pay one.”¹⁸⁰

138. Under these circumstances, the Respondent considers that it has established a reasonable basis to find that the Claimant is impecunious, and that accordingly, the burden is now on the Claimant to “produce evidence sufficient to prove it can pay an adverse costs order.”¹⁸¹ Yet, the Respondent observes that beyond stating that it has “limited assets beyond the Arbitration,” the Claimant has thus far not provided any evidence to prove that it has the capability to pay an adverse costs order.¹⁸²
139. Accordingly, because the Claimant has failed to meet this burden, the Tribunal must order it to issue security for costs.¹⁸³ Otherwise, the Respondent argues, it would be left in the same position as in *Mesa Power v. Canada*, where despite having been awarded part of its costs in the final award, Canada is still “spending significant funds trying to enforce [this order], without any alternative options.”¹⁸⁴
140. Regarding the third limb of the test, the Respondent alleges that the harm it will suffer substantially outweighs the harm the Claimant would suffer if the motion were granted.¹⁸⁵ In its view, the harm that the Claimant will suffer is temporary, as such an order would not undermine the Claimant’s access to justice, and the Claimant would be able to recover its full security if the Tribunal issues a costs order in its favour, and especially if the Claimant had a third-party funder that could post security for costs on its behalf.¹⁸⁶ In contrast, the Respondent “could suffer permanent harm by losing potentially millions of dollars from an unpaid costs order in its favour.”¹⁸⁷
141. Regarding the fourth limb of the test, the Respondent submits that its “ongoing expenditures to defend itself in investment arbitration are sufficient to meet the condition of urgency.”¹⁸⁸
142. Finally, the Respondent asserts that the requested amounts for security for costs, namely (i) 6,934,001.95 CAD for the entire proceedings; or, in the alternative, (ii) 1,477,098.91 CAD for the jurisdictional phase and, if necessary, 5,456,903.04 CAD for the remaining part of the proceedings, are reasonable.¹⁸⁹ The Respondent submits that the calculation of the requested amounts was based on the costs it incurred in *Mesa Power v. Canada*, adjusted in respect of the jurisdictional phase in light of the additional procedural steps envisioned in the procedural calendar of this arbitration.¹⁹⁰ According to the Respondent, this calculation is reasonable, as it has asserted before, the Claimant’s claims “virtually replicates” *Mesa Power*’s claims.¹⁹¹

¹⁸⁰ Hearing Transcript, Day 2, 226:23-227:1, 248:2-6.

¹⁸¹ Motion for Security for Costs, ¶ 31, referring to *García Armas v. Venezuela*, ¶¶ 7, 224, 226, 250 (revised **RLA-006**).

¹⁸² Hearing Transcript, Day 2, 257:19-258:10.

¹⁸³ Motion for Security for Costs, ¶ 31, referring to *García Armas v. Venezuela*, ¶¶ 197-199 (revised **RLA-006**).

¹⁸⁴ Motion for Security for Costs, ¶ 29; Hearing Transcript, Day 2, 227:2-8.

¹⁸⁵ Motion for Security for Costs, ¶¶ 32-34.

¹⁸⁶ Hearing Transcript, Day 2, 266:21-267:24.

¹⁸⁷ Motion for Security for Costs, ¶ 34; Hearing Transcript, Day 2, 265:4-10.

¹⁸⁸ Motion for Security for Costs, ¶ 35. See also Hearing Transcript, Day 2, 268:14-269:2.

¹⁸⁹ Motion for Security for Costs, ¶¶ 37-40; Hearing Transcript, Day 2, 270:10-271:5.

¹⁹⁰ Motion for Security for Costs, ¶¶ 38-39, Annexes I and II, referring to *Mesa Power v. Canada*, Canada’s Submission on Costs, 3 March 2015, ¶ 4 (**R-007**); Hearing Transcript, Day 2, 271:6-9.

¹⁹¹ Motion for Security for Costs, ¶ 38.

(b) *The Claimant's Position*

143. The Claimant asserts that even assuming *arguendo* that the Tribunal has the authority to issue an order for security for costs, the “exceptional circumstances” required for rendering such order do not exist in this case.¹⁹²
144. First, the Claimant submits that the Respondent has not met its burden of proving that it has *prima facie* a reasonable possibility of prevailing in this case.¹⁹³ In this respect, the Claimant alleges that its claim is not manifestly time-barred, reiterating its argument in response to the Respondent’s *ratione temporis* jurisdictional objection.¹⁹⁴ In addition, the Claimant alleges that its Motion for Interim Measures evidences that it does not have access to all the relevant documents in relation to the challenged conduct.¹⁹⁵
145. Addressing the Respondent’s assertion that the Claimant’s claim are frivolous due to their similarity with the claims in *Mesa Power*, the Claimant contends that the Respondent fails to recognize that the tribunal in that case considered it to be a “legitimate dispute” and that one of the members of that tribunal issued a dissenting opinion characterizing Canada’s conduct as “grotesque”.¹⁹⁶ Further, the Claimant notes, the Respondent fails to mention that measures related to the application of the FIT Program were found in breach of the NAFTA by the tribunal in *Windstream Energy v. Canada*.¹⁹⁷
146. The Claimant maintains that other tribunals, including the ones in *García Armas v. Venezuela*, *South American Silver v. Bolivia* and *Orlandini v. Bolivia*, have considered that when evaluating a request for security for costs, tribunals should avoid prejudging on the merits of the dispute.¹⁹⁸ Moreover, the Claimant emphasises that the tribunal in *Maffezini v. Spain* determined that upholding a request for security for costs on the basis that a respondent will hypothetically obtain a favourable costs order, entails prejudging on the merits of the dispute.¹⁹⁹ Relying on the foregoing, the Claimant states that at this stage of the proceedings, where jurisdictional and merits issues are still disputed and where the Claimant “continues to await information related to these disputed jurisdictional and merits issues,” “assessing the likelihood of the respondent state’s success would be premature.”²⁰⁰
147. Second, the Claimant submits that “the potential harm Canada invokes, [...] is hypothetical and, in any event, reparable through the courts of enforcement.”²⁰¹ Regarding Canada’s

¹⁹² Response to the Motion for Security for Costs, ¶¶ 31-57; Hearing Transcript, Day 2, 294:22-295:4.

¹⁹³ Response to the Motion for Security for Costs, ¶¶ 31-42.

¹⁹⁴ Response to the Motion for Security for Costs, ¶¶ 32, 33.

¹⁹⁵ Response to the Motion for Security for Costs, ¶ 33.

¹⁹⁶ Response to the Motion for Security for Costs, ¶ 35, referring to *Mesa Power v. Canada*, Award, 24 March 2016, ¶ 704 (RLA-001), Dissenting Opinion of Judge Charles N. Brower, ¶¶ 4, 23, (CLA-055). See also Hearing Transcript, Day 2, 300:17-301:1.

¹⁹⁷ Response to the Motion for Security for Costs, ¶ 35. See also Hearing Transcript, Day 2, 300:17-301:1.

¹⁹⁸ Response to the Motion for Security for Costs, ¶¶ 37-39, referring to *García Armas v. Venezuela*, ¶ 191 (revised RLA-006); *South American Silver v. Bolivia*, ¶ 55 (RLA-013); *Orlandini v. The Plurinational State of Bolivia*, PCA Case No. 2018-39 (“*Orlandini v. Bolivia*”), Decision on the Respondent’s Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, 9 July 2019, ¶ 142 (RLA-034).

¹⁹⁹ Response to the Motion for Security for Costs, ¶ 40, referring to *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶¶ 15-21 (RLA-016).

²⁰⁰ Response to the Motion for Security for Costs, ¶ 42.

²⁰¹ Response to the Motion for Security for Costs, ¶ 44.

inability to enforce the cost order in *Mesa Power v. Canada*, the Claimant contends that it is irrelevant because Canada “never took any steps to enforce that award”.²⁰²

148. Concerning the relevance of a claimant’s solvency in determining whether an order for security for costs is appropriate, the Claimant argues that several tribunals, including those in *Burimi v. Albania* and *RSM v. Saint Lucia*, have held that mere financial difficulties or lack of assets on the part of a claimant do not constitute a sufficient basis for an order for security for costs.²⁰³ Any decision contrary to this view, according to the Claimant, “would frustrate investor’s access to justice.”²⁰⁴
149. Referring to statements by the tribunals in *EuroGas v. Slovak Republic* and *Orlandini v. Bolivia*, the Claimant alleges that orders for security for costs should be warranted only in exceptional circumstances, such as when a claimant has a record of non-payment of costs awards or there is evidence showing a claimant’s bad faith or improper behaviour in the proceedings at stake.²⁰⁵ In the present case, the Claimant submits that the Respondent “has been unable to identify any exceptional circumstances of the kind found by previous tribunals as justification for an order for security for costs.”²⁰⁶
150. Referring to various ICSID tribunals that have considered requests for security for costs, the Claimant points out that they have held that there was insufficient risk to grant such requests even where the claimant lacked assets.²⁰⁷ Similarly, as in this case, where the claimant lacked a history of defaulting on its financial obligations, tribunals have found that there was no real risk to justify an award for security for costs, or requirement for the claimant to demonstrate its solvency.
151. Third, the Claimant submits that, contrary to the Respondent’s assertion, the harm the Respondent may suffer would not outweigh the Claimant’s harm in the event that the Tribunal ordered security for costs.²⁰⁸ The Claimant argues *inter alia* that the amount requested by the Respondent is “speculative and grossly excessive,” because it assumes that the Respondent will be awarded 100% of its costs when in *Mesa Power v. Canada*, the case the Respondent uses as a basis to calculate the amount it requests, the tribunal awarded Canada only 30% of its costs.²⁰⁹ On the other hand, the Claimant contends that harm it will suffer if it is required to issue security for costs is tangible and may even “hinder it from being able to proceed with the arbitration” as it has limited assets that are unconnected to this dispute.²¹⁰

²⁰² Response to the Motion for Security for Costs, ¶¶ 45, 52.

²⁰³ Response to the Motion for Security for Costs, ¶¶ 47-48, referring to *Burimi S.R.L. and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 41 (CLA-064); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (“*RSM et al. v. Grenada*”), ICSID Case No. ARB/10/6, Decision on Security for Costs, 14 October 2010, ¶¶ 5.19 (RLA-018).

²⁰⁴ Response to the Motion for Security for Costs, ¶ 49.

²⁰⁵ Response to the Motion for Security for Costs, ¶¶ 50-51, referring to *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14 (“*EuroGas v. Slovak Republic*”), Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, 23 June 2015, ¶ 122 (CLA-067); *Orlandini v. Bolivia*, ¶¶ 143-144 (RLA-034).

²⁰⁶ Response to the Motion for Security for Costs, ¶ 52.

²⁰⁷ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶¶ 57, 59, 61.

²⁰⁸ Response to the Motion for Security for Costs, ¶¶ 54-55.

²⁰⁹ Response to the Motion for Security for Costs, ¶ 54(c); Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 60(c).

²¹⁰ Response to the Motion for Security for Costs, ¶ 54(b); Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 60.

152. Finally, the Claimant argues that the Respondent has failed to demonstrate that its motion for security for costs is of an urgent character.²¹¹ The Claimant disagrees with the Respondent's position that its ongoing costs related to these proceedings justify the urgency of its request.²¹² In the Claimant's view, given that the Respondent's counsel are government employees with a fixed salary, the Respondent's costs of legal representation are not related to this claim and will still be borne in any event.²¹³

3. Non-Disputing Parties' Submissions

153. Both the U.S. and Mexico made submissions on the interpretation of Article 1134 of the NAFTA, and in particular on the question whether the tribunals' authority thereunder to grant interim measures of protection includes the authority to grant orders for security for costs. The following sub-sections summarize each of the non-disputing Parties' arguments in this respect.

(a) *The United States' Submission*

154. The U.S. submits that an order for security for costs "may constitute 'an interim measure of protection to preserve the rights of a disputing party'" under Article 1134 of the NAFTA, and that such an order is not barred by the second sentence of that Article.²¹⁴
155. According to the US, Article 1134 "makes no distinction between interim measures that protect contingent rights and measures that protect existing rights."²¹⁵ The phrase "rights of a disputing party" is not qualified in any way,²¹⁶ and the express example of an interim measure provided in Article 1134—an order to preserve evidence in the possession or control of a disputing party—preserves a right to disclosure of evidence that is contingent on the tribunal's authority to order such disclosure, and its determination that such an order is appropriate.²¹⁷
156. While no tribunal appears to have ruled on requests for security for costs under NAFTA Article 1134, the U.S. also points out that several tribunals have found that similar language under Article 47 of the ICSID Convention allows for provisional measures that preserve contingent rights, including orders granting a party security for its costs.²¹⁸
157. Thus, the U.S. submits that a tribunal constituted under Chapter 11 of the NAFTA may issue an order for security for costs under Article 1134 in appropriate circumstances and, if so, authorized by the applicable arbitration rules.²¹⁹
158. Furthermore, the U.S. contends that when the three NAFTA Parties demonstrate an agreement on the proper interpretation of a provision, as they have done with respect to

²¹¹ Response to the Motion for Security for Costs, ¶¶ 56-57.

²¹² Response to the Motion for Security for Costs, ¶¶ 56-57.

²¹³ Response to the Motion for Security for Costs, ¶¶ 56-57.

²¹⁴ U.S.' Article 1128 Submission, ¶ 7.

²¹⁵ U.S.' Article 1128 Submission, ¶ 5.

²¹⁶ U.S.' Article 1128 Submission, ¶ 5.

²¹⁷ U.S.' Article 1128 Submission, ¶ 4.

²¹⁸ U.S.' Article 1128 Submission, ¶ 6, citing *RSM et al. v. Grenada*, ¶¶ 5.6, 5.8 (RLA-018).

²¹⁹ U.S.' Article 1128 Submission, ¶ 7.

Article 1134 in this case, the Tribunal must take this into account, in accordance with the principles on subsequent agreement and practice as outlined in Article 31 of the VCLT.²²⁰

(b) The United Mexican States' Submission

159. Mexico submits that “[i]n general, NAFTA Article 1134 provides a margin of discretion for a Tribunal to order an interim measure of protection ‘to preserve the rights of a disputing party’ which allows the possibility for a Tribunal to order security for costs, provided that other relevant requirements contained in the applicable arbitration rules are met.”²²¹
160. This is because, Mexico argues, the first sentence of Article 1134 authorizes various types of interim measures of protection, and therefore does not limit the Tribunal’s authority to order security for costs simply because such an order is not expressly referenced therein.²²² In addition, the two limitations to the power of NAFTA Chapter 11 tribunals to order interim measures of protection, as laid out in the second sentence of Article 1134, also do not cover security for costs.²²³

4. The Tribunal’s Analysis and Decision

161. As a preliminary matter, following the conclusion of the Hearing, but before the making of this Order, the Respondent drew to the Tribunal’s, and the Claimant’s, attention, the publication of the Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim, dated 27 January 2020, handed down by the ICSID tribunal in the case *Dirk Herzig v. Turkmenistan*.²²⁴ Having afforded the Parties an opportunity to make submissions on this decision, the decision was admitted into the record of these proceedings and has been carefully weighed by the Tribunal for purposes of its present Order.
162. The Tribunal’s authority to order interim measures is governed by Article 26 of the UNCITRAL Rules, which provides as follows:
1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter of the dispute, such as ordering their deposit with a third person or the sale of perishable goods.
 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

²²⁰ Hearing Transcript, Day 2, 345:4-8, 346:25-347:9.

²²¹ Mexico’s Article 1128 Submission, ¶ 6.

²²² Mexico’s Article 1128 Submission, ¶ 4.

²²³ Mexico’s Article 1128 Submission, ¶ 5.

²²⁴ *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35 (“*Dirk Herzig v. Turkmenistan*”), Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim, 27 January 2020 (RLA-112).

163. Pursuant to Article 1120(2) of the NAFTA, Article 26 of the UNCITRAL Rules shall govern this arbitration except to the extent modified by Section B of NAFTA Chapter 11, which includes Article 1134.
164. Article 1134 of the NAFTA in turn provides that:
- A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.
165. Having carefully considered the Parties' and the non-disputing Parties' submissions on this issue, the Tribunal is of the view that it has authority to order security for costs in this arbitration.
166. In this regard, the Tribunal notes that the investment tribunals in *Pugachev v Russia*²²⁵ and *García Armas v Venezuela*²²⁶ have both affirmed their authority to order security for costs under Article 26 of the UNCITRAL Rules. Whilst the parties in *Pugachev v Russia* did not contest the issue on the Tribunal's power to grant requests for security for costs, the tribunal in that case nonetheless independently examined whether it has the power to do so. The Tribunal agrees with the tribunal in *Pugachev v Russia* that Article 26 of the UNCITRAL Rules does not set forth a limit on the types of provisional measures that this Tribunal may take. In fact, Article 26(2) expressly provides that UNCITRAL tribunals are entitled to require "security for the costs" of interim measures, which suggests that UNCITRAL tribunals do have power to request a party to provide security for costs. The Tribunal is fortified in its conclusion by the fact that in the context of investment arbitration, several arbitral tribunals have expressly confirmed that arbitral tribunals do have the power to grant requests for security for costs.
167. The Claimant argues that because the drafters of the 2010 UNCITRAL Rules revised Article 26 to remove the requirement that interim measures be "in relation to the subject-matter of the dispute" and included new language specifically authorising interim measures which provide a means of "preserving assets out of which a subsequent award may be satisfied", this suggests that the pre-amendment language does not empower tribunals to order a party to pay security for costs.²²⁷ The Tribunal is unable to agree. It may well be that the amendments, as the Respondent submits, make explicit powers that were implicit in Article 26 of the UNCITRAL Rules. This conclusion is supported by the Report commissioned by the UNCITRAL Secretariat on revisions of the 1976 UNCITRAL Rules, which explained that the amendments are merely "*clarifications* that practice has shown are necessary or at least highly desirable", and that these amendments would "*maintain* the basic structure and *content* of the existing article 26" (emphasis added). The reference to the "subject-matter" in Article 26(1) was also expressly characterised in the report as "facially restrictive phraseology".²²⁸

²²⁵ *Sergei Viktorovich Pugachev v Russia* (UNCITRAL) Interim Award, 7 July 2017 (**RLA-032**).

²²⁶ *García Armas v. Venezuela* (revised **RLA-006**).

²²⁷ Response to the Motion for Security for Costs, ¶¶ 16-18.

²²⁸ Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, (2006), ¶ 206 (**RLA-008**).

168. The Tribunal is also unable to agree with the Claimant’s argument that NAFTA Article 1134 limits the measures that this Tribunal may order to those that preserve an existing right, with the result that this Tribunal has no power to order security for costs as a party’s “right” to a costs award hinges on the hypothetical.²²⁹ Article 1134 permits the Tribunal to order measures of protection “to preserve the rights of a disputing party”. It does not make any distinction between interim measures that protect contingent rights and measures that protect existing rights. The only types of interim measures that the Article expressly bars a tribunal from ordering are (i) attachment orders, and (ii) orders that enjoin the application of the challenged measure, none of which restricts the Tribunal from ordering security for costs.
169. The Tribunal further notes that many tribunals have confirmed that the hypothetical nature of a costs award is not a bar to ordering provisional measures under Article 47 of the ICSID Convention, which like NAFTA Article 1134, similarly permits a tribunal to recommend provisional measures “to preserve the respective rights of either party”. In any case, it makes no sense to the Tribunal to construe the rights that are being preserved under NAFTA Article 1134 as being limited to “existing” rights. In this regard, the Tribunal agrees with the reasoning in *RSM v. Saint Lucia* that “the hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures”.²³⁰
170. In addition, neither party has addressed the Tribunal on whether it was necessary to establish that the Tribunal had *prima facie* jurisdiction before it could grant security for costs.
171. In the premises, the Tribunal is satisfied that it has the power under Article 26 of the UNCITRAL Rules to order security for costs in this arbitration. The Tribunal now turns to consider the legal standard to grant security for costs.
172. The Tribunal notes that the parties largely agree that the four factors set out in *García Armas v. Venezuela* would apply.²³¹ These factors are:
- (a) *prima facie*, there is a reasonable possibility that the respondent would prevail in the case;
 - (b) the respondent would likely suffer harm not adequately reparable by an award of damages without the order;
 - (c) the respondent’s potential harm without the order substantially outweighs the harm that the claimant would likely incur from the order; and
 - (d) the condition of urgency is met.
173. The disagreement between the Parties, it would appear, is whether a security for cost order may be only obtained in “exceptional circumstances”. The Tribunal agrees with the Claimant that the Respondent would have to show “exceptional circumstances”. In considering requests for security for costs, investment arbitration tribunals have emphasised that this power may only be exercised where there are “exceptional circumstances”. The Respondent has not been able to cite a single case where the standard “exceptional circumstances” was *not* applied. This is not surprising, given that security for

²²⁹ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 10.

²³⁰ *RSM v. Saint Lucia*, ¶ 72 (RLA-019).

²³¹ *García Armas v. Venezuela*, ¶ 191 (revised RLA-006).

costs orders raise specific access to justice issues that do not arise with other forms of provisional relief.

174. The Tribunal agrees with the tribunal in *Orlandini v Bolivia*²³² that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour.
175. In *RSM v. Saint Lucia* for example, the RSM tribunal took into account that the claimant was impecunious and was funded by a third-party that could presumably not be made responsible for any adverse costs award in reaching its decision to order security. However, the decisive factor for the tribunal to grant the requested security for costs was the fact that the claimant had a proven history of not complying with costs awards rendered against it.²³³
176. Similarly, in *EuroGas v. Slovak Republic*,²³⁴ the tribunal refused to make an order for security for costs as the respondent had failed to establish that the claimants had defaulted on their payment obligations in the proceedings or in other arbitration proceedings. The tribunal made clear in that case that "financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs".
177. For the reasons set out below, the Tribunal is not persuaded that the Respondent has met the burden of proving exceptional circumstances.
178. First, the Respondent has not discharged its initial burden of establishing a reasonable basis that the Claimant is impecunious such that the burden then shifts to the Claimant to produce evidence of its ability to meet a costs award. All that the Respondent has shown is that there is no public information which indicates that the Claimant holds financial assets. It is not the case that there is something which suggests that the Claimant does not hold financial assets. Instead, the Respondent simply lacks evidence about the asset position of the Claimant.²³⁵ That is not sufficient for the Respondent to discharge its initial burden. Given this lack of evidence, the Tribunal is not therefore persuaded of the Respondent's case that it is at risk of serious or irreparable harm.
179. Secondly, the existence of a funding agreement alone has not been found by arbitral tribunals to be sufficient to grant security for costs. As explained by the tribunal in *South American Silver v. Bolivia*,²³⁶ if "the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims". On this issue, the Tribunal notes the recent decision in *Dirk Herzig v. Turkmenistan*, which turned, *inter alia*, on the

²³² *Orlandini v. Bolivia*, ¶ 143 (RLA-034). See also ICCA-Queen Mary Taskforce, *Report on Third-Party Funding*, p. 174, April 2018 (CLA-065).

²³³ *RSM v. Saint Lucia*, ¶ 86 (RLA-019).

²³⁴ *EuroGas v. Slovak Republic*, ¶ 123 (CLA-067).

²³⁵ Hearing Transcript, Day 2, 248:16-249:19; Motion for Security for Costs, ¶ 30.

²³⁶ *South American Silver v. Bolivia*, ¶ 77 (RLA-013).

issue of “the explicit non-liability of the third-party funder for a costs award adverse to its funded party”.²³⁷

180. In illustrating the “irreparable harm” that the Respondent will suffer without an order for security in the present case, the Respondent points to Mesa’s failure to comply with a \$3 million costs order in *Mesa Power v. Canada*.²³⁸ However, this is irrelevant as the Claimant was not a party in that arbitration, which involved a different party, Mesa. To the extent that the Respondent suggests that the Claimant is controlled by Mesa because the present arbitration is *inter alia* a duplicative claim of that in *Mesa Power v. Canada*,²³⁹ the Tribunal cannot decide one way or another until it has seen the Parties’ pleadings which have yet to be filed. The fact that Mesa has failed to comply with a \$3 million costs order will not advance the Respondent’s case at this stage.
181. The Respondent’s motion for security for costs is therefore dismissed. For the avoidance of the doubt, however, the dismissal does not preclude the Respondent from re-applying for security costs if there is a change in circumstances or if there is new evidence which suggests that the Claimant may not, or may not be able to, comply with an adverse costs order.
182. The Tribunal is mindful of the principle that parties in proceedings like these under NAFTA Chapter 11 and under the UNCITRAL Rules have an obligation to comply with orders and awards, including those relating to costs. The Tribunal has not found anything to indicate that the Claimant will not comply with costs orders and the presumption must be that in the absence of evidence to the contrary, a party will act in good faith.

²³⁷ *Dirk Herzig v. Turkmenistan*, ¶ 57 (RLA-112).

²³⁸ Motion for Security for Costs, ¶ 29.

²³⁹ Hearing Transcript, Day 1, 74:9-14.

IV. DISPOSITIF

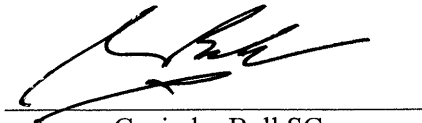
183. On the basis of the foregoing reasons, the Tribunal unanimously decides to:

- (a) REJECT the Claimant's request for interim measures.
- (b) REJECT the Respondent's request for bifurcation as premature, and directs that modifications in accordance with paragraph 93 above be made to the procedural timetable set out at PO 1 for the scenario where the proceedings are *not* bifurcated.
- (c) ORDER the Claimant to make the disclosures set out at paragraphs 106 and 107.
- (d) REJECT the Respondent's motion for security for costs.

184. The issue of costs of the above applications is to be reserved to be decided at a later stage.

Dated: 27 February 2020

Place of Arbitration: Washington, D.C.



Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal

LEGAL AUTHORITY CA-139

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan
(ICSID Case No. ARB/12/6)

PROCEDURAL ORDER NO. 3

Professor Julian D.M. Lew QC, President of the Tribunal
Professor Laurence Boisson de Chazournes, Arbitrator
Professor Bernard Hanotiau, Arbitrator

Secretary of the Tribunal
Mr Paul-Jean Le Cannu

I BACKGROUND

1. In April 2014, Respondent asked the Tribunal to order Claimants to disclose, *inter alia*, whether they had entered into third-party funding arrangements to finance their claims in this arbitration, and if so, the terms of such arrangements. That application was refused in the Tribunal's Procedural Order No. 2 dated 23 June 2014 as the Tribunal was not persuaded that there were reasons to make such an order. In that Decision the Tribunal gave several reasons which could justify an order for disclosure of a third-party funder, including in particular to avoid a conflict of interest for the arbitrator, for transparency and to identify the true party to the case, and if there is an application for security for costs.
2. By letter dated 10 April 2015, Respondent again requested the Tribunal to order Claimants to disclose "*the identity and nature of the involvement of third-party funders for Claimants in this proceeding*". To justify this application Respondent noted that Claimants had changed their legal counsel (who are also now representing the claimant in the annulment proceedings in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1). Claimants refused to disclose details of third-party funding when requested to do so by Respondent. Respondent said that disclosure was necessary for various reasons including to ensure there are no conflicts with those involved in the arbitration, including in particular the arbitrators. In this respect Respondent relied on the 2014 IBA Rules on Conflicts of Interest in International Arbitration. Respondent said it was considering making an application for security for costs because of its concern that a third-party funder "*may elect to withdraw at any time and [...] may be able to evade a costs award in the event of an adverse decision*". Further Respondent said it was necessary to check that Claimants, Mr Çap and Sehil İnşaat, are still the actual owners of the claims in this arbitration.
3. On 20 April 2015, at the request of the Tribunal, Claimants commented on Respondent's application for disclosure arguing, *inter alia*, that Respondent had previously sought to derail the arbitration and by its jurisdictional objections had caused significant costs, and it has now

declared its intention to request reconsideration of the Tribunal's Decision dated 13 February 2015. Claimants stated that the conflict of interest issue did not stand as the alleged relationship between Professor Hanotiau and Vannin Capital was unfounded. Claimants stated that they "*have not assigned their claims*" in this arbitration. Claimants further argue that Respondent's application is "*audacious*" as it "*has defaulted on payment obligations under 31 construction projects*", and "*has expropriated Claimants' equipment*" without any compensation leaving Claimants no choice but to bring this arbitration. Claimants therefore ask the Tribunal to deny Respondent's application.

4. On 21 April 2015, Respondent replied noting that Claimants had not denied that this arbitration is being financed by a third-party funder. Respondent argues that it is necessary "*to have disclosure of the third-party funder who has a direct economic interest in a potential award in this case, in order to determine if there are any conflicts and to have full transparency of all parties in interest with respect to this case*".

II TRIBUNAL'S ANALYSIS

5. § 14 of Procedural Order No. 2 stated:

This Decision does not preclude Respondent from making a further request for disclosure at a later stage in this arbitration if it has additional information to justify the application.

6. As stated at § 9 of Procedural Order No. 2 the Tribunal considers that it has inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the process. Claimants have not challenged this inherent power under the ICSID Rules.
7. Accordingly, there is no reason why Respondent cannot make this application for disclosure and for the Tribunal to consider the application again in light of changed circumstances and

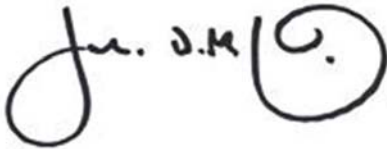
new arguments. The question for the Tribunal now is whether the circumstances exist to justify the Tribunal ordering Claimants to make the disclosures sought by Respondent.

8. The Tribunal has decided that Claimants should disclose whether their claims in this arbitration are being funded by a third-party/parties, and, if so, the names and details of the third-party funder(s) and the terms of that funding. The Tribunal's decision is based on the following factors.
9. First, the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder. In this respect the Tribunal considers that transparency as to the existence of a third-party funder is important in cases like this.
10. Second, although it has not yet done so, Respondent has indicated that it will be making an application for security for costs. It is unclear on what basis such application will be made, e.g. Claimants' inability to pay Respondent's costs and/or the existence of a third-party funder.
11. There are two additional factors which the Tribunal considers support the conclusion it has reached. Claimants have not denied that there is a third-party funder for the claims in this arbitration. It would have been straight forward to do so, just as they denied having assigned any of their rights to another party. Furthermore, and this was not denied by Claimants, Respondent has alleged that the order for costs in favour of Respondent made by the *Kılıç* Tribunal has not been paid even though the claimant (*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi*) has funded the annulment proceedings.
12. In the circumstances, the Tribunal is sympathetic to Respondent's concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration.

III TRIBUNAL'S DECISION

13. Accordingly, the Tribunal has decided and hereby orders that within 15 days of the date of this Procedural Order, Claimants shall confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, shall advise Respondent and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.

For and on behalf of the Tribunal

A handwritten signature in black ink, appearing to read "Jul. D.M. Lew" followed by a circular flourish.

Julian D.M. Lew QC
President of the Tribunal
Date: 12 June 2015

LEGAL AUTHORITY CA-140

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

CORONA MATERIALS, LLC

Claimant

and

DOMINICAN REPUBLIC

Respondent

ICSID Case No. ARB(AF)/14/3

**AWARD ON THE RESPONDENT'S EXPEDITED PRELIMINARY OBJECTIONS IN
ACCORDANCE WITH ARTICLE 10.20.5 OF THE DR-CAFTA**

Members of the Tribunal

Prof. Pierre-Marie Dupuy, President

Mr. Fernando Mantilla-Serrano

Mr. J. Christopher Thomas, QC

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

Date: May 31, 2016

REPRESENTATION OF THE PARTIES

Representing **Corona Materials, LLC:**

Mr. Ian Meredith and
Mr. Jake Ferm
K&L Gates LLP
One New Change
London EC4M 9AF
United Kingdom

and

Mr. Wojciech Sadowski and
Ms. Malgorzata Judkiewicz
K&L Gates LLP
Pl. Malachowskiego 2
00-066 Warsaw
Poland

Representing the **Dominican Republic:**

Dr. Katrina Naut
Directora General de Comercio Exterior
y Administración de Tratados Comerciales
Dra. Leslie Marmolejos y Dr. Ariel Gautreaux
Asesores
Dirección de Comercio Exterior y Administración
de Tratados Comerciales
Ministerio de Industria y Comercio
Av. 27 de Febrero No. 209, Naco
Santo Domingo, D.N.
República Dominicana

and

Ing. Patricia Abreu
Viceministra de Cooperación y Asuntos
Internacionales
Dra. Rosa Otero
Directora de Comercio y Medio Ambiente
Dras. Claudia Adames y Johanna Montero
Asesoras
Dra. Marisol Castillo
Consultora Jurídica
Ministerio de Medio Ambiente y Recursos
Naturales
Av. Cayetano Germosen Esq. Gregorio Luperón,
Santo Domingo, República Dominicana

and

Mr. Paolo Di Rosa,
Mr. Raúl Herrera,
Mr. José Antonio Rivas,
Ms. Mallory Silberman
Ms. Catherine Kettlewell,
Mr. Pedro Soto,
Ms. Natalia Giraldo
Ms. Claudia Taveras and
Ms. Daniela Páez
Arnold & Porter LLP
601 Massachusetts Ave., NW,
Washington, DC 20001-3743
United States of America

TABLE OF CONTENTS

I.	INTRODUCTION AND PARTIES	1
II.	PROCEDURAL HISTORY.....	1
	A. Request for Arbitration.....	1
	B. Tribunal Constitution	3
	C. The Respondent’s Expedited Preliminary Objections in Accordance with DR-CAFTA Article 10.20.5.....	4
	D. First Session	4
	E. Invitation to Non-Disputing Parties	5
	F. The Claimant’s Counter-Memorial on Preliminary Objections	5
	G. Fixing the Date for the Hearing on Preliminary Objections	5
	H. Disclosure Request	6
	I. Subsequent Submissions on Preliminary Objections	6
	J. The Hearing on Preliminary Objections.....	8
	K. Post-Hearing Submissions.....	9
III.	FACTUAL BACKGROUND	10
IV.	THE PARTIES’ REQUESTS	18
	A. The Respondent’s Requests.....	18
	B. The Claimant’s Requests.....	19
V.	SUMMARY OF THE PARTIES’ SUBMISSIONS	20
	A. The Respondent’s Memorial on Preliminary Objections	20
	B. The Claimant’s Counter-Memorial on Preliminary Objections	30
	C. The Respondent’s Reply on Preliminary Objections	40
	D. The Claimant’s Rejoinder on Preliminary Objections	43
VI.	SUBMISSION OF THE UNITED STATES OF AMERICA PURSUANT TO DR-CAFTA ARTICLE 10.20.2.....	50

Corona Materials, LLC v. Dominican Republic
(ICSID Case No. ARB(AF)/14/3)
Award on the Respondent’s Expedited Preliminary Objections

VII. THE TRIBUNAL’S ANALYSIS	53
A. The Relevant DR-CAFTA Provisions.....	53
B. The Applicable Law	54
C. The Basis for Consent to Arbitration	55
D. The Tribunal’s Approach	57
(1) Determination of the critical date	58
(2) Determination of the date when the Claimant acquired knowledge of the alleged breach and of the damage	59
a. One or several breaches?.....	59
b. “Actual” or “constructive” knowledge?	64
c. Did the Claimant acquire actual knowledge of the breach?	64
d. Did the Claimant acquire actual knowledge of the loss or damage?.....	69
(3) Conclusion	69
E. The issue of a Denial of Justice.....	70
(1) DR-CAFTA Article 10.5: Minimum Standard of Treatment	71
(2) The Tribunal’s Analysis.....	73
VIII. COSTS	82
IX. AWARD	84

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID, as amended effective April 10, 2006 (the “Additional Facility Rules”), on the basis of Chapter Ten of the Dominican Republic-Central America-United States Free Trade Agreement, (the “DR-CAFTA”), which entered into force for the United States on March 1, 2016, and for the Dominican Republic on March 1, 2007.
2. The Claimant is Corona Materials, LLC (“Corona” or “Claimant”), a limited liability company incorporated under the laws the State of Florida of the United States. The Respondent is the Dominican Republic (“Dominican Republic”, “DR” or the “Respondent”).
3. The Claimant and the Respondent are hereinafter collectively referred to as the “Parties.”
4. The present award (the “Award”) contains the Tribunal’s decision on the Respondent’s *Expedited Preliminary Objections in accordance with Article 10.20.5, DR-CAFTA*, dated December 3, 2015 (the “Preliminary Objections”). Through its Preliminary Objections the Respondent requests the Tribunal, among other things, to declare that it lacks jurisdiction to hear this dispute given that the Claimant’s claims allegedly fall outside the three-year period stipulated by Article 10.18.1 of the DR-CAFTA.

II. PROCEDURAL HISTORY

A. Request for Arbitration

5. On June 10, 2014, ICSID received a request for arbitration from Corona Materials, LLC against the Dominican Republic (the “Request” or “RFA”).
6. In its RFA, the Claimant submitted that the DR discriminated against Corona as a foreign investor, and deprived Corona of the value of its mining project as a result of the following

measures: (i) the DR Secretary of the Environment's passing Resolution 17-2008 cancelling the administrative procedure for obtaining permits to export aggregate, when to Corona's knowledge no other party was considering exporting construction aggregate out of the DR at that time¹; (ii) the DR Secretary of the Environment's passing Resolution 21-2009, which unfairly and disproportionately imposed a discriminatory tax of \$2.00 per cubic meter on aggregate exports²; (iii) denying Corona the environmental approval for the Joama Exploitation Concession when on August 18, 2010 the DR Environmental Ministry ruled that Corona's proposed project was "*not environmentally feasible*"³; and (iv) the Ministry's failing to reconsider the denial, when the Sub-Secretary of Environmental Management had agreed to do so. According to the RFA, on October 5, 2010, Corona submitted a letter requesting the Environmental Ministry to reconsider its conclusion that the project was "not environmentally feasible", but never received any written response.⁴

7. Corona further asserted in its RFA that the above measures allegedly breached the DR-CAFTA Articles **10.3** (National Treatment); **10.5** (Minimum Standards of Treatment, including fair and equitable treatment and full protection and security); and **10.7.1** (Expropriation and Compensation)⁵.
8. Subsequently, in accordance with Article 4(1) of the Additional Facility Rules, on June 24, 2014, the Claimant submitted an Application for Access to the Additional Facility, and expressly consented to the Centre's jurisdiction over the dispute if the Convention enters into force in the Dominican Republic at any point in the future.
9. Corona supplemented its RFA with letters dated June 24, 2014, July 14 and 29, 2014 in response to questions posed by the Centre in the course of its review of the RFA.
10. On July 14, 2014, the Claimant confirmed that its claims against the Dominican Republic were asserted in a timely manner in compliance with the condition set forth under DR-

¹ RFA, ¶¶ 65-67.

² RFA, ¶¶ 68-73.

³ RFA, ¶¶ 75-76.

⁴ RFA, ¶¶ 79-82.

⁵ RFA, ¶ 29.

CAFTA Article 10.18.1, which requires that “*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) [...] has incurred loss or damage.*” By letter of July 28, 2014, the Claimant confirmed that in accordance with DR-CAFTA Article 10.18(2)(b)(i) it waived “*any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.*”

11. On July 30, 2014, the Secretary-General of ICSID registered the Request in accordance with Article 4 of the Arbitration (Additional Facility) Rules and notified the Parties of the registration. In the Notice of Registration, the Secretary-General pursuant to Article 5(e) of the Arbitration (Additional Facility) Rules, invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Chapter III of those Rules.

B. Tribunal Constitution

12. In accordance with DR-CAFTA Article 10.19, unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the parties.
13. Pursuant to DR-CAFTA Articles 16.6 and 10.19, the Claimant appointed Mr. Fernando Mantilla-Serrano, a national of Colombia, and the Respondent appointed Mr. J. Christopher Thomas QC, a national of Canada, as arbitrators in this case. Both arbitrators accepted their appointments.
14. By letter of September 7, 2015, the Claimant requested the Chairman of the Administrative Council to appoint the President of the Tribunal, pursuant to Article 38 of the ICSID Convention, and Rule 4 of the ICSID Arbitration Rules. In response to a request for clarification from the Centre of September 8, 2015, by email of September 9, 2015, the Claimant confirmed that its request of September 7, 2015 was made pursuant to DR-

CAFTA Article 10.19(3), according to which, “[i]f a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.”

15. On October 6, 2015, the Secretary-General transmitted a list of potential candidates for a presiding arbitrator to the Parties, and invited the Parties to consider them and provide their views by October 16, 2015, by way of a ballot form. As a result, on October 16, 2015, the Parties agreed on the appointment of Professor Pierre-Marie Dupuy, a French national, as the presiding arbitrator.
16. On October 19, 2015, the Secretary-General, in accordance with Article 13(1) of the ICSID Arbitration (Additional Facility) Rules notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

C. The Respondent's Expedited Preliminary Objections in Accordance with DR-CAFTA Article 10.20.5.

17. On December 3, 2015, the Respondent filed “*Expedited Preliminary Objections in Accordance with Article 10.20.5, DR-CAFTA*” (the “PO Memorial”), together with accompanying factual and legal exhibits.

D. First Session

18. The Tribunal held a first session with the Parties on December 9, 2015, by telephone conference. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the proceedings would be conducted in accordance with the ICSID Additional Facility Rules in force as of April 10, 2006; and the DR-CAFTA; that the procedural languages would be English and Spanish; and that the legal seat of the proceeding would be Washington, D.C. A procedural timetable was fixed for

the Parties' submissions concerning the Preliminary Objections under DR-CAFTA Article 10.20.5, and for the submissions on the Merits (and Jurisdiction, if applicable). It was noted that the Non-Disputing DR-CAFTA Parties shall be entitled to make oral and written submissions to the Tribunal within the meaning of Article 10.20.2, and that pursuant to DR-CAFTA Article 10.21.2, the Tribunal shall conduct hearings open to the public and shall determine, in consultation with the parties, the appropriate logistical arrangements. The agreement of the Parties was embodied in Procedural Order No. 1 signed by the Members of the Tribunal and circulated to the Parties.

E. Invitation to Non-Disputing Parties

19. On January 12, 2016, pursuant to DR-CAFTA Article 10.20.2, and in view of the expedited procedure for Preliminary Objections, the Tribunal fixed a schedule for any Non-Disputing Party that wished to file an intervention on interpretation.

F. The Claimant's Counter-Memorial on Preliminary Objections

20. On January 29, 2016, the Claimant filed a Counter-Memorial on the Respondent's Preliminary Objections (the "PO Counter-Memorial"), pursuant to DR-CAFTA Article 10.20.5, together with accompanying factual and legal exhibits, and the first witness statements of Alain Stanley French and Randolph Howard Fields.

G. Fixing the Date for the Hearing on Preliminary Objections

21. On February 3, 2016, the Tribunal, in consultation with the Parties, scheduled the Hearing on Preliminary Objections (the "Hearing") to be held at the World Bank Conference Centre in Paris on April 11-12, 2016.

H. Disclosure Request

22. On February 3, 2016, the Respondent requested the Tribunal to direct the Claimant to indicate whether it had received funds from any third-party funder to cover the costs of this arbitration, and if so, to disclose its/their name(s), and the date when such funding started. On February 4, 2016, the Tribunal invited the Claimant to provide the requested information within five working days from its receipt of the English translation of the Respondent's letter. The Respondent provided the English translation on February 5, 2016, and the Secretary of the Tribunal confirmed that the Claimant's observations to the Respondent's Disclosure Request of February 3, 2016 were due by February 12, 2016. As scheduled, the Claimant filed its observations on February 12, 2016, and provided the name of the funder. On the same date, the Tribunal invited comments from the Respondent, which were filed, together with an English translation on February 16, 2016. In its letter, the Respondent requested the Tribunal to direct the Claimant to state the date when the external funding began, as such information might be relevant to the Respondent's Reply on Preliminary Objections due by February 19, 2016. On February 17, 2016, the Claimant offered to respond by February 29, 2016, but the Tribunal, after considering the Parties' respective positions on the matter, and the due date of the Respondent's Reply, directed the Claimant to state the requested date by noon (Washington, D.C. time) of February 18, 2016, with any other comments to follow by February 29, 2016. On February 18, 2016, the Claimant informed that the date of the Funding Agreement was November 19, 2015.

I. Subsequent Submissions on Preliminary Objections

23. On February 19, 2016, the Respondent filed a Reply on its Preliminary Objections (the "PO Reply"), pursuant to DR-CAFTA Article 10.20.5, together with accompanying factual and legal exhibits; the witness statements of Rosa Urania Abreu, Lina Beriguet, Jaime David Fernández Mirabal, and Ernesto Reyna Alcántara; and the Expert Report of Prof. Eduardo Jorge Prats.

Corona Materials, LLC v. Dominican Republic
(ICSID Case No. ARB(AF)/14/3)
Award on the Respondent's Expedited Preliminary Objections

24. On March 11, 2016, the Claimant filed a Rejoinder on the Respondent's Preliminary Objections (the "PO Rejoinder"), pursuant to DR-CAFTA Article 10.20.5, together with accompanying factual and legal exhibits; the Second Witness Statement of Alain Stanley French, the Expert Report of Professor Gustavo José Mena García; and the Expert Report of Fabiola Medina Garnes.
25. On March 11, 2016, the United States of America filed a written submission as a non-disputing State Party pursuant to DR-CAFTA Article 10.20.2 (the "U.S. NDSP Submission").
26. On March 14, 2016, in accordance with section 18.1 of the Tribunal's Procedural Order No. 1 of December 16, 2015, the Parties were invited to provide their comments on the U.S. NDSP Submission by March 18, 2016, with the translation into the other procedural language to follow by Friday, March 25, 2016.
27. On March 18, 2016, the Claimant filed its comments on the U.S. NDSP Submission. The Respondent did not take the opportunity to comment on the Submission at that time.
28. On March 22, 2016, the Parties submitted and agreed on the proposal for the scheduling and organization of the hearing (the "Procedural Agreements"), which was followed by the Parties' letters of March 23, 2016, stating their respective positions on the points of disagreement.
29. At the request of the Parties, and Organizational Meeting was held on March 29, 2016, by telephone conference, between the President of the Tribunal, on behalf of the Tribunal, and the Parties to discuss the outstanding procedural matters for the Hearing.
30. On March 30, 2016, the Tribunal issued Procedural Order No. 2, concerning the Tribunal's decisions on the outstanding procedural matters for the Hearing.

J. The Hearing on Preliminary Objections

31. The Hearing took place at the World Bank Conference Center in Paris on April 11-12, 2016. In addition to the Members of the Tribunal and the Secretary of the Tribunal⁶, present at the Hearing were:

For the Respondent:

Director Katrina Naut	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Director Rosa Otero	Ministerio del Medio Ambiente
Ms. Leslie Marmolejos	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Mr. Ariel Gauteaux	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Ms. Marisol Castillo	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Mr. Paolo Di Rosa	Arnold & Porter LLP
Mr. Raúl Herrera	Arnold & Porter LLP
Mr. José Antonio Rivas	Arnold & Porter LLP
Ms. Mallory Silberman	Arnold & Porter LLP
Ms. Catherine Kettlewell	Arnold & Porter LLP
Ms. Claudia Taveras	Arnold & Porter LLP
Ms. Ana Pirnia	Arnold & Porter LLP

For the Claimant:

Mr. Ian Meredith	K&L Gates LLP
Mr. Wojciech Sadowski	K&L Gates LLP
Ms. Ania Farren	K&L Gates LLP
Mr. Jake Ferm	K&L Gates LLP
Ms. Malgorzata Judkiewicz	K&L Gates LLP
Mr. Randolph Fields	Corona Materials, LLC
Mr. Alain French	Corona Materials, LLC
Mr. John Elliott	Corona Materials, LLC

⁶ By consent of the Parties, Ms. Christine Sim Hui Ling, a Practice Fellow of the National University of Singapore's Centre for International Law and assistant to Mr. Thomas, was permitted to attend the Hearing as an observer.

32. The following persons were examined:

On behalf of the Respondent:

Ing. Ernesto Reyna
Ing. Lina Beriguette
Minister Jaime David Fernandez Mirabal
Ing. Rosa Urania Abreu
Prof. Eduardo Jorge Prats

On behalf of the Claimant:

Mr. Alain French
Ms. Fabiola Medina Garnes
Prof. Gustavo José Mena García

33. During the Hearing and at the Tribunal's proposal, the parties reached the following agreement: *"The parties agree that the Members of the Tribunal may agree on the text of the award by correspondence or other means of communication and sign the final text without meeting in person at the place of arbitration. The parties agree that wherever the award is signed by each arbitrator, it is deemed to have been made at the place of arbitration (Washington, D.C.)."* Said agreement was recorded in Procedural Order No. 3 dated April 19, 2016.

K. Post-Hearing Submissions

34. Pursuant to the directions given by the Arbitral Tribunal at the Hearing as complemented by a letter dated April 20, 2016, the Parties submitted simultaneous Post-Hearing Briefs on April 26, 2016 and Costs Submissions on May 6, 2016.
35. In accordance with the section 22.4 of Procedural Order No. 1, on May 5, 2016, the Secretary of the Tribunal transmitted the Final Revised Transcripts of the Hearing on Preliminary Objections held on April 11-12, 2016 to the Parties, incorporating the agreed corrections to the transcripts submitted by the Parties on April 25, 2016, as confirmed by the Tribunal by email of April 26, 2016. At the invitation of the Tribunal, on May 13,

2016, each party filed an updated Post-Hearing Brief, incorporating the references to the Final Revised Hearing Transcripts.

36. On May 31, 2016, the Tribunal declared the proceeding closed in accordance with Article 44 of the ICSID Arbitration (Additional Facility) Rules.

III. FACTUAL BACKGROUND

37. To the extent relevant for the purposes required by the Tribunal to address the Respondent's DR-CAFTA Article 10.20.5 Preliminary Objections, and for that limited purpose only, the Tribunal summarises the factual background to the dispute. The summary of facts does not reflect any finding of fact or conclusion of law by the Tribunal in this Part of the Award.
38. The case concerns a mining project to build and operate a mine in the DR from which Corona would export construction aggregate materials to Florida and elsewhere (the "**Project**").⁷
39. In May 2007, Corona through its 99% owned Dominican subsidiary, Walvis Investments, S.A. ("Walvis"), submitted an application to the DR Mining Office to operate the Joama Exploitation Concession (the "**Exploitation Concession Application**").⁸
40. In September 2007, the Claimant submitted an application for an Environmental License (the "**Environmental License Application**"), required to operate the aggregates mine, to the Respondent's Ministry of Environment and Natural Resources (the "**Environmental Ministry**").⁹
41. The Claimant asserts that **Joama Exploitation Concession** was granted in 2009 for a period of 75 years¹⁰, and that the only remaining approval needed to make full use of it

⁷ RFA, ¶26; PO Counter-Memorial, ¶10.

⁸ PO Counter-Memorial, ¶11.

⁹ PO Counter-Memorial, ¶¶11, 30, 31; PO Reply, ¶10.

¹⁰ PO Counter-Memorial, ¶12.

was to obtain the Environmental License, for which an Environmental Impact Assessment (the “EIA”) was required.¹¹

42. The Claimant submits that there were delays in processing Corona's Environmental License Application,¹² in issuing the amended terms of reference,¹³ and in issuing Corona's EIA.¹⁴ In the Respondent's view, it was the Claimant that delayed the proceeding by omitting or delaying its response to the Ministry's requests for documents and information, and by modifying the scope of the project several times during the assessment process.¹⁵
43. On August 18, 2010, the Environmental Ministry, through Communication No. DEA-3867-10, informed Corona that the Joama Project was “*not environmentally viable*” (the “**Negative Environmental Decision**” or the “**Communication No. DEA-3867-10**”).¹⁶ The Negative Environmental Decision was taken by Resolution 737-10 of the Environmental Ministry's Technical Evaluation Committee (“**TEC**”) following a meeting of July 28, 2010 (“**Resolution 737-10**”).¹⁷ According to the Claimant, the Negative Environmental Decision failed to proffer actual reasons, was only two pages long, did not provide explanations, nor set out any procedure by which the decision could be appealed or could be submitted to reconsideration.¹⁸ The Claimant further submits that Resolution 737-10 was never served on the Claimant.¹⁹ The Respondent, on the other hand, argues that the communication not only informed Walvis of the Ministry's decision to reject the license application, but also of the reasons why such decision was made, as it indicated that the rejection was based on Articles 118, 120, 126, 129, and 8 of Law No. 64-00 on the Environment and Natural

¹¹ PO Counter-Memorial, ¶¶13, 20, 41, 42; PO Reply, ¶11.

¹² PO Counter-Memorial, ¶¶45-49.

¹³ PO Counter-Memorial, ¶¶50-51.

¹⁴ PO Counter-Memorial, ¶¶52-55.

¹⁵ PO Respondent's Reply, ¶13.

¹⁶ PO Counter-Memorial, ¶56. Communication from Reyna Ernesto to Walvis Investments, S.A. No. DEA-3867-10 (C-14) (R-4). First Witness Statement of Alain Stanley French, ¶10 (“**French 1st Statement**”). PO Respondent's Reply, ¶14.

¹⁷ PO Counter-Memorial, ¶60; (C-14) (R-4). Resolution 737-2010 was filed with the Respondent's Reply, (R-8).

¹⁸ PO Counter-Memorial, ¶¶57-58.

¹⁹ PO Counter-Memorial, ¶¶ 6(a), 60, 112, 127(b), 199.

Resources. According to the Respondent, those articles from Law No. 64-00 refer to the State's power to limit resource use for public interest reasons.²⁰ The Claimant argues that Resolution 737-2010, submitted by the Respondent with its Reply (but not served to the Claimant), if read jointly with Communication No. DEA-3867-10, establishes beyond doubt that the Respondent's refusal to grant Corona an Environmental Permit for the Project was an arbitrary act.²¹

44. According to the Respondent's witness, Ms. Beriguette, in her role of Environmental Assessment Director at the Environment Ministry at the time, she participated in the TEC for the Joama Project, and in particular in the July 28, 2010 meeting, during which various members of the committee offered technical reasons why the project should be rejected. She further submits that after the meeting, the project representative and its consultants, who were waiting outside of the room, as they could not be present during the deliberation, were invited into the room, and were informed orally of the decision and the reasons for it. This was followed by a written notification dated August 18, 2010.²² To the contrary, the Claimant's witness, Mr. French, submits that none of Corona's representatives or consultants were invited to the TEC meeting on July 28, 2010. Mr. French further asserts that between the July 28, 2010 meeting and the receipt of the Communication No. DEA-3867-10 of August 18, 2010, he was informed by one of Corona's environmental consultants that TEC had approved the Environmental License Application, but that it was not signed. Mr. French also submits that he had not seen Resolution 737-10 prior to reading the Respondent's Reply.²³

45. On October 5, 2010, the Claimant submitted a letter to the Environmental Ministry. According to the Claimant, the letter was a Motion for Reconsideration of the Negative Environmental Decision (the "**Motion for Reconsideration**"), to which it has never received a formal response.²⁴ According to the Respondent, although it seems from the

²⁰ PO Reply, ¶15.

²¹ PO Rejoinder, ¶2.

²² Witness Statement of Ms. Lina Beriguette, ¶¶15-16 ("**Beriguette Statement**").

²³ Second Witness Statement of Alain Stanley French, ¶7-10 ("**French 2nd Statement**").

²⁴ PO Counter-Memorial, ¶62. The Claimant's Motion for Reconsideration, October 5, 2010 (C-15)(R-1).

letter that is was a motion for reconsideration, since the deadline for seeking a reconsideration of the August 18, 2010 notification had expired, it could not be considered to be such a motion.²⁵

46. It is disputed whether the environmental assessment proceedings have been closed or not. According to the Claimant, it has never been formally closed by the Respondent.²⁶ However, the Respondent asserts that Communication No. DEA-3867-10 expressly stated that the file was closed.²⁷
47. The Claimant submits that at a meeting held in January 2011 (the “**January 2011 Meeting**”) between company representatives and the Sub-Secretary of Environmental Management, Mr. Reyna, and other government officials regarding the Negative Environmental Decision, the Claimant was told that the Decision would be reconsidered. A further meeting was allegedly held in mid-June 2011 (the “**June 2011 Meeting**”), also regarding the status of the Environmental License and the reconsideration of the Negative Environmental Decision. The Claimant also refers to its various written communications to Government officials,²⁸ and claims to have been told on several occasions by DR officials, among them, Ms. Beriguette of the Environmental Ministry, that the Negative Environmental Decision was under reconsideration.²⁹ With regard to the June 2011 Meeting, Mr. Alain Stanley French, a principal of the Claimant, asserts that environmental consultants, including Mario Mendez of Empaca, met with Secretary Jaime David of the Environmental Ministry and Sub-Secretary Reyna in relation to the Environmental License. Mr. French submits that based on what he was told he still believed that there was a possibility that the Environmental Ministry may reconsider its Negative Environmental Decision and issue an Environmental Decision for the Project.³⁰ According to the Respondent, the June 2011 Meeting between former Minister Jaime David Fernández,

²⁵ PO Reply, ¶19.

²⁶ PO Counter-Memorial, ¶13.

²⁷ PO Reply, ¶¶16, 20.

²⁸ PO Counter-Memorial, ¶¶61-75.

²⁹ PO Counter-Memorial, ¶76.

³⁰ French 1st Statement, ¶13.

Vice-Minister Ernesto Reyna, and Corona's consultant Mr. Mario Mendez never took place. The Respondent submits that the Claimant has not provided any evidence that such a meeting was held in June 2011, that the Claimant's accounts of the June 2011 meeting are inconsistent, and that this strongly suggests that the Claimant and/or its witness Mr. French chose to refer to "an alleged (but non-existent) June 2011 meeting for the sole purpose of avoiding the consequences of DR-CAFTA Article 18.10.1."³¹ The Respondent further rejects any allegation that the former Minister and Vice-Minister created expectations or made promises that the rejection of the environmental license would be reconsidered and annulled and/or that an environmental license could be granted.³² The Respondent's submissions were supported with the witness statements of Ms. Lina Beriguet, Mr. Ernesto Reyna, Minister Jaime David Fernández, and Ms. Rosa Abreu, who also indicated in their respective statements that no individual official was legally empowered to annul the Negative Environmental Decision.³³

48. On February 23, 2011, the Claimant wrote a letter to Vice-Minister Reyna³⁴ to complain about the lack of progress [of the Motion for Reconsideration] (the "**February 23, 2011 letter**").³⁵ The Respondent submits that it is evident from the express language of the letter that its real purpose was to warn the Dominican Republic of Corona's intent to proceed to arbitration under DR-CAFTA unless Corona's demands were met.³⁶
49. Since the Parties have extensively debated the February 23, 2011 letter, the Arbitral Tribunal considers important to transcribe said letter in its entirety:

"23 February 2011
Engineer Ernesto Reyna Alcántara
Vice-Minister of Environmental Management
Ministry of State of Environment and Natural Resources

³¹ PO Reply, ¶31.

³² PO Reply, ¶32.

³³ PO Reply, ¶¶21, 27-28, 32-33. Beriguet Statement, ¶¶17-18; Witness Statement of Mr. Ernesto Reyna, ¶19 ("**Reyna Statement**"); Witness Statement of Dr. Jaime David Fernández, ¶17 ("**Fernández Statement**"); Witness Statement of Ms. Rosa Urania Abreu, ¶¶12-17 ("**Abreu Statement**").

³⁴ Letter from A. French to the Ministry, February 23, 2011 (**R-2**).

³⁵ PO Counter-Memorial, ¶68.

³⁶ PO Reply, ¶23.

Present. –

Reference: ISSUANCE OF THE ENVIRONMENTAL PERMIT FOR THE JOAMAEXPLOITATION CONCESSION CODE 3378/3263: WALVIS INVESTMENTS, S.A.

Distinguished Engineer,

This past Thursday, 17 February 2011, we visited the offices of Environmental Management to determine the status of the Reconsideration of the JOAMA Environmental License. Several people at Management tried to assist us, but no one was able to provide any information about JOAMA. Finally, after two hours speaking with five people, we were informed that after the meeting with the delegates from Sanchez in their office on January 2011, personal [1] from Environmental Management had not worked or advanced on the reconsideration of the application for JOAMA Environmental License. It is true we are very disappointed but not surprised. For more than three years, the modus operandi of Environmental Management seems to stay the same without changes. During this time, we have been subjected to continuous delays, excuses, unfulfilled promises, questionable competence and, in several instances, rudeness.

We invested in the Dominican Republic for the following reasons. In 2006, high ranking officials from President Fernández's administration convinced us that our investment of 80 million dollars in an export company would be safe in Sánchez. Also, all the partners met with you and the Minister of Environment, Minister Omar Ramirez, in your offices and your personal expressed enthusiasm about JOAMA. On the basis of these guarantees, we proceeded to invest in good faith in the JOAMA project at World Level. Now, after our frustrating experience we have arrived at the conclusion that Environmental Management, for unknown reasons, does not want to or cannot process for JOAMA's Environmental License Application diligently and in good faith.

We recognize that the Dominican Government has correct and appropriate means to allow or deny mining activities, and must do so through administrative proceedings that are found in the environment in Mining Law 146-00, and the Environmental Law 64-00, nothing in this letter should be interpreted as a request for a special favor. However, the Dominican Government is also a Party to the DR-CAFTA Treaty and is required to respect its provisions.

The Partners of Corona in Florida believe that Environmental Management may be unaware of the substantive obligations of Article 10

of the DR-CAFTA that protects foreign investors like us. According to them, Environmental Management has seriously violated these protection provisions on various occasions. One Corona partner is also a lead partner in the prestigious international law firm Greenberg Traurig, which are specialists in the area of investor-state disputes and have successfully represented investors before arbitration tribunals as they did in the first DR-CAFTA case. This Arbitration Process in Investor-Dominican State disputes does not go before the Dominican courts but rather before an arbitral tribunal in Washington, DC. Generally, the Investor-State dispute tribunals are not indulgent to States and their interpretation of "Fair and Equitable Treatment" is much broader than in Dominican courts. The International Law Association (ILA) over the Committee on Foreign Investment last interpretation of the "Fair and Equitable Treatment" in Article 10 requires of very important obligations for the guest (Dominican) State: now it is well established that the rule requires certain level of rule of law within the host country which encapsulates the obligation to act in a coherent manner, without ambiguity and with total transparency, not arbitrary and in accordance with the principle of good faith.

Also, the investors may expect due process in processing their claims and that authorities' actions are taken in a non-discriminatory manner and proportionate to the political objectives involved. Among these features the need to respect the objective of creating favorable conditions for the investment, complying with legitimate commercial expectations of the investors and without any drastic changes in the tax regime.

For your reference, some of the specific violations to DR-CAFTA obligations are listed below:

- 1. The Minister has issued public statements in the press that environmental licenses are processed in 30-60 days, while we have been waiting more than thirty six months.*
- 2. After having been granted the Terms of Reference of the Mine and private Marine Port, the Minister signed Resolution No. 18 at the end of 2008, which effectively canceled the authorization procedure to export construction aggregates.*
- 3. Since we had already made a considerable investment and entered into the future commitments required, the Terms of Reference were divided in two: one Terms of Reference for the Quarry and another for the Marine Port so that at least the licensing process for the Quarry could continue, the original Terms of Reference were no longer valid. After a considerable delay, the Ministry issued a new Term of Reference only for the Quarry with a strict limitation that aggregate materials could not be exported.*

4. *After industry pressure, the Minister signed Resolution #21 at the beginning of 2009 reinstating the authorization process to export aggregates. Nevertheless, for reasons unknown to us . . . the Ministry continued denying the Terms of Reference for the Private Marine Port and continues not to permit the export construction aggregates notwithstanding Resolution #21. We have noted that Resolution 21 does not appear that they have distributed it within the Ministry and has not been published in the Ministry's website.*

5. *Resolution #21 includes a new tax of \$2.00 per square meter on exports for construction aggregates however the domestic tax was kept in \$0.30 per square meter. We consider that this tax is arbitrary and unfair and in violation of the obligations and spirit of the DR-CAFTA agreement.*

6. *The Ministry on repeated occasions has asked us for copies of the same information related to issues that are obsolete and not relevant anymore. For example, they have asked three times for copies of the "No Objection Letters" of the plot owners indicating that they allow us to have exploration activities on their land. The exploration phase was completed 30 months ago and the "No Objection Letters" have been replaced with sales and leasing contracts. We can only conclude that the technical staff that is working on the request does not completely understand the project or Environmental Management is deliberately blocking our request.*

7. *On November of 2010, the Ministry sent a notice that the project was "not environmentally viable," citing six extracts of environmental provisions... none of which we were in violation. For example, it declared that the project required a 30 meter buffer from all bodies of water when we are at a distance of 700 or more meters. In conclusion, the letter does not include a specific reason to deny the license.*

8. *The Minister can has recently declared that he is not going to any new mining operating license.*

9. *The Mining Director and the Minister of Foreign Relations of the Investment office (CEIRD) promoted the DR to us in Florida in 2005 and 2006 and, based on their guarantees in which we have invested in the good DR faith and now Corona's partners believe that we could have been cheated and could have been defrauded by the Dominican State.*

In accordance with the instructions of the Partner of Corona, I have contacted the Dominican CEI-RD offices and the International Commerce Direction (DICOEX) to try to negotiate an amicable solution. To this meeting scheduled for 2 March 2011 at 9:30, the Director of DICOEX, a representative of CEI-RD and the Mining Director, Corona has invited a representative of the Commercial Representation of the US and the

Executive Director of ASIEX (Dominican Foreign Investors Association) to participate.

According to the administrators of Corona, express if the Environmental License and the Terms of Reference for the Private Port are not issued the damages to Corona arising directly from the violations of Management would be USD 342 million. However, we can accept lesser losses and injuries and damages for the three years that JOAMA is paralyzed we can reach a settlement on 2 March 2011 during the meeting at DICOEX, subject to Corona receiving the Environmental License and the Terms of Reference for the Private Marine Port and the Conveyor Belt.

We sincerely hope that you or your colleagues also can participate in this meeting so that we have the opportunity to avoid an Arbitral Tribunal in Washington, DC...

Sincerely,

[Signature]

*Eng. A. French,
Managing Partner
Corona Materials, LLC
Cell 809-769-8080
Email: coronamaterials@gmail.com*

Cc:

*Jaime David Mirabel, Minister of Environment and Natural Resources
Congressman Miguel Ángel Jazmin
Ms. Yahaira Sosa, Director of Foreign Trade and Administration of
Commercial Treaties
Mr. Octavio López, Mining Director
Andria Malito, DR-CAFTA Specialist US Trade Representative Office,
Washington DC
Mr. Mario Méndez, EMPACA Redes, Environmental Consultant
Mr. Salvador Demallistre, Executive Director ASIEX”*

IV. THE PARTIES' REQUESTS

A. The Respondent's Requests

50. The Respondent's PO Memorial, contains the following petition:

“The Dominican Republic hereby respectfully requests this Tribunal that:

- a. *This Preliminary Objection be deemed to have been submitted in due time and in proper form in accordance with Article 10.20.5 of the DR-CAFTA; Substantive proceedings be suspended;*
- b. *The processing of this Objection be expedited in accordance with Article 10.20.5 of the DR-CAFTA;*
- c. *The Tribunal declare that the Tribunal lacks jurisdiction to hear this dispute given that the Claimant's claims fall outside the three-year period stipulated by Article 10.18.1 of the DR-CAFTA;*
- d. *The Claimant be ordered to pay the costs incurred by the Dominican Republic owing to this Arbitration, in accordance with Article 10.20.6 of the DR-CAFTA.”*³⁷

51. In its PO Reply, the Respondent requested *“that the Tribunal issue an award in which it:*

- a. *dismisses Claimant's claims in their entirety, on the basis of DR-CAFTA Article 10.18.1; and*
- b. *orders that Claimant bear the entirety of the costs and fees of the present arbitration, including the Dominican Republic's attorney fees, and any other fees and expenses.”*³⁸

B. The Claimant's Requests

52. The Claimant's PO Counter-Memorial includes the following request for relief:

“The Claimant therefore respectfully requests that:

³⁷ PO Memorial, ¶135.

³⁸ PO Reply, ¶108.

- a. *the Tribunal dismiss the Respondent's Preliminary Objections in their entirety;*
- b. *the Tribunal declare that it has jurisdiction to hear this dispute given that the Claimant's claims fall within the three-year period stipulated by Article 10.18.1 of DR-CAFTA;*
- c. *the Respondent be ordered to pay the costs of the determination of the Preliminary Objections, including reasonable counsel's fees; and*
- d. *the Tribunal confer such other relief as is just and warranted.*³⁹

53. The Claimant ratified the above request for relief in its PO Rejoinder.⁴⁰

V. SUMMARY OF THE PARTIES' SUBMISSIONS

A. The Respondent's Memorial on Preliminary Objections

54. In its PO Memorial, the Respondent claims that the Tribunal lacks jurisdiction to hear the Claimant's claims because the alleged acts and omissions on which the Claimant's claims are allegedly based took place outside the three-year period required under DR-CAFTA Article 10.18.1 for a Tribunal to have jurisdiction over the claims.⁴¹

(1) Legal Framework and Legal Standard

55. According to the Respondent, the legal framework that applies to preliminary objections can be found in Paragraphs 4, 5 and 6 of DR-CAFTA Article 10.20.⁴²

56. The Respondent submits that the legal standard applicable to DR-CAFTA Article 10.20.5 is the one adopted by the *Renco v. Peru*⁴³ tribunal, which after analysing Article 10.20.5 of

³⁹ PO Counter-Memorial, ¶232.

⁴⁰ PO Rejoinder, ¶197.

⁴¹ PO Memorial, ¶¶2-3.

⁴² PO Memorial, ¶4.

the United States-Peru FTA (analogous to DR-CAFTA Article 10.20.5)⁴⁴, asserted (i) that the expedited procedure comprises both objections of law under paragraph 4 as well and any objection that the dispute is not within the tribunal's competence;⁴⁵ and (ii) that claimant's factual allegations relating to tribunal jurisdictional issues under Article 10.20.5, unlike Article 10.20.4, are not required to be "assumed to be true" for the filing of preliminary objections.

(2) Claims Lie Outside of the DR-CAFTA Article 10.18.1 Three-Year Period

57. The Respondent submits that in accordance with the two elements comprised in DR-CAFTA Article 10.18.1, a tribunal would lack jurisdiction *ratione temporis* if the claim brought under DR-CAFTA Article 10.16 is not submitted to arbitration within three years following the date on which the claimant (a) acquired, or should have acquired, knowledge of the alleged breach; and (b) acquired, or should have acquired, knowledge of the loss or damage incurred.⁴⁶
58. In analyzing the elements of the statute of limitations set out in DR-CAFTA Article 10.18.1, the Respondent notes that certain steps need to be followed.
59. First, the Tribunal should define the relevant measure(s) that allegedly gives rise to the alleged breach⁴⁷.
60. Second, the Tribunal should determine the relevant critical date in order to determine the end of the three-year limitation period. The Respondent submits that tribunals have uniformly taken the date of receipt by the Secretary-General of ICSID of the Request for

⁴³ *The Renco Group, Inc. v. Republic of Peru*, UNCT-13-1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, dated December 18, 2014 ("*Renco v Peru*") (**RA-3**).

⁴⁴ PO Memorial, ¶¶13-14.

⁴⁵ PO Memorial, ¶13.

⁴⁶ PO Memorial, ¶24.

⁴⁷ PO Memorial, ¶¶25-26. DR-CAFTA Article 2.1 defines "measure" as including "any law, regulation, procedure, requirement, or practice...." (**RA-1**).

Arbitration from which the three-year period is calculated backwards⁴⁸. The Respondent initially asserted that in the present case, the date of the RFA, as supplemented, is July 28, 2014, and that consequently, July 28, 2014 would be the date prior to which the Claimant must have acquired knowledge of the alleged breaches, and of the alleged resulting damage⁴⁹. However, during the Hearing, the Respondent agreed to take June 10, 2014 (*i.e.* date of receipt of the RFA by ICSID) as the effective date of the RFA and, therefore, **June 10, 2011** as the critical date for DR-CAFTA Article 10.18.1, after deducting the DR-CAFTA three-year limitation period.⁵⁰

61. Relying on the interpretation given by several North American Free Trade Agreement (“NAFTA”) tribunals to a provision included in Articles 1116(2) and 1117(2) of NAFTA, which is similar to DR-CAFTA Article 10.18.1, the Respondent asserts that the three-year period set out in Article 10.18.1 does not permit suspensions, extensions or other modifications,⁵¹ and that it is not necessary for the claimant to know the exact amount of loss or damage in order for time to begin to run.⁵²
62. The Respondent includes a table with a compilation of (1) the Claimant's claims; (2) the measures which, according to the Claimant, constitute the breaches on which the Claimant's claims are based; (3) each of the dates of the measures invoked; and (4) the time period that elapsed from the date of the measure to the date of the RFA.⁵³
63. According to the Respondent, the Claimant acquired knowledge of the existence of the measures on each of the dates when the measures were passed, or alternatively on dates very close to such dates and, in each case, on dates prior to June 10, 2011.

⁴⁸ PO Memorial, ¶27. See *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)99/2 (“*Mondev v. USA*”) (RA-9).

⁴⁹ PO Memorial, ¶¶ 29-30.

⁵⁰ Tr.27:22-30:6.

⁵¹ See Respondent's Post-Hearing Brief, ¶¶ 3-4.

⁵² PO Memorial, ¶30. *Mondev v. USA* (RA-9).

⁵³ PO Memorial, ¶31.

64. As for the loss or damage claimed to have been suffered, the Respondent submits that in the Claimant's Notice of Intent⁵⁴, reference was made to a letter of February 16, 2011 to Mr. Ernesto Reyna Alcántara, Deputy Minister of Environmental Management at the Environmental Ministry⁵⁵, which evidences that the Claimant "*had clearly acquired knowledge of the damages supposedly caused by the alleged breaches of the DR-CAFTA*", 3 years, 5 months and 6 days before the RFA.⁵⁶
65. The Respondent then analyses the Claimant's claims for alleged breaches of DR-CAFTA Articles 10.3 (National Treatment), 10.5 (Minimum Standard of Treatment), 10.7 (Expropriation), under the perspective of its objection under DR-CAFTA Article 10.18.1, and concludes that they were all submitted outside of the three-year relevant time limit, and must therefore be dismissed.
- a. **The Dominican Republic has not consented to arbitration to settle the claim made by Corona regarding the alleged breach of Article 10.3 (National Treatment) of the DR-CAFTA**
66. The Respondent notes that Corona invokes the Environmental Ministry Resolution No. 17-2008 dated November 18, 2008 ("**Resolution No. 17-2008**"), and Resolution No. 21-2009 dated May 25, 2009 ("**Resolution No. 21-2009**"), as measures that allegedly breached DR-CAFTA Article 10.3 by being discriminatory, designed to unfairly and disproportionately tax any party, seeking to export aggregate outside the Dominican Republic, in particular Corona.⁵⁷
67. According to the Respondent, the Claimant acquired, or should have acquired knowledge of Resolution 17-2008, and of Resolution No. 21-009, on the date of the respective

⁵⁴ PO Memorial, ¶32.

⁵⁵ The Respondent understands that this letter might in fact be one dated February 23, 2011 from Mr. A. French, representing Corona Materials, LLC to Mr. Ernesto Reyna Alcántara. (R-2)

⁵⁶ PO Memorial, ¶33.

⁵⁷ PO Memorial, ¶¶36-38.

adoption of these measures, over five years before the RFA, thus the claim based on those measures is outside the relevant three-year period.⁵⁸

68. The Respondent also refers to Communication No. DEA-386710, issued by the Environmental Ministry on August 18, 2010, which notified Walvis that the Joama Exploitation Concession project had been declared environmental unfeasible.⁵⁹ The Claimant argues that this Communication, which rejected the request for an environmental license, breached DR-CAFTA Article 10.3 by allegedly applying environmental regulations to Corona differently than that applied to domestically owned mining operations.⁶⁰
69. The Respondent claims that the Claimant acquired knowledge of this measure on August 18, 2010, 3 years, 11 months and 11 days before the RFA, and that consequently, the claim based on this measure was submitted outside the relevant three-year period.⁶¹
70. Further, the Respondent, referring to decisions rendered under the NAFTA, submits that given that the DR-CAFTA does not allow a suspension or interruption to the limitation period established in Article 10.18.1, it is irrelevant whether Corona submitted any appeal for reconsideration or not.⁶²
71. With regard to the alleged damages caused by the above-indicated measures, namely: (i) the termination of the possibility of Corona pursuing its mining project (Resolution No. 17-2008); (ii) imposing a tax of US\$2.00 per cubic meter on aggregate exports, which was alleged to have a severe impact on Corona's future profit margins (Resolution No. 21-2009); and (iii) the denial of the request, the Respondent submits that the Claimant also acquired, or should have acquired, knowledge of the alleged damages caused by the above-

⁵⁸ PO Memorial, ¶¶40-42.

⁵⁹ (R-4).

⁶⁰ PO Memorial, ¶¶45-46.

⁶¹ PO Memorial, ¶48.

⁶² PO Memorial, ¶¶49-51. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL Arbitration, Decision on Objections to Jurisdiction, July 20, 2006, ¶29 (“*Grand River v. USA*”) (R-7). *Marvin Roy Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶63 (“*Feldman v Mexico*”) (R-8).

indicated measures, on the same dates as each of such measures were adopted. That is, over three years prior to filing the RFA.

72. Furthermore, the Respondent submits that such knowledge is evidenced by the February 23, 2011 letter from Mr. A. French, Corona's representative, to the Deputy Minister of Environmental Management, where the company estimated the amount of damages it had sustained as a consequence of the measures just listed, which allegedly resulted in the violation of DR-CAFTA Article 10.3, at some US\$342 million.⁶³

b. **The Dominican Republic did not Consent to Arbitration to Submitting the Claim Concerning the Alleged Violation of Article 10.5 (Minimum Standard of Treatment) of the DR-CAFTA.**

73. The Respondent refers to the measures which, according to the Claimant, allegedly violated DR-CAFTA Article 10.5. by (i) displaying arbitrary and discriminatory conduct, unfairly targeting Corona's investment, or to Corona's detriment as a foreign investor⁶⁴; (ii) by violating the fair and equitable treatment and full protection and security owed to Corona; (iii) by discriminating against Corona as an investor, denying it the right to due process as part of the environmental licensing procedure, and not granting the minimum standards of due process in the reconsideration process.⁶⁵
74. First, with regard to Resolution No. 17-2008 (subsequently revoked) and Resolution No. 21-2009, already identified *supra*, the Respondent submits that the Claimant was, or should have been aware of both resolutions on the dates on which they were issued (over five years before the RFA).

⁶³ PO Memorial, ¶¶53-57. See, Letter dated February 23, 2011 written by Mr. A. French, representing Corona Materials, LL.C. (R-2).

⁶⁴ RFA, ¶107.

⁶⁵ PO Memorial, ¶59. RFA, ¶107.

75. Second, with regard to the *administrative procedure regarding the environmental license application*, the Respondent argues that the Claimant has not elaborated or provided data to support its allegations of violations of the right to due process.⁶⁶
76. The Respondent asserts that the relevant administrative procedure ended with the denial of the license application, which according to the Claimant's Notice of Intent, was communicated to the Claimant on August 18, 2010.⁶⁷ As a result, the Claimant would have been aware of the alleged violations of due process during the environmental license application procedure prior to August 18, 2010.
77. Third, regarding the *denial of the environmental license*, the Respondent submits that as stated in its preceding arguments *supra*, the Claimant was aware of such denial (3 years, 11 months and 11 days prior to the submission of the RFA).⁶⁸
78. Fourth, with reference to the *absence of any response to the "Request for Reconsideration"*, the Claimant claims that its application for reconsideration was submitted on October 5, 2011.⁶⁹ The Respondent argues that it was untimely, because in the Dominican Republic, administrative actions become final and unchallengeable thirty (30) days after their notification.⁷⁰ Corona would have had up till September 17, 2010 to request a reconsideration of the denial decision, but submitted it only on October 5, 2010, after the statutory time limit had expired. As a result, the Ministry's decision denying the license became final on September 17, 2010 (3 years, 10 months and 12 days prior to the RFA).⁷¹

⁶⁶ PO Memorial, ¶¶66.

⁶⁷ PO Memorial, ¶¶69. See, Notice of Intent, ¶12.

⁶⁸ PO Memorial, ¶72.

⁶⁹ PO Memorial, ¶¶73-74. RFA, ¶¶105-106.

⁷⁰ Rodríguez Huertas, Olivo A, Dominican Administrative Law and General Principles, (University of Montevideo Law Review, Year VIII (2009) No. 16), ("Rodríguez, Administrative Law") p.119, ¶83 (**RA-11**).

⁷¹ PO Memorial, ¶¶73-79.

79. The Respondent notes that ‘negative administrative silence’ is a legal principle according to which an administrative authority shall be deemed to have denied an application when a specific statutory period has expired without its having responded to the application.
80. The Respondent submits that Corona cannot therefore assert that it did not receive a response to its application of October 5, 2010. Once two months had elapsed without a response from the Ministry, the Claimant should have concluded that its request for reconsideration had *de facto* been denied by operation of negative administrative silence.⁷²
81. In the event that it is still argued that this silence constitutes a violation of the Minimum Standard of Treatment under DR-CAFTA, the Respondent submits that the date to be considered for the purposes of DR-CAFTA Article 10.18.1, would be December 5, 2010, when the Ministry’s decision was deemed confirmed by operation of the negative administrative silence. Arguably, that date could be extended to January 5, 2011, up to when the Claimant could have resorted to the administrative courts. Even that date would fall outside of the relevant three-year time limit.⁷³
82. The Respondent then refers to the Claimant’s claim of alleged violations of the DR-CAFTA by the Dominican Republic’s absence of a response to Corona’s communication of February 16, 2011⁷⁴ to the Sub-Secretary of Environmental Management, whereby the Claimant allegedly requested, inter alia, an environmental license to commence operations in the Joama Exploitation Concession⁷⁵ (*the alleged “New License Application”*). The Respondent rejects the contention that this letter was a license application; rather, it was a threat with the initiation of arbitration proceedings to seek compensation for damages estimated to be US\$342 million, unless the environmental license and the terms of reference for the private seaport and the conveyor belt were issued, and submits that such letter did not require a response.⁷⁶ Nevertheless, the Respondent argues that in the event

⁷² PO Memorial, ¶¶83-84.

⁷³ PO Memorial, ¶¶85-86.

⁷⁴ The Respondent understands that this letter is actually the letter dated February 23, 2011 from Mr. A. French to Ernesto Reyna Alcántara. (R-2)

⁷⁵ PO Memorial, ¶87.

⁷⁶ PO Memorial, ¶¶87-100.

that this Tribunal determines that a response was required, in the absence of a written response, by virtue of the negative administrative silence doctrine, the adduced application is deemed to have been denied once two months had elapsed from its filing.⁷⁷

83. According to the Respondent, the Claimant was or should have been aware of any violation or damage caused by virtue of negative administrative silence concerning the alleged “New License Application” not later than March 23, 2011 (or April 23, 2011, if considering the date of expiration of the Claimant’s right to resort to the administrative courts following the authority’s silence and of the implicit refusal arising therefrom). Either of these dates would still be prior to the July 28, 2011 critical date.⁷⁸
84. The Respondent submits that in the event that the Claimant attempts to argue that this “License Application”, and the alleged lack of response interrupt or suspend the prescription period set forth under DR-CAFTA Article 10.18.1, it should be recalled that (i) DR-CAFTA Article 10.18.1 does not provide for any suspension of the relevant three-year period; and (ii) that in accordance with the general principles of law applied by international courts, a suspension of this nature only applies in cases of force majeure or when a right-holder is fraudulently prevented from bringing proceedings.⁷⁹ According to the Respondent, this is not the case here, and the prescription period under DR-CAFTA Article 10.18.1 cannot be deemed to have been suspended or interrupted.
85. The Respondent also disputes the Claimant’s submissions concerning the alleged January 2011 and June 2010 Meetings with officials of the Environmental Ministry following the denial of the environmental license application, as no evidence has been provided as to whether they took place or what was allegedly discussed in them. The Respondent also points to some inconsistencies in the RFA.
86. In its letter of July 14, 2014, in response to ICSID’s request for a confirmation of whether the condition set forth under DR-CAFTA Article 10.18.1 had been met, the Claimant

⁷⁷ PO Memorial, ¶101.

⁷⁸ PO Memorial, ¶102.

⁷⁹ PO Memorial, ¶¶103-104. *Feldman v Mexico (RA-8)*.

confirmed that the claims were filed in time, as this was done during the three years from the mid-June 2011 Meeting during which the Dominican Republic promised to reconsider the application for the issue of a license.

87. The Respondent rejects the contention that any alleged promise made in any such alleged meeting would suspend the prescription term. Relying on *Feldman v. Mexico*, the Respondent submits that for conduct to interrupt or suspend the prescription periods, it must have been prolonged, uniform, consistent and effective and must originate from an administrative authority competent to acknowledge the viability of a claim against the State and its amount. The holding of meetings with representatives of the Dominican Republic cannot be considered as a continuing act resulting from the denial of environmental permit or as a suspension of the prescription. Finally, according to the Respondent, Corona had access to and could have appealed the environmental permit denial before the Dominican Republic's administrative or judicial authorities, but did not.⁸⁰
88. As for the loss or damage, the Respondent, relying on its previous arguments *above*, submits that Corona was or should have been aware of the loss or damage it would sustain as a result of the measures it cites as violating DR-CAFTA Article 10.5, at least as of February 23, 2011⁸¹. Such measures all occurred over three years prior to the submission of the RFA.⁸²

c. **The Dominican Republic did not Consent to Arbitration by Submitting the Claim Concerning the Alleged Violation of Article 10.7 (Expropriation) of the DR-CAFTA.**

89. The Respondent argues that the facts cited by Corona as grounds for the alleged violations of DR-CAFTA Article 10.7, namely (i) the denial of the environmental license application;

⁸⁰ PO Memorial, ¶¶109-112. *Feldman v Mexico*, ¶63 (RA-8).

⁸¹ Letter dated February 23, 2011 signed by A. French, representing Corona, to Ernesto Reyna Alcántara. (R-2).

⁸² PO Memorial, ¶¶113-115.

and (ii) the absence of any response to the “request for reconsideration”, all took place prior to July 28, 2011, and therefore, outside of the three-year prescription period.⁸³

90. According to the Claimant, the alleged expropriation is a direct consequence of the denial of the environmental license application. The Respondent submits that the Claimant became aware of such denial, when it was issued on August 18, 2010, over three years prior to the filing of the RFA.⁸⁴
91. As to the alleged “Motion for Reconsideration”, the Respondent, once again submits that it was untimely, without effect, and that by virtue of negative administrative silence, no claim can be made of an absence of response.⁸⁵
92. The Respondent reverts to its previous arguments with respect to the Claimant's contention that the Dominican Republic's inaction with respect to the alleged pledge to reconsider its application suspended any prescription period that was applicable.⁸⁶
93. According to the Respondent, the Claimant was, or should have been, aware of the alleged damages caused by the alleged expropriation, more than three years prior to the filing of the RFA. At least on February 23, 2011, when Mr. A. French, in his letter on behalf of Corona to Mr. Reyna Alcántara, estimated that the denial of the license had caused Corona damages of US\$342 million.⁸⁷

B. The Claimant's Counter-Memorial on Preliminary Objections

(1) Introduction and Relevant Facts

94. The Claimant asserts that the Respondent's Preliminary Objections are ill-founded as a matter of principle; and too closely linked to the merits to be decided in an expedited

⁸³ PO Memorial, ¶¶116-118.

⁸⁴ PO Memorial, ¶¶119-121.

⁸⁵ PO Memorial, ¶123.

⁸⁶ PO Memorial, ¶¶125-127.

⁸⁷ PO Memorial, ¶¶128-130. See letter dated February 23, 2011, signed by A. French (R-2).

preliminary objections proceeding. As a result, they should be dismissed as falling outside the scope *ratione materiae* of eligible objections for determination under the DR-CAFTA Article 10.20.5 Expedited Procedure.⁸⁸

95. The Claimant submits that its “Motion for Reconsideration” of October 5, 2010, of the denial of the environmental license, which is equivalent to an appeal, is still pending and has not yet been decided, and in the Claimant’s view, this is a denial of administrative justice on the grounds of excessive delay.⁸⁹
96. The Claimant submits that it was only in the second half of 2011, when the Claimant lost hope that the Negative Environmental Decision would be reconsidered. The Claimant notes that the RFA was filed 3 years from that date.⁹⁰
97. The Claimant gives a general overview of the facts, noting that although the Exploitation Concession was granted in 2009, the Respondent has refused to grant the Environmental License and/or explain how the Project should be modified for the Claimant to benefit from its asset. In the Claimant’s view, this constitutes a continuing violation of the Fair and Equitable Treatment standard (“**FET Standard**”), equivalent in effect to a *de facto* expropriation.⁹¹
98. According to the Claimant, the Respondent’s Preliminary Objections did not dispute the facts alleged in the Claimant’s RFA, in particular the meetings held in 2011 and 2012 with the DR authorities concerning the Motion for Reconsideration of the Claimant’s Environmental License Application.⁹²
99. The Claimant referred to Corona’s corporate registration on November 7, 2005, as a limited liability company under the laws of the U.S. State of Florida, and summarised the commercial business experience of its principal members: Messrs. Randolph Fields, John

⁸⁸ PO Counter-Memorial, ¶¶2, 9.

⁸⁹ PO Counter-Memorial, ¶4.

⁹⁰ PO Counter-Memorial, ¶5.

⁹¹ PO Counter-Memorial, ¶¶14-15.

⁹² PO Counter-Memorial, ¶16.

Elliott and Alain Stanley French. The Claimant submitted witness statements from Mr. Fields and Mr. French with its PO Counter-Memorial.⁹³

100. Regarding the Joama Concession, the Claimant referred to its early search in 2005 for potential options to obtain aggregates from mines in the Caribbean to supply the Florida market, noting that it carried out its operations in the DR through Walvis Investments, S.A. (“Walvis”), its DR-incorporated subsidiary. In 2006, Walvis purchased three existing applications for Exploration Concessions at the DR sites of Perla, Joben and Joama. The Claimant asserts that after considering its key advantages, and encouragement from senior officials from the DR government, it decided to start with the Joama Concession, and commissioned a series of feasibility studies, including an environmental feasibility study conducted by Empaca in February 2007, which concluded that the Project was “viable environmentally”.⁹⁴
101. The Joama Exploitation Concession was granted to Walvis on June 1, 2009, conferring, among others, the rights (i) to conduct mining activities within the perimeters of the Concession; (ii) to extract mineral substances of mining sites for economic gain; (iii) to exploit and benefit from the mineral substances extracted within the perimeters of the concession for up to 75 years; and (iv) to construct and establish various types of infrastructure in connection with the mining operations.⁹⁵
102. However, the Claimant notes that the use of the Concession was subject to the positive evaluation of the EIA, and the obtainment of the Environmental License or Permit.⁹⁶
103. The Claimant thus sought to obtain the Concession and requisite Environmental License. Reference is made, in particular, to (i) Corona’s Application for an Exploitation Concession to Mine Aggregates and a Corresponding Environmental License; (ii) the delays in approving the Exploitation Concession Application; (iii) the delays in processing Corona’s Application for an Environmental License; (iv) the delays in issuing the

⁹³ PO Counter-Memorial, ¶¶18-21.

⁹⁴ PO Counter-Memorial, ¶¶22-27.

⁹⁵ PO Counter-Memorial, ¶28.

⁹⁶ PO Counter-Memorial, ¶29.

Amended Terms of Reference; (v) the delays in issuing Corona's Environmental Impact Assessment Study; (vi) the denial by the DR of the Environmental Approval for the Joama Exploitation Concession; and (vii) Corona's application for reconsideration of the negative environmental decision.⁹⁷

(2) Environmental Impact Assessment Process

104. After providing an overview of generally accepted international principles of modern environmental law, and of the international law commitments assumed directly by the Respondent under DR-CAFTA, the Claimant concludes that a modern EIA process imposes enhanced obligations upon states with respect to transparency, access to justice and due process⁹⁸. The Claimant submits that the conduct of the EIA process carried out by the Respondent with respect to the Project was inconsistent with such principles and international law, and protracted from the outset.⁹⁹
105. According to the Claimant, the Respondent failed to achieve a balance of three fundamental rights (i) the Respondent's sovereign right to form its environmental and economic policies; (ii) the Claimant's rights (prevalingly economic in nature) under DR-CAFTA; and (iii) the right of the public (including Corona and Walvis) to receive reliable, transparent information concerning the environment and decisions concerning the conduct of EIAs in the DR.¹⁰⁰ In late July 2010, the Respondent took a secret decision to discontinue the EIA of the Project on murky grounds. Corona submits that the decision, (allegedly in TEC Resolution 737-10) as described in the letter of August 18, 2010, was arbitrary, and did not follow due process. It was never published nor served on the Claimant, who only became notified of the decision by way of a two-page letter of August 18, 2010, which according to the Claimant did not provide specific reasons for the

⁹⁷ PO Counter-Memorial, ¶¶ 30-78.

⁹⁸ PO Counter-Memorial, ¶¶ 79-102.

⁹⁹ PO Counter-Memorial, ¶¶ 104-105.

¹⁰⁰ PO Counter-Memorial, ¶¶ 111-112.

discontinuance of the environmental assessment, nor any information concerning the legal remedies available to it.¹⁰¹

106. The Claimant asserts that the Dominican authorities had several meetings and exchanges with the Claimant which led it to believe that the Motion for Reconsideration of October 5, 2010 was being processed.¹⁰²

a. **Violation of DR-CAFTA Article 10.5**

107. DR-CAFTA Article 10.5.1 states:

“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”

108. Pursuant to DR-CAFTA Article 10.5.2, the treatment accorded to covered investments is the customary international law minimum standard. The Claimant notes that in accordance with the FET standard, the Host State is obliged, among other things, not to deny administrative justice. The Claimant submits that in its conduct of the EIA process with respect to the Project, the Respondent committed numerous breaches of the FET Standard as defined in DR-CAFTA Article 10.5, as it failed to conform to the international law requirements of transparency and due process, with the result that it committed a denial of administrative justice.¹⁰³
109. According to the Claimant, the **Negative Environmental Decision**, taken by Resolution 737-10, in a session of the Environmental Ministry's TEC of July 28, 2010, without the participation of the Claimant, deprived the Claimant's right to be heard, had an expropriatory effect on the Exploitation Concession, did not comply with the due process requirements prescribed under DR-CAFTA Article 10.7, and was never served on the Claimant, who only received a two-page notification letter with inadequate reasons. The Respondent claims that the **Motion for Reconsideration** was practically the only legal

¹⁰¹ PO Counter-Memorial, ¶¶112-113, 127.

¹⁰² PO Counter-Memorial, ¶118. French 1st Statement, ¶13.

¹⁰³ PO Counter-Memorial, ¶¶122-123, 128.

remedy available to Corona at that time, and the failure to rule on it implied a denial of administrative justice.

110. Relying on the writings of international law scholars, the Claimant submits that the minimum standard of treatment has developed as an independent standard that affords foreigners certain procedural guarantees, such as due process and transparency, that must be respected by the Host State, regardless of the treatment it affords to its own nationals, and regards the denial of justice as a breach of international law.¹⁰⁴
111. The Claimant submits that as held by numerous arbitral tribunals (i.e., *Bayindir v. Pakistan*, *Lemire v. Ukraine*, and *Metalclad v. Mexico*), and concluded in *Redfern and Hunter on International Arbitration*, “the failure to ensure **due process, consistency, and transparency in the functioning of public authorities**, and the lack of a predictable and stable framework for investment [...] are breaches of fair and equitable treatment standards”.¹⁰⁵ [Bolding in original.]
112. According to the Claimant, by having a deficient system of administrative law, and thus failing to guarantee due process, the Respondent is in breach of the FET Standard, and thus of its treaty obligations under DR-CAFTA. Further, the Claimant relying on the approaches from the tribunals taken by tribunals in *Azinian v. Mexico* and *Hochtief v. Argentina*, submits that the excessively lengthy proceedings that the Claimant faced in relation to the Motion for Reconsideration of the Environmental License was ruinous, and amounted to a denial of justice by the Respondent's administration.¹⁰⁶
113. Finally, relying on various transnational sources of laws and standards, the Claimant asserts that the international law requirements with respect to the conduct of EIA proceedings are higher than in other cases.¹⁰⁷

¹⁰⁴ PO Counter-Memorial, ¶¶129-133.

¹⁰⁵ PO Counter-Memorial, ¶¶135-139 (footnotes omitted). See, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th edition (Kluwer International; Oxford University Press 2015), Chapter 8 (CL-19).

¹⁰⁶ PO Counter-Memorial, ¶¶140-146 (footnotes omitted).

¹⁰⁷ PO Counter-Memorial, ¶¶148-149.

b. Violation of DR-CAFTA Article 10.7

114. DR-CAFTA Article 10.7 provides:

“[N]o Party may expropriate or nationalize a covered investment either directly or *indirectly* through measures equivalent to expropriation or nationalization.”¹⁰⁸

115. According to the Claimant, the Respondent's violations of the FET standard also equates to *de facto* expropriation of the Claimant's investment.

116. The Claimant states that according to a number of arbitral tribunals, to find *de facto* expropriation, a requirement of substantial deprivation has to be met. This has been defined by the tribunal in *Telenor v. Hungary* as a substantial interference with the investor's rights that deprives the investor of the economic value, use and enjoyment of its investment. Further, and as indicated by the tribunal in *Tecmed v. Mexico*, the government's intention or the form of the deprivation is less important than the actual effects of the measures.¹⁰⁹

c. Continuing Nature of the Breach

117. The Claimant, relying on Article 14(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts¹¹⁰, submits that the Respondent's actions form a continuous violation of the DR-CAFTA protection standards. As a result, in the Claimant's view, the three-year limitation period provided for under DR-CAFTA Article 10.18 was renewed, and the Claimant's claims are not time-barred.¹¹¹

¹⁰⁸ PO Counter-Memorial, ¶151. DR-CAFTA, Chapter Ten (CL-1).

¹⁰⁹ PO Counter-Memorial, ¶¶153-154. *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006 (CL-27). *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 (CL-30).

¹¹⁰ Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001. Article 14(2) provides: “The breach on an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligations.”

¹¹¹ PO Counter-Memorial, ¶¶155-157.

118. Such was the case in the *UPS v Canada*, submits the Claimant, where the tribunal held that “*continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.*”¹¹²
119. The Claimant also submits that the Tribunal should consider whether there is any legal recourse available under domestic laws against the relevant measures.¹¹³

(3) The Respondent's Jurisdictional Objection is Without Merit

120. The Claimant notes that the Respondent's Preliminary Objections are limited to the contention that the Claimant's claims are time-barred pursuant to DR-CAFTA Article 10.18.1.¹¹⁴
121. The Claimant submits that, from the clear language of DR-CAFTA Article 10.18.1, to calculate the three-year period stipulated therein: (i) the relevant date is the date of the breach (not of the measure); (ii) the *dies a quo* is the date of the knowledge or presumed knowledge (not the date of the breach); and (iii) the *dies ad quem* is the date of the initial effecting of service of the RFA on ICSID.¹¹⁵
122. According to the Claimant, in the present case, the breach is the Respondent's continuing failure to react to the Motion for Reconsideration, and the cumulative impact of many months without a decision amounts to denial of justice.¹¹⁶
123. Regarding the relevance of the requisite knowledge, the Claimant recalls that according to the Respondent two requirements have to be met to trigger the three-year time limit: (i) the actual knowledge of the breach by the investor, and (ii) the knowledge of loss or damage resulting from the breach. The Claimant submits that the major difficulty in the present case is that the international wrong committed by the Respondent consists of an arbitrary

¹¹² PO Counter-Memorial, ¶160.

¹¹³ PO Counter-Memorial, ¶159.

¹¹⁴ PO Counter-Memorial, ¶164.

¹¹⁵ PO Counter-Memorial, ¶167.

¹¹⁶ PO Counter-Memorial, ¶169.

omission. As a result, it is only based on the subsequent, external manifestations of that decision that the Claimant could have realized that the wrong had been committed. Between 2010 and 2012, the Claimant received mixed signals from the Respondent that led it to believe that the Negative Environmental Decision would be re-considered.¹¹⁷

124. As a result, the Claimant submits that the Respondent should be estopped from arguing that the Claimant should have had knowledge of the denial of justice before June 2011.¹¹⁸

125. According to the Claimant, the critical date for determining the relevant three-year period is **June 10, 2014**, when the Claimant's RFA was submitted, and not when the RFA was supplemented, as the Respondent contends.

126. In this respect, the Claimant recalls that pursuant to DR-CAFTA Article 10.16.4(b)

“A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (“notice of arbitration”): referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General.”

127. Further, the Claimant notes that the tribunal in *Feldman v Mexico*, when analyzing whether the investor's claims in that case were time-barred, confirmed that:

“the time at which the notice of arbitration has been received by the Secretary General rather than the time of delivery of the notice of intent to submit a claim to arbitration is apt to interrupt the running of limitation period under NAFTA Article 117(2).”¹¹⁹

128. According to the Claimant, the Respondent's Preliminary Objections are ill-founded and should therefore be dismissed on the facts of the case, since the RFA was filed within three years from the date when Corona first acquired knowledge of the denial of justice by the Respondent.¹²⁰

¹¹⁷ PO Counter-Memorial, ¶¶172-177.

¹¹⁸ PO Counter-Memorial, ¶178.

¹¹⁹ PO Counter-Memorial, ¶186. *Feldman v Mexico* (CL-38).

¹²⁰ PO Counter-Memorial, ¶188.

129. The Claimant rejects the Respondent's arguments based on the doctrine of *negative administrative silence*, claiming that this would allow the Respondent to benefit from its own wrongdoing. Further, the Claimant argues that the Respondent should be estopped from arguing that the Claimant ought to have submitted its claim earlier, given that the Respondent's officials induced the Claimant to believe that they were going to respond to the Reconsideration Request.
130. At the time when the Motion for Reconsideration was submitted, the Dominican Republic's administrative procedural laws were not codified. This happened only in 2013, when the DR Parliament enacted the general administrative law which entered into force in 2015 as **Law 107-13**.¹²¹
131. The Claimant also notes that under DR Law, following the entry into force of **Law 13-07**, an administrative act could be challenged in parallel by both a motion for reconsideration and a judicial action.¹²² The two bases of challenge were subject to different sets of rules. A judicial challenge had to be brought within 30 days, whereas a motion for reconsideration did not. As a result, the Claimant submits that the Respondent's argument to the contrary is without merit.¹²³
132. According to the Claimant, its Motion for Reconsideration was directed against the Negative Environmental Decision, and not against the letter of August 18, 2010. As a result, even if the 30-day rule applied to the Motion for Reconsideration, which the Claimant refutes, the time period could not start to run from August 18, 2010, because the Negative Environmental Decision was never served upon the Claimant.¹²⁴
133. The Claimant submits that the *doctrine of negative administrative silence* on which Respondent relies cannot be applied to the Claimant, for the following reasons: (i) The purpose of that doctrine in DR law "*is to guarantee due process as by this rule, subjects of administrative actions do not need to wait indefinitely for a response from the*

¹²¹ PO Counter-Memorial, ¶¶191-192. Law 107-13 of the DR (Spanish) (CL-39).

¹²² PO Counter-Memorial, ¶198. Law 13-07 of the DR, (Spanish) (CL-40A).

¹²³ PO Counter-Memorial, ¶198.

¹²⁴ PO Counter-Memorial, ¶¶199-200.

administrative authority";¹²⁵(ii) it always acts in favor of the individual;¹²⁶ (iii) it would deprive the Claimant of such an effective remedy before the DR-CAFTA Tribunal; (iv) it would be unreasonable to assume that the environmental administration would be able to complete the review of the application within such a short period of time; and (v) the application of that doctrine to the EIA process in such a way as alleged by the Respondent, would result in the Motion for Reconsideration of the negative decision not being an effective remedy, which would be equivalent to a breach of the Respondent's international law obligations, including under DR-CAFTA, the violation of the FET Standard, and a breach of Articles 68 and 69 of the DR Constitution.¹²⁷

134. The Claimant once again challenges the Respondent's contention that the Claimant could have brought an international claim for denial of justice against DR after December 5, 2010; reaffirms its position that no party should benefit from its own wrongs, and asserts that the Respondent is estopped from arguing that the Claimant should have submitted the claim earlier.¹²⁸
135. Finally, the Claimant submits that the Respondent's objection is ill-suited for the expedited procedure; that the three-year period under DR-CAFTA Article 10.18.1 should be calculated from the moment when the Claimant should have realized the inertia on the part of the DR administration had transformed into a breach of DR-CAFTA; and that the Preliminary Objections should be joined with the merits of the case.¹²⁹

C. The Respondent's Reply on Preliminary Objections

136. The Respondent reaffirms that its preliminary objection is suited for resolution in the present expedited procedure, for the following reasons.

¹²⁵ PO Counter-Memorial, ¶202, citing PO Memorial, ¶80.

¹²⁶ "*La teleología de la figura jurídica del silencio administrativo es operar siempre a favor del administrado[...]* (R-006).

¹²⁷ PO Counter-Memorial, ¶¶201-208.

¹²⁸ PO Counter-Memorial, ¶¶210-220.

¹²⁹ PO Counter-Memorial, ¶¶221-231.

137. First, Article 10.20.5 DR-CAFTA allows for the determination of issues of fact in the course of the Expedited Procedure.¹³⁰ Relying in *Pac Rim v. El Salvador*, the Respondent submits that a tribunal must view with a discerning eye claimant's characterization of events "as facts".¹³¹ As in *Trans-Global v. Jordan*, a tribunal "need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; not need a tribunal accept a legal submission dressed up as a factual allegation."¹³²
138. Second, the Respondent, relying on an article from Professor Jan Paulsson, quoted by the *Renco v. Peru* tribunal, asserts that from a plain textual interpretation of DR-CAFTA Article 10.20.4, the Tribunal is also empowered to decide the merits of the case in this procedure.¹³³ Although, the Respondent notes, the Tribunal has not been asked to decide the merits of the case within this Expedited Procedure.¹³⁴
139. Respondent submits that the Claimant's substantive arguments on the DR's preliminary objection are unsustainable. The Dominican Republic has demonstrated that the Claimant's claims are time-barred by virtue of DR-CAFTA Article 10.18.1, because the Claimant was aware, more than three years before the RFA's registration, of the refusal of the license by the Dominican authorities, and of its implications. In the Respondent's view, this was evidenced, in particular, by the Claimant's letter of February 23, 2011 to the Environmental Ministry.¹³⁵
140. According to the Respondent, in an attempt to overcome the three-year limitation, the Claimant divided the application process in two parts in its Counter-Memorial: (i) the review and express rejection of the Claimant's environmental application, which lies

¹³⁰ PO Reply, ¶35. PO Counter-Memorial, ¶222.

¹³¹ PO Reply, ¶35. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under DR-CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶91 ("*Pac Rim*") (RA-6) (CL-47).

¹³² PO Reply, ¶35. *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, the Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, ¶105 (RA-12).

¹³³ PO Reply, ¶37. J. Paulsson (RA-13). See *Renco v. Peru* (RA-3) (CL-48).

¹³⁴ PO Reply, ¶38.

¹³⁵ PO Reply, ¶¶40-42 (footnotes omitted).

outside that limit, and, as indicated by the Claimant itself, is to be treated as background information; and (ii) the absence of a response by Dominican authorities to the “Motion for Reconsideration”, which the Claimant submits is a free-standing measure that falls within the three-year limit.

141. In the Respondent's view, such a division is wholly arbitrary and self-serving. According to the Respondent, the absence of a response to the Motion for Reconsideration is not a stand-alone “measure” capable of creating jurisdiction. This, because (i) the claims regarding the absence of a response to the “Motion for Reconsideration” are no different from the claims concerning the Environmental License Application process generally; (ii) the absence of a response to the “Motion for Reconsideration” is not an “omission” capable of giving rise to a stand-alone claim under DR-CAFTA; and (iii) the “continuing violation” doctrine does not exempt the Claimant's claims from the time bar imposed by DR-CAFTA Article 10.18.1.¹³⁶
142. Furthermore, the Respondent argues that even assuming *arguendo* that the absence of a response to the “Motion for Reconsideration” qualified as a stand-alone “measure”, the Claimant has failed to articulate a *prima facie* claim for denial of justice in connection with such measure.¹³⁷
143. In light of the above, the Respondent concludes that (i) the Claimant failed to submit its claims to arbitration within the deadline contemplated by DR-CAFTA Article 10.18.1, and they should therefore be dismissed; (ii) the Claimant's claim with respect to the alleged failure to issue a ruling on the Motion for Reconsideration is neither different nor separate from its challenge to other parts of the application review process; (iii) it is manifest from the Claimant's February 23, 2011 letter that the Claimant was aware at that time of the alleged breach of DR-CAFTA, as well as of the corresponding damages; (iv) the Claimant deliberately delayed the filing of the RFA until June 10, 2014, because in Respondent's view, the Claimant was trying to obtain external financing, which it did not obtain until November 19, 2015. The Respondent characterizes such a delay for lack of funding as

¹³⁶ PO Reply, ¶¶45-95 (footnotes omitted).

¹³⁷ PO Reply, ¶¶96-99.

negligent, and submits that the Claimant has also acted in bad faith by altering the formulation of its relevant claims for the sole purpose of trying to fit such claims within the limitations period established by Article 10.18.1.¹³⁸

D. The Claimant's Rejoinder on Preliminary Objections

144. By way of introduction, the Claimant recalls that Resolution 737-2010, which had not been served upon the Claimant, was submitted by the Respondent together with its Reply. The Claimant submits that if read together with Communication No. DEA-3867-10, the Resolution establishes beyond doubt that the Respondent's refusal to grant Corona an Environmental Permit for the Project was an arbitrary act.¹³⁹
145. The Claimant asserts that the original international wrong, consisting of the Respondent's arbitrary act taken in July 2010 in breach of due process, subsequently evolved into an international wrong of a different genre, i.e., a denial of justice, which did not come into existence until after July 2011. Thus, this cause of action falls within the three-year period leading up to the date of submission of the RFA on June 10, 2014.¹⁴⁰
146. The Claimant submits that at the time of its February 23, 2011 letter, the Claimant still expected that, by way of the Motion for Reconsideration, the Negative Environmental Decision might be reversed, and reaffirms its position that the Respondent's Preliminary Objections are ill-suited for determination under DR-CAFTA Article 10.20.5.¹⁴¹
147. In its Rejoinder, the Claimant reaffirms that the case concerns a clear violation of DR-CAFTA by the Respondent comprising: (i) the Refusal of the Environmental License, and (ii) the Refusal to Entertain the Motion for Reconsideration as a separate breach of the DR-CAFTA¹⁴².

¹³⁸ PO Reply, ¶¶100-105.

¹³⁹ PO Rejoinder, ¶2.

¹⁴⁰ PO Rejoinder, ¶¶4-5.

¹⁴¹ PO Rejoinder, ¶¶6-7.

¹⁴² PO Rejoinder, ¶¶8-68.

148. With regard to the **Refusal of the Environmental License**, the Claimant quotes the relevant paragraph of Resolution 737-2010, that reads as follows:

“5. Exploitation Concession JOAMA (Code 3263)

*Dismissed, the Province Director stated that the community is not in agreement with the installation of the project because of a dispute between the project-owner and the owners of real properties and that the entry into the project has not been clearly defined; Lic. Germán Dominici asserted that the project would affect coastal waters, Ing. Apolinar Suero noted that there is lack of information concerning the structure of the project and that it would have a negative impact on the community.”*¹⁴³

149. The Claimant submits that Resolution 737-2010 contains an arbitrary decision falling manifestly short of the minimum standard of treatment required under DR-CAFTA Article 10.5.1. Resolution 737-2010 further violates domestic principles, in particular those under the DR regulatory framework of Environmental Licenses, *Reglamento del Sistema de Permisos y Licencias Ambientales* (Regulation of the System of Environmental Licenses and Permits) dated June 2004 (the “**June 2004 Regulations**”)¹⁴⁴. As shown in the Expert Report of Fabiola Medina Garnes, the flaws of Resolution 737-2010 – most specifically the lack of reasoning and the lack of competence of the body issuing it¹⁴⁵ – are of such nature that the Negative Environmental Decision in Resolution 737-2010 should be declared null and void.¹⁴⁶
150. The Claimant then addresses the **Refusal to Entertain the Motion for Reconsideration**. The Claimant notes that a distinction should be drawn between the original international wrong resulting from the arbitrariness of the Negative Environmental Decision of July 2010, and the subsequent and distinct international wrong resulting from the Respondent's failure to redress that original wrong through its own system of domestic remedies. This, in

¹⁴³ (R-8).

¹⁴⁴ (R-19).

¹⁴⁵ In accordance with Article 6 of the June 2004 Regulations, the exclusive competence to take decisions with respect to projects requiring an Environmental Licenses was granted to the Technical Validation Committee (not to the TEC). (R-19).

¹⁴⁶ PO Rejoinder, ¶¶11-38. Expert Report of Fabiola Median Garnes, ¶¶41-43. See also Expert Report of Gustavo José Mena García, ¶34.

the Claimant's view, is pivotal to the outcome of the Respondent's Preliminary Objections.¹⁴⁷

151. The first, the Negative Environmental Decision, was an arbitrary act, in violation of due process, and a breach of the minimum standard of treatment under DR-CAFTA Article 10.5.1.¹⁴⁸
152. According to the Claimant, faced with the Negative Environmental Decision, and after evaluating the recourses that were available locally and internationally, the Claimant opted for filing the Motion for Reconsideration of the Negative Environmental Decision with the Environmental Ministry. This was done as it was determined to move forward with the Project,¹⁴⁹ and also out of concern that an international tribunal might not find the Respondent liable in an eventual investor-state dispute settlement scenario, if the Claimant did not exhaust local remedies in the host state.¹⁵⁰
153. The Claimant submits that the Respondent has prevented the Claimant from challenging the initial arbitrary act (the Negative Environmental Decision), by (i) failing to serve Resolution 737-2010 containing the Negative Environmental Decision upon the Claimant; and (ii) failing to respond to the Motion for Reconsideration.¹⁵¹
154. According to the Claimant, the Respondent's failure to respond on the Motion for Reconsideration violates Article 22.4 of the Dominican Constitution¹⁵² and amounts to a breach of the state's obligations under DR-CAFTA to afford the Claimant "an adequate opportunity, **within a reasonable time**, to vindicate their legitimate rights" (emphasis added).¹⁵³

¹⁴⁷ PO Rejoinder, ¶39.

¹⁴⁸ PO Rejoinder, ¶41.

¹⁴⁹ PO Rejoinder, ¶¶42-44. French 1st Statement, ¶13; French 2nd Statement, ¶20.

¹⁵⁰ PO Rejoinder, ¶¶44-48.

¹⁵¹ PO Rejoinder, ¶51.

¹⁵² Expert Report of Fabiola Medina Garnes, ¶¶82 *et seq.*

¹⁵³ PO Rejoinder, ¶¶52-53. *Reinhard Hans Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/09/20), Award, May 16, 2012, ¶272 (**RA-29**).

155. In the Claimant's view, the delay was caused solely by the Respondent's reluctance or refusal to respond to the Motion for Reconsideration. As a result, the Claimant submits that the Respondent has violated DR-CAFTA Article 10.5.1 by violating the Claimant's right to be heard within a reasonable time, and that such a breach produces effects tantamount to an expropriation of the Claimant's investment in the DR.¹⁵⁴
156. The Claimant submits that the Respondent's Preliminary Objections are without merit, because they: (i) are misdirected, in that the Respondent fail to observe the distinction between the breach of DR-CAFTA resulting from the Negative Environmental Decision of July 2010 on the one hand, and the breach of DR-CAFTA resulting from the failure to address the Motion for Reconsideration from October 2010 to the present date; (ii) are based on a misreading of DR-CAFTA and misinterpretation of the Claimant's February 23, 2011 letter; (iii) are based on arguments rooted in non-existent or misinterpreted rules of DR law; (iv) are based on unreliable witness testimony; and (v) do not take into account important principles of international law, such as estoppel and the *nemo capere* rule.¹⁵⁵
157. The Claimant asserts that its pleadings regarding the Respondent's Preliminary Objections are chiefly directed against the Respondent's failure to respond appropriately to the Motion for Reconsideration, which amounts to a denial of justice. For the purposes of DR-CAFTA Article 10.18.1, this internationally wrongful act took place at some point between August 2011 and the present date.¹⁵⁶
158. With regard to the February 23, 2011 letter, the Claimant submits that the purpose of the letter was to attract attention, and to strengthen the negotiating position of the investor by highlighting the undesirable alternative in order to obtain a decision. The Respondent's reliance on that letter is inapposite and insufficient to found its Preliminary Objection because (i) the letter could not possibly refer to a breach of DR-CAFTA that did not exist

¹⁵⁴ PO Rejoinder, ¶67.

¹⁵⁵ PO Rejoinder, ¶70 (footnotes omitted).

¹⁵⁶ PO Rejoinder, ¶75.

at the date of the letter; and (ii) the fact that the letter does not refer to the Respondent's failure to deal with the Motion for Reconsideration as a breach of DR-CAFTA.¹⁵⁷

159. According to the Claimant, as part of its attempt to mischaracterize the Claimant's claim, the Respondent conflates the notion of the "breach" referred to in DR-CAFTA Article 10.18.1 with the concept of a "measure". After explaining the difference between these two concepts, the Claimant submits that if neither Party argues that a denial of justice existed in February 2011, it is not possible to assert that a non-existent breach of DR-CAFTA resulted in quantifiable losses.¹⁵⁸
160. In the Claimant's view, the Respondent mischaracterizes the denial of justice as an individual act. In this regard, the Claimant argues that (i) DR-CAFTA recognizes the doctrine of continuous acts (a fact not contested by the Respondent), confirmed in the *Pac Rim* case;¹⁵⁹ and (ii) as recognized by the *UPS v. Canada* tribunal, it is a general rule that continuing breaches may renew the limitation period for claims under international law.¹⁶⁰
161. The Claimant rejects the Respondent's allegations that the Claimant has in some manner manipulated the facts to present its claim as falling within the time-limit requirement under DR-CAFTA Article 10.18.1.¹⁶¹
162. According to the Claimant, the Preliminary Objections are based on incorrect arguments of DR Law, for the reasons that follow.
163. First, the Claimant submits that the suspensive condition of receiving a positive result of the EIA to which the Exploitation Concession was subject, means that until the condition is fulfilled, the legal effect in question does not arise. As a result, in the Claimant's view, under the terms of the Exploitation Concession, until the Claimant receives a positive EIA

¹⁵⁷ PO Rejoinder, ¶¶79-86.

¹⁵⁸ PO Rejoinder, ¶¶88-94.

¹⁵⁹ *Pac Rim (CL-33) (RA-25)*.

¹⁶⁰ PO Rejoinder, ¶¶95-106.

¹⁶¹ PO Rejoinder, ¶107.

and the Environmental License is granted, its Exploitation Concession remains suspended.¹⁶²

164. Second, the Claimant, relying on the expert reports of its two legal experts, refutes the Respondent's argument that Resolution 737-2010 is a working paper, and that the Negative Environmental Decision dismissing Claimant's Environmental License Application was Communication No. DEA-3867-10.¹⁶³
165. Third, the Claimant also refutes the Respondent's argument that DR law prescribes a time limit for the submission of the Motion for Reconsideration of 30 days from the date of service of the impugned administrative act (i.e., by September 17, 2010). The Claimant submits that there was no such 30-day time limit for the submission of the Motion for Reconsideration, and that in any event no such time limit could have started to run against the Claimant, since Resolution 737-2010, the proper administrative act disposing of the Environmental License Application, was never duly served by the Respondent upon the Claimant. According to the Claimant, the Respondent had the burden to prove its argument that the Motion for Reconsideration was extemporaneous, and failed to do so.¹⁶⁴
166. Fourth, the Claimant rejects the alleged lack of duty on the part of the Respondent to respond to the Motion for Reconsideration. As shown by the Medina Legal Expert Report, under the Dominican Constitution and the Inter-American Convention of Human Rights, the DR administration has a general obligation to respond to all petitions received by the concerned parties, and to do so within a reasonable time.¹⁶⁵
167. Fifth, with regard to the alleged applicability and effects of the Doctrine of Negative Administrative Silence, the Claimant submits that if such doctrine did apply to the Motion for Reconsideration, it entitled the Claimant to challenge the Respondent's inaction before the DR courts, but would not relieve the Environmental Ministry from its obligation to

¹⁶² PO Rejoinder, ¶¶114-116.

¹⁶³ PO Rejoinder, ¶117. Expert Report of Fabiola Medina Garnes ¶¶34-35; Expert Report of Gustavo José Mena García ¶37.

¹⁶⁴ PO Rejoinder, ¶¶125-142. Expert Report of Fabiola Medina Garnes, ¶44, second conclusion on page 32.

¹⁶⁵ PO Rejoinder, ¶¶143-147 (footnotes omitted).

respond within a reasonable time. The Claimant argues that the Respondent's failure to provide a response for the last five and a half years, absent any known mitigating circumstances, constitutes a denial of justice under DR Law and under DR-CAFTA.¹⁶⁶

168. The Claimant argues that if the Tribunal accedes to the Respondent's request to look behind the facts set out by the Claimant, then the Respondent's jurisdictional challenge is unsuitable for determination within the Expedited Procedure, since highly relevant documents are missing from the record because the document production process has not yet taken place. The Claimant submits that the central procedural issue here is the degree to which an arbitral tribunal sitting under DR-CAFTA Article 10.20.5 should make its own determinations of the relevant facts and issues of domestic law, and what procedural guarantees of due process it should afford in that respect to the Parties. In the Claimant's view, this should be approached in a methodical and abstract manner, as a pure exercise in the interpretation of the treaty.¹⁶⁷
169. According to the Claimant, the Tribunal should dismiss the Preliminary Objections, without prejudice at this stage of the Arbitration, on the grounds of a reasonable interpretation of DR-CAFTA Article 10.20.5, leading to the conclusion that the legal and factual questions involved are too complex to be decided within such a compressed time period. Such dismissal, in the Claimant's view, should be without prejudice to the Tribunal's right to re-examine the issue at a later stage of the proceedings, based on the full examination of the relevant facts and evidence.¹⁶⁸
170. Alternatively, the Claimant suggests the Tribunal to proceed with the Preliminary Objections on the basis of *pro tem* assumption that the facts as stated by the Claimant are correct, and dismiss the Respondent's Preliminary Objections for lack of merit.¹⁶⁹

¹⁶⁶ PO Rejoinder, ¶¶148-156.

¹⁶⁷ PO Rejoinder, ¶¶171-187.

¹⁶⁸ PO Rejoinder, ¶188.

¹⁶⁹ PO Rejoinder, ¶189.

171. Finally, the Claimant submits that third-party funding is irrelevant to the issues before the Tribunal. The Claimant was entitled to investigate alternative ways to finance its claims, in accordance with a standard practice in both commercial and investor-state arbitration.¹⁷⁰

VI. SUBMISSION OF THE UNITED STATES OF AMERICA PURSUANT TO DR-CAFTA ARTICLE 10.20.2

172. On March 11, 2016, the United States of America (“U.S.”) made its submission on questions of interpretation of the DR-CAFTA, pursuant to Article 10.20.2. In its submission the U.S. addressed the three issues relating to questions of interpretation of the DR-CAFTA: (i) the limitations period under Article 10.18.1; (ii) the waiver requirement under Article 10.18.2(b); and, (iii) the Minimum Standard of Treatment under Article 10.5.

173. On the issue of the limitations period, the U.S. interpretation of DR-CAFTA Article 10.18.1 is as follows:

- (i) Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular “date”, not at multiple points in time or on a recurring basis. As a result, a continuing course of conduct cannot renew the limitations period under Article 10.18.1;
- (ii) where a “series of similar and related actions by a respondent state is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression of that series”. Accordingly, once a claimant *first* acquires (or should have acquired) knowledge of the breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1;
- (iii) the interpretation from the *UPS v Canada* tribunal, regarding the renewal of claims limitation period by continuing courses of conduct constituting continuing breaches, is misplaced;

¹⁷⁰ PO Rejoinder, ¶¶191-196.

- (iv) the specific requirements of Article 10.20.1 operates as a *lex specialis*;
- (v) the knowledge of loss or damage incurred need not be of the full or precise extent of loss or damage; and
- (vi) claimant bears the burden of proof, and must prove the necessary and relevant fact to establish that its claims fall within the three-year limitation period.¹⁷¹

174. On the issue of the waiver requirement, according to the U.S. a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Thus, a Notice of Arbitration that is unaccompanied by a valid waiver does not constitute a claim pursuant to the provisions of Chapter Ten. Further, in the event that a valid waiver is filed subsequent to a Notice of Arbitration, the claim will be considered to have been submitted on the date of the waiver.¹⁷²

175. Finally, on the issue of the Minimum Standard of Treatment, the U.S. submits that: (i) the applicable standard in DR-CAFTA Article 10.5 of fair and equitable treatment is the customary international law minimum standard of treatment (the “MST”); (ii) the MST includes the notion of denial of justice; (iii) to breach the standard, the denial of justice must arise from a final decision of a State’s highest judicial authority (unless an appeal would be futile or manifestly ineffective) that is “notoriously unjust” or “egregious” “which offends a sense of judicial propriety”.¹⁷³

176. By email of March 18, 2016, the Respondent informed the Tribunal that the Dominican Republic had no comments on the Submission, reserving its right to discuss the Submission during the Hearing.

177. On the same date, the Claimant submitted its observations on the three aspects raised in the U.S. Submission.

¹⁷¹ Submission of the United States of America, dated March 11, 2016, (“U.S. Submission”) ¶¶2-7.

¹⁷² U.S. Submission, ¶¶8-9.

¹⁷³ U.S. Submission, ¶¶10-13.

178. First, with respect to the limitation period under Article 10.18.1, the Claimant submits that the arguments advanced by the U.S. are internally contradictory, irrelevant to the factual matrix in the present case, and unfounded under principles of treaty interpretation. The Claimant submits (i) that in the present case the Respondent's failure to respond to the Motion for Reconsideration gives rise to legally distinct injury (a denial of justice) to the original wrongful act (the arbitrary refusal of the Environmental License), even though both breaches are to a certain degree related to each other; (ii) its disagreement with the U.S. interpretation that DR-CAFTA should be considered as a *lex specialis* with respect to admissibility *rationae temporis* of claims for continued violations of an international obligation; and (iii) its continued reliance on the *UPS* tribunal's interpretation that "*continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.*"¹⁷⁴
179. Second, regarding the waiver requirement under Article 10.18.2(b), according to the Claimant, the U.S. submission in such regard manifestly exceeds the scope *ratione materiae* of the Preliminary Objections, and disregards the fact that the waiver was submitted in the present case. The Claimant also notes that Corona has not resorted to other domestic or international remedies with respect to the matters at stake in this arbitration, and that the Motion for Reconsideration was submitted by the Claimant's wholly-owned subsidiary, Walvis, which has a separate legal personality under DR law.¹⁷⁵
180. Third, with regard to the third aspect of the Minimum Standard of Treatment under Article 10.5.1, the Claimant agrees with the U.S. general description that a denial of justice would be considered a breach of DR-CAFTA Article 10.5.1, but takes a different position on the following: (i) a denial of justice can also be committed by the administrative branch under international law¹⁷⁶; (ii) the exhaustion of local remedies requirement is a matter of substance and not of jurisdiction/admissibility under investment treaty law; and, (iii) the

¹⁷⁴ Claimant's Observations to the U.S. Submission, dated March 18, 2016 ("**Claimant's Observations**"), ¶¶6(a), 18-25 (footnotes omitted).

¹⁷⁵ Claimant's Observations, ¶¶6(b), 26-38 (footnotes omitted).

¹⁷⁶ Claimant's Observations, ¶¶6(c); *see also Amco Asia Corp., Pan American Development, Ltd. and PT Amco Indonesia v. Republic of Indonesia*, Award in Resubmitted Proceeding, 5 June 1990, 1 ICSID Reports 569, ¶137.

question of denial of justice must be analysed in each case considering the particular remedies available to an injured party.¹⁷⁷

VII. THE TRIBUNAL'S ANALYSIS

A. The Relevant DR-CAFTA Provisions

181. DR-CAFTA Article 10.20, *Conduct of the Arbitration*, provides at subparagraph 4:

“Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26. [...]”

182. DR-CAFTA Article 10.20.5 states that:

“In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.”

183. DR-CAFTA Article 10.20.6 provides:

“When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.”

¹⁷⁷ Claimant’s Observations, ¶¶6(c), 39-46.

184. DR-CAFTA Article 10.18.01 provides:

“No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.”

B. The Applicable Law

185. The Respondent's Preliminary Objections filed according to Article 10.20.5 of the DR-CAFTA are to be considered on the basis of the pertinent provisions of this very Agreement. Article 10.22, *Governing Law*, sets out the governing law for a claim of this type; the Tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. This means that the law to be applied by the Tribunal is public international law, constituted primarily by the specific source provided by the DR-CAFTA as *lex specialis*, but also interpreted and completed as the case may be by general international law (i.e. customary international law)¹⁷⁸.

186. In their respective written pleadings as well as during the Hearing, both Parties have introduced a considerable amount of legal analysis of the DR's municipal law. It is then all the more important for the Tribunal to state that, as far as the examination of a Preliminary Objection filed under the DR-CAFTA is concerned, the municipal law of the Respondent, as such, cannot be considered as part of the law applicable to the examination of these objections.

187. As the case may be, municipal law might provide some pertinent elements of consideration to the Tribunal, but the instruments, rules and provisions of this *non*-international law are no more than mere facts in the context of the current proceeding which may inform the Tribunal in its application of the governing international law. Such is the case, even if the elements provided by this municipal law can be characterized as “*legal*” facts, in the sense that they may have some legal significance for the application of the pertinent rules of

¹⁷⁸ This includes the customary rules of interpretation of treaties as codified in the Vienna Convention on the Law of Treaties at Articles 31 and 32.

public international law. As it will be seen later in this Award, whatever the importance devoted to DR municipal law by the Parties, and in particular by the Claimant, both in its written pleadings and during the Hearing as well as in its Post-Hearing Brief, the DR's Law plays nothing but a marginal or subsidiary role, including when the Tribunal addresses the issue of an alleged denial of justice committed by the Respondent against the Claimant.

C. The Basis for Consent to Arbitration

188. The DR-CAFTA's "*Investor-State Dispute Settlement*" section (Section B) contains the consent of each DR-CAFTA Party to this form of arbitration. Article 10.17, "*Consent of Each Party to Arbitration*", provides in relevant part:

"1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement [...]." [Emphasis added.]

Consent is thus expressly conditioned on the claimant's submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.

189. The precise contours of the State Party's consent are addressed in the next article, Article 10.18, "*Conditions and Limitations on Consent of Each Party*", which among other things contains a limitation period stating that:

"1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimants first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage."

190. Article 10.18 sets out two other conditions and limitations, specifically the requirements: (i) that no claim may be submitted to arbitration unless the claimant consents in writing to arbitration in accordance with the procedures set out in the Agreement; and that (ii) the notice of arbitration must be accompanied by a written waiver from the claimant and/or its enterprise, as the case may be. The claimant must waive "the right to initiate or continue

before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”¹⁷⁹

191. Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement's object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.
192. The present proceeding concerns the Claimant's compliance, or not, with the three-year limitation period prescribed by Article 10.18.1. The limitation period clause is written in plain terms and does not contemplate the suspension or “tolling” of the three-year period. In this regard, it is consistent with the approach taken in other treaties such as the North American Free Trade Agreement. The relevant subparagraphs of Articles 1116 and 1117 of that Agreement are worded similarly¹⁸⁰ and, as pointed out by the Respondent¹⁸¹ and by the intervenor, the United States of America¹⁸², NAFTA tribunals have described NAFTA's limitation period as “clear and rigid” and not subject to any “suspension, prolongation, or other qualification.”
193. Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage, namely, *actual* knowledge (*viz.* “No claim may be submitted to arbitration...if more than three years have elapsed from the date on which the claimant *first acquired*... knowledge

¹⁷⁹ This waiver requirement is not absolute; subparagraph 3 permits a claimant to initiate or continue an action that seeks “*interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.*” Accordingly, it is possible for a DR-CAFTA claimant to commence an international claim for damages whilst pursuing non-monetary injunctive relief before the respondent Party's tribunals.

¹⁸⁰ Article 1116(2) provides: “*An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*” Article 1117(2) is worded similarly.

¹⁸¹ “*The three-year period set out in Article 10.18.1 does not permit suspensions, extensions or other modifications, as several arbitration tribunals have confirmed. Articles 1116(2) and 1117(2) of NAFTA, for example, include a provision similar to Article 10.18.1, which also sets out a time period for investors to file their claims. NAFTA tribunals have interpreted that the period of limitations is “clear and fixed” and that “it is not subject to suspension, extension or other modifications.”* Respondent's Memorial on Objections, ¶ 28.

¹⁸² *Grand River v. USA (RA-7)*, ¶ 29. See also *Feldman v. Mexico (RA-8)*, ¶ 63.

of the breach... and knowledge that the claimant... has incurred loss or damage”) and *constructive* knowledge (*viz.* “No claim may be submitted to arbitration ...if more than three years have elapsed from the date on which the claimant...*should have first acquired*... knowledge of the breach... and knowledge that the claimant... has incurred loss or damage”). [Emphasis added.]

194. It warrants emphasising that knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach *and* knowledge of loss or damage. That said, in order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity¹⁸³); nor must the amount of loss or damage suffered be precisely determined. It is enough, as the *Mondev* tribunal found when applying NAFTA's limitation clause, that a “*claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear...*”¹⁸⁴
195. Applying Article 10.18.1 to the facts of the present case, in the Tribunal's view, it is logical to proceed by first considering any evidence of the Claimant's actual knowledge; only if such an inquiry does not establish such knowledge is it necessary to then engage in an objective determination of whether in light of all the circumstances it can be held that the Claimant should have first acquired knowledge of breach and loss or damage at a particular point in time.

D. The Tribunal's Approach

196. The Tribunal shall thus proceed in two steps: First, it shall determine the earliest possible date on which the Claimant would be permitted to have acquired actual or constructive

¹⁸³ As discussed below at paragraphs 210 *et seq.*, the Tribunal notes that one of Claimant's contentions is that it could not be aware of the denial of justice prior to June 11, 2011 because it did not manifest itself until “after July 2011” (PO Rejoinder, ¶ 5). As discussed below, the Tribunal considers that this attempt to differentiate between the initial license denial and the closure of the file on August 18, 2010, on the one hand, and the alleged denial of justice resulting from the failure to respond to the Motion for Reconsideration, on the other, is unavailing. Thus, for the Tribunal, the limitation period began to run as of August 18, 2010.

¹⁸⁴ *Mondev v. USA*, (RA-9), ¶ 87 and at ¶ 88 (“*The present proceedings were commenced within three years from the final Tribunal decisions.*”)

knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant's claims to have been submitted within the time limit for the purpose of Article 10.18.1. That date has been referred to by the Parties as the "critical date". Once the critical date has been established, the Tribunal shall, in a second step, verify whether or not, on that very date, the Claimant already had, or should have had such knowledge.

(I) Determination of the critical date

197. DR-CAFTA Article 10.18.1 sets a time limit for the submission of claims to arbitration which starts to run on the day that the Claimant acquires or should have acquired knowledge of the alleged breach of the Treaty and of the incurred loss or damage.
198. The Tribunal's first task is thus to determine the earliest possible date on which the Claimant would have obtained knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant's claims to have been submitted within the time limit for the purpose of Article 10.18.1. That date is three years before the Claimant submitted a claim to arbitration under Section 10 of DR-CAFTA.
199. There is little room for discussion about what is the critical date; as agreed by both Parties¹⁸⁵, it is uncontroversial that the Claimant submitted its claims to arbitration when it initiated the present proceedings, *i.e.*, by way of its Request for Arbitration which was dated June 10, 2014. The application of Article 10.18.1 leads to the conclusion that the critical date is three years earlier, *i.e.* June 10, 2011.¹⁸⁶ As indicated above, the three-year period is a strict one, no suspension or "tolling" of the three-year period is contemplated by the Treaty. Both Parties agree on this date and there is no need for the Tribunal to postpone its determination in this respect by going into further discussion and analysis.

¹⁸⁵ PO Rejoinder, ¶72, footnote 80.

¹⁸⁶ The Tribunal leaves to one side the United States' submission that a request for arbitration is not perfected until it is filed with a DR-CAFTA-compliant waiver. This point was not advanced by the Respondent, which was content to proceed on the basis of the ICSID's receipt of the RFA.

(2) Determination of the date when the Claimant acquired knowledge of the alleged breach and of the damage

200. The second step in applying DR-CAFTA Article 10.18.1 requires the Tribunal to determine the date on which the Claimant “*first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.*” A comparison of that date with the ‘critical date’ will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant’s Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant’s claims.

a. One or several breaches?

201. As a preliminary matter, the Parties disagree on whether the Claimant’s claims, as set out in its Request for Arbitration, must be treated as relating to one or several alleged breaches of DR-CAFTA by the Respondent. In particular, the Claimant contends that, given that the DR’s failure – in contradiction with its own law – to respond to the Claimant’s Motion for Reconsideration constitutes a denial of justice, the relevant date of knowledge for the purpose of Article 10.18.1 is the date of the alleged denial of justice and related loss or damage. The question whether the omission complained of by the Claimant amounts to a denial of justice is primarily one of substance, rather than jurisdiction. For the sake of completeness of the Tribunal’s analysis, it will nevertheless be addressed in the following section¹⁸⁷.

202. At this stage, the Tribunal only needs to decide whether the failure to respond to the Claimant’s Motion for Reconsideration would, if found to amount to a denial of justice, constitute a breach of the Treaty that is separate from the non-issuance of the license. The Claimant’s case on the merits, as set out in the Request for Arbitration, is built on the

¹⁸⁷ See *infra*, at ¶238 ff.

premise that one measure adopted by the DR frustrated Corona Materials' efforts to build and operate a construction aggregate mine in the DR in such a drastic way so as to amount to a breach of the DR's Treaty obligations.

203. The measure that is complained is described in paragraph 27 of the Request for Arbitration:

“Despite repeated assurances and formal approvals from senior DR government officials, including the President, that Corona Materials would be permitted to construct and operate the proposed aggregate mine, the DR ultimately denied Corona Materials a final environmental license for the project for reasons that are empirically false and objectively discriminatory.”

204. Nevertheless, the Claimant argues that the DR's violations of the Treaty did not stop with the official decision not to grant the environmental license for the project. The fact that the DR never responded to a Motion for Reconsideration of said decision is alleged to constitute a further, separate breach in the form of a denial of justice, of which the Claimant only gained knowledge *after* the critical date.

205. The Tribunal notes that, in this respect, the Claimant's position is not free of an inherent contradiction. On the one hand, the Claimant defends the idea of a continuing violation by the Respondent of its substantive obligations under DR-CAFTA; on the other hand, the Claimant, at least at the stage of its Counter-Memorial, and further in the proceedings, has tried to sustain that the absence of response by the DR Environmental Ministry to its “Motion for Reconsideration” is to be treated as a *specific* measure (or absence of measure) which in itself would be constitutive of a separate violation of DR-CAFTA Article 10.5, as it would be a denial of justice.

206. The first of these two options, a unified presentation of the DR's breach of its obligation was asserted in the Claimant's Request for Arbitration:

“The DR failed to accord Corona Materials' investment fair and equitable treatment, as well as full protection and security, by repeatedly discriminating against Corona Materials as foreign investor, denying Corona Materials due process in the environmental licensing process and

by then failing to follow minimum due process standards in the reconsideration process”¹⁸⁸

207. It was actually the same position that Mr. French, the Principal of Corona Materials present in the DR, had also taken in a letter of February 23, 2011 to the DR's Environmental Ministry where he did not differentiate between the negative answer given on August 2010 to Corona Materials' request for issuance of an environmental license and the persistent absence of response to the Motion for Reconsideration addressed to the same Ministry and submitted by Corona almost two months later, on October 5, 2010¹⁸⁹.
208. Still in its Counter-Memorial, the Claimant persisted in treating the environmental application process as a single, uninterrupted event, arguing that “*the Environmental Impact Assessment procedure for the Project was initiated in 2007 and has never been formally closed by the Respondent*”¹⁹⁰.
209. Nevertheless, and in clear contrast with the preceding view, also in its Counter-Memorial, the Claimant adopted another analysis. According to this second analysis, the very absence of response to the Motion for Reconsideration should be treated as an autonomous breach of international law, constitutive in itself of a denial of justice¹⁹¹. This articulation is even more clearly sustained in the Claimant's Post-Hearing Brief which declares that:

“[...] The Claimant's case is a simple one. For over five-years-and-a-half, the DR has failed to respond to the Claimant's Motion for Reconsideration, as it was obliged to under its own law.”

“That failure amounts to a denial of justice and a breach of the FET Standard in Article 10.5. of CAFTA-DR. That breach is a separate and distinct breach from (i) the Negative Environmental Decision [...] and (ii) the other breaches of CAFTA-DR outlined in the Request. The elements of Article 10.18.1 CAFTA-DR must be applied separately to each individual breach, rather than to a conflation and aggregation of breaches, as the DR purports”¹⁹².

¹⁸⁸ RFA, ¶106.

¹⁸⁹ (R-2). See also PO Reply, ¶54.

¹⁹⁰ PO Counter-Memorial, ¶14-15.

¹⁹¹ *Ibid*, ¶62.

¹⁹² Claimant's PHB, ¶¶2 and 3.

210. The Tribunal does not accept this position. As correctly stated by the Respondent, the absence of a response to the Motion for Reconsideration cannot be considered as a stand-alone “measure”, or a separate breach of the Treaty. The Tribunal agrees with the Respondent’s analysis in that respect:

“[A]ll of the alleged breaches relate to the same theory of liability, which is predicated on the notion that “the DR refused to permit Corona Materials to proceed with its mining project for reasons that are not legitimate and which are unrelated to the merits of that project,” and that “[d]ue to the refusal of the Environmental License by the Respondent, the Claimant cannot enjoy any meaningful benefit from the Joama Exploitation Concession”. Even the claim relating to the absence of a response to Claimant’s reconsideration request rests on this theory of liability.”¹⁹³

211. In this context, the Respondent’s failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision. As will be seen when the Tribunal examines the issue of a denial of justice, the filing of a Motion for Reconsideration cannot be considered as a separate action. There was no administrative adjudicatory proceeding in existence at the time of the Motion’s submission. Indeed, the very purpose of the Motion for Reconsideration was to have the Ministry re-open the proceeding and render a different decision. In the Dominican Republic’s administrative law as well in French administrative law, which the former took as a model, such an initiative is a “*recours gracieux*” *i.e.*, a non-contentious action, only aimed at having the same administration review its own decision.¹⁹⁴ There is therefore no basis to consider that there was a continuing breach.

212. As recognized by Mr. French in his letter dated February 23, 2010 to the Environmental Ministry¹⁹⁵, the DR’s failure to respond to the Claimant’s Motion for Reconsideration was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision. Under the

¹⁹³ Respondent’s PHB, ¶10.

¹⁹⁴ See Expert Report of Professor Eduardo Jorge Prats, ¶54 and Tr. 346:9-22.

¹⁹⁵ (R-2), and *supra* ¶202.

circumstances, the State's inaction following the Claimant's efforts to have that very same measure reconsidered cannot be considered a separate breach of the Treaty.

213. The discussion about the non-issuance of the license and the discussion about the failure to respond to the Claimant's Motion for Reconsideration did both relate to the exact and same alleged breach of the Treaty. This was the conviction expressed by Mr. French himself, still in his letter of February 23, 2011 to the Environmental Ministry, when he stated:

*"After two hours speaking with five people, we were informed that after the meeting with the delegates from Sanchez in their office on January 2011, personnel from Environmental Management had not worked or advanced on the reconsideration of the application for JOAMA Environmental License"*¹⁹⁶

214. The Tribunal concludes that there is no valid basis for treating the alleged denial of justice as distinct from the non-issuance of the environmental license.

215. In any event, even hypothetically assuming that the DR administration's silence in reply to the Motion for Reconsideration would amount to a denial of justice, which the Tribunal does not consider to be the case here, it would remain, as rightly pointed out by the United States in their submissions on questions of interpretation of the DR-CAFTA, that:

*"Where a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series'*¹⁹⁷. *To allow an investor to do so would, as the tribunal in Grand River recognized, 'render the limitations provisions ineffective'*¹⁹⁸¹⁹⁹.

216. In light of the above considerations, the Tribunal concludes that the relevant date of knowledge for the purpose of Article 10.18.1 is the date on which the Claimant first

¹⁹⁶ (R-2), p. 1.

¹⁹⁷ *Grand River v. USA*, ¶81 (interpreting the claims limitation language in NAFTA Chapter Eleven which is identical to DR-CAFTA Article 10.18.1. for all relevant purposes).

¹⁹⁸ *Ibid.*

¹⁹⁹ U.S. Submission, ¶5.

acquired, or should have first acquired, knowledge of the Respondent's decision not to grant the environmental license for the Claimant's project.

b. "Actual" or "constructive" knowledge?

217. As already noted above, DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: actual knowledge – what the Claimant did in fact know at a given time – and constructive knowledge – what the Claimant should have known at a given time. For the running of the three-year period to be triggered, it is sufficient that the Claimant acquired either actual or constructive knowledge. The Tribunal shall first consider any evidence of the Claimant's actual knowledge of the Respondent's decision not to grant the environmental license for the Claimant's project; only when such an inquiry would lead to the conclusion that actual knowledge was not acquired by the Claimant before the critical date, would the Tribunal then need to engage in an objective determination of whether in light of all the circumstances it can be held that the Claimant should have first acquired knowledge of the breach and loss or damage at a particular point in time.

c. Did the Claimant acquire actual knowledge of the breach?

218. The Tribunal thus turns to the evidence on the record, which is sufficient to answer this question. The Claimant alleged in its Request for Arbitration that the DR breached several provisions under Chapter 10 of the DR-CAFTA, in particular, Article 10.3 on National Treatment, Article 10.5 on the requirement that covered investments be treated in accordance with the Minimum Standard of Treatment under customary international law, and Article 10.7 forbidding illegal expropriation.²⁰⁰

219. As noted above, however, with the exception of the export tax claim, the alleged breaches relate to one central measure adopted by the Respondent: the Environment Ministry's refusal to grant the environmental license. Considering the documentary evidence on record, that particular measure must be considered to have occurred on August 18, 2010,

²⁰⁰ RFA, ¶29

which is the date on which the Environmental Ministry advised the Claimant of the decision already taken on July 28, 2010 by the Technical Evaluation Committee of the same Ministry. As of that date, Claimant knew that its license application was formally rejected²⁰¹; the letter was sent by Vice-Minister Reyna to the Claimant's Principal present in the DR, Mr. French, and it stated that the Joama environmental assessment resulted in a finding by the Environment Ministry's Technical Evaluation Committee that the project was not environmentally viable; as a consequence, the letter indicated the Committee's formal decision to deny the Claimant's license application.

220. In its relevant part, the August 18 letter reads as follows:

"We cordially write to you in regards to the "JOAMA Exploitation Concession" Project . . . we hereby inform you of the results of the evaluation of the information contained in the file, the review of the study, and the technical evaluation visits made to the proposed area for the development and operation of the mining exploitation Project.

The Technical Evaluation Committee met on 28 July 2010 and, as per Resolution 737-10, evaluated the Technical Review Report (ITR) and the file submitted for the above referenced project; it has been determine [sic] that this project is not environmentally viable

[. . .]

*Therefore, this Ministry hereby informs you of the closure of your file, allowing the company to have an opportunity to select a new alternative site for the development of its proposal."*²⁰²

221. As Mr. French is one of Corona's three principals, there is no doubt that the day on which he received that letter must be considered to be the date on which the Claimant first gained *actual* knowledge of the non-issuance of the license.

222. It is worth mentioning that the August 18, 2010 letter is not a mere notification of the decision; it further sets out a clear indication of the decision's final character insofar as the environmental authorities were concerned, by their indicating the "closure of [Corona's] file".

²⁰¹ (R-4) and PO Counter-Memorial, ¶56.

²⁰² (R-4), p.2.

223. The Claimant's actual knowledge of the Environment Ministry's measure and of its definitive character is confirmed by its own letter to the Environment Ministry dated October 5, 2010, in which it complained about the decision and asked the Ministry to reconsider it. In this letter, the Claimant acknowledges receipt of the August 18, 2010 letter, thereby confirming its actual knowledge of the Committee's decision and of the closure of its file:

*"We respectfully address you for you to **reconsider and open the file** of the project "Joama Exploitation Concession," Code 3378.*

*This Project was considered not environmentally viable, as from the Decision of the Technical Evaluation Committee that evaluated the Project, **which was informed to us in the letter DEA-3867-10, dated August 18, 2010.**"*²⁰³ (emphasis added)

224. At the Hearing, Mr. French confirmed that he understood the file as having been closed as of August 18, 2010²⁰⁴.

225. The evidence further shows that, in January/February 2011, the Claimant already considered the DR's refusal to grant the license amounted to a violation of its obligations under DR-CAFTA. In particular, at the Hearing, Mr. French confirmed that he had already begun exploring the possibility of a DR-CAFTA arbitration in January 2011.²⁰⁵ Having made this view known to the Environmental Ministry, Claimant was told by CEI-RD that if it decided to pursue the DR-CAFTA arbitration option, it should contact the Directorate of Foreign Trade (DICOEX)²⁰⁶.

226. On January 21, 2011, Mr. French sent an e-mail to his partner in which he wrote:

*"the timing may be ripe to formally lodge an investor-state dispute notice with CEI the office of exportation and foreign investments for an obscene amount of damages."*²⁰⁷

²⁰³ (C-15), p. 2

²⁰⁴ Tr. 238:15-20; Tr. 239:3-5.

²⁰⁵ Tr. 259:11-16.

²⁰⁶ (C-74), Email from CEI-RD to A. French, February 4, 2011.

²⁰⁷ (C-73), Email from A. French to J. Elliott and R. Fields, January 7, 2011.

227. In this respect, a specific piece of evidence of the Claimant's own making demonstrates that, at the latest at the end of February 2011, the Claimant had without doubt acquired *actual* knowledge of the two elements required by DR-CAFTA Article 18.10.1 in order for the limitation period to start running: First, that a potential breach of the Treaty could be claimed against the Respondent; second, as it will be confirmed later in this Award, that this breach had caused serious loss or damage to Corona. This evidence, already referred to several times in the present Award, is the letter sent by the Claimant to the Environment Ministry on February 23, 2011²⁰⁸ in which Mr. French tried to exert some pressure on the Minister in order to finally get a reconsideration of the decision notified on August 18 of the previous year. In this letter, Mr. French declared in particular:

*"The Partners of Corona in Florida believe that Environmental Management may be unaware of the substantive obligations of Article 10 of the DR-CAFTA that protects foreign investors like us. According to them, Environmental Management has seriously violated these protection provisions on various occasions"*²⁰⁹

228. Mr. French became even more precise in terms of identifying the substantive obligations that the Dominican Republic could be reputed to have violated. He added:

*"The 'Fair and Equitable Treatment' in Article 10...requires certain level of rule of law within the host country which encapsulates the obligation to act in a coherent manner, without ambiguity and with total transparency, not arbitrary and in accordance with the principle of good faith. Also, the investors may expect due process in processing their claims and that authorities actions are taken in a non-discriminatory manner and proportionate to the political objectives involved"*²¹⁰

229. The Claimant's repeated reference to the rights it enjoys as a foreign investor under DR-CAFTA and to the numerous alleged Treaty violations by the DR shows that Corona Materials not only was aware of the alleged breach, and set out a non-exhaustive list of nine such breaches in the same letter, but it was already explicitly considering resorting to

²⁰⁸ (R-2). See *supra*, ¶ 49.

²⁰⁹ *Ibid*, p. 2

²¹⁰ *Ibid*.

arbitration²¹¹. Already on February 4, 2011, in an e-mail sent to the DR Export and Investment Agency (CEI-RD), Mr. French had declared:

*“If you would like to see the other 11 reasons why we believe this department has treated us unfairly and inequitably, I am tempted to forward the draft of the ‘Notice of Arbitration’ prepared in Washington which I am sitting on...”*²¹².

230. It is equally plain that, at the same time, Mr. French had already acquired the conviction that Corona's Motion for Reconsideration of the refusal of the environmental license would not receive any positive response. At the Hearing, Mr. French declared:

*“We felt completely let down after the meeting on the 20th [of January 2011] with the community where they [the Ministry officials] said they were going to reconsider, and nothing happened, so we felt we'd been lied and cheated”*²¹³.

231. The Tribunal furthermore notes that the Claimant itself stated in its Rejoinder that:

*“There can be no doubt that apart from the (i) lapse of time, combined with (ii) the Respondent's inaction, there have been no material developments concerning the factual background of the case since early 2011”.*²¹⁴

232. As for any meetings alleged to have taken place in June 2011, the Tribunal notes that Claimant neither submitted any direct testimony from the Corona consultant(s) who allegedly attended the meeting²¹⁵, nor gave any undisputed date on which such a meeting would have taken place; more generally, nor was any documentary evidence provided to the Tribunal in relation with the effective realization of any meeting in June 2011.

233. The Tribunal must now turn to the issue whether the Claimant also had actual knowledge of the fact that it had incurred loss or damage from the DR's measure

²¹¹ *Ibid*, ¶¶2-3.

²¹² (C-74), p. 5.

²¹³ Tr. 256:15-256:20; Tr. 257:19-258:1.

²¹⁴ PO Rejoinder, ¶109.

²¹⁵ Tr. 249: 20-250:7; Tr. 251:20-252:1.

d. Did the Claimant acquire actual knowledge of the loss or damage?

234. The answer to this question cannot be other than positive, as the Claimant, during the same period, proved not only to be conscious of the reality of damage caused by the DR refusal to grant the environmental license but was even able to evaluate it. Still in the letter of 23 February 2011 referred to above, Mr. French stated, inter alia, that:

*“[I]f the Environmental License and the Terms of Reference for the Private Port are not issued the damages to Corona arising directly from the violations of [Environmental] Management would be USD 342 Million.”*²¹⁶

235. The same was confirmed by Mr. French at the Hearing.²¹⁷

(3) Conclusion

236. To sum up, the Tribunal is able to observe that a number of elements, and in particular the February 23, 2011 letter constitutes clear evidence of the fact that, on that date at the latest, the rejection of the application for an environmental license and the failure to address the Motion for Reconsideration (among other alleged acts and omissions by the Dominican Republic) was considered by the Claimant to amount to a violation by the DR of several provisions of DR-CAFTA Chapter 10, and that such alleged breaches caused loss or damage that the Claimant quantified in specific terms.

237. Considering that (i) the DR's act constituting the alleged breach occurred at the latest, August 2010, (ii) the Claimant gained knowledge of that act on August 18, 2010, (iii) the Claimant manifested its opinion that said act constituted a breach of the Treaty in January and February 2011, (iv) the Claimant manifested its awareness in February 2011 that it would suffer harm as a result, and (v) all these dates are prior to the “critical date” of June 10, 2011, the Tribunal concludes that the Claimant failed to submit its claims to arbitration within the time limit set out in DR-CAFTA Article 10.18.1.

²¹⁶ (R-2), p.4.

²¹⁷ Tr. 254:22–255:8.

238. The record shows that the Claimant had actual knowledge of the alleged breach and of the corresponding damage or harm before the critical date. It derives from the evidence reviewed above that Claimant concluded well before the critical date that DR-CAFTA had been effectively breached and that such breach had produced substantial loss or damage. As a matter of fact, the Claimant did not submit its Request for Arbitration until June 10, 2014, which is 3 years, 3 months, and 19 days later. As a consequence, its claims are time-barred by DR-CAFTA Article 10.18.1.

E. The issue of a Denial of Justice

239. The Tribunal could simply end its task at this juncture and consider that it has already fulfilled its task, having firmly reached the conclusion that, in application of DR-CAFTA Article 10.18.1, it has no jurisdiction over the case filed by the Claimant. It is even more so that there is no difference between the non-issuance of the license and the absence of answer to the request for its reconsideration. The two are parts and parcel of the same conduct, contrary to the Claimant's allegations.

240. That said, although the claim could be disposed of based on the Tribunal's prior findings, the Tribunal considers it appropriate to address what increasingly took a more prominent position in the Claimant's claim as the proceeding unfolded, namely that the Dominican Republic committed a denial of justice against it. During the Hearing as well as in its Post-Hearing Brief, this was identified by the Claimant as the "central issue"²¹⁸.

241. Particular emphasis was placed on this argument because, whilst the letter sent to the Environmental Ministry asking for reconsideration of the refusal of environmental license to the Joama Project was dispatched to Vice-Minister Reyna on October 5, 2010, *i.e.*, well before the critical date of June 10, 2011, there was no written response to it. As seen above, this alleged failure to respond is submitted by the Claimant to constitute a continuing act that both falls within the Tribunal's temporal jurisdiction and, having allegedly persisted to the present day, constitutes a denial of justice in breach of DR-CAFTA Article 10.5.1. To quote again the Claimant's Post-Hearing Brief:

²¹⁸ Tr. 70:22-71:14 and Claimant's PHB, ¶¶2 and 3.

*“The Claimant’s case is a simple one. For over five-and-a-half years, the DR has failed to respond to the Claimant’s Motion for Reconsideration, as it was obliged to under its own law.”*²¹⁹

(I) DR-CAFTA Article 10.5: Minimum Standard of Treatment

242. DR-CAFTA Article 10.5.1 entitled, *Minimum Standard of Treatment*, states:

*“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”*²²⁰

243. DR-CAFTA Article 10.5.2 elaborates upon the preceding subparagraph as follows:

“For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

*(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.*²²¹ [Emphasis added.]

244. Having regard to the foregoing, the Claimant submits that a denial of justice can arise from “any judicial or *administrative act* which deprives a citizen of any of the essential guarantees granted to him by law.”²²² [Emphasis added.] DR-CAFTA Article 10.5.2 prescribes the “*customary international law minimum standard of treatment*” as the applicable standard of treatment.²²³ The minimum standard of treatment’s fair and

²¹⁹ Claimant’s PHB, ¶2.

²²⁰ DR-CAFTA Article 10.5.1.

²²¹ DR-CAFTA Article 10.5.2 [Emphasis added].

²²² Claimant’s Observations, ¶¶42-44 [Emphasis added].

²²³ In this respect, it echoes the NAFTA’s *Minimum Standard of Treatment* provision, Article 1105, as interpreted by the NAFTA Free Trade Commission in its Note of Interpretation of July 31, 2001[Available at http://www.sice.oas.org/TPD/NAFTA/Commission/CHI1understanding_e.asp].

The “for greater certainty” phrasing of Article 10.5.2 likewise tracks the NAFTA Note of Interpretation, but adds a further clarification not found in the Note: the customary international law minimum standard of

equitable treatment standard is expressly stated to include the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

245. As recounted in the procedural history above, acting in its capacity as a DR-CAFTA Party, the United States expressed its view that the minimum standard of treatment “is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law”²²⁴
246. The Claimant characterized the US Submission as “*an amalgamation of passages taken verbatim from various earlier submissions made by the United States of America in various DR-CAFTA and NAFTA cases*” and thus was not a position formulated specifically for this case concerning the particular facts before this Tribunal.”²²⁵ Since it did not address the facts, the submission was, in Corona’s view, an “abstract and theoretical” view of a Non-Disputing Party.²²⁶ That said, the Claimant did state its agreement “with the United States’ general description of a denial of justice” in paragraphs 12 and 13 of the US Submission, while adding three qualifications: (i) a denial of justice can be committed under international law by the administrative branch of the State;²²⁷ (ii) the requirement of exhaustion of local remedies under international investment treaty law is a matter of substance and not of jurisdiction/admissibility;²²⁸ and (iii) the question of whether there has been a denial of justice should be analyzed in each case with regard to the particular remedies available to an injured party.²²⁹
247. The Respondent did not comment on the US Submission at the time, but did advert to it in its Post-Hearing Brief.²³⁰

treatment’s fair and equitable treatment standard is expressly stated to include the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

²²⁴ U.S. Submission, ¶¶12-13 [Footnote references omitted].

²²⁵ Claimant’s Observations, ¶2.

²²⁶ *Ibid*, ¶4. The point is also made at ¶13.

²²⁷ The point is also made at Claimant’s Observations, ¶¶42-44.

²²⁸ The point is also made at Claimant’s Observations, ¶45.

²²⁹ *Ibid*, ¶6(c). The point is also made at ¶45.

²³⁰ Respondent’s PHB, ¶¶4 and 19.

(2) The Tribunal's Analysis

248. The Tribunal begins by noting the Claimant's observation that a denial of justice can arise under international law by an act of the administrative branch of the State. To the extent that a denial of justice can originate in a State's administrative act, the Tribunal agrees that this is the case. However, as discussed further below, the Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.
249. With respect to the Claimant's third qualification of its general approval of the United States' position, articulated at paragraphs 12-13 of the US Submission, the Tribunal agrees that the question of whether there has been a denial of justice should be analyzed in each case with regard to the particular remedies available to an injured party. In addition, while it agrees with the Claimant's observation that the requirement of exhaustion of local remedies under international investment treaty law is a matter of substance and not of jurisdiction/admissibility, that condition does not preclude the Tribunal's consideration of the denial of justice claim at this stage of the proceedings. DR-CAFTA Article 10.20.4 refers to the Tribunal's "authority to address other objections as a preliminary question."²³¹ Further, DR-CAFTA Article 10.20.5 directs that the Tribunal "shall decide on an expedited basis an objection under paragraph 4."²³² DR-CAFTA's expedited procedure does not preclude a tribunal from considering an issue going to the substance of a case if the tribunal finds that it is appropriate to consider such an issue based on the facts as pleaded by the Claimant. In the present circumstances, the Tribunal considers that it is in a position to consider the issue, which, in any event, turns on an interpretation of the DR-CAFTA and the rules of international law.
250. Although the Claimant asserted that a denial of justice can result from "any judicial or *administrative act* which deprives a citizen of any of the essential guarantees granted to

²³¹ DR-CAFTA Article 10.20.4.

²³² DR-CAFTA Article 10.20.5.

him by law”,²³³ the DR-CAFTA is not drafted in such broad terms. Article 10.5.2(a)'s treatment of denial of justice focuses on different forms of “*adjudicatory* proceedings”, be they criminal, civil or administrative. The inclusion of the word “*adjudicatory*” assumes importance because it requires a tribunal to focus on the nature of the State's measure(s) at issue. That is, not all criminal, civil or administrative matters, acts or procedures fall within the scope of DR-CAFTA Article 10.5.1 such that they are capable of giving rise to an international claim for denial of justice.

251. Adjudicatory proceedings that do fall within the scope of DR-CAFTA Article 10.5.1 are governed by “the principle of due process *embodied in the principal legal systems of the world.*”²³⁴ The precise wording of DR-CAFTA Article 10.5.2 immediately raises questions about the validity of the Claimant's claim because the administrative proceeding in respect of which the Motion for Reconsideration was made was, as the Respondent noted, and the Tribunal has agreed, completed on August 18, 2010 with the file closed as of that date.²³⁵ As already indicated above with regard to the nature of the Motion for Reconsideration²³⁶, the Tribunal considers that there was no administrative adjudicatory proceeding in existence at the time of the Motion's submission. Indeed the very purpose of the Motion was to have the Ministry re-open the proceeding and render a different decision. In the Tribunal's view, it would be straining the meaning of the term “administrative adjudicatory proceeding” to treat the Ministry's receipt of such a motion and alleged inaction as in itself an “adjudicatory proceeding.” The Claimant certainly hoped that its Motion for Reconsideration would prompt the authorities to re-open the matter, but no action was taken on the request and no adjudicatory proceeding was launched.

²³³ Claimant's Observations, ¶¶42-44.

²³⁴ Article 10.5.2(a) [Emphasis added].

²³⁵ Respondent's PHB, Chronology, p. 2: Ministry sends a letter to the Claimant (**R-4**) “inform[ing] Corona that the Joama Project was not environmentally feasible” The Claimant admits that “at the point that it received this communication, it was obviously aware that a Negative Environmental Decision had been taken” The letter states, and the Claimant therefore understands as of receipt of this letter, that the license application file has been closed. Moreover, the Claimant apprehends that “the letter . . . d[oes] not set out any procedure by which the decision could be appealed or could be submitted for reconsideration.” [Footnote references omitted].

²³⁶ See *supra*, ¶205.

252. In this regard, the Tribunal concurs with the Respondent's analysis of this aspect of the Claimant's case:

“In the present case, there is no valid basis for treating the alleged denial of justice as distinct from the license denial. To proceed on the basis of such a distinction, Claimant would need to have asserted at least a plausible denial of justice claim. Yet, what Claimant attempts to label as a denial of justice — a failure by the State to respond to a one-page letter — simply cannot under any conception amount to a denial of justice under international law, no matter how much time may have elapsed. As Claimant acknowledged in its Rejoinder, the alleged denial of justice here is not like that alleged in any other investment treaty case in the record. “All the [other] cases involved legal proceedings which — in varying degrees of speed — moved forward.” Here, there simply was not any “proceeding” at all — just the absence of a response to Claimant’s letter.”²³⁷

253. The Tribunal turns to the next point in the analysis. Even if the Motion for Reconsideration were considered to have triggered an administrative adjudicatory proceeding, as the Claimant itself acknowledged, the question of whether there has been a denial of justice *should be analyzed in each case with regard to the particular remedies available* to an injured party.²³⁸ This is an important point because administrative adjudicatory proceedings typically do not take place in a legal vacuum; the acts of such adjudicators are typically reviewable in the local courts. Put another way, administrative decision-making is situated within a broader framework of a State's legal system.

254. The international delict of denial of justice rests upon a specific predicate, namely, the *systemic failure* of the State's justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent's legal system as a whole has failed to accord justice to the claimant. The Claimant itself noted in its comments on the US Submission:

“In Unglaube, the Tribunal held (the Claimant submits, correctly) that a denial of justice is concerned not with whether a particular domestic

²³⁷ Respondent's PHB, ¶11 [Emphasis added, footnote references omitted].

²³⁸ Claimant's Observations, ¶¶6(c) and 45 [Emphasis added].

*decision was right or wrong, but with the systemic deficiency of the host state to render justice”.*²³⁹

255. The Claimant's Rejoinder also recognized the need for the investor's having taken domestic remedies if it wished to make out a claim for denial of justice:

46. [. . .] [T]here remains a question as to whether a state can be held internationally liable for acts (judgments, decisions and so forth) of its organs (including courts and administrative bodies), which could have been — but were not — appealed by the investor.

*47. The broad consensus, supported by a number of investment treaty cases, is that the state is not so liable if the investor failed to take such domestic remedies*²⁴⁰

256. The Claimant was correct on this point. Several other international law decisions support the conclusion that the State is not liable if the investor failed to take such domestic remedies. In *Apotex Inc. v. United States* the tribunal similarly noted that denial of justice claims:

*“[D]epend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.”*²⁴¹

257. The tribunal in *Loewen v. United States* likewise expressed the view that the purpose of exhaustion of local remedies is to give the respondent State an opportunity to correct its alleged breach²⁴². These cases, cited by the Respondent, are only two of a large number of cases that could be cited in support of the proposition, for instance the *Jan de Nul v. Egypt*

²³⁹ PO Rejoinder, ¶50.

²⁴⁰ PO Rejoinder, ¶¶46-47.

²⁴¹*Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award, June 14, 2013 (**RA-14**) (“*Apotex v. United States*”), ¶282 [Emphasis added].

²⁴²*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, (**RA-21**) (“*Loewen v. United States*”), ¶132 : “The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”

Case,²⁴³ or the *AMTO v. Ukraine* Case, in which the tribunal emphasized the need to consider the State's legal system as a whole, to assess the propriety of the act against the availability of means to address errors or injustices, and the importance of the investor's own responsibility for the outcome²⁴⁴. In the case of *Duke Energy v. Ecuador*, the tribunal took the view that the claimant "never challenged the final arbitral award before the Ecuadorian courts, and therefore "the Ecuadorian system never came into play on the award."²⁴⁵

258. Scholars have likewise described exhaustion of local remedies as a "prerequisite to a valid complaint that the alien has been denied justice."²⁴⁶ Jan Paulsson, whose short but cogent treatment of the subject, *Denial of Justice*, was cited by the Claimant itself, is frequently quoted on the issue, stated:

"For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself..."

[I]t is in the very nature of the delict that a state is judged by the final product – or at least a sufficiently final product – of its administration of justice. A denial of justice is not consummated by the decision of a court of first instance. Having sought to rely on national justice, the foreigner cannot complain that its operations have been delictual until he has given it scope to operate, including by the agency of its ordinary corrective functions."²⁴⁷

259. The Tribunal shares this view. Exhaustion of local remedies is, as the Claimant correctly pointed out in its Rejoinder, typically not a jurisdictional prerequisite to an investor's submitting an international claim, but the exhaustion of local remedies is relevant in a consideration of the merits, as a substantive element of the alleged breach.

²⁴³ *Jan de Nul Dredging v. Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶258, where the tribunal defined a denial of justice as follows: "[T]he system as a whole has been tested and the initial delict remained uncorrected".

²⁴⁴ *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, March 26, 2008, ¶¶76-78.

²⁴⁵ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶¶394 and 398.

²⁴⁶ U.S. Submission, ¶¶12-13.

²⁴⁷ Jan Paulsson, *Denial of Justice* (2005) (CL-21), p. 108.

260. In order to exhaust local remedies, the general requirement (subject to the futility exception discussed below) is as expressed by the United States in its intervention: the investor “*must proceed to the highest court in the whole system, which may include more than one line of tribunals or courts where the legal system of the respondent or host state has a multiple hierarchy of fora which can provide redress.*”²⁴⁸
261. As recognized by the US Submission and by the Parties themselves, there is an exception to the requirement to exhaust local remedies, where seeking such an appeal domestically would be obviously futile or manifestly ineffective²⁴⁹, a position which finds support in a number of international investor/State arbitration awards, in particular in *Loewen v. United States*, where the tribunal found that the claimant's obligation to seek a remedy from higher courts was subject to “reasonable practical limitations”²⁵⁰ or in *Apotex v. United States*, in which the tribunal similarly emphasized the importance of proving that the available recourse was “manifestly ineffective”²⁵¹.
262. Having regard to the clear position at international law, as pleaded, the Claimant’s case on denial of justice must fail because it can point to no act or any administrative adjudicatory proceeding before any court or administrative adjudicatory body in the Dominican Republic beyond the unanswered Motion for Reconsideration which, as noted above, did not itself amount to an administrative adjudicatory proceeding. In this context, a mere failure to answer the Motion cannot by any objective measure be equated to a denial of justice at international law. In this respect, the Tribunal agrees with the Respondent’s characterization of the steps taken by Claimant:

“Claimant has not adduced any evidence that it exhausted local remedies, either in connection with the license denial or the non-response to its reconsideration request. In fact, and to the contrary, Claimant conceded

²⁴⁸ U.S. Submission, ¶13 and footnote 16, citing CF Amerasinghe, *Local Remedies in International Law*, (2004), p. 198 [Emphasis added].

²⁴⁹ U.S. Submission, ¶13; PO Counter-Memorial, ¶82; Claimant’s Observations, ¶46; Claimant’s PHB, ¶5(b).

²⁵⁰ *Loewen v. United States (RA-21)*, ¶167ff.

²⁵¹ *Apotex v. United States (RA-14)*, ¶¶284-285 [Emphasis added] citing C.F. Amerasinghe, *Local Remedies in International Law* 206 (2nd. ed. 2004) and E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1916) p. 824.

that it chose for tactical reasons to forgo a local litigation option."²⁵²

263. The Respondent submits that the Claimant chose not to bring a judicial challenge against the license denial because "the Claimant was resolutely determined to move forward with the Project."²⁵³ After the Hearing, the Claimant sought to qualify its position in its Post-Hearing Brief, arguing that:

*"[T]he denial of justice arises out of an excessive delay in rendering the decision in response to the filed Motion for Reconsideration, and that the local remedies rule should not apply."*²⁵⁴

264. The Tribunal does not agree with this submission, because a finding of denial of justice under international law necessarily depends on the final product of the State's domestic legal system. Since, as the United States put it, the "responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort",²⁵⁵ there can be no denial of justice without a final decision of a State's highest judicial authority.²⁵⁶ In the instant case, not only is there no final decision of a State's highest judicial authority, there is no decision of an administrative adjudicatory body or judicial authority *at all*. In the end, faced with no official response to its Motion, the Claimant failed to take any step in proceedings for administrative or judicial review. Yet, as the Claimant itself recognized:

*"The lapse of two months enables the individuals to issue a complaint against administrative inaction by filing a claim before an administrative court. This, as recognised by the own DR's expert, is a presumption envisaged for the protection of an individual, to enable them to challenge decisions of the administration before the courts."*²⁵⁷

265. Based on the Claimant's allegations and the evidence submitted by the Parties in this arbitration, it has not been shown that taking a further step in the domestic legal system of the Dominican Republic would have been futile or manifestly ineffective.

²⁵² Respondent's PHB, ¶13.

²⁵³ Respondent's PHB, footnote 53.

²⁵⁴ Claimant's PHB, ¶15.

²⁵⁵ U.S. Submission, ¶¶12-13, *citing* Alwyn Freeman, *International Responsibility of States for Denial of Justice* (1938), pp. 311-12.

²⁵⁶ U.S. Submission, ¶¶12-13, *citing* Christo G Pirocaco (*US v Turkey*), (1937) Nielsen's Opinions and Report, pp. 587, 592-93.

²⁵⁷ Claimant's PHB, ¶44.

266. Finally, the Claimant is incorrect in contending that the waiver required to submit this international claim for damages barred it from challenging the alleged failure to act on the Motion for Reconsideration. In its Post-Hearing Brief, the Claimant submitted that it was prohibited from exhausting local remedies by the waiver required under DR-CAFTA Annex 10E:

*“Annex 10E of CAFTA-DR contains a “fork in the road” provision for claims brought against the DR. An investor must elect to either (i) submit its claim to arbitration or (ii) to bring its claim before a local court or administrative tribunal. It cannot do both. To require an investor to exhaust local remedies prior to submitting its claim to arbitration, the very consequence of which would be to prevent the investor from submitting that claim to arbitration, would make a mockery of the protections guaranteed under Chapter 10 CAFTA-DR.”*²⁵⁸

267. For its part, the Respondent submitted that:

*“Claimant misunderstands the Annex 10E requirement, as a claim by Walvis (rather than Corona) in a Dominican court, for asserted violations of Dominican law, would not have triggered the fork-in-the-road clause.”*²⁵⁹

268. In the Tribunal's view, the waiver required to submit a claim to international arbitration pursuant to DR-CAFTA Chapter 10 is clear in its terms. Article 10.18.2 first requires the claimant (whether claiming on its own behalf or on behalf of an enterprise) to waive “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16”, this requirement is immediately qualified by the article's subparagraph 3 which provides:

“3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of

²⁵⁸ Claimant's PHB, ¶5(b).

²⁵⁹ Respondent's PHB, footnote 53.

preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration." ²⁶⁰

Thus, an action seeking interim injunctive relief not involving the payment of damages is available to a DR-CAFTA claimant (or its enterprise) while it pursues its DR-CAFTA claim for damages.

269. DR-CAFTA Article 10.18.4 then sets out the 'fork in the road' provision. But this applies only to claims of an alleged breach of an obligation under Section A of Chapter 10 in proceedings before a court or administrative tribunal of a Central American State Party or the Dominican Republic. Annex 10-E applies to claims by US investors only.²⁶¹ This 'fork in the road' is clearly intended to deal with the situation in certain civil law countries where international treaties have direct effect and thus an alleged breach of an international treaty can form a cause of action under the domestic law of such States. The Claimant would have fallen afoul of this provision if Walvis (or Corona) had submitted a claim in the local courts for the "same alleged breach" (*i.e.*, a breach of Section A of Chapter 10 of DR-CAFTA) as in the present proceeding.²⁶² If Walvis had submitted an administrative contentious proceeding which did *not* invoke DR-CAFTA's Chapter 10, it would not have run afoul of Article 10.18.4.
270. For all of the foregoing reasons, the Tribunal considers that Corona's denial of justice claim is "not a claim for which an award in favor of the claimant may be made under Article 10.26".²⁶³ The Tribunal concludes by reiterating its statement already formulated above at paragraphs 237-238, according to which, the Claimant not having satisfied the conditions required under DR-CAFTA Article 18.10.1, its request for arbitration was time-barred, and the present Tribunal has no jurisdiction over the claims.

²⁶⁰ DR-CAFTA Article 10.18.3 [Emphasis added].

²⁶¹ DR-CAFTA Annex 10-E(1).

²⁶² DR-CAFTA Article 10.18.4.

²⁶³ DR-CAFTA Article 10.20.5.

VIII. COSTS

271. DR-CAFTA Article 10.20.6 provides:

“When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.”

272. Article 58 of the ICSID Arbitration (Additional Facility) Rules provides:

“(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.”

273. The Arbitral Tribunal has offered to the Parties the opportunity to express their comments on the possibility to award costs with respect to the decision on the Preliminary Objections. Both Parties have expressed comments in this regard.

274. The Claimant has filed a Cost Submission stating that its legal fees and expenses incurred in the arbitration amount to US\$1,121,972.79; the Respondent has also filed a cost submission stating that its legal fees and expenses incurred in the arbitration amount to US\$1,685,991.00. The Parties have advanced US\$200,000.00 each on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses (the “Arbitration Costs”). Both Parties seek an award for the entirety of their respective legal fees and expenses and Arbitration Costs.

275. When deciding how the arbitral costs should be apportioned between the Parties, the Arbitral Tribunal notes its discretion to allocate costs and expenses in accordance both with

the DR-CAFTA and the Arbitration Additional Facility Rules. In determining the allocation of costs, the Arbitral Tribunal has taken into account all of the circumstances of the present arbitration.

276. The Respondent has prevailed entirely as a matter of jurisdiction. The question arises whether, as a consequence, the Claimant should bear more than half of the arbitration costs and/or pay the Respondent's legal fees and other arbitration costs.
277. Looking at DR-CAFTA Article 10.20.6, the immediate test for the Arbitral Tribunal is to determine whether the claim was "frivolous". The Arbitral Tribunal finds that the facts surrounding the dispute and the allegations made demonstrate that the Claimant – even if it was wrong in the construction and application of the DR-CAFTA to said facts – had a *bona fide* claim and did not act with such wanton disregard of the facts and the law as to permit this tribunal to consider that its claim was "frivolous".
278. Furthermore, in the present case, neither of the Parties has presented its case in a way justifying the shifting of arbitral costs against it. To the contrary, counsel for both Parties worked professionally and efficiently in pursuing their clients' interests.
279. Accordingly, each of the Parties shall be liable to pay half of the Arbitration Costs. Each Party shall also bear its own legal fees and expenses incurred in connection with presenting its case.

IX. AWARD

280. For the reasons set forth above, the Tribunal decides as follows:

- (1) The Tribunal decides that the Claimant not having satisfied the conditions required under DR-CAFTA Article 18.10.1, its request for arbitration was time-barred and the present Tribunal has no jurisdiction over the claims.
- (2) Each of the Parties shall be liable to pay half of the Arbitration Costs. Each Party shall also bear its own legal fees and expenses incurred in connection with presenting its case.

Corona Materials, LLC v. Dominican Republic
(ICSID Case No. ARB(AF)/14/3)
Award on the Respondent's Expedited Preliminary Objections

Made as at Washington, D.C.

[Signed]

Mr. Fernando Mantilla-Serrano
Arbitrator
Date: May 24, 2016

[Signed]

Mr. J. Christopher Thomas QC
Arbitrator
Date: May 10, 2016

[Signed]

Prof. Pierre-Marie-Dupuy
President of the Tribunal
Date: May 26, 2016

Place of arbitration: Washington, D.C.

LEGAL AUTHORITY CA-141



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [Summers v. City of Cathedral City](#), Cal.App. 4 Dist., November 29, 1990

207 Cal.App.3d 852, 255 Cal.Rptr. 232

MAXIM N. BACH, Plaintiff and Appellant,

v.

STEVEN R. McNELIS et al.,
Defendants and Respondents

No. C000659.

Court of Appeal, Third District, California.

Jan 31, 1989.

[Opinion certified for partial publication. *]

* Pursuant to [California Rules of Court, rule 976.1](#), this opinion is certified for publication with the exception of parts II and IV.

SUMMARY

An attorney brought an action pro se against a justice court judge and a superior court judge to challenge the constitutional validity of the assignment of the justice court judge to county courts of record, and also alleging violations of the Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)) by defendant judges. The trial court sustained defendants' general demurrers without leave to amend and granted the superior court judge's motion for judgment on the pleadings. Finding the lawsuit frivolous, the court also awarded defendants their attorney fees as sanctions. The justice court judge was a member of the State Bar and taught at a community college, which the attorney alleged violated [Cal. Const., art. VI, § 9](#) and former § 17. The attorney also alleged the justice court judge had failed to make annual income disclosures required by the act and that the superior court judge had omitted from his disclosures a personal school loan, both in violation of [Gov. Code, § 87200](#). (Superior Court of Butte County, No. 90213, Raymond R. Roberts, Judge. †)

The Court of Appeal reversed the portion of the judgment dismissing the cause of action against the superior court judge under [Gov. Code, § 87200](#), affirmed the judgment in all other respects, and remanded for redetermination of the amount of sanctions due the superior court judge. The court held that, in ruling on the superior court judge's demurrer to the

§ 87200 cause, the trial court erred by judicially noticing the contents of an affidavit in a companion case for the truth of the matters asserted and then sustaining the demurrer on that ground, and that for the same reason it was error to grant the judge's motion for judgment on the pleadings. The court held the *853 complaint failed to state a cause of action against the justice court judge for violating the annual income disclosure requirement of § 87200. The court also held that, because the justice court judge was eligible for assignment under [Cal. Const., art. VI, § 15](#), the general demurrers to all causes of action predicated on the assignment were properly sustained. The court further held that the assigned judge was not a member of a court of record, and so was not required to comply with former [Gov. Code, § 87200](#) (requiring annual income disclosures by judges of courts of record) before that section was amended to apply to all judges. It held the trial court's imposition of sanctions under [Code Civ. Proc., § 128.5](#), was amply supported by its finding the lawsuit was frivolous and brought only to harass the judges, except for the one cause of action not yet found frivolous, i.e., the [Gov. Code, § 87200](#), allegation against the superior court judge. Finally, the court held the appeal of the judgment as to the justice court judge was frivolous and prosecuted solely to harass the judge and awarded him his attorney fees on appeal.

† Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council. (Opinion by Sparks, J., with Carr, Acting P. J., and Marler, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)

Pleading § 29--Demurrer to Complaint--Judicial Notice--Files in Other Proceedings--Contents of Affidavit.

In an action alleging a superior court judge violated the Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)) by failing to report a personal school loan on his annual disclosure statement ([Gov. Code, § 87200](#)), the trial court erred in judicially noticing the contents of an affidavit in a companion case for the truth of the matters asserted and then sustaining a general demurrer on that ground.

(2)

Pleading § 26--General Demurrer; Failure to State Cause of Action--Reference to Extrinsic Matter.

If a pleading sufficiently states a cause of action, a demurrer cannot be granted on the basis of a showing of extrinsic matter by reference from attached exhibits, affidavits, or otherwise, except those matters subject to judicial notice.

[See [Cal.Jur.3d, Pleading, § 152.](#)]

(3)

Pleading § 29--Demurrer to Complaint--Judicial Notice--Files in Other Proceedings--Truth of Matters Asserted.

Although in ruling on a demurrer a court may take judicial notice of files in other judicial proceedings, a court cannot take judicial notice of hearsay allegations *854 as being true just because they are part of a court record or file. A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.

(4a, 4b, 4c, 4d)

Pleading § 92--Motion for Judgment on Pleadings--Erroneous Judicial Notice of Affidavit.

In an action alleging a superior court judge violated the Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)) by failing to report a personal school loan on his annual disclosure statement ([Gov. Code, § 87200](#)), the trial court erred in granting defendant's motion for judgment on the pleadings, where the complaint stated a cause of action on its face and was not otherwise defeated by matters properly subject to judicial notice. Plaintiff also was not required to plead and negate a statutory exception to the disclosure requirement that was set forth in a different section of the code.

(5)

Pleading § 92--Motion for Judgment on Pleadings--Failure to State Cause of Action.

A motion for judgment on the pleadings is made on the same grounds, and is decided on the same basis, as a general demurrer, i.e., it will be granted only if the complaint on its face fails to state a cause of action.

[See [Cal.Jur.3d, Pleading, § 290.](#)]

(6)

Pleading § 17--Complaint--Negating Statutory Liability Exceptions.

The rule of pleading that a party relying for recovery on a purely statutory liability must specifically negate any limitation in the clause creating and defining that liability only applies to statutes that define the right or liability and also contain the exception in the enabling clause itself. Where the exception is found in a subsequent section of the act, it need not be negated in the initial pleading.

(7)

Pleading § 29--Demurrer to Complaint--Factual Proof.

The question of proof cannot be resolved on a demurrer, where all properly pleaded allegations are taken as true even though their proof appears unlikely.

(8a, 8b)

Public Officers and Employees § 14--Powers; Conflicts of Interest--Financial Disclosures--Judges--Nonjudicial Public Employment.

The trial court properly sustained, without leave to amend, a general demurrer to a cause of action alleging a justice court judge violated the annual income disclosure law ([Gov. Code, § 87200](#)) by *855 omitting earnings from his employment at a community college. The allegations on their face established the earnings were not reportable income as defined by the Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)).

(9)

Judges § 5--Appointment; Tenure--Conditions--Sole Occupation--Purpose.

The purpose of the constitutional proscription against any public employment other than a judicial one by judges (former Cal. Const., art. VI, § 17) are (1) to save judges from the entanglements and partisan suspicions that may result when a judge engages in the extrajudicial activity of campaigning for public office; and (2) to conserve the time of judges for the performance of their work so as not to embarrass or impede the orderly and proper discharge of their judicial functions.

(10a, 10b)

Public Officers and Employees § 14--Powers; Conflicts of Interest--Financial Disclosures--Judges--Filing Requirements.

Allegations that a justice court judge accepted blanket assignments to the municipal court and substantial assignments to the superior court but never filed periodic statements of economic interest required of judges of courts

of record (former [Gov. Code, § 87200](#)) did not state a cause of action under the Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)). The mere fact that the assigned judge acts with the authority of an incumbent member of the court to which he is assigned does not transform him into an incumbent of that court, and he therefore need not satisfy an incumbent's restrictions. It must be taken for granted that an assignment made in proper exercise of the wise discretion of the Chief Justice will not continue indefinitely.

(11)

Judges § 3--Assignment by Chief Justice--Constitutional Restriction-- Eligibility of Judge.

The Chief Justice's sweeping power of judicial assignment ([Cal. Const., art. VI, § 6](#)) is necessarily limited by, and must be read in the light of, the judicial eligibility criteria contained in [Cal. Const. art. VI, § 15](#).

[See [Cal.Jur.3d, Judges, § 85](#).]

(12)

Judges § 3--Assignment by Chief Justice--Judge Pro Tempore--Membership in State Bar.

An assigned judge does not hold the office of the higher court; he merely exercises the power of the judicial position during the temporary period of assignment. Consequently, he need not satisfy the restrictions on an incumbent office holder, and a justice court judge's membership in the State Bar is not terminated on his assignment to a court of record. *856

(13)

Judges § 3--Assignment by Chief Justice--Propriety of Assignment.

In an action challenging the constitutional validity of the assignment of a justice court judge to county courts of record, the trial court properly sustained, without leave to amend, a general demurrer to all causes of action predicated on the assignment. Since defendant justice court judge was eligible under [Cal. Const., art. VI, § 15](#), for assignment and was not required to comply with the restrictions applicable to an incumbent judge of a court of record, it was proper for defendant superior court judge to recommend him for assignment to the superior court, and it was proper for the justice court judge to accept assignments to superior or municipal courts. As the assigned judge was not a member of a court of record, he was not required to comply with former [Gov. Code, § 87200](#) (annual income disclosures by judges of

courts of record), before that section was amended to apply to all judges.

(14)

Declaratory Relief § 12--Appeal--Of Dismissal After Sustaining of Demurrer--Affirmance as Declaration on Merits.

Where the issue on appeal from dismissal of a declaratory relief cause of action is purely one of law, if the reviewing court agrees with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal rights and duties of the parties concerning the matter in controversy.

(15)

Malicious Prosecution § 1--Constitutional Right of Petition for Redress.

The right to petition the government for a redress of grievances ([U.S. Const., 1st Amend.](#)) extends to all departments of the government; the right to petition to the courts is indeed but one aspect of the right to petition. It therefore follows that the exercise of this constitutional right by the institution of a winning lawsuit brought for the primary purpose of enforcing one's legal rights is not subject to sanctions no matter what subsidiary motives the litigator may harbor.

[See [Am.Jur.2d, Constitutional Law, § 526 et seq.](#)]

(16)

Costs § 23--Attorney Fees--Sanctions--Partial Frivolity.

Sanctions may be awarded under [Code Civ. Proc., § 128.5](#), when some but not all the causes of action alleged in a complaint are frivolous.

(17)

Costs § 23--Attorney Fees--Sanctions--Bad Faith Actions or Tactics-- Burden of Proof.

Sanctions under [Code Civ. Proc., § 128.5](#), *857 are warranted only if the moving party meets its burden of proving that the opposing party's motion or tactic was (1) totally and completely without merit, measured by the objective, reasonable-attorney standard, or (2) motivated

solely by an intention to harass or cause unnecessary delay, measured by a subjective standard. Once a party shows that an action was arguably meritorious (in the circumstances and in light of existing standards for the particular area of law within which the action was taken), the logical conclusion is that the party's motive was probably not solely to harass or cause unnecessary delay, and that sanctions are probably not warranted. That an action is arguably meritorious is not conclusive proof the action was not brought solely to harass or delay, but the party moving for sanctions has the burden of proving the arguably meritorious action was taken for improper motives.

[See [Cal.Jur.3d \(Rev\), Costs, § 103.](#)]

(18)

Costs § 23--Attorney Fees--Sanctions--Bad Faith Actions or Tactics-- Allegations of Judicial Misconduct--Income Disclosures.

The trial court's imposition of sanctions under [Code Civ. Proc., § 128.5](#), for an attorney's pro se institution of an action against a justice court judge was both warranted and appropriate. Ample evidence supported the trial court's finding frivolous the allegations the judge violated former [Gov. Code, § 87200](#), requiring judges of courts of record to make annual income disclosures. The action was brought solely to harass the judge. It did not matter that the attorney was appearing pro se and not as counsel in the action; the trial court's basing the sanctions on violations of the Rules of Professional Conduct was not improper.

(19a, 19b, 19c)

Costs § 23--Attorney Fees--Sanctions--Bad Faith Actions or Tactics--Allegations of Judicial Misconduct--Assignment of Judge.

In an action challenging the constitutional validity of the assignment of a justice court judge to county courts of record, the trial court properly awarded sanctions against plaintiff attorney under [Code Civ. Proc., § 128.5](#). The evidence amply supported the trial court's finding the attorney's challenge to the legal and long-practiced assignment policy was patently untenable and without redeeming legal merit, and thus frivolous, and was brought solely to harass two judges, one of whom plaintiff had simultaneously filed to run against in a judicial election. There was also no abuse of discretion in the trial court's setting the amount of fees awarded based on the showings made by defendant judges. *858

(20)

Costs § 23--Attorney Fees--Sanctions--Bad Faith Actions or Tactics-- Precedential Support.

Although the mere fact that a plaintiff's claim lacked precedential support is not the equivalent of a finding that the action was frivolous for purposes of sanctions, the absence of a judicial construction of a law does not by itself make all challenges arguably meritorious.

(21)

Costs § 30--Attorney Fees--Amount; Discretion--Sanctions--Frivolous Action.

The award of sanctions for a frivolous action under [Code Civ. Proc., § 128.5](#), is within the sound discretion of the trial court.

(22)

Costs § 32--Postjudgment Fees, Appeal, and Review--Appellate Review-- Scope of Review--Fees as Sanctions.

Once sanctions are imposed under [Code Civ. Proc., § 128.5](#), for a frivolous action, the test on appeal is whether the trial court abused its broad discretion so as to justify the appellate court's interference with a sanction award. In reviewing that exercise of discretion, the appellate court is informed by several policy guidelines: (a) an action that is simply without merit is not by itself sufficient to incur sanctions; (b) an action involving issues that are arguably correct, but extremely unlikely to prevail, should not incur sanctions; and (c) sanctions should be used sparingly in the clearest of cases to deter the most egregious conduct.

(23)

Costs § 30--Attorney Fees--Amount; Discretion--Sanctions--Action Not Found Frivolous.

In an action alleging a superior court judge violated the Political Reform Act of 1974 ([Gov. Code, § 81000 et seq.](#)) by failing to report a personal school loan on his annual disclosure statement ([Gov. Code, § 87200](#)), the trial court erred in including an amount for defending that cause in an award of sanctions on other, frivolous causes of action against the judge, where the [§ 87200](#) action had not yet been found to be frivolous.

(24)

Costs § 34--Attorney Fees--Fees on Appeal--Sanctions--Frivolous Appeal.

An award of attorney fees was warranted as sanctions for taking a frivolous appeal, where the appeal was indisputably

meritless and was prosecuted for the improper motive of harassing a justice court judge, as was appellant's initial complaint against the judge (which had resulted in dismissal and sanctions).

COUNSEL

Maxim N. Bach, in pro. per., for Plaintiff and Appellant.
*859

Coddington, Hicks & Danforth, Clinton H. Coddington, Richard G. Grotch, Kronick, Moskowitz, Tiedemann & Girard and Thomas C. Hughes III for Defendants and Respondents.

SPARKS, J.

The former version of [article VI, section 17 of the California Constitution](#) barred a judge of a court of record from practicing law and rendered the judge ineligible for any public employment other than a judicial one. [Section 6](#) of that article empowers the Chief Justice to assign any judge to another court of higher jurisdiction without the consent of the assigned judge. In the published portion of this opinion we consider the interplay between these constitutional provisions. The question is whether a judge of a justice court, a court of nonrecord at the time of this action,¹ who is a member of the State Bar of California and who is employed by a public community college, may lawfully be assigned to sit on the municipal and superior courts, both courts of record. We conclude that there is no constitutional conflict in such a case and therefore hold that the assignment may lawfully be made.

¹ At the time of these events, justice courts were not courts of record. "All except justice courts are courts of record." (Former Cal. Const., art. VI, § 1.) At the November 1988 general election, the electorate passed Proposition 91, a constitutional amendment proposed by the Legislature. This measure amended [article VI, section 1 of the California Constitution](#) to provide that justice courts, like all other California courts, are courts of record. As amended, [section 1](#) now reads: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All courts are courts of record." By its terms, "the changes made by this measure shall be operative on January 1, 1990." (Stats. 1988 (1987-1988 Reg. Sess.) Res. ch. 65; see also Stats. 1988, ch. 505, § 3, re [Gov. Code, § 71607](#).)

We also consider whether sanctions may be imposed where most but not all of the causes of actions in a plaintiff's complaint are frivolous. We hold that sanctions may properly be imposed under [Code of Civil Procedure section 128.5](#) in such a case.

Plaintiff Maxim N. Bach, an Oroville attorney, appeals from the judgment of dismissal entered after the trial court sustained demurrers without leave to amend to his 1986 pro se complaint which had named Judge Roger Gilbert, a Butte County Superior Court judge, and Judge Steven McNelis, a Gridley Justice Court judge, as defendants. The complaint challenged the constitutional validity of the assignment of Judge McNelis to courts of record in Butte County and added causes of action against both judges for claimed violations of the Political Reform Act of 1974 (PRA). In addition *860 to his appeal from the dismissal of his complaint, plaintiff also appeals from the subsequent order of the lower court awarding attorney's fees as sanctions to the defendant jurists. Although the issues raised by the parties are too numerous to recount here succinctly, we shall ultimately affirm the dismissal of all of the complaint except for the Political Reform Act cause of action against Judge Gilbert. On the sanctions question, we shall uphold the award in part and reverse it in part. In the interests of brevity, a host of procedural challenges are addressed and rejected in the unpublished portion of this opinion.

The Complaint and Its Procedural History

Plaintiff's complaint is entitled "Complaint for Violations of California Constitution, Political Reform Act, Government Code, etc." At the heart of the complaint is a challenge to the propriety of the assignments of Judge McNelis of the Gridley Justice Court to courts of record while he maintained his membership in the state bar and held public employment, both of which assertedly violate the constitutional restrictions on judges of courts of record. Plaintiff alleged a conspiracy between the defendant jurists (which we shall call "the assignment conspiracy") to obtain the assignments of Judge McNelis to the superior court since 1984 despite the fact they knew he was "ineligible and unqualified to be selected, assigned or appointed to the Butte County Superior Court."² The complaint also alleged Judge McNelis accepted blanket assignments to the municipal court from 1980 on, "[even] though not qualified legally" With a touch of inconsistency, the complaint then alleged Judge McNelis, though illegally occupying positions on the municipal and superior court benches, nevertheless violated

the Political Reform Act of 1974 (PRA) ([Gov. Code, § 81000 et seq.](#) [subsequent undesignated section references are to the Government Code]) by failing from 1980 to 1984 to file the disclosure statements required of judges of courts of record by former [section 87200](#).³ (Stats. 1983, ch. 214, § 1, p. 680.)

² Since it is alleged that Judge Gilbert has been presiding judge of the superior court only since 1985, it is unclear how he “obtained” the challenged assignments in 1984.

³ Effective July 1, 1985, [section 87200](#) was amended to apply to all judges of the judicial branch. (Stats. 1984, ch. 727, §§ 7, 12, p. 2666.) Judge McNelis began filing disclosure statements as of July 1985.

Plaintiff alleged it was a further violation of the PRA's disclosure requirements for Judge McNelis to omit from his 1985 disclosure statement (and to fail to disclose in earlier years) his income from public employment at Butte County Community College. Tacked onto these allegations which essentially involved Judge McNelis is a final substantive one which generally claimed Judge Gilbert failed to comply with the PRA by failing to report *861 “various matters,” and specifically claimed he omitted a personal school loan from his 1984 disclosure statement. It was alleged the defendants were jointly liable for each other's PRA violations. (§ 91006.) Plaintiff sought damages (both compensatory and punitive), declaratory relief, mandate against Judge Gilbert ever recommending that Judge McNelis be assigned to the superior court, and prohibition against Judge McNelis from accepting assignments to the municipal or superior courts.

Judge McNelis demurred on various procedural grounds and upon the substantive grounds that (1) because he was properly assigned to courts of record, no cause of action was stated with respect to the assignment conspiracy; and (2) no cause of action was stated for violation of the PRA because he was not required before 1985 to file any statements and he was not required to report his public employment income on his 1985 statement. Describing plaintiff as “a disgruntled attorney acting in propria persona who seeks to disrupt the operation of the Butte County courts by bringing a completely frivolous complaint,” Judge McNelis requested that “sanctions be imposed upon plaintiff pursuant to [California Code of Civil Procedure Section 128.5](#).”

Judge Gilbert also generally demurred to plaintiff's complaint. Like Judge McNelis, he too challenged plaintiff's complaint on a series of procedural grounds. On substantive grounds,

his demurrer asserted that insufficient facts were alleged to establish (1) his liability either individually or under a conspiracy theory for obtaining the challenged assignments; or (2) a violation of the PRA. Judge Gilbert also filed a motion for judgment on the pleadings which raised the identical contentions and added a claim of judicial immunity in obtaining the appointments. Finally, as part of his fusillade against the complaint, Judge Gilbert moved for summary judgment based on his declaration showing there were no violations of the PRA and no facts on which to base liability either as an individual or as part of the assignment conspiracy. Although his counsel, in an application to stay discovery, described plaintiff's suit as “frivolous, egregious and otherwise without merit” and as a “campaign ploy,” Judge Gilbert did not originally seek sanctions against plaintiff.

Judge Raymond R. Roberts, a retired superior court judge, was assigned to the case and heard argument on the various motions on May 2, 1986. The court sustained both demurrers without leave to amend. As to the assignment conspiracy, the trial court ruled that plaintiff's theory was predicated upon the fallacious premise that an assigned judge was subject to the same limitations and proscriptions as a judge regularly elected or appointed. Since Judge McNelis, as a justice court judge, was constitutionally and legally qualified to be assigned to a higher court, there could not be an *862 illegal conspiracy between the defendants to obtain his lawful assignment. In the trial court's view, “there is no known requirement that a Justice Court judge temporarily assigned to a higher court must either file a financial disclosure because of his elevation or that he must resign from the State Bar.” On the question of Judge Gilbert's duty to report his loan, the trial court took judicial notice of a sworn affidavit in another action which indicated “that the loan in question was a regular bank loan made to students, and for that reason falls under an exception and need not be reported.” For these same reasons the court granted the motion for judgment on the pleadings. It then placed the motion for summary judgment off calendar. Finally, the court orally stated it “reserve[d] the right to assess attorney's fees against the plaintiff since he is acting as a private person and the code provides that private persons initiating that type of litigation do so at their own risk; therefore, I am reserving the right to award attorney's fees upon application after finality of this Court's action.” In its formal order sustaining the demurrers and granting the motion for judgment on the pleadings, entered on June 9, the court explicitly “reserve[d] the right to assess attorney's fees against the plaintiff pursuant to [Government Code Section 91012](#) upon application after finality of the Court's action.”

In the meantime, on May 23, the court on its own motion issued an order to show cause why attorney's fees should not be awarded as sanctions against plaintiff under [Code of Civil Procedure section 128.5](#) and why plaintiff should not be referred to the State Bar for discipline.

The order set forth a schedule for filing supporting and opposing papers and advised the parties that if deemed necessary the court would calendar the matter for oral argument. On June 16, Judge McNelis filed his opening brief on the order to show cause re sanctions. There he argued sanctions could and should be imposed under both [section 91012](#) and [Code of Civil Procedure section 128.5](#).

Eventually the hearing on sanctions was heard on July 15. In the meantime, plaintiff made a number of procedural attacks upon this hearing. He renews these grounds on appeal and we consider and reject them in the unpublished portion of this opinion. At the conclusion of the hearing, the court awarded attorney's fees as a sanction under [section 91012](#) and [Code of Civil Procedure section 128.5](#) in the amount of \$9,073.50 to Judge McNelis and \$9,675.15 to Judge Gilbert. A formal order specifying the bases for the award followed, and plaintiff thereafter timely filed his notice of appeal. The parties' arguments on appeal recapitulate those raised below. For clarity, we shall reorder and consolidate them in the discussion. *863

Discussion

I Political Reform Act of 1974

We first consider two of the alleged PRA violations by the defendants, which are something of a non sequitur in a complaint otherwise purporting to be concerned with the impropriety of the assignments of Judge McNelis to courts of record.

A

With regard to the cause of action for Judge Gilbert's alleged failure to comply with the disclosure requirements of the PRA, plaintiff alleged: "Defendant Gilbert also willfully and/or negligently failed or refused to properly report in his 1984 Statement of Economic Interest various matters, including but not limited to a personal school loan with Crocker National Bank, and said amount is approximately several thousand dollars, and that amount is likewise required to be repaid or refunded to the State of California, County of Butte, or

Plaintiff, as trustee for the citizens of Butte County and their court system."

Among the several declared purposes of the PRA is the following: "Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided." (§ 81002, subd. (c).) In furtherance of this and other purposes, a disclosure procedure is mandated under the PRA. Under these disclosure provisions, "Every person who holds an office specified in [Section 87200](#) shall, each year ... , file a statement disclosing his investments, his interests in real property and his income during the period since the previous statement filed under this section [or the statement filed on assuming the office]." (§ 87203.) The manner in which the income is to be disclosed is specified in section 87207. The term "income" is a word of art under the PRA and hence is specially defined. "(a) 'Income' means, except as provided in subdivision (b), a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, ... loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse. Income also includes an outstanding loan. ... (b) 'Income' also does not include: ... (8) Any loan ... from a commercial lending institution which [is] made in *864 the lender's regular course of business on terms available to members of the public without regard to official status if: ... (B) The balance owed does not exceed ... (\$10,000)." (§ 82030.)

A civil right of action against any violator of these requirements is provided to any person of the jurisdiction in the amount of the violation so long as 40 days' notice is given the appropriate civil prosecutor, in this case the Butte County District Attorney, and the prosecutor does not act. (§§ 91001, 91004, 91007.)⁴ Plaintiff alleged that he properly gave notice to the Butte County District Attorney more than 40 days before the institution of this lawsuit and the prosecutor has failed to act.

⁴ It is true that plaintiff has failed to serve a copy of this complaint on the Fair Political Practices Commission as required by section 91007, subdivision (b). However, this is not, as

suggested by the defendants, a basis for dismissal of the action. (§ 91007, subd. (c).)

(1a) Plaintiff argues that since his complaint properly alleged that Judge Gilbert violated the reporting requirements of the PRA, the defendant judge's assertion that he was not required to report his loan from Crocker Bank could not be determined on demurrer. Judge Gilbert counters that the trial court "quite properly took judicial notice of a sworn affidavit indicating that 'the loan in question was a regular bank loan made to students, ...' Application of this exception to the Political Reform Act's disclosure requirement to the facts of this case properly enabled the court to determine that no legal cognizable controversy existed between the parties as a matter of law." Plaintiff has the better argument.

A demurrer lies "[w]hen any ground for objection to a complaint, ... appears on the face thereof, or from any matter of which the court is required to or may take judicial notice," (Code Civ. Proc., § 430.30, subd. (a).) Consequently, the "demurrer tests the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint. (2) This principle means that if the pleading sufficiently states a cause of action the demurrer cannot be granted on the basis of a showing of extrinsic matters by inference from attached exhibits, affidavits or otherwise except those matters which are subject to judicial notice." (*Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496, 499 [193 Cal.Rptr. 377].)

As we have noted, the trial court sustained Judge Gilbert's general demurrer to the PRA cause of action by taking judicial notice of a declaration in a companion case which indicated that the loan in question was exempt as a regular bank loan made to students. Although a court is authorized to take judicial notice in connection with a demurrer (*865 Code Civ. Proc., § 430.30, subd. (a)), it may not judicially notice the truth of assertions in declarations or affidavits filed in court proceedings. (3) "Although in ruling on a demurrer courts may take judicial notice of files in other judicial proceedings, this does not mean that they take judicial notice of the truth of factual matters asserted therein. As stated in *Day v. Sharp*, 50 Cal.App.3d 904, 914 [123 Cal.Rptr. 918], '... There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. However, a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file.

A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." (Italics in original.)" (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879 [138 Cal.Rptr. 426], citations omitted; see also 2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 1982) § 47.2, p. 1757.) (1b) The trial court thus erred in judicially noticing the contents of the affidavit for the truth of the matters asserted and then sustaining the demurrer on that ground.

(4a) For the same reason, the court erred in granting the motion for judgment on the pleadings as to this cause of action. (5) A motion for judgment on the pleadings "is made on the same grounds, and is decided on the same basis, as a general demurrer, i.e., it will be granted only if the complaint on its face fails to state a cause of action." (5 *Witkin, Cal. Procedure* (3d ed. 1985) Pleadings, § 953, pp. 385 - 386.) (4b) Because the complaint stated a cause of action on its face and was not otherwise defeated by matters properly subject to judicial notice, this motion should have been denied as well.

This error is not saved by the rule of pleading that "[w]here a party relies for recovery upon a purely statutory liability it is indispensable that he plead facts demonstrating his right to recover under the statute. The complaint must plead every fact which is essential to the cause of action under the statute. Where a party relies on a statute which contains a limitation in the clause creating and defining the liability, ... such limitation must be negated in the complaint." (*Green v. Grimes-Stassforth S. Co.* (1940) 39 Cal.App.2d 52, 56 [102 P.2d 452].) (6) The *Green* rule, however, "only applies to statutes which define the right or liability and also contain the exception in the enabling clause itself. Where the exception is found in a subsequent section of the act, it need not be negated in the initial pleading." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 273 [195 Cal.Rptr. 211, 41 A.L.R.4th 653].) (4c) Here the exception is found in the statute defining income and not in the enabling statute itself. Consequently, plaintiff was not required under the rules of pleading to negate the exception in *866 his complaint. Thus, the only basis for sustaining the general demurrer was the erroneously noticed affidavit.

It may well be, as counsel for Judge Gilbert asserted in his memorandum in support of the demurrer, that plaintiff cannot prove this cause of action because "[i]n fact, the two loans in question were made more than a decade before Judge Gilbert

assumed an 'official' status - as a superior court judge - and had an outstanding balance of less than two and one-half percent of the minimum reporting balance required by the act.”⁵ (7) But the question of proof cannot be resolved on a demurrer where all properly pled allegations “are taken as true even though their proof appears unlikely.” (*Stanson v. Brown* (1975) 49 Cal.App.3d 812, 814 [122 Cal.Rptr. 862], citation omitted.) (4d) Since the general demurrer was improperly sustained, the judgment of dismissal of this cause of action must fall with it.

5 Indeed, this cause of action may well turn out to be frivolous. In his declaration for summary judgment, Judge Gilbert averred that in August 1971 he borrowed \$1,500 from Crocker National Bank to help defray his law school expenses. In November 1972 he borrowed an additional \$1,500 to continue his legal education. At the time he filed his Statement of Economic Interests in 1984, the total outstanding balance on the loans was \$224.63. These loans, the judge further declared, were made in the regular course of business by the bank on terms available to any member of the public. Because discovery was stayed by the trial court, plaintiff did not file any response to the summary judgment motion and the trial court did not decide it. We therefore have no occasion to pass upon its merits.

B

We turn next to the claim that Judge McNelis violated the PRA by failing to disclose “his public employment as a teacher/instructor at Butte College” either in the 1985 disclosure statement or during the years in which plaintiff alleged Judge McNelis was subject to the disclosure requirements of the PRA but did not file any statements. Plaintiff alleged all this income is consequently forfeit under section 91004.

(8a) These allegations fail to state a cause of action because on their face they establish that these earnings were not reportable income under the PRA. As we have noted, the term “income” has a special meaning under the PRA. As defined there, income “does not include: ... (2) Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from bona fide educational, academic or charitable organization.” (§ 82030, subd. (b).) By alleging Judge McNelis's earnings were from

a community college, which is a local governmental agency, plaintiff has pled himself outside the statute's ambit.

Plaintiff attempts to avoid this effect in two ways. First, he gives a bizarre interpretation to this straightforward language, claiming that *public* educational *867 organizations come only within the second half of the sentence which in turn exempts only travel expenses and per diem from disclosure. Thus, as he reads it, this statutory exemption does not apply to salaries. This is an untenable and unreasonable interpretation. There is no basis for interpreting the phrase “state [or] local ... government” as somehow excluding educational institutions from its broad reach. Thus, the second half of the sentence can be read only as *expanding* the exception for public income to include reimbursement for travel expenses and per diem received from *private* educational, academic, or charitable organizations.

His second argument is no more persuasive. He claims that since a judge of a court of record is precluded from holding public employment of a nonjudicial nature (former Cal. Const., art. VI, § 17), section 82030's exclusion of public employment from reportable income impliedly does not apply to the disclosure obligation of judges of courts of record. We are urged to read such an undetectable distinction into the statute as a prophylactic measure forcing errant judges to disclose such employment. Contrary to plaintiff's importuning, we perceive no need to “harmonize” the apple prohibiting public employment with the orange exempting public employment earnings from disclosure. The statutes imposing a duty to file annual disclosure statements are not limited to judges. (§§ 87200; 87203.) Instead, they presently apply also to “elected state officers, ... members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, and chief administrative officers of counties, mayors, city managers, city attorneys, chief administrative officers and members of city councils of cities, and to candidates for any of these offices at any election.” (§ 87200.) We decline to accept plaintiff's urgings that the statute ought to be construed one way for judges and another for all other public officials and candidates. Under the clearest of statutory terms, what is income for one is income for all. Nothing in the PRA even remotely suggests that the statutory definition of “income” should not apply to judges. Nor is there anything

in the state Constitution implying the need for any such reading. The constitutional proscription against any public employment other than a judicial one by judges long predates the enactment of the PRA and addresses different institutional concerns. (9) The purposes of this constitutional restriction on judges are “(1) to save the judges from the 'entanglements, at times the partisan suspicions' which may result when a judge engages in the extrajudicial activity of campaigning for public office; and (2) 'to conserve the time of the judges for the performance of their work' so as not to 'embarrass, if not in fact impede, the orderly and proper discharge of their judicial functions.’” (*868 *Alex v. County of Los Angeles* (1973) 35 Cal.App.3d 994, 1001 [111 Cal.Rptr. 285], citation omitted.) In contrast, one of the central purposes of the disclosure requirements is to insure that public officials “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests or persons who have supported them.” (§ 81001, subd. (b).) These similar but separate provisions, like parallel lines in Euclidean geometry, do not intersect and hence need not be construed to avoid any conflicting cross-over.

(10a)(See fn. 6.), (8b) Since Judge McNelis had no obligation under the PRA to report his Butte College income, no violation was alleged and the demurrer was properly sustained as to this cause of action.⁶ And because there is no way the income at issue could ever come within the disclosure requirement of the PRA, the demurrer was properly sustained without leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)

⁶ Plaintiff's final PRA cause of action alleged that Judge McNelis, since September 1980, has accepted blanket assignments to the municipal court and “while assigned to the Chico Municipal Court as a court of record judge, has refused or failed to prepare and file the required yearly or periodic Statements of Economic Interests (Form 721) in accordance with [Government Code, Section 87200](#).” He further alleged that since April 1984, Judge McNelis has accepted assignments of a substantial nature to the Butte County Superior Court and, until the new law mandated all judges to file, refused and failed to prepare and file the required Statements of Economic Interests. Since these allegations are inextricably intertwined with the underlying validity of the assignments, we consider them in part III. For the reasons stated

there, we hold these allegations failed to state a cause of action under the PRA.

II Procedural Matters and Defenses^{*}

* See footnote, [ante](#), page 852.

.....

III Assignment Conspiracy

We come at last to the merits of the assignment conspiracy. Here we address plaintiff's surviving prayers for a declaration that Judge McNelis cannot be assigned to courts of record, for a writ of mandate precluding Judge Gilbert from requesting such assignments to the superior court, for a writ of prohibition preventing Judge McNelis from accepting such assignments to municipal or superior courts, and for a declaration that Judge *869 McNelis violated the PRA for the years 1980 - 1984 by failing to file disclosure statements (along with whatever damages can be claimed under the PRA). To resolve this dispute between plaintiff and the defendant jurists, we must now confront the interplay between various provisions of article VI of the California Constitution.

Article VI of the state Constitution deals with the judicial branch of government and vests the judicial power of California “in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts.” ([Cal. Const., art. VI, § 1.](#)) Judicial prohibitions are found in [section 17](#) of this article. At the time of this dispute [section 17](#) provided in relevant part: “A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office.”¹⁰ [Section 9](#) of that article further provides in pertinent part that “[e]very person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record.” At the time of this controversy and until January 1, 1990, justice courts are not courts of record. Under the controlling constitutional definition, “[a]ll except justice courts are courts of record.” (Former Cal. Const., art. VI, § 1.)

¹⁰ At the November 1988 general election, the electorate also passed Proposition 94, another constitutional amendment proposed by the Legislature. This measure amended [article VI, section 17 of the California Constitution](#) to provide that a judge of a court of record may accept a part-

time teaching position. As amended, the relevant part of this section now reads: "A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office, except a judge of a court of record may accept a part-time teaching position that is outside the normal hours of his or her judicial position and that does not interfere with the regular performance of his or her judicial duties while holding office." (Stats. 1988 (1987 - 1988 Reg. Sess.) Res. ch. 70.)

Judicial administration is covered in [section 6 of article VI](#). Under this section the Chief Justice is charged with the duty to "seek to expedite judicial business and to equalize the work of judges." In furtherance of that charge, the Chief Justice has been granted the power of judicial assignment. "The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction." ([Cal. Const., art. VI, § 6.](#)) The assignment power of the Chief Justice is statutorily augmented by section 68548. This section reads: "Each judge assigned by the Chairman of the Judicial Council [the Chief Justice] to another court of a like or higher jurisdiction pursuant to [Section 6, Article VI, of the State Constitution](#) has no authority to refuse such assignment and shall forthwith accept such assignment and shall sit and hold court as so assigned."

(11) But this sweeping power of assignment is necessarily limited by the eligibility criteria contained in [article VI](#) for judicial office since the Chief Justice may not assign an ineligible judge to a court of record. (See [Stewart v. Bird \(1979\) 100 Cal.App.3d 215 \[160 Cal.Rptr. 660\]](#).) Eligibility for service on a court of record is governed by [section 15 of article VI](#). ([Department of Forestry v. Terry \(1981\) 124 Cal.App.3d 140, 148 \[177 Cal.Rptr. 92\]](#).) This section provides in pertinent part: "A person is ineligible to be a judge of a court of record unless for 5 years immediately preceding selection to a municipal court or 10 years immediately preceding selection to other courts, the person has been a member of the State Bar or served as a judge of a court of record in this State. *A judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court.*" (Italics ours.) As the high court has counseled, the assignment power of the Chief Justice must be read in light of this restriction. ([Edler v. Hollopeter \(1931\) 214 Cal. 427 \[6 P.2d 245\]](#).) "This section [the predecessor of [section 15](#)] must be construed along with the other sections above referred to

and given due effect and to this end it must be held that no judge of inferior jurisdiction may be assigned for duty to a higher jurisdiction unless he meets the test above prescribed for persons who may occupy the higher judicial positions. In other words, if a judge of an inferior court is assigned to a higher court, he may not serve in that capacity unless he shall have been admitted to practice before the Supreme Court of this state for a period of at least five years immediately preceding his election or appointment to the office then held by him." (*Id.*, at p. 430; see also [2 Witkin, Cal. Procedure \(3d ed. 1985\) Courts, § 334](#), pp. 348 - 349.)

Although plaintiff continually refers to Judge McNelis as "ineligible," this is a mischaracterization. Since Judge McNelis has been a member of the State Bar since June 27, 1975 (a fact we judicially note), by the end of June 1980 he was *eligible* to become a member of the municipal court bench and thus was a judge who could properly be assigned by the Chief Justice to any court. ([Cal. Const., art. VI, § 15; Terry, supra, 124 Cal.App.3d at p. 148.](#))

This mischaracterization aside, the real gist of plaintiff's argument is that when Judge McNelis is assigned to a court of record he must comply with the same restrictions as an incumbent judge of that court. For judges of courts of record this includes suspension of membership in the State Bar ([Cal. Const., art. VI, § 9](#)), forsaking the practice of law or the holding of any other public employment or office (former [Cal. Const., art. VI, § 17](#)), and filing a disclosure statement under the PRA. ([§ 87200.](#)) Apparently an adherent of the "if it looks like a duck, waddles like a duck, and quacks like a duck, it must therefore be a duck" school of logic, plaintiff argues that because Judge McNelis has been assigned to sit as a judge of a court of record and looks, acts and talks like an incumbent he therefore must be one. Consequently, so the argument goes, he is obligated to meet all the requirements of an incumbent.

*871

(10b), (12) It is true that "[a] duly assigned judge pro tempore generally has the same power and authority ... as a regular judge of the court to which he ... is assigned." ([Mosk v. Superior Court \(1979\) 25 Cal.3d 474, 483 \[159 Cal.Rptr. 494, 601 P.2d 1030\]](#).) But the mere fact that the assigned judge acts with the authority of an incumbent member of the court to which he is assigned does not transform him into an incumbent of that court; he is simply invested "with no other or different official relation to such courts than that held by the already regularly constituted members thereof ... in order, in that relation, to exercise the judicial function." ([Fay](#)

v. District Court of Appeal [1927] 200 Cal. 522, 540 [254 P. 896].) By contrast, the sole means by which one can become a regularly constituted incumbent of a court of record is through election or appointment by the governor to a vacancy. (Cal. Const., art. VI, § 16.) Assignment thus does not make a judge an incumbent, just as acting in the Governor's absence does not make the Lieutenant Governor the Governor of California. The Lieutenant Governor becomes Governor only when a vacancy occurs in the office of Governor and a justice court judge becomes an incumbent of a higher court only when elected or appointed to that office. (See Cal. Const., art. V, § 10; art. VI, § 16.) Though acting with the authority of the office, the judge does not on that account become the incumbent officeholder. An assigned judge therefore need not satisfy the restrictions on the officeholder.¹¹ This construction is implicit in a judge's suspension from the State Bar "while holding office as a judge of a court of record." (Cal. Const., art. VI, § 9.) By the same token, a temporary assignment to a court of record does not result in an automatic suspension from the bar. In short, an assigned judge does not hold the office of the higher court; he merely exercises the power of the judicial position during the temporary period of assignment. Consequently, the membership of a justice court judge in the State Bar is not terminated upon his assignment to a court of record.

¹¹ Plaintiff makes the specious analogy an assigned judge must abide by the restrictions on an incumbent judge because the assigned judge must "abide by all of the standards of judicial conduct, and by the ordinary rules of court, as well as the traditionally accepted rules of procedure and evidence." The first of these binds a judge of any status; the remainder are limitations upon the judicial power and not the incumbent. The analogy thus fails.

No other interpretation can be sustained. Since, as noted, an assigned judge has no authority on his own to refuse an assignment to a higher court, under plaintiff's construction a justice court judge would be forced to resign his membership in the State Bar and give up any public employment whenever he is assigned to a court of record, regardless of how abbreviated the assignment might be and regardless of the frequency of the assignments. To prevent such disruptions, he either would have to forego public employment or the active practice of law entirely and thus be forced indirectly to comply with restrictions to which he is not subject explicitly,

or he would have to *872 forego his judgeship. We decline to create such a conundrum out of our Constitution.

Moreover, if plaintiff's construction were correct, it would nullify the provisions of [section 21 of article VI](#). This section provides: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." Following plaintiff's reasoning, the temporary judge, like the assigned judge, would become an incumbent of the court and hence also subject to the restrictions against the practice of law and continued membership in the bar. To avoid this, the temporary judge would be compelled to resign from the bar and by that act would be ineligible to become a temporary judge. We reject such a nonsensical, catch-22 construction of the Constitution.

It may be true, as argued by plaintiff, that an assignment might conceivably result in a "loophole" where an assigned judge may sit for substantial periods of time on a court of record without complying with the restrictions under which an incumbent judge would operate. But this lacuna in the judicial structure, if it may be said to exist, is one we believe was contemplated and countenanced by the Constitution on the assumption the temporary nature of assignments would inevitably render the service de minimis. As the Supreme Court noted long ago, it must be "taken for granted" that an assignment made in proper exercise of the wise discretion of the Chief Justice will not continue indefinitely. (*Pickens v. Johnson* (1954) 42 Cal.2d 399, 406 [267 P.2d 801].)

(13) Since Judge McNelis was eligible for assignment and was not required to comply with the restrictions applicable to an incumbent judge of a court of record, it was proper for Judge Gilbert to recommend him for assignment to the superior court. It also follows that it was proper for Judge McNelis to accept assignments to superior or municipal courts. It further follows that, not being a member of a court of record, there was no requirement he comply with the PRA in the years before 1985. The demurrer was therefore properly sustained as to all causes of action predicated upon the assignment of Judge McNelis, including the declaratory relief count. (14) Under the circumstances of this case, the declaratory relief cause of action is governed by the special rule of appellate procedure that "where the issue is purely one of law, if the reviewing court agreed with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the

merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal *873 rights and duties of the parties concerning the matter in controversy.” (*Taschner v. City Council* (1973) 31 Cal.App.3d 48, 57 [107 Cal.Rptr. 214]; accord, 5 Witkin, Cal. Procedure, *supra*, § 826, p. 270.) Since only issues of law were tendered on that part of declaratory relief action involving assignments, this opinion will constitute the declaration of the legal rights and duties of the parties concerning that controversy.¹²

12 Our disposition, finding no liability based upon the assignment of Judge McNelis, renders unnecessary any discussion about the propriety of the conspiracy allegation, the propriety of the allegation of joint liability under section 91006 for the PRA violations, or the sufficiency of the punitive damages allegation.

IV Hearing on Sanctions *

* See footnote, *ante*, at page 852.

.....

V The Sanctions Award

We turn next to the award of sanctions. Plaintiff attacks the award on the ground that [Code of Civil Procedure section 128.5](#) cannot be used to punish a litigant and that in any event the claimed violations of the Rules of Professional Conduct relied upon by the lower court do not support the award.¹⁴

14 The trial court awarded attorney fees under both [Code of Civil Procedure section 128.5](#) and [Government Code section 91012](#). The latter provision, a part of the PRA, provides: “The court may award to a plaintiff or defendant other than an agency, who prevails in any action authorized by this title his costs of litigation, including reasonable attorney's fees.” Cases construing this statute have held that prevailing defendants may be awarded attorney fees only if the suit was frivolous, unreasonable, brought in bad faith or was otherwise without foundation. (*People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 815 - 817 [228 Cal.Rptr. 424]; *Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 538 [214

[Cal.Rptr. 297](#)].) Since we uphold the sustainable portions of the sanctions award under [Code of Civil Procedure section 128.5](#), we have no occasion to consider sanctions permitted under the PRA.

Following the sanctions hearing, the trial court concluded that “plaintiff's complaint was both frivolous and interposed for an improper purpose.” With respect to Judge Gilbert, the court found that plaintiff “singled out and named the Honorable Roger G. Gilbert as a defendant in this action, alleging certain acts that were identical to long-standing, accepted procedures of at least two other presiding judges in the same jurisdiction. *874 Naming Judge Gilbert alone was contemporaneous with plaintiff's announced decision to run for office against him. This singling out of Judge Gilbert and not joining the other presiding judges is evidence of plaintiff's subjective malicious intent to injure and to harass this defendant and was done solely out of spite.” It further found that “Judge Gilbert's acceptance of a Justice Court Judge on assignment to Superior Court was in accordance with long-standing practice throughout the State recognized by reported appellate decisions as the law of this State. In alleging a 'conspiracy' on the part of Judge Gilbert, the plaintiff seeks to discredit this practice. Contrary to the Rules of Professional Conduct, the plaintiff, while claiming 'law reform,' did not state that the law, as it exists and is interpreted, is contrary to his position, nor did he argue in good faith that the law should be changed, nor did he offer persuasive reasons why a change in the law is desirable.”

With respect to Judge McNelis, the court found that “[p]laintiff claimed that Judge McNelis violated the law by failing to file economic reports prior to the time that the Fair Political Practices Act provisions were specifically extended to include Justice Court Judges. This claim did not meet the specific requirements of [Rule of Professional Conduct 2-110 \(B\)](#).” The court further found that “[p]laintiff's claim that Judge McNelis violated the law by failing to report his teaching income was not in compliance with [Rule of Professional Conduct 2-110 \(B\)](#).”¹⁵

15 This ethical canon provides: “A member of the State Bar shall not seek or accept employment to accomplish any of the following objectives, nor shall the member do so if he knows or should know that the person solicited for or offering the employment wishes to accomplish any of the following objectives: [¶] (A) Bring a legal action, conduct a defense, or assert a position in litigation,

or otherwise take steps, solely for the purpose of harassing or maliciously injuring any person or to prosecute or defend a case solely out of spite. [¶]
(B) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification or reversal of existing law.”

Code of Civil Procedure section 128.5, subdivision (a) provides in relevant part: “Every trial court may order a party, the party’s attorney, or both to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” The term “frivolous” is defined to mean “(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.” (Code Civ. Proc., § 128.5, subd. (b)(2).) The words “actions or tactics” in turn “include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint.” (Code Civ. Proc., § 128.5, subd. (b)(1).)

We think it self-evident that a completely successful lawsuit can never be characterized as a “bad faith action” under this statute. By definition and *875 the rules of logic, such a meritorious suit could never be “totally and completely without merit.” Nor can such an action be said to have been brought “for the sole purpose of harassing an opposing party.” (Code Civ. Proc., § 128.5, subd. (b)(2)(B).) Much of the Code of Civil Procedure can be read only as a legislative authorization to institute legal proceedings to enforce rights, redress injuries and to otherwise resolve disputes peacefully. Moreover, the right to seek legal redress in the courts springs from a constitutional source. (15) The right “to petition the Government for a redress of grievances” is one of the freedoms protected by the Bill of Rights. (U.S. Const., 1st Amend.) This constitutional right of petition extends to the courts, the third branch of government. “Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.” (*California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510 [30 L.Ed.2d 642, 646, 92 S.Ct. 609].) It therefore follows that the exercise of this constitutional right by the institution of a winning lawsuit brought for the primary purpose of enforcing one’s legal rights cannot be sanctioned no matter what subsidiary motives the litigator may harbor.

As we have explained, in the procedural posture of this case, plaintiff’s cause of action against Judge Gilbert under the

PRA has not been shown to be meritless and hence remains presumptively meritorious. Consequently, that portion of plaintiff’s complaint cannot be the subject of sanctions at this nascent stage of the proceedings. Thus, only the remaining portions of plaintiff’s complaint are subject to possible sanctions for frivolousness.

(16) The threshold question then is whether sanctions may be awarded under this section when some but not all of the causes of action alleged in a complaint are frivolous. We conclude that they may. First of all, nothing in the statute limits bad-faith “actions or tactics” to the entire complaint. Although that phrase includes “the filing and service of a complaint,” by the terms of the statute it is “not limited to” that inclusive pleading. Secondly, the statute permits the imposition of sanctions when motions or other tactics are frivolous or made for the purpose of causing unnecessary delay even though the underlying action may be entirely meritorious. It would be anomalous to permit sanctions in those circumstances and yet deny them when an utterly frivolous and bad-faith cause of action is joined with a meritorious one. Thirdly, sanctions have been imposed in analogous circumstances for a partially frivolous appeal. (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010 [205 Cal.Rptr. 532] [“Sanctions for an appeal which is partially frivolous are appropriate if the frivolous claims are *876 a significant and material part of the appeal.”].)¹⁶ By a parity of reasoning, sanctions should also be impossible for filing and serving or otherwise prosecuting a partially frivolous complaint.

¹⁶ In *Maple Properties*, the trial court dismissed the entire complaint and plaintiff appealed. On appeal, plaintiff contended that even if some of its claims were frivolous sanctions could not be levied for prosecuting its appeal because there were other viable causes of action. Rejecting that contention, the appellate court responded: “Appellant’s argument could be carried to an illogical extreme. If an appeal consists of 100 causes of action and 99 of said actions were frivolous, then the appeal could not be *totally* frivolous because one cause of action had merit. Therefore, we must look to the entire character of the appeal to determine whether the frivolous aspects are significant and material such as to warrant sanctions because the appeal was partially frivolous.” (*Maple Properties, supra*, 158 Cal.App.3d at p. 1009, fn. 12.)

Having crossed that threshold, we next turn to the merits of the sanctions award. “Section 128.5 permits the trial court to impose sanctions under certain narrowly defined conditions. (17) Sanctions are warranted only if the moving party meets its burden of proving that the opposing party's action or tactic was (1) totally and completely without merit, measured by the objective, 'reasonable attorney' standard, or (2) motivated solely by an intention to harass or cause unnecessary delay, measured by a subjective standard. Whether sanctions are warranted depends on an evaluation of all the circumstances surrounding the questioned action.” (*Weisman v. Bower* (1987) 193 Cal.App.3d 1231, 1236 [238 Cal.Rptr. 756], citations and fn. omitted.) Thus, “an action is deemed frivolous or in bad faith if it is prosecuted for improper motive (including harassment or delay) or if it is totally and completely devoid of merit. The standard of determining whether a lawsuit is frivolous is an objective one: a suit indisputably has no merit only 'where any reasonable attorney would agree that the action is totally and completely without merit.’” (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 12 [244 Cal.Rptr. 581], citations omitted.)

On the other hand, “once a party shows that his or her action was arguably meritorious (under the circumstances and in light of existing standards for the particular area of law within which the action was taken), the logical conclusion is that the party's motive was probably not *solely* to harass or cause unnecessary delay, and that sanctions are probably not warranted. Of course, the fact that an action is arguably meritorious is not conclusive proof that the action was not brought solely to harass or delay. However, the party moving for sanctions has the burden of proving that the arguably meritorious action was taken for improper motives. (See *Evid. Code*, § 500.)” (*Weisman v. Bower*, *supra*, 193 Cal.App.3d at p. 1237.)

We apply these standards first to the PRA cause of action against Judge McNelis and then to the assignment conspiracy. (18) The trial court found that the claims against Judge McNelis were both objectively without *877 any merit and were asserted solely for the purpose of harassing the judge. That finding is amply supported. In our view, any reasonable attorney would agree that the PRA cause of action against Judge McNelis was totally and completely without merit. As we have already explained, the PRA had no conceivable application to Judge McNelis. Notwithstanding plaintiff's bizarre and disingenuous construction of the straightforward statutory provisions, the PRA claim against Judge McNelis, measured by an objective standard, can only be described as

utterly meritless. By citing the Rules of Professional Conduct, the trial court also implicitly found that plaintiff knowingly brought a claim against Judge McNelis which was neither warranted under existing law nor subject to any good faith argument for revision. Thus, the award of sanctions was justified under both the objective and subjective standards of frivolousness.

The best plaintiff can do to overcome this finding of frivolousness is to claim here as he did below that it was somehow improper to base sanctions upon violations of the Rules of Professional Conduct. Those rules, when approved by the Supreme Court of California, are “binding upon all members of the State Bar, and the wilful breach of any of these rules shall be punishable as provided by law.” (*Rules Prof. Conduct*, rule 1-100.) Moreover, by their terms, “[n]othing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.” (*Ibid.*) Plaintiff neglects to explain why the knowing presentation of a claim in litigation which “is not warranted under existing law” and which cannot “be supported by good faith argument for an extension, modification or reversal of existing law” (*Rules Prof. Conduct*, rule 2-110 (B)) may not constitute evidence that the action was brought “for the sole purpose of harassing an opposing party.” (*Code Civ. Proc.*, § 128.5, subd. (b)(2).) After all, it is the *conduct* prohibited by the rule which may amount to a “frivolous” action or tactic, not the mere violation of the rule itself. If that conduct, evaluated in the context of all the circumstances surrounding the questioned action, shows that plaintiff launched this unjustified attack against Judge McNelis in order to harass and embarrass him and for the purpose of furthering plaintiff's own judicial candidacy then nothing prohibits the trial court from relying upon a violation of the Rules of Professional Conduct in assessing whether the statutory standard has been met. Thus, it does not matter that the plaintiff was appearing in pro se and not “as” an attorney in this action. Given the findings of the trial court, the imposition of sanctions for the institution of the frivolous PRA claims against Judge McNelis was both warranted and appropriate.

(19a) We examine next the so-called assignment conspiracy. Plaintiff claims his suit was not frivolous because it was a “very serious attempt to *878 interpret the Constitution of California.” To the contrary, we find the underlying premise of plaintiff's claim - that an assigned judge miraculously becomes an incumbent - to be patently untenable and without any redeeming legal merit. It is true that the question of the relationship of the two sections of article VI of the California

Constitution had not been judicially passed on and in that sense the question was open. (20) And it is also true that the mere fact that plaintiff's claim lacked precedential support is not the equivalent of a finding that the action was frivolous. (*Jones v. Jones* (1986) 179 Cal.App.3d 1011, 1018 [225 Cal.Rptr. 95].) But the converse is equally true. The mere absence of a judicial construction does not by itself make all challenges arguably meritorious. It may well be that the limitation in the United States Constitution that “[n]o person shall be a Senator who shall not have attained to the age of thirty years, ...” (U.S. Const., art. I, § 3, cl. 3) has not yet been adjudicated by an appellate court. But that fact would not convert a lawsuit seeking a declaration that a 22-year-old aspirant is eligible for election to the United States Senate into a “very serious attempt to interpret the Constitution of the United States.” (19b) The Chief Justice of California is given explicit constitutional authority to assign a lower court judge to a higher court without the consent of the assigned judge. The short of this controversy is that Judge McNelis was such a judge and hence was properly subject to assignment to the municipal and superior courts of Butte County. No reasonable attorney would have thought otherwise or, to make matters worse, brought an action in his own name to prohibit this legal and long-practiced assignment policy.

Not only was this portion of plaintiff's lawsuit frivolous under the objective standard, it was also motivated, the trial court found, solely by an intention to harass both Judge Gilbert and Judge McNelis. The lower court inferred an evil purpose in filing this suit from the fact that plaintiff singled out Judge Gilbert as a defendant when he did nothing other than to follow a practice long accepted throughout the state. This undisputed fact, when added to the “coincidence” this suit was filed on the same day that plaintiff filed his candidacy for Judge Gilbert's superior court seat in a judicial election, can only give an indelible taint of enmity to plaintiff's assignment conspiracy.

(21) The award of sanctions for a frivolous action under [Code of Civil Procedure section 128.5](#) is within the sound discretion of the trial court. (*Winick Corp. v. County Sanitation Dist. No. 2* (1986) 185 Cal.App.3d 1170, 1176 [230 Cal.Rptr. 289].) (22) Once imposed, “[t]he test on appeal is whether the trial court has abused the broad discretion to justify our interference with a sanction award.” (*Ibid.*) In reviewing that exercise of discretion we are informed by “several policy guidelines: (a) an action that is simply without merit is not by itself sufficient to incur sanctions; (b) an *879 action involving issues that are arguably correct, but extremely

unlikely to prevail, should not incur sanctions; and (c) sanctions should be used sparingly in the clearest of cases to deter the most egregious conduct.” (*Id.*, at p. 1177, citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651 [183 Cal.Rptr. 508, 646 P.2d 179].) (19c) But even given these constraints on the exercise of discretion, the award of sanctions for the palpably frivolous assignment conspiracy was amply supported by the finding of the trial court. Plaintiff's hollow claim of interest in “law reform” with respect to the assignment policy - with no showing how the “reform” would be an improvement - will not dissipate it. Plaintiff also attempts to deflect the fusillade of findings of frivolousness by claiming two opinions of the California Attorney General gave support to his interpretation of the Constitution. However, [Acceptance of Public Teaching Position by Former Supreme Court Justice](#), 67 Ops.Cal.Atty.Gen. 149 (1984) and [California Constitution, article VI, section 17](#), 66 Ops.Cal.Atty.Gen. 440 (1983) are wholly inapposite, since they deal with restrictions on *incumbent* judges of courts of record and whether they continue to apply to a *retired* incumbent throughout the term of office or merely during the tenure in office.

Given the trial court's findings and the dearth of effort by plaintiff to show otherwise, we conclude that a sufficient basis for the award of sanctions under [Code of Civil Procedure section 128.5](#) has been established for all parts of plaintiff's complaint except the PRA cause of action against Judge Gilbert. With that exception, we have no difficulty affirming the lower court's finding that this action was both totally and completely without merit *and* was filed for the purpose of harassment.

This leaves plaintiff's attacks on the manner in which fees were assessed by the lower court.¹⁷ He claims Judge Gilbert's counsel filed his declarations beyond the time limit set by the order to show cause and thus could not provide the basis for the fees. As the time limits of the order to show cause were hardly jurisdictional, we can safely assume the lower court impliedly found good cause for the late filing and received them into evidence. He next claims the materials supplied by Judge McNelis and Judge Gilbert were, respectively, untimely and unverified in violation of former [Code of Civil Procedure section 1033](#). (Stats. 1982, ch. 812, § 2, p. 3102.) That code section applied to *bills of costs*, and has no application to materials submitted in support of sanctions. In characteristic form, plaintiff then renews his sweeping statements made below that these lengthy memoranda demonstrating the attorney labors expended in this action are “unreasonable”

and *880 include costs not properly chargeable to this action. However, as he has failed to specify even one instance of improper charging, his contention will not be sustained (particularly in light of the specific separation of such costs by counsel for Judge McNelis). Judge McNelis presented declarations to the lower court of over \$11,000 in attorney's fees incurred in this action. Judge Gilbert submitted evidence of attorney's fees in excess of \$19,000 incurred with respect to both this suit and the related federal action. There was no abuse of discretion in setting the amount of fees actually awarded based upon the showing made by the defendant jurists. (23) However, to the extent that the award of sanctions in favor of Judge Gilbert included an amount for defending the PRA cause of action, the trial court erred in including such an amount for a cause of action not yet found to be frivolous. Because we cannot determine what amount, if any, was awarded for defense of that presumptively meritorious cause of action, we must vacate that award and remand for a redetermination of the amount of sanctions in favor of Judge Gilbert.

17 In the course of seven pages of plaintiff's brief on the propriety of sanctions no less than twelve contentions are summarily advanced. We disregarded most of them because no authority or argument has been offered. (*People v. Barry* (1987) 194 Cal.App.3d 158, 178, fn. 17 [239 Cal.Rptr. 349].)

VI Sanctions on Appeal

Judge McNelis requested sanctions for a frivolous appeal in his respondent's brief. Plaintiff took the opportunity to devote a scant two paragraphs in his reply brief to the question, claiming the appeal was not frivolous because the lower court had erred, and even if the lower court were upheld, his issues were arguable under *In re Marriage of Flaherty*, *supra*, 31 Cal.3d 637. We issued an order to show cause returnable at the

time of the oral argument scheduled for this matter, in which we invited materials relevant to our determination whether the appeal should be found frivolous and, if so, the proper amount of attorney's fees payable to Judge McNelis.

(24) We conclude that sanctions are appropriate since the appeal of the dismissal of the causes of action against Judge McNelis, like the complaint against him, is frivolous. First, for reasons parallel to those found by the trial court, we find that the appeal from the judgment dismissing that part of his action was prosecuted for an improper motive of harassing Judge McNelis. Second, we further find that the appeal of that part of the dismissal indisputably has no merit and that any reasonable attorney would agree this part of the appeal is totally and completely without merit. We have further concluded that, under the circumstances of this case, an award of \$2,000 is appropriate for pursuing that portion of the appeal relating to the dismissal of the causes of action against Judge McNelis. *881

Disposition

That portion of the judgment dismissing the PRA cause of action against Judge Gilbert is reversed. In all other respects, the judgment is affirmed. The order imposing sanctions against plaintiff in favor of Judge McNelis is affirmed. The award of sanctions in the sum of \$9,675.15 in favor of Judge Gilbert is reversed and the cause remanded to the trial court with directions to redetermine the amount of those sanctions without regard to the PRA cause of action. Plaintiff is directed to pay Judge McNelis an additional penalty of \$2,000 for pursuing a frivolous appeal.

Carr, Acting P. J., and Marler, J., concurred.

Appellant's petition for review by the Supreme Court was denied April 25, 1989. *882

LEGAL AUTHORITY CA-142

**ARBITRATION UNDER
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES**

Between

DETROIT INTERNATIONAL BRIDGE COMPANY

(on its own behalf and on behalf of its enterprise The Canadian Transit Company)

Claimant

and

THE GOVERNMENT OF CANADA

Respondent

(and together with the Claimant, the “*disputing parties*”)

PCA Case No. 2012-25

AWARD ON COSTS

Arbitral Tribunal

Mr. Yves Derains (Chairman)

The Hon. Michael Chertoff

Mr. Vaughan Lowe, Q.C

Table of Contents

I.	THE PARTIES.....	3
II.	THE ARBITRAL TRIBUNAL.....	5
III.	PROCEDURAL BACKGROUND.....	5
I.	SUMMARY OF THE DISPUTING PARTIES' POSITIONS.....	7
A.	Respondent's Position.....	7
B.	Claimant's Position.....	9
II.	THE TRIBUNAL'S DECISION.....	12
A.	Preliminary remarks.....	12
B.	The legal costs.....	13
C.	The costs of the arbitration.....	14
III.	HOLDING.....	16

I. THE PARTIES

A. CLAIMANT

1. The Claimant, Detroit International Bridge (“DIBC or Claimant”)¹, is a United States company, duly incorporated and existing under the laws of the State of Michigan. DIBC’s principal place of business is 12225 Stephens Road, Warren, Michigan 48089, United States of America.
2. DIBC owns and controls the stock of The Canadian Transit Company (“CTC”), a Canadian company established by a Special Act of Parliament. CTC’s principal place of business is at 4285 Industrial Drive, Windsor, Ontario, N9C 3R9, Canada.
3. DIBC and CTC, respectively, own the United States and Canadian sides of the Ambassador Bridge. They operate the Ambassador Bridge in cooperation with each other pursuant to a joint cooperation agreement.
4. This arbitration is brought by DIBC on its own behalf and on behalf of CTC.²
5. Claimant is represented in this arbitration by:

Mr. Jonathan D. Schiller
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
7th Floor
New York, NY 10022
United States of America
Tel: +1 212 446 2300
Fax: +1 212 446 2350
E-mail: jschiller@bsfllp.com

and

Mr. William A. Isaacson
Mr. Hamish P.M. Hume

¹ Claimant is the successor in interest to the entities that received the statutory rights to construct and own the Ambassador Bridge. For the sake of simplicity, this award refers to the Claimant and its predecessors-in-interest collectively as “Claimant” or “DIBC”.

² DIBC’s Statement of Claim, ¶ 1.

Ms. Heather King
Ms. Amy L. Neuhardt
Mr. Ross P. McSweeney
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
8th Floor
Washington, DC 20015
United States of America
Tel: +1 202 237 2727
Fax: + 202 137 6131
E-mail: wisaacson@bsfllp.com
hhume@bsfllp.com
hking@bsfllp.com
aneuhardt@bsfllp.com
rmcsweeney@bsfllp.com

B. RESPONDENT

6. The Respondent is the Government of Canada (hereinafter “Canada”, “Respondent” or “disputing Party”), which is a State Party to the North American Free Trade Agreement (“NAFTA”).
7. Respondent is represented in this arbitration by:

Ms. Sylvie Tabet
Mr. Mark A. Luz
Mr. Adam Douglas
Mr. Reuben East
Ms. Heather Squires
Trade Law Bureau (JLT)
Foreign Affairs and International Trade Canada
Government of Canada
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada
E-mail: mark.luz@international.gc.ca
sylvie.tabet@international.gc.ca
adam.douglas@international.gc.ca
reuben.east@international.gc.ca
heather.squires@international.gc.ca

8. In accordance with the practice in NAFTA Article 1139, the (capitalized) terms “Party” and “Parties” refer to the States Parties to NAFTA. The term “disputing parties” refers to the disputing investor (i.e., the Claimant) and the disputing Party (i.e., the Respondent) in this case.

II. THE ARBITRAL TRIBUNAL

9. Co-Arbitrator appointed by Claimant:

The Hon. Michael Chertoff
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
U.S.A.
Tel.: 00 1 202 662 5060
E-mail: mchertoff@cov.com

10. Co-Arbitrator appointed by Respondent:

Mr. Vaughan Lowe, Q.C.
Essex Court Chambers
24 Lincoln’s Inn Fields
London WC2A 3EG
United Kingdom
Tel.: 00 44 20 7813 8000
E-mail: vlowe@essexcourt.net

11. Presiding Arbitrator jointly appointed by the disputing parties:

Mr. Yves Derains
Derains & Gharavi
25, rue Balzac
75008 – Paris – France
Tel.: 00 33 (0) 1 40 555 972
E-mail: yderains@derainsgharavi.com

III. PROCEDURAL BACKGROUND

12. On April 2, 2015, the Tribunal rendered the Award on Jurisdiction in this arbitration, whereby it decided:

“(a) That is does not have jurisdiction to hear Claimant’s claims in this case, and

(b) To defer the decision regarding the allocation of the costs of this arbitration to a future award.”³

13. On April 13, 2015, the Tribunal notified the Award on Jurisdiction to the disputing parties.
14. By e-mail of April 15, 2015, the Tribunal invited the disputing parties “[...] *to try to agree on a timetable for submitting their respective statement of costs and rebuttals and, to the extent possible, to present a joint timetable to the Tribunal by April 22, 2015. If the disputing parties are not able to agree on a joint timetable, each disputing party shall submit its proposed timetable to the Tribunal by the same date.*”
15. By e-mail of April 21, 2015, the disputing parties informed the Tribunal of their agreement to *“make simultaneous submissions regarding costs on May 20, 2015 at 5pm EST.”*
16. By e-mail of May 19, 2015, the disputing parties’ informed the Tribunal that:

“[...] The parties have conferred further, however, and have agreed that, because Canada’s May 20 submission will be the first time DIBC is able to view a schedule of the costs of arbitration sought by Canada, if agreeable to the Tribunal, DIBC may submit a reply brief on May 27, 2015 at 5pm that will be limited to a discussion of Canada’s schedule of costs. Further, and again if agreeable to the Tribunal, Canada then may submit a reply brief on June 3, 2015 at 5pm that will be limited to discussion of DIBC’s response to Canada’s schedule.”
17. On May 20, 2015, the disputing parties’ submitted their respective Submissions on Costs.
18. On May 27, 2015, DIBC submitted its Reply Submission on Costs.
19. On June 3, 2015, Canada submitted its Reply Submission on Costs.
20. On July 29, 2015, the Tribunal received the Final Statement of Account from the Permanent Court of Arbitration (“PCA”).

³ Award on Jurisdiction of April 2, 2015, ¶ 340.

I. SUMMARY OF THE DISPUTING PARTIES' POSITIONS

A. RESPONDENT'S POSITION

(1) Summary of Canada's position on the allocation of costs

21. Pursuant to NAFTA Article 1135 and Article 42 of the UNCITRAL Rules, Respondent requests that the Tribunal award Canada all of its costs⁴.
22. The costs incurred by Canada, pursuant to Article 40(2)(e) of the UNCITRAL Rules, including legal fees and disbursements, are set forth below:

Summary of Costs (\$ CDN)	
Disbursements ⁵	\$ 437,458.58
Legal Representation ⁶	\$ 3,015,557.37
TOTAL	\$ 3,453,015.95

23. Canada submits that the 2010 UNCITRAL Rules, and more specifically its Article 42, contain a presumption that the unsuccessful party will bear both the costs of arbitral and institutional fees and reasonable legal representation costs.⁷ It argues that cotemporary practice in international investment treaty arbitration favors a “loser pays” or “cost follow the event” approach.⁸
24. According to Canada this is particularly true in disputes governed by the 2010 UNCITRAL Arbitration Rules where Article 42 was specifically amended from Article 40 of the 1976 UNCITRAL Rules to include legal fees in the costs of arbitration rather than leaving legal fees to the discretion of the Tribunal.⁹
25. Canada relies on *S.D. Myers* and *International Thunderbird* cases, where both tribunals noted that the UNCITRAL Rules emphasize “success” and establish a presumption that the costs of arbitration should be borne by the unsuccessful party.¹⁰

⁴ Canada's Rejoinder on Costs, June 3, 2015, ¶ 23.

⁵ Canada's Submission on Costs, May 20, 2015, ¶ 5 and its Annex II, p. 17.

⁶ Canada's Submission on Costs, May 20, 2015, ¶ 5 and its Annex I, p. 16.

⁷ Canada's Submission on Costs, May 20, 2015, ¶ 7.

⁸ Canada's Submission on Costs, May 20, 2015, ¶ 8 and footnote no. 10.

⁹ Canada's Submission on Costs, May 20, 2015, ¶ 8 and footnote no. 10.

¹⁰ Canada's Submission on Costs, May 20, 2015, ¶ 10.

26. Canada submits that the Tribunal should look at all the circumstances to decide which party is the “successful” one. As Canada discussed in its memorials in this arbitration, the Tribunal was without jurisdiction due to Claimant’s failure to comply with Article 1121 of the NAFTA. The Tribunal ultimately decided for Canada in this respect based on the overlap of the First Notice of Arbitration in the NAFTA proceedings and the first claim in the Washington Litigation alone. In doing so, the Tribunal found it unnecessary to decide any further arguments put forward by the parties with respect to jurisdiction. Canada concludes that it is the only successful party in this arbitration as every point that was decided by the Tribunal was in Canada’s favour – Claimant did not win on any argument it put forward with respect to those issues.¹¹
27. Moreover, Canada submits that its costs in this arbitration are reasonable in light of the length of the dispute (2010-2015), the seriousness of the allegations, the amount of damages claimed and the amount of resources required to prepare for and defend the arbitration. Combined, the Claimant’s first Notice of Intent (“NOI”) and second NOI alleged USD 5 billion in damages against Canada, which by far is the highest claim in the history of NAFTA arbitrations.¹²
28. DIBC complains that Canada’s lawyers spent more time on this NAFTA arbitration than DIBC’s lawyers. However, it is inappropriate and misleading to compare Canada’s legal costs to that of DIBC’s counsel. Disparity between the legal costs of the opposing parties does not imply that the higher costs incurred by one party are not reasonable. This is particularly true here given that DIBC submitted duplicative pleadings in this NAFTA arbitration and the Washington Litigation and relied on the same documents in both proceedings, thereby reducing the amount of time spent on this NAFTA arbitration. It was DIBC that benefited from what it has described as “synergies between the various proceedings”, not Canada.¹³
29. Canada submits that no costs related to domestic proceedings were included in Canada’s Submission on Costs.¹⁴

¹¹ Canada’s Submission on Costs, May 20, 2015, ¶¶ 13-14.

¹² Canada’s Submission on Costs, May 20, 2015, ¶ 19.

¹³ Canada’s Rejoinder on Costs, June 3, 2015, ¶ 4.

¹⁴ Canada’s Rejoinder on Costs, June 3, 2015, ¶ 15.

(2) Canada's Request

30. Pursuant to NAFTA Article 1135 and Article 42 of the UNCITRAL Rules, DIBC must bear the cost of Canada's legal representation and arbitration costs. In light of the Claimant's loss on jurisdiction in this case, and on the basis of Canada's longest-standing Article 1121 objection with respect to the Washington Litigation, the Tribunal should award Canada all of its costs. Such an award is directly in line with the purpose of Article 1121 and is the only way in which Canada can be fully indemnified for having to defend itself with respect to the measures alleged to breach the NAFTA in multiple forms.¹⁵

B. CLAIMANT'S POSITION

(1) Summary of DIBC's position on the allocation of costs

31. DIBC submits that the typical course of practice with respect to the award of costs in international investment treaty arbitration is for the tribunal to direct that the parties evenly split the costs of arbitration other than legal fees and for each party to bear its own legal costs. Only a small minority of tribunals in such proceedings require an unsuccessful investor claimant to pay the arbitration costs and costs of representation of the government respondent. The exceptions to this prevailing practice generally include cases where the tribunal has determined that the claim was manifestly without merit or that its prosecution by the claimant or its counsel fell below common accepted professional standards.¹⁶
32. The purpose of this policy against awarding costs in favour of a successful respondent is to avoid placing additional constraints on the access to justice for investors, who are frequently at a pronounced resource disadvantage compared to respondents.¹⁷
33. According to DIBC, Tribunals order parties to bear their own costs in arbitrations in close to eighty percent of cases. DIBC submits that Canada itself has noted the same when it was unsuccessful in investment arbitrations.¹⁸

¹⁵ Canada's Submission on Costs, May 20, 2015, ¶ 29.

¹⁶ DIBC's Submission on Costs, May 20, 2015, ¶ 1.

¹⁷ DIBC's Submission on Costs, May 20, 2015, ¶ 31.

¹⁸ DIBC's Submission on Costs, May 20, 2015, ¶ 2.

34. This is particularly appropriate here, where, although Canada seeks legal fees and expenses with respect to the entirety of the arbitration proceedings, this Tribunal decided only a single issue against DIBC in its Award – i.e., the question of whether DIBC properly issued a waiver under Article 1121 of the NAFTA. This is the only issue with respect to which DIBC can be said to have been “unsuccessful” under the meaning of Article 42 of the UNCITRAL Rules, and Canada has no right to seek recovery of costs of arbitration or the legal fees relating to any other aspect of the arbitration.¹⁹
35. DIBC relies, *inter alia*, on the *Glamis Gold, Ltd. v. United States of America*²⁰ case. In this case, despite the fact that the claimant “failed with respect to both of its claims,” the tribunal found that the “Claimant raised difficult and complicated claims based at least one area of unsettled law, and both Parties well argued their positions with considerable legal talent and respect for one another, the process and the Tribunal”. The tribunal therefore ordered that “[e]ach Party shall bear its own legal costs of representation.”²¹
36. Furthermore, DIBC submits that, while this arbitration did not proceed to the merits phase, DIBC’s argument that the Tribunal did have jurisdiction to hear DIBC’s claim was complex and made in good faith. DIBC’s argument that it made a proper waiver in compliance with NAFTA Article 1121 was sufficiently meritorious that Judge Chertoff dissented from the panel’s determination with respect to waiver.²² DIBC concludes that whatever expenses the parties have incurred in this arbitration have resulted from the DIBC’s presentment of complex and novel claims, and not from any dilatory or vexatious practices by DIBC.²³
37. DIBC also submits that Canada’s request for reimbursement of 14,943.20 hours in fees for attorneys and paralegals is incommensurate with the nature of this arbitration, which had only two, relatively short in-person hearings, and was dismissed at the jurisdictional phase.²⁴

¹⁹ DIBC’s Submission on Costs, May 20, 2015, ¶ 5.

²⁰ UNCITRAL, Award of June 8, 2009, Exhibit CLA-101.

²¹ DIBC’s Submission on Costs, May 20, 2015, ¶ 21.

²² DIBC’s Submission on Costs, May 20, 2015, ¶ 33.

²³ DIBC’s Submission on Costs, May 20, 2015, ¶ 35.

²⁴ DIBC’s Reply Submission on Costs, May 27, 2015, ¶ 4.

38. The exorbitant nature of Canada's claim for legal fees and expenses here is also demonstrated by the stark contrast between the nearly 15,000 hours of attorney and paralegal time Canada seeks recovery for and the approximately 4,100 attorney and paralegal hours DIBC devoted to the same matter (3,616.8 hours billed by Boies, Schiller & Flexner LLP, and approximately 500 hours billed by prior counsel.). That is, Canada claims to have devoted more than three times the amount of attorney and paralegal hours to this matter than did DIBC. Although there are different approaches to arbitration and litigation generally, Canada's claimed legal fees are not reasonable by any measure. They equate to a lawyer devoting five 3,000 hour billable years to a matter that ended in the jurisdictional phase.²⁵
39. DIBC submits that, although Canada provide little information regarding the legal fees and expenses for which it seeks reimbursement, certain of the information provided by Canada suggests that its legal fees do not solely relate to this proceedings.²⁶
40. Finally, with respect to Canada's preparation for its defense on the merits against DIBC's claims, Canada specifically asked this Tribunal to set a hearing with respect to jurisdiction before reaching the merits, presumably in an effort to reduce expenses and effort with respect to the merits. To the extent that Canada nonetheless chose to devote thousands of hours of attorney and paralegal time to the development of its merits strategy, that approach was not reasonable under the circumstances. Moreover, awarding such fees and expenses to Canada at this stage would be particularly unjust in the event that DIBC institutes a new arbitration with respect to this dispute and is successful on the merits there.²⁷

(2) DIBC's Request

41. DIBC requests that the Tribunal issue an order directing that each party bear its own costs of representation, and that all other costs of arbitration be divided evenly between the parties. Alternatively, the most that the Tribunal should award against DIBC are costs associated with the

²⁵ DIBC's Reply Submission on Costs, May 2, 2015, ¶ 7.

²⁶ DIBC's Reply Submission on Costs, May 2, 2015, ¶ 9.

²⁷ DIBC's Reply Submission on Costs, May 2, 2015, ¶ 12.

Article 1121 waiver issue and not any costs associated with the time limitations argument, the merits, or any other aspect of the arbitration with respect to which the Tribunal issued no ruling.²⁸

II. THE TRIBUNAL'S DECISION

A. PRELIMINARY REMARKS

42. By way of reminder, on April 2, 2015, the Tribunal rendered the Award on Jurisdiction in this arbitration, whereby it decided:

“(a) That is does not have jurisdiction to hear Claimant’s claims in this case, and

*(b) To defer the decision regarding the allocation of the costs of this arbitration to a future award.”*²⁹

43. In view of the Tribunal’s decision above, it has now to decide on the allocation of the costs of this arbitration between the disputing parties.

44. In a nutshell, while DIBC requests the Tribunal to order that each party bear its own costs of representation, and that all other costs of arbitration be divided evenly between the parties, Canada submits that DIBC must bear all the costs of Canada’s legal representation and arbitration costs.

45. The Tribunal notes that NAFTA Chapter Eleven contains no provision on the allocation of costs. Its Article 1135 only provides that “[a] *Tribunal may [...] award costs in accordance with the applicable arbitration rules.*” Therefore, the Tribunal’s decision in the matter of costs are to be found in the 2010 UNCITRAL Arbitration Rules (hereinafter “UNCITRAL Arbitration Rules”),³⁰ more specifically at Articles 40 to 42 thereof.

46. Articles 40 of the UNCITRAL Arbitration Rules provides the definition of “costs of arbitration” as follows:

²⁸ DIBC’s Submission on Costs, May 20, 2015, p. 22; DIBC’s Reply Submission on Costs, May 27, 2015, p. 7.

²⁹ Award on Jurisdiction of April 2, 2015, ¶ 340.

³⁰ Pursuant to item 12 of Procedural Order No. 1, “[t]he applicable arbitration rules are the 2010 UNCITRAL Rules, pursuant to the Parties’ agreement, except to the extent that they are modified by Section B of Chapter 11 as per NAFTA Article 1120(2)”.

Article 40 of the UNCITRAL Arbitration Rules:

1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*

2. *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 41;*

(b) *The reasonable travel and other expenses incurred by the arbitrators;*

(c) *The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*

(d) *The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*

(e) *The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*

(f) *Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.* (Emphasis added)

47. The rule governing the power of the arbitrators to decide on costs is set forth in Article 42 of the UNCITRAL Rules, which provides that:

Article 42 of the UNCITRAL Arbitration Rules

1. *The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. 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. *The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.* (Emphasis added)

48. According to such provision, the costs of the arbitration shall in principle be borne by the unsuccessful party, unless the Tribunal finds it reasonable to allocate such costs in a different manner. In summary, an arbitral tribunal has near total discretion to allocate the costs of arbitration pursuant to Article 42(1) of the UNCITRAL Arbitration Rules.

B. THE LEGAL COSTS

49. In the case at stake the Tribunal concluded that it has no jurisdiction over any of Claimant's claims. Moreover, Claimant was already pursuing its claims against Respondent before State

Courts in the United States and Canada and it decided to try another avenue without abandoning the others. By doing so Claimant chose to take a risk and it shall bear the costs of the strategy it chose to follow.

50. The Tribunal sees no reason for deviating from the “*cost follow the event*” principle established in Article 42 of the UNCITRAL Rules. However, the Tribunal notes that it did not issue any ruling on Claimant’s claims associated with the time limitations argument and the merits.
51. In view of the above, the Tribunal finds that Claimant was partially unsuccessful in this arbitration and should bear 2/3 of Canada’s reasonable legal costs (as defined in Article 40.2(e) of the UNCITRAL Arbitration Rules) and all the costs of the arbitration (as defined in Article 40.2(a),(b),(c),(d) and (f) of the UNCITRAL Arbitration Rules).
52. Article 40.2(e) of the UNCITRAL Rules provides that the costs of the arbitration shall include “*the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable*”. After analyzing the costs submitted by Canada, i.e. CAD 3,015,557.37 (legal costs) + CAD 437,458.58 (disbursements) = CAD 3,453,015.95, the Tribunal considers that Canada’s legal costs are not reasonable.
53. Although Canada’s legal costs represent an average fee of CAD 200 per hour (or approx. USD 163), which seems reasonable, the time spent on the case, i.e. approx. 1,500 hours per year, does not seem so. The number of people working on the case seems exaggerated. For instance, in the year 2011-2012, when the Notice of Arbitration was submitted and no submission was made by Canada, Canada had 8 lawyers working on the case (see p. 15 of Canada’s Submission on Costs). In the circumstances, the Tribunal decides to reduce Canada’s legal costs by 1/3 (which totals CAD 2,010,371.58), so that the 2/3 of Canada’s reasonable legal costs to be reimbursed by Claimant amount to CAD 1,340,247.72. This amount, added to Canada’s disbursements (CAD 437,458.58) totals CAD 1,777,706.30.

C. THE COSTS OF THE ARBITRATION

54. With respect to the costs of arbitration, as defined in Articles 40.2(a)(b)(c)(d) and (f) of the UNCITRAL Arbitration Rules, the Parties deposited a total of USD 320,000 (USD 160,000 by each of the disputing parties) with the PCA to cover the fees and expenses of the arbitral tribunal.

55. The fees and expenses of the Arbitral Tribunal total USD 267,681.79, and are broken down in the table below:

Arbitrator	Fees	Expenses
Hon. Judge Chertoff	USD 20,250.00	USD 831.02
Prof. Vaughan Lowe	USD 57,656.25	USD 24,209.46
Mr. Yves Derains	USD 109,218.75	USD 17,916.06
All other tribunal expenses, including (i) bank costs, (ii) courier expenses, (iii) court reporter, (iv) currency translation variances, (v) Derains & Gharavi VAT (paid for Resp.), (vi) hearing facilities and (vii) printing and supplies.		USD 37,600,25
Total		USD 267,681.79

56. Pursuant to item 1 of Procedural Order No. 1, the Secretariat of the Permanent Court of Arbitration (“PCA”) was designated to act as Registry in this arbitration. The PCA’s fees for registry services amount to USD 3,206.88.

57. Pursuant to item 2 of Procedural Order No. 1, Ms. Ana Paula Montans was designated as Assistant to the Presiding Arbitrator. Ms. Montans’ fees and expenses amount to USD 29,783.33.

58. Based on the above figures, the arbitration costs, comprising the items covered in Article 40.2(a)(b)(c)(d) and (f) of the UNCITRAL Arbitration Rules, total USD 300,672.00.

59. In light of the Tribunal’s decision in paragraph 51 above, Claimant shall bear all the costs of the arbitration in the amount of USD 300,672.00 and shall reimburse Respondent the amount paid to the PCA as deposit in the amount of USD 150,336.00 (i.e. USD 160,000.00 deposited by Respondent - USD 9,664.00 which shall be reimbursed to Respondent by the PCA as indicated below).

60. Considering that the remaining deposit with the PCA totals USD 19,328.00, the PCA shall reimburse the amount of USD 9,664.00 to each side in accordance with Article 43(5) of the UNCITRAL Arbitration Rules.

III. HOLDING

61. In view of the foregoing, the Tribunal decides that:

- (a) Claimant shall bear 2/3 of Canada's reasonable legal costs and expenses in this arbitration and shall consequently reimburse Respondent the total of CAD 1,777,706.30;
- (b) Claimant shall bear all the costs of the proceedings, and shall consequently reimburse Canada the deposit it made to the PCA in the amount of USD 150,336.00;
- (c) The PCA shall reimburse USD 9,664.00 to each Party in respect to the unexpended balance of the deposit.

Date: 17 August 2015

Place of the arbitration: Washington DC, USA.

ARBITRAL TRIBUNAL



The Hon. Michael Chertoff
Co-arbitrator



Mr. Vaughan Lowe, Q.C.
Co-arbitrator



Mr. Yves Derains
Chairman

LEGAL AUTHORITY CA-143

Ad Hoc NAFTA Arbitration under UNCITRAL Rules

CHEMTURA CORPORATION
(formerly Crompton Corporation)

CLAIMANT

v.

GOVERNMENT OF CANADA

RESPONDENT

AWARD

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, Chairperson
The Honorable Charles N. Brower, Arbitrator
Prof. James R. Crawford, Arbitrator

Secretary to the Tribunal:

Dr. Jorge E. Viñuales

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS	4
I. SUMMARY OF THE MAIN FACTS	7
A. The Parties	7
a. The Claimant.....	7
b. The Respondent	7
B. Background facts	7
a. Background.....	8
b. The origin of the present dispute	9
c. The Withdrawal Agreement.....	10
d. The Special Review	11
e. The termination of the registrations.....	13
f. The Board of Review.....	13
g. The Re-evaluation process	14
h. The situation in the United States.....	16
II. PROCEDURAL HISTORY	17
A. Initial phase	17
B. Written proceedings	19
C. The hearings and final procedural steps	22
III. POSITION OF THE PARTIES AND REQUESTS FOR RELIEF	24
A. Claimant	24
B. Respondent	25
IV. ANALYSIS	25
A. Preliminary issues	25
a. Jurisdiction	25
b. Law governing the procedure.....	27
c. Law governing the merits	27

d. Relevance of prior decisions	28
B. Minimum standard of treatment.....	28
a. Applicable standard.....	28
b. The Review of Lindane	32
c. Prohibition on planting treated seed after 1 July 2001	49
d. Cancellation of Chemtura's lindane registrations on 11 and 21 February 2002	54
e. Treatment of Gaucho CS FL	57
C. Most favoured nation clause and fair and equitable treatment.....	68
D. Expropriation.....	71
a. Applicable standard.....	71
b. Cancellation of Chemtura's lindane registrations	75
E. Costs.....	79
V. DECISION.....	80

TABLE OF ABBREVIATIONS

Ann.	Annex
Arbitration Rules	UNCITRAL Arbitration Rules
ATIA	Access to Information Act
CCC	Canola Council of Canada
CCGA	Canadian Canola Growers Association
C-Mem.	Respondent's Counter-Memorial of 20 October 2008
CO	Confidentiality Order of 21 January 2008
EPA	Environmental Protection Agency (of the United States of America)
Exh. B-	Exhibit submitted with Alfred Ingulli's witness statement
Exh. [C.]	Claimant's Exhibit
Exh. CC-	Exhibit submitted with Cheryl Chaffey's witness statement
Exh. CF-	Exhibit submitted with Claire Franklin's witness statement
Exh. JB-	Exhibit submitted with Joanne Buth's witness statement
Exh. JW-	Exhibit submitted with John Worgan's witness statement
Exh. NCI-	Exhibit submitted with Brent Kaczmarek's expert report
Exh. [R.]	Respondent's Exhibit
Exh. WS-	Exhibit submitted with Wendy Sexsmith's witness statement
Exh. TZ-	Exhibit submitted with Tony Zatylny's witness statement
FAO	Food and Agriculture Organization
FET	Fair and equitable treatment
FFDCA	Federal Food, Drug and Cosmetic Act
FIFRA	Federal Insecticide, Fungicide and Rodenticide Act
FTC Note	Note of Interpretation issued by the NAFTA Free Trade Commission on

31 July 2001

LECG report	LECG Damage Assessment report of 2 June 2008
Mem.	Claimant's Memorial of 2 June 2006
Mem-R.	Claimant's Reply Memorial of 15 May 2009
MFN	Most favoured nation
Minister	The Respondent's Minister of Health
NAFTA	North American Free Trade Agreement
NOA	Notice of Arbitration of 10 February 2005
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration (The Hague, Netherlands)
PCPA	Pest Control Products Act
PHB Cl.	Claimant's Post-Hearing Brief of 23 October 2009
PHB Resp.	Respondent's Post-Hearing Brief of 23 October 2009
PMRA	Pest Management Regulatory Agency (of Canada)
PO 1	Procedural Order No.1 of 21 January 2008
PO 3	Procedural Order No. 3 of 8 August 2008
PO 4	Procedural Order No. 4 of 18 March 2009
PO 5	Procedural Order No. 5 of 30 July 2009
PO 6	Procedural Order No. 6 of 29 September 2009
RED	Re-registration Eligibility Decision issued on 31 July 2002
Regulations	Pest Control Products Regulations
Rej.	Respondent's Rejoinder of 10 July 2009
Review Board	Lindane Board of Review
ROU	Record of Understanding between Canada and the United States regarding areas of agricultural trade of 2 December 1998
Special Review	Special Review of Pest Control Products Containing Lindane of 15 March 1999

Tr.,[date], [page:line(s)]	Transcript of the hearing on the merits held on 2-8 September 2009, or transcript of the closing hearing held on 17 December 2009
Tribunal	Arbitral Tribunal in the present arbitration
UNCITRAL	United Nations Commission on International Trade Law
WA	Withdrawal Agreement
WHO	World Health Organization

I. SUMMARY OF THE MAIN FACTS

A. THE PARTIES

a. The Claimant

1. The Claimant, Chemtura Corporation, is a corporation established under the laws of the State of Delaware with its head office at Middlebury, Connecticut.
2. The Claimant is represented in this arbitration by
 - Gregory O. Somers, Benjamin P. Bedard, Alison FitzGerald and Renée Thériault; Ogilvy Renault LLP; 45 O'Connor Street; Suite 1500; Ottawa, Ontario K1P 1A4; Canada.

b. The Respondent

3. The Respondent is the Government of Canada.
4. The Respondent is represented in this arbitration by
 - Meg Kinnear (until 8 December 2008). Christophe Douaire de Bondy, Ms. Sylvie Tabet, Mr. Stephen Kurelek, Ms. Yasmin Shaker, Ms. Christina Beharry, Ms. Carolyn Elliott-Magwood, Mr. Mark Luz, Ms. Celine Levesque; Trade Law Bureau (JLT); Government of Canada; Lester B. Pearson Building, Flr. C7; 125 Sussex Drive; Ottawa ON K1A 0G2; Canada.

B. BACKGROUND FACTS

5. The following summary is meant to give a general overview of the present dispute. It does not claim to include all factual aspects which will later turn out to be of relevance, particularly as they emerged from the extensive testimony of witnesses and experts at the hearing. The latter will be discussed, as far as relevant, in the context of the Tribunal's analysis of the disputed issues.

a. Background

6. Lindane is a pesticide that was first registered on the Canadian market in 1938 (Mem., para. 41; C-Mem., para. 24). In 1979-1980, Uniroyal Canada¹ developed and registered a flowable version of lindane (Vitavax rs Flowable) (Mem., para. 41; C-Mem., para. 48).
7. Lindane-based products were used notably on canola (Mem., para. 10; C-Mem., para. 49). The use of lindane on canola was not approved in the United States (Mem., para. 53; C-Mem., para. 39) and, therefore, lindane-based products could not be sold or distributed (including through importation) in the United States as a seed treatment for canola (Exh. B-9).
8. As a result of the risks associated with the use of lindane, many steps have been taken to restrict the use of lindane on an international level in the last decades (C-Mem., para. 34).
9. Crop protection products in Canada are regulated by the Pest Control Products Act ("PCPA") and the Pest Control Products Regulations (the "Regulations") (Ann. R-1, R-2)² (Mem., para. 11; C-Mem., para. 19). Subsection 5(1) of the PCPA provides that "[n]o person shall sell in or import into Canada any control product unless the product (a) has been registered as prescribed; (b) conforms to prescribed standards; and (c) is packaged and labelled as prescribed". Subsection 5(2) of the PCPA provided that "[n]o person shall export out of Canada, or send or convey from one province to another any

¹ The following clarifications regarding the Claimant (C.-Mem., tab D) may be useful. Uniroyal Canada Co./Cie ("Uniroyal Canada") was an indirect, wholly-owned subsidiary of Uniroyal Chemical Company ("Uniroyal"), which was bought in August 1996 by Crompton & Knowles, later renamed Crompton Corporation ("Crompton"). Prior to 1989, Uniroyal Canada sold directly to Canadian wholesalers and distributors. From 1989 onwards, Uniroyal Canada began to sell through "Gustafson", an unincorporated business of Uniroyal Canada (from November 1998 to March 2004, Gustafson operated as a partnership "Gustafson Partnership", which is to be distinguished from Gustafson Incorporated, a wholly owned subsidiary of Uniroyal Chemical Corporation and later of Crompton & Knowles. In November 1998 Bayer Corporation bought 50% of Gustafson Incorporated. The latter then became Gustafson LL.C., and a wholly owned subsidiary of Bayer Corporation in March 2004). After January 24, 2001, Uniroyal Canada took the name of Crompton Co./Cie ("Crompton Canada"). Shortly after Crompton changed its name to Chemtura Corporation ("Chemtura") in July 2005, Crompton Canada also changed its name to Chemtura Canada Co./Cie ("Chemtura Canada") in April 2006. The Claimant is Chemtura (formerly Crompton). In this award, the Tribunal will refer indistinctly to the "Claimant", except in those cases where it deems it necessary to be more specific.

² Mention is made that the PCPA was in force from 1997 to 13 October 2004 and the Regulations from 16 April 1997 to 27 August 2001. See Mem. Ann. A, to the effect that the PCPA was repealed and replaced by new legislation in 2006 but that the events that gave rise to this claim occurred prior to the entry into force of the new legislation. See also C-Mem. p.10, footnote 6.

prescribed control product unless the product was manufactured in an establishment that (a) complied with prescribed conditions; and (b) was registered and operated as prescribed."

10. The Pest Management Regulatory Agency ("PMRA"), established in April 1995, is the federal agency responsible for the regulation of pest control products in Canada. Its primary objective is to prevent unacceptable risks to people and the environment from the use of pest control products (Ann. R-1, R-29) and to ensure that only those pest control products that are determined to be of acceptable value are approved for use in Canada (Ann. R-11).

b. The origin of the present dispute

11. On 17 September 1997, the U.S. Environmental Protection Agency ("EPA") was contacted by Mr. E. L. Moore, Executive Vice President of Gustafson Incorporated³, regarding the lawfulness of importation into the United States of certain products, including lindane (Exh. B-2; Mem., para. 62; C-Mem., para. 61; Ann. A).
12. On 12 January 1998, the EPA wrote in response to Mr. Moore's letter that it was illegal to import canola seeds treated with unregistered pesticides under the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA") (Exh. B-3; Mem., para. 62; C-Mem., para. 63; Ann. B).
13. On 12 March 1998, the EPA announced that it would allow U.S. farmers to continue to import lindane-treated canola seed from Canada only until 1 June 1998 (C-Mem., para. 73; Exh. TZ-8).
14. At the time, the Claimant was one of four registrants in Canada of lindane-based pesticides (Mem., para. 101; C-Mem., para. 44).

³ Gustafson was at the time the Claimant's wholly-owned subsidiary (Mem., p. 20 footnote 52; C-Mem., p. 28).

c. The Withdrawal Agreement⁴

15. On 28 October 1998, the Claimant and other registrants of canola seed protectants were reportedly contacted by the Canadian Canola Growers Association (the "CCGA") and the Canola Council of Canada (the "CCC"), two national industry groups, regarding an expressed concern over the threat of potential trade restrictions and negative controversy related to seed protectants used in the production of canola. As a response to this threat, both the CCGA and CCC requested that all registrants of canola seed protectants participate in a plan to voluntarily remove canola from the registered uses of lindane-containing products (Exh. R-16).
16. On 26 November 1998, the CCGA informed the PMRA that the four registrants of seed treatments containing lindane had agreed to voluntarily remove canola/rapeseed claims from labels of registered canola seed treatments containing lindane by 31 December 1999 and that commercial stocks of products containing lindane for use on canola and lindane treated canola seed could not be used after 1 July 2001 (Exh. B-12).
17. On 2 December 1998, Canada and the United States entered into a Record of Understanding regarding areas of agricultural trade (the "ROU") (Exh. B-13; Mem. para. 74; C-Mem., para. 100). The ROU contains *inter alia* the following language:

Canadian canola growers have requested Canadian registrants to agree voluntarily to remove canola/rapeseed claims from labels of registered canola seed treatments containing lindane by December 31, 1999. All commercial stocks [of pesticide] containing lindane for use on canola and lindane treated canola seed would not be used after July 1, 2001. This is contingent on registrants requesting voluntary removal. EPA, PMRA, growers and registrants will continue to work together to facilitate access to replacement products" (Mem., para. 75; C-Mem., para. 100).
18. On 17 December 1998, the Claimant confirmed its agreement to voluntarily remove canola from the product labels of its seed protectants that contained lindane insecticide by the end of 1999 subject to a number of provisions, including *inter alia* that (i) all other registrants of products used to treat canola that contain lindane also agree to voluntarily withdraw canola from their product labels by the end of 1999, (ii) the PMRA approve the registrations of "Gaucho 75ST" and "Gaucho 480" for use on canola for

⁴ The Claimant refers to the "Conditional Withdrawal Agreement" (the "CWA") whereas the Respondent uses the term "Voluntary Withdrawal Agreement" (the "VWA"). The Tribunal will use the term "Withdrawal Agreement".

planting in Canada at least six months prior to the withdrawal of canola from the labels of the affected lindane-based seed treatments, (iii) that several registrations be issued, including a "lindane substitution" product by 1 July 1999, and that (iv) if a tolerance were to be established in the U.S. for lindane in canola prior to the end of 1999, thereby removing the potential threat to trade, the Claimant would reconsider its offer to voluntarily remove canola from the labels of its lindane based products (Exh. B-14).

19. On 2 March 1999, the Claimant stated that it would not voluntarily withdraw canola/rapeseed from the labels of its seed treatments that contain lindane unless it had suitable alternative products registered to replace them (Exh. B-16). The PMRA responded on 25 March 1999, stating that, although the Withdrawal Agreement did not promise registration of replacements for lindane seed treatments for Canada, it was committed to working with growers and registrants to facilitate access to alternatives (Exh. B-17)⁵.
20. In the course of 1998 and 1999, letters were exchanged between the Claimant and the PMRA regarding the conditions under which the former would agree to withdraw canola use from its lindane registrations (Ingulli Statement, para. 43; Mem. Para. 81). The Claimant has argued that some of the final conditions agreed with the PMRA were embodied in the exchange of letters of 27 and 28 October 1999 between the Claimant and the PMRA, which agreement was within the discretionary mandate of the PMRA (PHB Cl., para. 75). This issue is disputed and will be discussed, as relevant, in the Tribunal's analysis of the Claimant's specific claims.

d. The Special Review

21. On 15 March 1999, the PMRA announced a Special Review of Pest Control Products Containing Lindane ("Special Review") under Section 19 of the Regulations (Exh. B-17, Mem., para. 141; C-Mem., para. 278). In its announcement, the PMRA specified that "[t]he scope of issues surrounding Lindane is potentially broad" (Mem., para. 141; C-Mem., para. 318). An update on the Special Review of lindane and on the status of lindane registrations was provided on 5 April 2002 (Exh. B-62).

⁵ See Exh. B-18 for the Claimant's attempt to defer the Withdrawal Agreement until 31 December 2000. See also Exh. B-19 where the Claimant specified that in the event that the PMRA determined that lindane was safe to be used on canola as a seed treatment or that the U.S. EPA should issue a canola tolerance or determine that lindane was exempt from requiring a tolerance in canola, the Claimant reserved the right to resume manufacturing of lindane products for use on canola. See further Exh. B-20.

22. According to the Claimant, on 28 October 1999, a Withdrawal Agreement was entered into between the Claimant and the PMRA (Mem. p. 212). As already noted, this is a disputed fact to which the Tribunal will revert.
23. On 31 December 1999, the Claimant ceased manufacture of lindane products for canola use in Canada and canola use was removed from its labels (Mem. p. 212).
24. In November 2000, a meeting was held between the PMRA and canola growers and seed treaters during which the enforcement policies of the PMRA were discussed among other topics (Mem. para. 118; C-Mem. para. 196-197).
25. Issues of fairness in the conduct of the Special Review by the PMRA arose (Exh. A-4, p.14) and, as of 4 April 2001, the Claimant began the first of a series of Federal Court applications for judicial review (Mem. Ann. B, p.212; C-Mem., para. 208; Ann. R-54).
26. On 8 May 2001, the Claimant filed a request with the PMRA for reinstatement of canola use on its lindane labels (Exh. B-53; Mem., para. 149; C-Mem., para. 213). The PMRA replied on 29 May 2001 that it believed that "the conditions under which [Crompton Canada] can properly require reinstatement to its lindane product registrations of the canola/rapeseed use have not yet been met and that to grant your request at this time would not be consistent with the terms of the voluntary agreement" (Exh. B-55; Mem., para. 150; C-Mem., para. 217). The Claimant challenged this refusal before the Federal Court of Canada (Mem., Ann. B, p. 212; C-Mem., para. 219).
27. The Special Review was expected to be completed by December 2000 (Exh. A4 p.2; Mem., para. 143; C-Mem., para. 334). Completion was, however, delayed until October 2001 (Exh. A4 p.2, Exh. B-60).
28. On 26 October 2001, the PMRA released its Occupational Exposure Assessment on lindane (Exh. B-55; Mem., para. 152).
29. On 30 October and 5 November 2001, the PMRA announced that it had completed the Special Review and that it had formed the view that the risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations (Exh. A-4, para. 7).

e. The termination of the registrations

30. On 19 December 2001, the PMRA, considering that there remained significant concerns regarding the adequacy of the margin of exposure for workers during seed treatment and handling of treated seed both on-farm and in commercial seed treatment facilities, determined that termination of lindane products was warranted and could be effected through phase-out by suspension of registrations or voluntary discontinuation (Exh. B-56, B-57). If the Claimant chose to voluntarily discontinue the sale of its products, a letter of discontinuation was to be submitted to the PMRA within a specific time-limit (Exh. B-57; B-59).
31. On 28 December 2001, the Claimant discontinued its pending application against the Minister of Health (the "Minister") and the Minister of Agriculture and Agri-Food (Ann. R-72).
32. At the beginning of 2002, in a letter of 11 February and on the basis of the results of the Special Review of pest control products containing lindane, the PMRA informed the Claimant that the five registrations mentioned therein had to be terminated through suspension, on the ground that the safety of the control products was no longer acceptable (Mem. p. 85; C-Mem., p. 134; Ann. R-307; Exh. B-59).
33. On the same day, the PMRA also informed the Claimant that it had completed the Special Review of pest control products containing lindane under Section 19 of the Regulations (Exh. B-60).
34. On 21 February 2002, the PMRA advised the Claimant that its remaining registrations for lindane products were terminated through suspension (Exh. A-4 p. 2; Mem., para. 163; C-Mem., para. 364).

f. The Board of Review

35. By letters of 18 February and 14 March 2002 to the Minister, the Claimant requested the establishment of a Review Board (Exh. WS-64, WS-65; Mem., para. 259; C-Mem., para. 371).
36. The Minister replied on 6 May 2002 that the Claimant's request for review had been referred to the PMRA for appropriate action (Mem., para. 261; C-Mem., para. 373).

37. On 3 June 2002, the Claimant expressed to the Minister its concerns about this referral (Mem., para. 262; C-Mem., para. 373). Without waiting for a response from the Minister, on 12 June 2002, the Claimant brought an application before the Federal Court of Canada challenging the Minister's decision to refer the review request to the PMRA (Mem., para. 263; C-Mem., para. 374).
38. On 22 October 2003, the Minister informed the Claimant that a Lindane Board of Review (the "Board of Review") had been established (Mem. Annex. B; C-Mem., para. 381).
39. The Board of Review began its work in May 2004 (Exh. A-4 p.2; Mem., para. 263; C-Mem., para. 383). Pursuant to Section 24 of the Regulations (C.R.C. c.1253), it was given the mandate by the Minister to review the decisions made by the PMRA on 11 and 21 February 2002 and on 8 September 2003 to the effect that the occupational health risks associated with the use of lindane products were not acceptable (Ann. R-125).
40. The Board of Review released its Report on 17 August 2005 (Mem., para. 273; C-Mem., para. 396). Regarding the process of the Special Review, the Board of Review recommended that the PMRA reconsider potential opportunities for mitigating its concern for health related issues associated with the use of lindane. It further recommended that during its deliberations, the PMRA should seek and consider input from the Claimant as well as from other interested parties (Exh. A-4 p.51). The Board of Review also stated certain conclusions regarding toxicological issues and recommended that the Minister direct the PMRA to consult with the Claimant in order to take into account any available mitigation measures and to consider the possibility of a mitigation strategy that might result in labels and practices for use acceptable to the PMRA (Exh. A-4, pp. 50-55).

g. The Re-evaluation process

41. Following the Report of the Board of Review, the PMRA launched a re-evaluation process and asked the registrants of affected lindane products to submit data or information that could be useful in conducting such a re-evaluation (Exh. JW-37). During March and April 2006, five registrants, including the Claimant, asked for further information regarding the process as well as for an extension of the deadline to submit their reply (Exh. JW-47, JW-48, JW-49, JW-50, JW-51).

42. On 26 April 2006, the PMRA issued a public Information Note outlining the actions contemplated to implement the recommendations of the Board of Review (Exh. JW-43). On 28 April 2006, the then re-evaluation coordinator, Marisa Romano, wrote an email to the affected lindane registrants extending the deadline for submission of information to 31 July 2006 (Exh. JW-52). In a subsequent email, Ms. Romano further specified that the PMRA had started a review of its policy concerning the use of uncertainty and safety factors in risk assessment before the issuance of the Report of the Board of Review, and noted that such review would include public and stakeholder consultation (Exh. JW-55).
43. Throughout the process, the Claimant submitted information in three instalments. First, on 14 July 2006, the Claimant gave the PMRA access to certain studies and data, including those submitted to the EPA (Exh. JW-56; Exh. R-310). Second, on 21 July 2006, the Claimant submitted further information, including a report on lindane risk mitigation. The Claimant noted that it had "a new occupational exposure study for on-farm seed treating in progress" that would be available in the first quarter of 2007 (Exh. JW-57). Third, on 4 August 2006, the Claimant filed another instalment of studies on lindane as well as a list of studies still outstanding (Exh. JW-60).
44. During the last months of 2006, the PMRA prepared the schedule of the review and granted a number of extensions to the Claimant for the submission of the new occupational exposure study for on-farm seed treating (Exh. JW-63, JW-65, JW-68). The occupational exposure study was received in the first half of March 2007 (Exh. JW-69). Throughout 2007, the PMRA prepared a first draft Re-evaluation Note (the "REN") which, was circulated internally for comments in December of that year (Exh. JW-77, JW-80). The draft was then adjusted to incorporate the ongoing results of the review of uncertainty and safety factors and circulated to affected registrants between the end of April and the beginning of May 2008 for additional comments (Exh. JW-83, JW-84, JW-85, JW-86, JW-87, JW-88, JW-89, JW-90, JW-91, JW-92). The draft REN reached similar conclusions as the Special Review on the risks presented by lindane.
45. An exchange of letters followed. The Claimant commented on the draft REN in a letter of 27 June 2008 (Exh. JW-95), noting *inter alia* that the uncertainty factors used in the draft REN were in contrast with the findings of the EPA and the Board of Review, and that the PMRA had proceeded without dialog on the exposure study and the potential for occupational risk mitigation measures available. It asked for further consultations. The PMRA replied to the Claimant's letter on 6 August 2008, rejecting the Claimant's

contentions as to the absence of dialog, specifying the opportunities given the Claimant to submit information, and offering a further opportunity (Exh. JW-97). The Claimant replied requesting a meeting with the PMRA staff to discuss the interpretation of the worker exposure study already submitted (Exh. JW-98). On 30 September 2008, noting that the Claimant had not availed itself of the opportunity to submit further information, the PMRA completed its response to the Claimant's comments addressing at length the different issues raised by the Claimant in its letter of 27 June 2008 (Exh. JW-99). Thereafter, a meeting was organized between representatives of the Claimant and PMRA officials in the presence of counsel to both Parties in this arbitration.

h. The situation in the United States

46. On 31 July 2002, the EPA issued the Re-registration Eligibility Decision (the "RED") on lindane (Ann. R-34; Mem., para. 294; C-Mem., para. 455). The EPA decided to "revoke all existing lindane tolerances because all lindane products for which the tolerances were originally established have been cancelled" (Ann. R-34).
47. In July 2006, an Addendum to the 2002 RED was established (Exh. C-2). It addressed the issue whether pesticide products containing the active ingredient lindane were eligible for re-registration under the FIFRA and whether existing tolerances for residues of lindane in food and feed were safe under the provisions of the Federal Food, Drug and Cosmetic Act (FFDCA). In light of several factors, the EPA concluded that the six lindane seed treatment uses were not eligible for re-registration (Exh. C-2, p.3).
48. Prior to the EPA'S 2006 Addendum to the 2002 RED, the Claimant had withdrawn its registrations (Mem., para. 291; C-Mem., para. 466). Following such withdrawal, the EPA advised the Claimant on 4 October 2006 that the registrations were cancelled with effect on 1 July 2007 (R-312).
49. On 13 December 2006, the EPA then announced the issuance of final orders cancelling the registration of all pesticide products containing the pesticide lindane. It specified that the cancellation of manufacturing-use product registrations was effective as of 4 October 2006 and that the last date of use would be 1 July 2007. It also stated that the cancellation of end-use product registrations would become effective on 1 July 2007 with the last date of use being 1 October 2009 (R-49; C-Mem., para. 467).

II. PROCEDURAL HISTORY

A. INITIAL PHASE

50. The Claimant filed Notices of Intent to Submit a Claim to Arbitration on 6 November 2001 and on 4 April 2002. It then filed a Notice of Arbitration in respect of those Notices of Intent, on 17 October 2002. It filed a third Notice of Intent on 19 September 2002, followed by a Notice of Arbitration (the "NOA") on 10 February 2005.
51. Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules and Articles 1116, 1117 and 1120 of the North American Free Trade Agreement ("NAFTA"), the Claimant initiated recourse to arbitration under the UNCITRAL Arbitration Rules.
52. In the NOA, the Claimant invoked the provisions of NAFTA and sought the following relief:

Pursuant to Article 1135(b) ... by way of restitution the

- (a) reinstatement of all registrations relating to its lindane products; and
- (b) such damages, costs, interest, and amounts for tax consequences as described below, both past and future, resulting from Canada's breaches which cannot adequately be compensated by restitution.

Alternatively, pursuant to Article 1135(a) ...

- (i) An award in the amount of approximately \$100 million (U.S.) or damages caused by Canada's breaches of its obligations under Chapter 11 NAFTA for, without limitation, loss of sales, profits, goodwill, investment and other costs related to the products arising from the breaches. These damages are suffered by the Claimant and its enterprise.
- (ii) Costs associated with these proceedings including counsel, expert and arbitration fees and disbursements.
- (iii) Pre and post-judgment interest at a rate to be fixed by the arbitrators.
- (iv) Amounts for tax consequences of the award sufficient to maintain the integrity of the award on a net-net basis.
- (v) Such further and other relief as counsel may advise or as may be deemed just.

The relief and damages claimed in this Notice of Arbitration are separate from, and in addition to, the relief and damages claimed in the 17 October 2002 Notice of Arbitration (NOA, para. 46-49).

53. On 7 December 2007, the Parties jointly submitted draft procedural and confidentiality orders.
54. On 12 December 2007, the Tribunal notified the Parties that the first session would be held on 9 January 2008 in Washington D.C. and invited the Parties to make submissions, by 3 January 2008, on the issues they wished to discuss at the first session.
55. On 21 December 2007, the Tribunal submitted a draft procedural order based on the draft sent by the Parties.
56. On 3 January 2008, the Respondent filed its Submission on Certain Procedural Matters to be reviewed at the hearing of 9 January 2008, together with related authorities and supporting documents.
57. The hearing was held as scheduled on 9 January 2008 in Washington D.C. At the hearing, the Tribunal and the Parties discussed the draft procedural and confidentiality orders as well as other procedural and logistical matters.
58. In a letter of 21 January 2008, the Tribunal enclosed *inter alia* Procedural Order No. 1 ("PO 1"), a Confidentiality Order ("CO"), the Chairperson's declaration of independence, as well as the résumé of Ms Aurélia Antonietti, the Secretary to the Tribunal, and a confirmation of her independence. The Tribunal also mentioned the query of the Permanent Court of Arbitration ("PCA") regarding the posting of the names of the disputing Parties, counsel, Tribunal members and Secretary, on the PCA home page under pending cases. Both Parties agreed on 23 January 2008.
59. On 18 January 2008, Professor Crawford informed the Tribunal that his declaration had been sent directly to the Parties. In a letter to the Parties dated 23 January 2008, the Tribunal attached Judge Brower's declaration of independence.
60. On 27 February 2008, the Respondent informed the Tribunal and the Claimant that, pursuant to Paragraph 8 of the CO, the Department of Justice, the Department of Foreign Affairs and International Trade Canada, Environment Canada and Health Canada had received requests pursuant to the Access to Information Act ("ATIA"). For reference, the Respondent compiled a chart setting out the details of the timing and

scope of such requests. On 28 April 2008, the Respondent informed of two additional requests under the ATIA.

61. On 28 February 2008, the Tribunal confirmed its acceptance of Ottawa as the place of the hearing as proposed by the Parties in a joint letter of 26 February 2008.

B. WRITTEN PROCEEDINGS

62. On 2 June 2008 and in accordance with PO 1, the Claimant submitted its Memorial, Statements of Evidence of Alfred F. Ingulli, Paul Thomson, John Kibbee and Edwin L. Johnson, Expert Reports of Manuel Abdala, Andrés Chambouleyron, Pablo Spiller and James V. Abdala, and exhibits and legal authorities. On 23 June 2008, the Claimant produced the redacted form of such submission.
63. On 2 July 2008, the Respondent, pursuant to Article 7 of the CO, communicated its objections to certain of the Claimant's designations as 'confidential' of materials communicated by the Claimant on 23 June 2008. On 7 July 2008, the Tribunal invited the Claimant to reply no later than 18 July 2008, which the latter did on 17 July 2008.
64. On 3 July 2008, the Claimant communicated its responses to the Respondent's requests for documents pertaining to the LECG Damages Assessment dated 2 June 2008 ("LECG report")⁶.
65. On 7 July 2008, the Tribunal wrote to the Parties proposing that Dr. Jorge E. Vinuales, whose CV was included, replace Ms. Aurélia Antonietti as the Secretary to the Tribunal. The Parties agreed with the Tribunal's proposal on 7 and 8 July 2008 respectively. On 9 July 2008, the Tribunal submitted to the Parties Dr. Vinuales's declaration of independence.
66. On 8 August 2008, the Tribunal issued Procedural Order No. 3 ("PO 3") ruling on the Respondent's objections to the confidentiality designations made by the Claimant.
67. On 11 August 2008, the Respondent requested a clarification regarding the Claimant's designation as confidential of all references to the amount of damages claimed

⁶ The LECG report can be found in the binder which includes Exhibits B-1 - B-25.

- appearing in the redacted version of the Memorial and appended documents, the issue of redacting damage amounts not being addressed in PO 3.
68. On 12 August 2008, the Tribunal invited the Claimant to submit a reply on the clarification requested by the Respondent by no later than 14 August 2008. The Claimant submitted its reply on 14 August 2008 and requested the Tribunal to confirm that the information in question had been properly designated as confidential.
 69. On 15 August 2008, the Tribunal considered that such confidentiality designations were not in accordance with the CO. Section 3 of PO 3 was therefore supplemented to the effect that all references in the Claimant's memorial and appended documents to the amounts of damages sought by the Claimant in this arbitration could not be maintained and were accordingly lifted. The Tribunal also ruled that the Claimant had to provide revised redacted versions of the Memorial and appended documents.
 70. On 18 August 2008, the Respondent informed the Tribunal of the documentation it intended to make publicly available pursuant to paragraph 11 of the CO, once it had received the Claimant's revised redacted submissions.
 71. On 29 August 2008, pursuant to the Tribunal's ruling of 15 August 2008, the Claimant submitted revised redacted submissions, disclosing the amounts of damages sought by the Claimant in this arbitration.
 72. On 20 October 2008, the Respondent, in accordance with PO 1, submitted its Counter-Memorial, affidavits of JoAnne Buth, Cheryl Chaffey, Suzanne Chalifour, Dr. Claire Franklin, Jim Reid, Wendy Sexsmith, John Worgan and Tony Zatylny (with corrections of 7 November 2008), expert reports of Dr. Lucio Costa, Dr. Lynn Goldman and Brent Kaczmarek, together with exhibits and legal authorities. On 7 November 2008, the Respondent, pursuant to paragraph 3 of the CO, submitted redacted excerpts from its Counter-Memorial and related affidavits, expert reports, and other supporting documents.
 73. On 5 December 2008 in accordance with PO 1, both Parties submitted a Redfern Schedule comprising their requests for document production.
 74. On 23 January 2009, pursuant to paragraphs 37, 42 and 43 of PO 1, the Respondent replied to the Claimant's request for documents of 5 December 2008. On the same

date, the Claimant submitted its objections to the Respondent's request for document production. The Respondent replied to these objections on 26 January 2009, and proposed a revision of the timetable. On 30 January 2009, the Tribunal agreed with the timetable revision.

75. Exchanges of correspondence with respect to requests for document production ensued during February 2009.
76. On 18 March 2009, the Tribunal issued Procedural Order No. 4 ("PO 4") with its Appendices, ruling on the document production requests and objections of the Parties.
77. On 17 April 2009, the United States, pursuant to Article 1128 of NAFTA and in connection with PO 1, reserved its right to make a submission on a question of interpretation of NAFTA.
78. On 15 May 2009 in accordance with PO 1, the Claimant produced its Reply Memorial, Reply Statements of Evidence of Alfred F. Ingulli, Paul Thomson, John Kibbee, Edwin L. Johnson, and Expert Reply Reports of Manuel Abdala, Andrés Chambouleyron, Pablo Spiller, James V. Aidala, together with exhibits and legal authorities. On 4 June 2009, the Claimant submitted the redacted version of its Reply Memorial.
79. On 10 July 2009 in accordance with PO 1, the Respondent submitted its Rejoinder Memorial, Rejoinder Affidavits of JoAnne Buth, Cheryl Chaffey, Suzanne Chalifour, Dr. Peter Chan, Dr. Claire Franklin, Wendy Sexsmith, John Worgan, Tony Zatylny, and Expert Reports of Dr. Lucio Costa, Dr. Lynn Goldman, and Navigant Consulting Inc, together with four volumes of contemporary and legal annexes. On 30 July 2009, the Respondent submitted redacted excerpts from its Rejoinder, related affidavits, expert reports, and other supporting documents.
80. By letter of 15 July 2009, Mexico advised that it intended to make a submission in accordance with Article 1128 of NAFTA.
81. By letter of 17 July 2009, the Claimant requested that the Tribunal admit 9 additional exhibits into the record. The Respondent replied to this request on 24 July 2009.

82. On 30 July 2009, the Tribunal issued Procedural Order No. 5 ("PO 5") addressing the organization of the hearing, interventions pursuant to Article 1128 of NAFTA and the Claimant's request of 17 July 2009.
83. In accordance with PO 1, on 20 July 2009 the Tribunal held a pre-hearing telephone conference with the Parties to address outstanding organizational and procedural matters in connection with the hearing.

C. THE HEARINGS AND FINAL PROCEDURAL STEPS

84. The Tribunal held the hearing on the merits from 2 to 8 September 2009 at the Government Conference Centre in Ottawa, Canada. At the hearing, the following persons appeared before the Tribunal:
- (i) On behalf of the Claimant:
 - Mr. Gregory O. Somers; Ogilvy Renault LLP
 - Mr. Benjamin P. Bedard; Ogilvy Renault LLP
 - Ms. Alison Fitzgerald; Ogilvy Renault LLP
 - Ms. R n e Th riault; Ogilvy Renault LLP

 - (ii) On behalf of the Respondent:
 - Mr. Christophe Douaire de Bondy; DFAIT, Trade Law Bureau
 - Mr. Stephen Kurelek; DFAIT, Trade Law Bureau
 - Ms. Yasmin Shaker; DFAIT, Trade Law Bureau
 - Ms. Christina Beharry; DFAIT, Trade Law Bureau
 - Ms. Carolyn Elliott-Magwood; DFAIT, Trade Law Bureau
 - Ms. Sylvie Tabet; DFAIT, Trade Law Bureau
 - Mr. Mark Luz; DFAIT, Trade Law Bureau
 - Ms. C line M. Levesque; DFAIT, Trade Law Bureau
85. The hearing on the merits was transcribed and the transcript was distributed to the Parties at the end of each day. The complete version of the *verbatim* transcript was later distributed to the Parties.
86. At the end of the hearing on the merits, after consultation with the Parties, the Tribunal issued directions regarding the further procedural steps. These directions were summarized in Procedural Order No. 6, of 29 September 2009 ("PO 6").

87. In accordance with PO 6, the Parties submitted simultaneous post-hearing briefs on 23 October 2009 (PHB Cl. and PHB Resp).
88. Also in accordance with PO 6, on 17 December 2009, a hearing was held at the Government Conference Centre, in Ottawa, for the presentation of the Parties' closing arguments. At the closing hearing, the following persons appeared before the Tribunal:
- (i) On behalf of the Claimant:
- Mr. Gregory O. Somers; Ogilvy Renault LLP
 - Mr. Benjamin P. Bedard; Ogilvy Renault LLP
 - Ms. Alison Fitzgerald; Ogilvy Renault LLP
 - Ms. R  n  e Th  riault; Ogilvy Renault LLP
- (ii) On behalf of the Respondent:
- Mr. Christophe Douaire de Bondy; DFAIT, Trade Law Bureau
 - Mr. Stephen Kurelek; DFAIT, Trade Law Bureau
 - Ms. Yasmin Shaker; DFAIT, Trade Law Bureau
 - Ms. Christina Beharry; DFAIT, Trade Law Bureau
 - Ms. Carolyn Elliott-Magwood; DFAIT, Trade Law Bureau
 - Ms. Sylvie Tabet; DFAIT, Trade Law Bureau
 - Mr. Mark Luz; DFAIT, Trade Law Bureau
 - Ms. Celine M. Levesque; DFAIT, Trade Law Bureau
89. The closing hearing was transcribed and the *verbatim* transcript was later distributed to the Parties.
90. Following consultation with the Parties at the end of the closing hearing, by letter of 23 December 2009, the Tribunal closed the hearings phase of the proceedings and directed the Parties to submit their statements of cost by 15 February 2010.
91. On 15 February 2010, both Parties submitted their statements of costs.

III. POSITION OF THE PARTIES AND REQUESTS FOR RELIEF

A. CLAIMANT

92. The Claimant argues in essence that Canada has breached its obligations under NAFTA Articles 1105 (minimum standard of treatment), 1103 (most favored nation clause, as the basis for the import of a more favorable free-standing fair and equitable treatment clause), and 1110 (expropriation).

93. More specifically, the Claimant argues that Canada has breached Articles 1105 and 1103 of NAFTA in conducting a flawed review of its lindane registrations and thwarting its attempts at having such review re-evaluated in accordance with the law, in prohibiting the planting of lindane treated seed after 1 July 2001 despite the assurances previously given in the context of the Withdrawal Agreement, in not granting the treatment agreed for the registration process of the replacement product Gaucho CS FL, and in proceeding to the cancellation of its lindane registrations, including for use on canola. The Claimant further argues that the cancellations of its lindane registrations were in breach of Article 1110 of NAFTA.

94. On this basis, it claims damages in the amount of US\$ 83,139,672, plus compound interest on the amount awarded to be computed at a rate deemed appropriate by the Tribunal from the date of expropriation to the date of payment.

95. In the Reply, the Claimant amended the amount claimed to US\$ 78,593,520, together with pre- and post-award compound interest.

96. In its Post-Hearing Brief, the Claimant requested the following relief:

In summary, the Investor claims:

- (a) Damages for breach of Article 1105, 1103, and/or 1110 in the amount of US\$ 78,593,520
 - (b) Its costs of this arbitration including expert and legal fees, as well as applicable taxes thereon;
 - (c) Pre and post-award compound interest on the amounts claimed above
- (PHB Cl., para. 194).

B. RESPONDENT

97. On the liability issues, the Respondent argues in essence that: (i) it did not expropriate the investment, as there has been no substantial deprivation of Chemtura Canada, and in any event, the conduct of the PMRA is a valid (and non-compensable) exercise of police powers; (ii) the Claimant's conduct triggering the U.S. border closure and its participation in the Withdrawal Agreement estop it from pursuing expropriation claims with respect to lindane use on canola and canola seed; (iii) Canada did not breach the minimum standard of treatment of which the Claimant has not even attempted to establish the content under customary international law; (iv) in any event, the facts overwhelmingly demonstrate that Canada has accorded the Claimant ample due process, conducted itself lawfully and treated the Claimant fairly, and that Canada has complied with Article 1105 of NAFTA in every respect; (v) even if Article 1103 of NAFTA could serve to import a free-standing FET clause from another treaty, *quod non*, the PMRA accorded fair and equitable treatment to Chemtura at all relevant times, no matter how extensively one defines the scope of that standard (C-Mem., para. 16); (vi) Canada never consented to arbitrate the claim under Article 1103 of NAFTA, which has been pleaded for the first time in Chemtura's Memorial (C-Mem., par. 852, 853 ff).
98. On this basis, the Respondent requests in its Post-Hearing Brief that the Tribunal render an award (a) dismissing the claims of Chemtura in their entirety, and (b) ordering that Chemtura bear the costs of the arbitration in full and indemnify Canada for its costs of legal representation (C.-Mem., p. 355; Rej., para. 360; PHB Resp., para. 299).

IV. ANALYSIS

A. PRELIMINARY ISSUES

a. Jurisdiction

99. The Tribunal notes that its jurisdiction to hear the claims brought by the Claimant under Article 1105 and 1110 of NAFTA is not in dispute.
100. The Respondent, however, disputes the jurisdiction of the Tribunal to hear the claim for breach of Article 1103 of NAFTA (C-Mem., para. 852-858). It argues, in essence, that

the Claimant's Memorial "advances an Article 1103 claim that cannot be traced in any way to its Notices of Intent and Arbitration but rather represents an entirely new most-favoured-nation (MFN) theory" (C-Mem., para. 856). As a result, the Respondent argues that the conditions set forth in Articles 1119 and 1122 of NAFTA in connection with its consent to arbitrate a claim are not fulfilled, because the Claimant failed to specify the issues and the factual basis for the claim in its Notices of Intent and Arbitration (C.-Mem., para. 857-858).

101. The Claimant replies that it did identify its claim for breach of Article 1103 of NAFTA in its Notices of Intent and Arbitration and that the narrow requirements to which the Respondent seeks to subject its consent to arbitration are neither supported by the letter of Article 1122 nor by its subsequent interpretation by other NAFTA tribunals (Reply, para. 441-453). The Claimant further argues that "[t]o the extent the MFN argument contained in the Investor's Memorial may be viewed as a 'new' claim (which is denied), such claim is timely presented at the opening of written pleadings and poses no prejudice to Canada in this arbitration" (Reply, para. 453).
102. Article 1122(1) of NAFTA states that: "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement". Among these procedures, Article 1119 requires, in connection with the form and content of a notice of intent to submit a claim to arbitration, that such notice "shall specify [...] (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; (c) the issues and the factual basis for the claim". NAFTA tribunals have interpreted these provisions rather broadly "within the context of the objective of NAFTA in establishing investment dispute arbitration in the first place."⁷ As noted by the tribunal in *ADF. v. United States*, to which the Claimant refers, with respect to the requirements set forth in Article 1119(2):

"the notice of intention to submit to arbitration should specify not only 'the provisions of [NAFTA] alleged to have been breached' but also 'any other relevant procedures [of NAFTA].' Which provisions of NAFTA may be regarded as also 'relevant' would depend on, among other things, what arguments are subsequently developed to sustain the legal claims made. We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its Notice of Intention to Submit a Claim

⁷ Pope & Talbot Inc. v. Canada, UNCITRAL (NAFTA), Award of 7 August 2000, para. 26.

to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute.”⁸

103. The Tribunal sees no reason why the same considerations should not also apply to the circumstances of the present case. Indeed, as acknowledged by the Respondent itself, the second Notice of Intent submitted by the Claimant on 4 April 2002 focused specifically on the alleged breach of Article 1103 (Exh. R-138) and the third Notice of Intent of 19 September 2002 incorporated this claim by reference (Exh. R-139). It is true that the main argument made in such notices in connection with Article 1103 did not concern the potential import of a fair and equitable treatment provision from another treaty through the MFN clause in Article 1103. Yet, the facts mentioned therein are essentially the same as those subsequently referred to in the Claimant's Memorial in support of the claim under Article 1103 (Mem., para. 493-494).
104. More fundamentally, the fact that the Claimant may have advanced arguments in its Memorial which were not spelled out in its previous submissions in connection with Article 1103 has not caused any prejudice to the ability of the Respondent to respond to such arguments. Indeed, the Respondent has had ample opportunity to state its position, and has done so in its briefs and at the hearings.
105. For these reasons, the Tribunal concludes that it has jurisdiction over the claim brought by the Claimant under Article 1103 of NAFTA.

b. Law governing the procedure

106. Pursuant to Section 22 of PO 1, the applicable arbitration rules are the UNCITRAL Arbitration Rules, except to the extent that they are modified by the provisions of Section B of NAFTA Chapter 11.

c. Law governing the merits

107. Pursuant to Section 23 of PO 1 and in accordance with Article 1131 of NAFTA and Article 33 of the UNCITRAL Arbitration Rules, the law governing the merits is the NAFTA and applicable rules of international law.

⁸ ADF Group Inc. v. United States of America, Case No. ARB(AF)/00/1, Award of 9 January 2003, para. 134 (emphasis in the original).

d. Relevance of prior decisions

108. In support of their positions, both Parties have relied extensively on previous decisions and awards of NAFTA and other international tribunals, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a certain solution.
109. The Tribunal is not bound by previous decisions of NAFTA or other international tribunals. At the same time, it is of the opinion that it should pay due regard to earlier decisions of such tribunals.⁹ The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case.

B. MINIMUM STANDARD OF TREATMENT

110. At the outset, the Tribunal notes that the Claimant specified the actual measures allegedly in breach of Article 1105 of NAFTA only in its Post-Hearing Brief upon the Tribunal's invitation. The Tribunal will thus structure its analysis of this first claim on the basis of the articulation provided in the Claimant's Post-Hearing Brief. After determining the applicable standard (a), the Tribunal will focus, on the process of review of lindane (b), the scope of the prohibition of planting treated seed after 1 July 2001 (c), the cancellation of the Claimant's lindane registrations on 11 and 21 February 2002 (d), and the treatment of Gaucho CS FL (e).

a. Applicable standard

1. Claimant's position

111. By reference to the Note of Interpretation issued by the Free Trade Commission (FTC) on 31 July 2001 ("FTC Note"), the Claimant argues that the Tribunal must apply the customary international law minimum standard of treatment, the content of which cannot be ascertained in the abstract (PHB Cl., para. 20-21). According to the Claimant, NAFTA tribunals in *Pope & Talbot v. Canada*, *Mondev v. United States*, *ADF*

⁹ On the precedential value of previous arbitral awards, see Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, *The 2006 Freshfields Lecture*, published in *Arbitration International*, Vol. 23, 2007, pp. 357-378.

v. United States, and *UPS v. Canada* have considered that the minimum standard prescribed by customary law is not frozen in time (PHB Cl., para. 24 ff).

112. The Claimant argues that the content of the standard is therefore influenced by treaty practice (Mem. par. 342). In this context, the Claimant proceeds to list different types of conduct that may constitute a breach of Article 1105(1), including (i) a lack of sufficient evidence to support a decision and/or basing a decision on irrelevant considerations, resulting in a decision that is clearly improper and discreditable; (ii) lack of due process, including denial of the right to be heard, leading to an outcome which offends a sense of judicial propriety; (iii) arbitrary, grossly unfair, unjust or idiosyncratic conduct; (iv) breach of an investor's legitimate expectations; (v) lack of transparency and candor in an administrative process; (vi) action taken beyond the scope of lawful authority; (vii) failure to act in good faith; and (viii) failure to ensure a stable and predictable environment for investments. The Claimant submits that such actions, individually and collectively, may constitute a breach of Article 1105(1) of NAFTA (PHB Cl., para. 21; Mem., para. 364).

113. The Claimant further contends that regardless of the circumstances to which Article 1105(1) applies, the minimum standard set forth in such provision is not lessened by a "margin of appreciation" (PHB Cl., para. 35 ff). It refers in this regard to the decisions in *Pope & Talbot v. Canada* and *Glamis Gold v. United States*. The Claimant points in particular to the statement of the latter tribunal according to which the standard of deference is already present in Article 1105 of NAFTA as shown in the modifiers "manifest" and "gross" that make such standard of treatment a stringent one and, therefore, no additional deference is required (PHB Cl., para. 38).

2. Respondent's position

114. The Respondent replies that the Claimant has not even attempted to establish the content of the minimum standard of treatment under customary international law. More specifically, the Respondent argues that the Claimant bears the burden of proving the content of the minimum standard of treatment through evidence of both State practice and *opinio juris* (C-Mem., para. 741 ff). According to the Respondent, instead of establishing such content, the Claimant seeks to import idiosyncratic content into Article 1105 that is not comprehended by the customary international law standard (Mem., para. 16, 665, 666 ff). In particular, all three NAFTA Member States have

expressly rejected the notion that bilateral investment treaties establish customary international law (C-Mem., para. 756 ff);

115. Regarding the content of the standard, the Respondent argues in essence that (i) Article 1105 NAFTA imposes an objective standard of treatment, formulated in the FTC Note which binds NAFTA Chapter 11 tribunals, and not a standard open for definition by future tribunals (C-Mem., para. 670-571); (ii) this standard must be established in customary law (C-Mem., para. 672 ff); (iii) Article 1105 NAFTA sets a high threshold for violation, as noted in *S.D. Myers v. Canada*, *Mondev v. United States*, *ELSI (ICJ)*, *ADF v. United States*, *Waste Management v. Mexico*, *GAMI v. Mexico* and *Thunderbird v. Mexico*; (iv) the customary international minimum standard does not include a requirement of total transparency, and no such requirement stems from Article 1105 NAFTA (C-Mem., para. 835 ff).
116. Moreover, the Respondent submits that tribunals acting under Chapter 11 of NAFTA do not have the authority to review the substance of decisions made by specialized regulatory agencies. By reference to the decisions in *Methanex v. United States* and *Glamis v. United States*, it adds that tribunals must focus on the process that led to a science-based decision when assessing an alleged breach of the international minimum standard of treatment (PHB Resp., para. 11 ff).

3. The Tribunal's determination

117. The Parties disagree on the scope of Article 1105 of NAFTA. This provision states, in relevant part: "Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
118. The scope of this provision has been further specified by the FTC Note, which states in relevant part:

2. Minimum Standard of Treatment in Accordance with International Law.

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

119. Pursuant to Article 1131(2) of NAFTA, "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."
120. It is not disputed that the Tribunal must interpret the scope of Article 1105 in accordance with the FTC Note. However, each party puts forward different conclusions as to the impact of the FTC Note on the scope of Article 1105. The Claimant argues that the reference in the FTC Note to customary international law entails a standard of treatment that has evolved over time as a result *inter alia* of the conclusion of a large number of BITs providing for fair and equitable treatment of investments. The Respondent replies that the conclusion of BITs is not sufficient to build customary international law and that, in all events, the Claimant has failed to establish the content of the customary standards which it invokes. Both Parties have referred to the decisions of a number of NAFTA tribunals to buttress their respective positions.
121. At the outset, the Tribunal notes that it is not disputed that the scope of Article 1105 of NAFTA must be determined by reference to customary international law. Such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution. As noted by the tribunal in *Mondev v. United States*:

[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith. [...]

And further:

[T]he vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. [...] In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. [...] It [the term "customary international law"] is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is

shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce".¹⁰

122. In line with *Mondev*, the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard. Such inquiry will be conducted, as necessary, in analyzing each specific measure allegedly in breach of Article 1105 of NAFTA.
123. Before undertaking such analysis, the Tribunal deems it necessary to address an additional question concerning the scope of Article 1105 on which the Parties disagree, i.e. whether the protection granted under this provision is lessened by a margin of appreciation granted to domestic regulatory agencies and, if so, to what extent. Having reviewed the arguments of the Parties, the Tribunal is of the opinion that the assessment of the facts is an integral part of its review under Article 1105 of NAFTA. In assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted *in concreto*. The Tribunal will proceed to such assessment *in concreto* when reviewing the specific measures challenged by the Claimant.

b. The Review of Lindane

1. Claimant's position

124. In response to an invitation by a Tribunal, the Claimant identified in its Post-Hearing Brief the specific measures that it considers in breach of Article 1105(1) of NAFTA. For the purposes of the analysis, the first and sixth measures identified by the Claimant, both concerning the review process of lindane, can be treated together.
125. The first measure identified by the Claimant is the conduct, by the Respondent, of a seriously flawed and delayed special review, which according to the Claimant resulted in a breach of Article 1105(1) on 19 December 2001, the date when the PMRA

¹⁰ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 116, 117, 125.

determined that termination of lindane products was warranted and could be effected by way of phase-out by suspension of registrations or by way of voluntary discontinuation (Exh. B-56).

126. According to the Claimant, the flaws that affected the conduct of the Special Review can be summarized as follows: (i) the notice of 15 March 1999 announcing the Special Review was unspecific and provided insufficient information with respect to both the concerns underlying the process and the manner in which registrants could participate (PHB Cl., para. 99); (ii) the PMRA failed to timely complete the Special Review, preventing the Claimant from taking appropriate action in the United States to register or obtain a tolerance for the use of lindane on canola (PHB Cl., para. 101); (iii) the PMRA disingenuously failed to clarify the impact of the occupational risk assessment for the outcome of the Special Review (PHB Cl., para. 102 ff); (iv) the scientific basis for the outcome of the Special Review was insufficient, a fact that suggests that the underlying reasons explaining the outcome are to be found in the political pressures on the PMRA (PHB Cl., para. 106 ff); (v) the PMRA did not request relevant data from registrants, thus depriving the Claimant of the opportunity to comment on use and exposure practices and/or to present an updated occupational risk study before the Special Review reached a conclusion on lindane (PHB Cl., para. 110 ff); (vi) registrants were offered very little time to comment on the Occupational Exposure Assessment once issued; (vii) after the Special Review, the PMRA refused to establish a Board of Review as required by Sections 23 and 24 of the Pest Control Product Regulations (Mem., para. 432 ff).

127. The Claimant further refers to the fact that the independent Review Board that was subsequently established found that the PMRA's Special Review was fundamentally flawed in both its process and conclusions (Mem, paras. 424 ff). In this connection, the Claimant argues that the Tribunal should adopt the conclusions of the Review Board as to the scientific dimensions of the review process, disregarding the scientific evidence provided by Dr. Lucio Costa, the expert witness produced by the Respondent.

128. Finally, the Claimant also argues that the re-evaluation process or REN of lindane conducted following the conclusions of the Review Board was also seriously flawed because:

[t]he same individual [Mr. John Worgan] who was involved in the Special Review condemning the continued use of lindane and who appeared before the Board, supervised, participated in and approved the re-evaluation of lindane that reached the same negative conclusions. The objectivity of

lindane's re-evaluation by PMRA is patently negated by Mr. Worgan's key role in that process. These circumstances give rise to the inference that the re-evaluation of lindane, begun in 2005 and ongoing today, had its condemnation as a foregone conclusion.

(PHB Cl., para. 146).

129. The Claimant further argues that the REN was conducted *pro forma* to buttress the Respondent's position in the present arbitration.
130. The Claimant sees these flaws essentially as a breach of due process.

2. Respondent's position

131. The Respondent argues that (i) the PMRA's scientific review of lindane was undertaken on the basis of legitimate considerations, acknowledged by the Claimant's witnesses, squarely within the PMRA's mandate and in accordance with Canada's international undertakings under the Aarhus Protocol to the LRTAP Convention (PHB Resp., para. 24 ff); (ii) the scientific review of lindane falls within acceptable scientific parameters and, given the possibility of reasonable disagreements on the choice of safety factors or on the adequacy of existing data, it is not for the Tribunal to review the scientific basis of the PMRA's decision (PHB Resp., para. 30 ff); (iii) the outcome of the Special Review was not a foregone conclusion (PHB Resp., para. 47 ff); (iv) the Special Review was not fundamentally flawed from a procedural point of view, as the Claimant was given two opportunities at the outset and during the Special Review to ask questions and make comments (including at a high-level meeting between Mr. Ingulli, Chemtura's Executive Vice-President for the Crop Protection Division, and Dr. Franklin, the PMRA's Executive Director), and the announcement of the Special Review mentioned that the review could cover other issues, which included exposure considerations, a standard focus of PMRA evaluation, as acknowledged by the Claimant's witness, Mr. Thomson (PHB Resp., para. 79 ff); (v) the process leading to de-registration, including the Board of Review, provided the Claimant due process (PHB Resp., para. 93 ff).
132. The Respondent further argues that the REN was not biased, nor was it an admission that the Special Review was fundamentally flawed, and, in any event, it cured any alleged deficiencies in the Special Review (PHB Resp., para. 103 ff). The Respondent contends mainly that the evidence gathered at the hearing confirmed that Mr. Worgan had no substantive role in the REN. It refers to the testimony of Dr. Chan pursuant to which Mr. Worgan played a very limited role in the conduct of the risk assessment

within the REN process given his managerial coordination role. The Respondent further refers to Mr. Worgan's own testimony that his role was distinct from the risk assessment carried out by the Health and Environmental Directorates (PHB Resp., para. 103 ff). Moreover, the Respondent stresses that the REN team conducting the scientific review was distinct from the original Special Review team. It notes in particular that scientists like Ms. Chaffey had minimal involvement in the REN and no direct involvement in the work of the evaluators (PHB Resp., para. 107). By reference to the testimony of Mr. Worgan, the Respondent finally puts forward that the primary reason for launching the REN was the series of recommendations made by the Board of Review, and that there is no evidence to suggest that the REN was not a good faith scientific process (PHB Resp., para. 108 ff).

3. The Tribunal's determination

133. In its oral and written submissions, the Claimant's argumentation has focused on two main issues. First, the Claimant has argued that the PMRA launched its Special Review of lindane as a result of a trade irritant and not of health and environmental considerations. Second, the Claimant has also argued that the process through which the PMRA reviewed the risks associated with lindane was flawed, scientifically and procedurally, and reached what was in fact a foregone conclusion. However, the position of the Claimant as to whether lindane itself presents unacceptable health and environmental risks is somewhat ambiguous. Underlying the Claimant's argumentation is the suggestion that lindane could have remained usable, at least on some hypotheses or for a longer time-period than the one eventually decided by the PMRA. Such allegations are made to challenge the manner in which the PMRA conducted the lindane review process rather than the more fundamental question of the risks associated with using lindane.
134. The Tribunal notes at the outset that it is not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context, as the Claimant acknowledged at the hearing for closing arguments: "As Canada has noted, the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies. We agree with this proposition" (Tr., 17 December 2009, 1423: 18-21).
135. Irrespective of the state of the science, however, the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the

international level since the 1970s. The Respondent has amply established the existence of such concerns, by referring *inter alia* to the following examples (C.-Mem., para. 34):

- (i) In 1968, Hungary restricted the use of lindane to grain treatment for winter wheat and nurseries;
- (ii) In 1971, lindane was banned in Japan;
- (iii) In 1974, mixed isomer-based lindane products were banned in Portugal;
- (iv) In 1979, the Netherlands prohibited the sale, stocking or use of pesticides containing HCH in all of its isometric forms;
- (v) In 1986, South Korea banned the sale and use of lindane and Switzerland severely restricted its sale and use;
- (vi) In 1987, Cyprus restricted the use of lindane to wood protection and paints, eliminating agricultural use;
- (vii) In 1988, Finland prohibited the use of lindane as a pesticide;
- (viii) In both 1978 and 1988, the use of lindane was severely restricted within the European Community;
- (ix) In 1988, lindane was banned in Germany;
- (x) In 1988, the former USSR prohibited the use of lindane as a pesticide, and severely restricted all other uses;
- (xi) In 1989, lindane was banned in Sweden, and in Belgium its use was restricted to wood treatment and veterinary applications;
- (xii) In 1990, lindane was banned in New Zealand and deregistered in Mongolia;
- (xiii) In 1991, lindane was banned in Bangladesh and Hong Kong, and its use was severely restricted in Belize and China;
- (xiv) In 1992, lindane was banned in Austria and Brazil;
- (xv) In 1993, lindane was banned in Bulgaria;
- (xvi) In 1994, lindane was banned in Norway;
- (xvii) In 1995, lindane was banned in Denmark and its use was severely restricted in Argentina;
- (xviii) In 1997, the U.K. Pesticides Safety Directorate (PSD), the U.K. equivalent of the PMRA, initiated a review of lindane. By 1999, the PSD had decided to ban all forms of lindane seed treatment use, on the basis of unacceptable health risks to workers exposed to the chemical during seed treatment;
- (xix) In 1998 the Aarhus Protocol on Persistent Organic Pollutants to the UNECE Convention on Long-Range Transboundary Air Pollution of 1979 was adopted by some 30 countries, including the United States, Canada, and most countries of Western and Eastern Europe (this Protocol restricted the use of lindane to six specific uses and required a reassessment of lindane);
- (xx) In 1998, lindane was banned in France;
- (xxi) In 1998, the EU initiated a complete re-evaluation of lindane which resulted in an eventual Europe-wide ban on plant protection products containing lindane in 2000;

(xxii) At the same time, a number of European countries added lindane to the List of Chemicals for Priority Action under the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, further signalling international concern about the human health and environmental effects of lindane.

136. Moreover, in May 2009, lindane was included in the list of chemicals designated for elimination under the Stockholm Convention on Persistent Organic Pollutants or POPs (Exh. CC-45).

137. This broader factual context is relevant in assessing the first point raised by the Claimant, namely whether the PMRA undertook the Special Review as a result of a trade irritant and not as a part of its mandate as a regulatory agency or as part of an international commitment undertaken by Canada under the Aarhus Protocol to the LRTAP Convention.¹¹ Although the Claimant has avoided formulating this allegation in such terms, the underlying idea is that the PMRA acted in bad faith and launched a review process for reasons unrelated to its mandate and to the international obligations of Canada. The burden of proving these facts rests on the Claimant, in accordance with well established principles on the allocation of the burden of proof,¹² and the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one.¹³

138. In the Tribunal's view, the evidence on the record does not show bad faith or disingenuous conduct on the part of Canada. Quite the contrary, it shows that the Special Review was undertaken by the PMRA in pursuance of its mandate and as a result of Canada's international obligations.

139. Annex II of the Aarhus Protocol expressly provides that "[a]ll restricted uses of lindane shall be reassessed under the Protocol no later than two years after the date of entry in force" (Exh. JW-10). At the hearing on the merits, Dr. Franklin, at the time the Director of PMRA, noted that the conduct of the Special Review was prompted by commitments undertaken by Canada during the negotiation of the Aarhus Protocol:

Canada was not in a position to sign--other countries had already banned lindane, so that they had no problem with signing a Protocol that, in essence, was leading to an overall ban. For them the situation was very clear: It didn't make a difference. It was gone in their country, so they could sign that because, in effect, they had already done that. We had registered products in Canada, and we had not

¹¹ Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (Aarhus Protocol) (Exhibit JW-10).

¹² See Article 21, UNCITRAL Arbitration Rules.

¹³ See *Bayindir Insaat Turizm Ticaret VE Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award of 27 August 2009, para. 143.

done a review, so that there was no way that we were in a position to support a Protocol that, in effect, was going to ban them [...]

Everybody was pressuring. I mean, my goodness, countries that had already banned lindane very much wanted other countries that were still using it to stop because, of course, their use could contribute to long-range transboundary, which could then, even though a country had banned it, they could still end up being exposed to it. So, the whole purpose of these international POPs Conventions was to find a way to deal with it. Our position was that that could well be the case. But I think it really points out or should point out to everybody that we were not going to take action to ban. This wasn't a preconceived idea that Canada had that they were going to ban this, regardless. We clearly stated that we had to do a review to make a decision as to whether a ban was acceptable or not, so that there was not--there was not a—we hadn't taken a decision ahead of time as to what the outcome would be—that was based on the scientific review--despite the pressure from many other countries." (Tr., 7 September 2009, 1072-1074).

140. The oral testimony of Dr. Franklin is corroborated by the testimony of three other witnesses. Examined on the reasons for the launch of the Special Review, Ms. Chaffey, Head of the Toxicology Re-Evaluation Section of the PMRA's Health Evaluation Directory, stated that the PMRA

launched the Special Review in response to both domestic concerns such as those that were articulated in the Northern Contaminants Program Report on contaminants in the Arctic environment as well as international concerns that were specifically addressed through the United Nations LRTAP program (Tr., 3 September 2009, 457:9-14).

141. Similarly, asked in cross-examination about the uses of lindane that Canada retained under the Aarhus Protocol, Mr. Worgan, at the time PMRA's Head of Exposure Assessment, declared that

Canada agreed to put those into that list of restricted uses because those were currently registered—at that time they were registered in Canada, and we would not have been able to agree to a ban until such time that we had done like a full re-assessment of that, and that's exactly what we committed to do at the Aarhus Protocol meeting (Tr., 4 September 2009, 564: 23-25, 565: 1-3).

142. In the same vein, Ms. Sexsmith, at the time the Director of the Alternative Strategies and Regulatory Affairs Division of the PMRA, made the following statements:

Q. Would it be fair to say that that wanting by the Canola Council of a VWA was very consonant with the desire of the PMRA to phase out all uses of lindane?

A. No. I would say at that point in time they were mutually exclusive. Lindane was an older product. And according to the new re-evaluation policy that was being developed, it would naturally fall into the queue for review. And then with the international activity around concerns for lindane, Canada would be required to do a review, but requiring--being required to do a scientific review is quite different than getting rid of a product because the scientific review has to come first. So--and the upshot or the result

of a scientific review, it could be positive or negative. So, you know, if you're saying that because the Canola Council wanted to get rid of it that lined up with PMRA's view of wanting to get rid of it, I have to say categorically, no, because we don't have personal views of products. We're a regulatory organization. We regulate. We ensure health and environmental safety. And it's the science that tells us whether or not it meets those provisions. So, for us to make a conclusion before we've done the work is not something that we do as an organization, so I would just have to say no to your statement (Tr., 5 September 2009, 817:10-25, 818:1-8).

143. On the basis of this evidence, the Tribunal concludes that the Claimant's allegations of bad faith in connection with the launching of the Special Review of lindane have not been established.
144. Regarding the second broad allegation of the Claimant, namely that the lindane review process and more specifically the Special Review and the REN were flawed, the Tribunal notes as a preliminary matter that the Claimant approaches the review of lindane not as an overall process (starting with the Special Review, continuing with the assessment of the Board of Review, and ending with the REN), but rather as separate measures, two of which (the Special Review and the REN) are said to be in breach of Article 1103 of NAFTA. Aside from the fact that the conclusions of the Board of Review are relatively more favourable to the Claimant than those of the Special Review and the REN, the rationale for separating the three phases of one and the same process is not entirely clear. Without framing its allegations expressly in such terms, the Claimant has suggested that both the Special Review and the REN were flawed because they were conducted in bad faith in order to reach the foregone conclusion that lindane was to be banned. The key argument in challenging the legitimacy of the REN is that its results were allegedly influenced by Mr. Worgan, who had previously taken an important part in the Special Review, as well as by the litigation needs of the Respondent in the present case. Such allegation might provide a possible rationale for distinguishing between, on the one hand, the Special Review and the REN, both conducted in bad faith by the PMRA, and, on the other hand, the assessment of the Board of Review. However, such distinction would be dependent on the underlying contention that the PMRA acted in bad faith since the beginning of the overall review process.
145. Thus, in assessing the measures identified by the Claimant as allegedly in breach of Article 1105 of NAFTA, the Tribunal must first determine whether the Special Review was conducted in such a manner as to reflect bad faith on the part of the PMRA. If this is not the case, the allegation of bad faith in the conduct of the REN would also have to be discarded. To this first inquiry, the Tribunal must however add a second one,

namely whether the review of lindane (even if in good faith), breached the due process rights of the Claimant. Such inquiry must take into account the review process as a whole, including the procedure before the Board of Review, as an additional opportunity offered to the Claimant to put forward its position. Indeed, the mechanisms for the review of regulated products, such as lindane-based products, as well as those applicable to the consequences of such review, are set out in a complex array of laws and regulations, the purpose of which is precisely that any decisions taken by the authorities in this context are subject to procedural checks and balances. The establishment of the Board of Review was an important component of such arrangements, as was the REN. In assessing whether the alleged procedural deficiencies attributable to the Respondent involved a breach of Article 1105 of NAFTA, the Tribunal should not limit its inquiry to a specific portion of such arrangements. It must appraise any procedural deficiency in the light of the mechanisms provided by the Respondent itself to manage such potential occurrences. In the following paragraphs, the Tribunal will assess the main factual contentions of the Claimant from the perspective of these two distinct inquiries.

146. The Claimant seeks to ground its allegations of bad faith or at least procedural impropriety in the manner in which the Special Review was conducted by reference to five main factual contentions.

147. First, according to the Claimant, the notice of 15 March 1999 announcing the Special Review was unspecific and provided insufficient information with respect to both the concerns underlying the process and the manner in which registrants could participate (PHB Cl., para. 99). Having regard to the circumstances in which the Special Review was launched, as discussed in paragraphs 138-143 above, the Tribunal is not persuaded by the conclusions that the Claimant seeks to derive from the contents of the notice of 15 March 1999. As already noted, the balance of the evidence clearly suggests that the Special Review was launched out of legitimate regulatory concerns and in accordance with Canada's international commitments. Even assuming *ratio arguendi* that the content of such notice were insufficient to inform the Claimant of the concerns underlying the process and the manner in which registrants were able to participate, such fact alone would not be sufficient to justify a finding of a failure of due process sufficient to constitute a breach of Article 1105 of the NAFTA. Rather, the content of such notice must be assessed together with the other steps taken by the PMRA to convey the rationale and focus of Special Review and in light of the specific circumstances, as we shall see next.

148. Second, the Claimant also contends that the PMRA disingenuously failed to clarify the impact of the occupational risk assessment for the outcome of the Special Review (PHB Cl., para. 102 ff), that it did not request relevant data from registrants, thus depriving the Claimant of the opportunity to comment on the use and exposure practices and/or to present an updated occupational risk study (PHB Cl., para. 110 ff). It further submits that the registrants were offered very little time to comment on the Occupational Exposure Assessment once issued. It is true that the findings of the Board of Review lend some support to these contentions. This observation is, however, not dispositive of the inquiry of this Tribunal, which implies determining whether the facts reflect bad faith or at least procedurally improper behaviour by the PMRA which was both serious in itself and material to the outcome of its inquiry. Having regard to all the circumstances of the case, the Tribunal considers that this aspect of the Special Review was not conducted in a manner that reached such a threshold.

149. Indeed, as a sophisticated registrant experienced in a highly-regulated industry, the Claimant could not reasonably ignore the PMRA's practices and the importance of the evaluation of exposure risks within such practices. Both Mr. Ingulli, at the time the Claimant's Executive Vice-President for the Crop Protection Division, and Mr. Thomson, at the time the formulations manager of Chemtura Canada, acknowledged at the hearing that they were aware of the PMRA's practices and of the role played by exposure risks in such practices. In cross-examination, Mr. Ingulli answered as follows:

Q. All right. I will come back to some of the issues you've raised, but I would like to discuss the Special Review process for a moment. Now, Chemtura, you would agree, is a sophisticated registrant?

A. Yes.

Q. As a sophisticated registrant, Chemtura would be expected to know and understand PMRA practices?

A. Yes, I would say that's correct.

Q. And Chemtura is generally familiar with PMRA re-evaluation policy?

A. Yes (Tr., 2 September 2009, 197:17-25, 198:1-3).

Similarly, Mr. Thomson gave the following answers:

Q. Okay. When you affirmed your first Witness Statement, were you aware of the PMRA's practice that it was standard practice for conducting pesticides re-evaluations that they simultaneously examined three things, three broad categories: Toxicity, exposure, and environmental impact? So, were you aware of that at the time you affirmed your Witness Statement?

A. Yes.

Q. So, would you agree that the evaluation of the exposure to the pesticide is a standard practice of re-evaluation?

A. Yes (Tr., 3 September 2009, 281:8-18).

150. Moreover, the record shows that at least on two occasions the Claimant was made aware of the importance of exposure risk and was asked to provide information on this matter, but failed to take advantage of these opportunities. In a meeting held on 10-11 May 1999 (Exh. CC-23), shortly after the announcement of the Special Review, representatives of the Claimant were made aware that health issues would be addressed in the Special Review. Mr. Ingulli recognized, at the hearing on the merits, that health issues were understood to include exposure risks during seed treatment (Tr., 2 September 2009, 206:3-19). The minutes of this meeting prepared by one of the Claimant's representatives, Mr. Johnson, mention the PMRA's interest in obtaining an exposure study elaborated for the United Kingdom regulatory agency, of which the Claimant was well aware (Exh. JW-19). Then, in a meeting held on 4 October 2000 with Mr. Ingulli, the Claimant's top representative for this matter, Dr. Franklin, the PMRA's Executive Director, specifically mentioned that worker exposure was a concern in the lindane Special Review:

Q. Now, Mr. Ingulli suggested in his testimony before the Board of Review that worker exposure was only raised in passing at this October 4th, 2000 meeting, and that you didn't signal that the PMRA had any particular concern about this issue in connection with the ongoing Special Review. Do you agree?

A. Well, my recollection of the meeting is that it was more than a just in passing discussion. The issue, of course, is when I would be at meetings like that, the intent would not be a technical discussion of the science specifically involved, so that I think it's fair to say that most companies would understand if I had raised it that it had worked its way up and that I was familiar with that (Tr., 7 September 2009, 1041:24-25, 1042: 1-10).

In fact, only two days after that meeting, an employee of the Claimant, Mr. Dupree, sent to PMRA a copy of a 1992 study on workers' exposure to lindane (Exh. CF-10). At the October meeting, the representatives of the Claimant referred the PMRA staff to the 1992 Dupree study. Moreover, Mr. Ingulli's own notes of the meeting specifically mention "Concerns of PMRA: Worker Exposure. Told PMRA that EPA reviewed and accepted seed treat[ment] worker exposure study" (Exh. CF-12).

151. In the light of these facts, the Claimant's allegation, by reference to the conclusions of the Board of Review, that the comment period given to the Claimant after the release of the draft Special Review results was too short, is not persuasive either. Despite the suggestion by Mr. Ingulli at the hearing that the Dupree study reflected outdated data,

the Claimant did not point that out to the PMRA during the comment period. Rather, it relied, once again, on the Dupree study, although applying a lower safety standard (First Affidavit of Cheryl Chaffey, para. 101-102; First Affidavit of Wendy Sexsmith, para. 99-102).

152. On the basis of the evidence just discussed, the Tribunal cannot conclude that the second factual contention advanced by the Claimant amounted to unfair, let alone bad faith behaviour on the part of the PMRA.
153. Third, the Claimant further argues that the scientific basis for the outcome of the Special Review was insufficient, a fact that suggests that the underlying reasons explaining the outcome are to be found in the political pressures exerted on the PMRA (PHB Cl., para. 106 ff). The Tribunal has already discussed the reasons why the PMRA launched the Special Review, rejecting the arguments of the Claimant in that regard. It adds, in this connection that the Claimant itself acknowledges that it is not for the Tribunal to judge the correctness or adequacy of the scientific results of the Special Review, not even those questioned by the Board of Review. Thus, such divergence cannot, under the present circumstances, constitute a basis for a finding of unfair or bad faith treatment.
154. The Tribunal is further comforted in this conclusion by the fact that in both his written and oral testimony, the expert witness presented by the Respondent, Dr. Costa, confirmed that the PMRA conclusions were within acceptable scientific parameters:

Q. Yeah, okay. So, and I'll just read it in. This is the Lindane Board of Review at Paragraph 222: "The Board is of the view that the additional 10X uncertainty factor is not justified. Where a scientist makes a finding or a determination that is not justified, would you say that that is within generally acceptable scientific parameters?"

A. I think so. The application of these additional uncertainty factors, it's left to the scientists who conduct the Risk Assessment, and it's often very possible that different scientists, as I mentioned earlier, by looking at the same data, may reach different conclusions. It's also—you could find also differences in the amount of this uncertainty factor. It could be, as I said, anything from 2 to 10. So, there are differences. The way I read the Paragraph 222 is that not that the Board recommended that the additional uncertainty factor be totally removed. It says that, "it therefore recommends that PMRA consider an adjustment factor added in additional 10-fold maximum default." In other words, my interpretation of this recommendation on part of the Board of Review is that, "PMRA, you have decided to apply a 10-fold safety factor," which is the maximum basically. "Why don't you go back and look at the data again and see whether you can go by and consider and use a different safety factor?" The Board didn't say, "You should use 2 or 3 or 5 or 7." It simply recommended PMRA to take another look at the data and see whether they could apply a lower uncertainty factor [...]

And these differences of opinion are within the boundaries of acceptable sciences. Obviously, if you apply a higher safety factor, you are leaning toward a more conservative position, and this is what PMRA seemed to have done. They have chosen a more conservative safety factor. And although you could say, you know, "You have been too conservative, you could have chosen a lower one," you also have to think that PMRA is the Canadian Agency which is responsible for the safe use of pesticide in the State of Canada, and so it's the responsibility to assure that the use of any pesticide would be within the realm of safety. That's their duty and their mission. And from this point of view, it's not surprising they may be leaning toward a slightly more conservative position (Tr., 7 September 2009, 1115:13-25, 1116:1-17, 1117:5-18; see also First Expert Report of Dr. Costa, para. 4, 113, 116, 158; Second Expert Report of Dr. Costa, para. 24, 36).

In his oral testimony, Dr. Costa further added the following statements in connection with the PMRA's choice of a safety factor:

One other thing that--it's also written in the paragraph you pointed out to--is that even if PMRA had chosen a safety factor of 300 instead of 1000, thereby somehow appearing to be a little bit less conservative or assuming that this additional 3-fold safety factor instead of 10 would have covered all the toxicological concerns, several of the values of the margin of exposure, about 50 percent of those under different scenarios would have still been below the target of 300. And on this basis alone, PMRA could have reasonably concluded that it was an acceptable risk for workers the continuous use of lindane. So, in the end, this is what I want to say: They chose 1000, but even if they had chosen 300, the bottom line would have been the same (Tr., 7 September 2009, 1124:23-25, 1125:1-11).

This provides additional confirmation that the scientific divergence to which the Claimant referred cannot in and of itself serve as a basis for a finding of breach of Article 1105 of NAFTA.

155. Fourth, the Claimant has also argued that the PMRA failed to timely complete the Special Review, preventing the Claimant from taking appropriate action in the United States to register or to obtain a tolerance for the use of lindane on canola. According to the Claimant, the "PMRA only released its Occupational Exposure Assessment, which was ostensibly the culmination of its Special Review, in October 2001. If PMRA had completed a proper scientific review on lindane by the end of 2000, as it had committed to do, Chemtura would have actively pursued its U.S. application for registration and/or tolerance of lindane for use on canola" (PHB Cl., para. 101). The Tribunal understands this factual contention as a composite one, involving the following four statements: (i) that the Claimant was entitled to obtain the result of the Special Review by the end of 2000, (ii) that it did not actively seek a registration or a tolerance from the EPA, (iii) that such abstention was caused by the delay of the Special Review, and (iv) that the Claimant would otherwise have obtained a registration or a tolerance from the EPA. At the outset, the Tribunal notes that these components must all be established for the

Claimant's contention to be well-founded. Without some entitlement, there would be no reason to attribute to the PMRA's delay in issuing the Special Review any consequence suffered by the Claimant. Similarly, if despite the existence of such an entitlement, the Claimant is found to have sought a registration or a tolerance from the EPA, whatever the results of its endeavour, no consequences may be attributed to the PMRA. It is further clear that the burden of proving each of these factual components rests with the Claimant.

156. The Claimant has not shown that it was entitled to obtain the results of the Special Review by the end of 2000. Even if *ratio arguendi* the Tribunal were to accept the existence of such an entitlement, there is ample evidence in the record that the Claimant actively sought a registration or a tolerance from the EPA, although unsuccessfully. At the hearing on the merits, Dr. Goldmann, a former senior EPA officer, made the following statement:

[...] I do know that it appears to me that they were aggressively attempting to maintain their registrations and to secure a registration for canola all the way through the beginning of 2006 when I would look at the record – I mean, 2006. And when I look at the record—and I see that they were continuing to perform studies, continuing to submit studies, continue to pay consultants to do work for them on this, continuing to meet with the EPA (Tr., 7 September 2009, 1232:21-25, 1233:1-3).

This point was confirmed by a witness produced by the Claimant. Examined about the Claimant's attempts to obtain a tolerance from the EPA for lindane use on canola, Mr. Johnson, formerly a consultant advising the Claimant, gave the following answers:

Q. Okay. Let's take a look in Tab 259. It's an E-mail that we already looked at. This is in 2003. Tab 259 is in Volume 7--no, Volume 9. I apologize. So, point three, you have, "There has been some discussion on the general issue of how to handle FDA approved product exposure in a cumulative risk assessment at top OPP management levels and OGC, but not much progress has been made." OGC is the Office of General Counsel—

A. Yes.

Q. --of the EPA? Okay. And then the next page, in the middle of it you ask at point one, "Should we try to press upper OPP management for closure on the RED comments, including the generic FDA issue?" And Mr. Cummings replies, "I would push the FDA issue. The FDA issue is not resolved in our favor, there will not be any future lindane tolerances because the risk cup is full." Did you continue to push the EPA, Mr. Johnson?

A. Yes, we did. We sent in several written comments, and we sent in some analyses by our toxicologists as to how to apply a probabilistic assessment to show that there is a problem that EPA is basically using the wrong analysis, and we continued to talk with people over there on the phone about getting this resolved.

Q. Okay. So, you put in a good deal of effort to try and convince the EPA—

A. Yes.

Q. --because Chemtura believed this was an important part of getting a canola tolerance in the United States?

A. Yes, that's correct (Tr., 3 September 2009, 431:16-25, 432:1-20).

157. If, in spite of this evidence, the Tribunal were to accept that the Claimant did not seek a tolerance or a registration with the EPA or did not do so actively enough, the Claimant would still have to establish that the decisive reason for this omission was the delay in the Special Review, which it has not done.
158. Finally, the assertion of the Claimant according to which it would have obtained a tolerance or a registration from the EPA is highly speculative. For these reasons, the fourth factual contention advanced by the Claimant cannot ground a finding of unfair, let alone bad faith treatment from the PMRA.
159. Fifth, according to the Claimant, after the Special Review, the PMRA refused to establish a Board of Review as required by Sections 23 and 24 of the Pest Control Product Regulations (Mem., para. 432 ff). The consequences that the Claimant attempts to derive from this factual contention are unclear. It is a fact that the Board of Review was established and the Claimant does not question the manner in which the Board proceeded or the results it reached. Irrespective of whether the PMRA refused to establish a Board of Review or not, an issue which is disputed by the Parties, what matters from the perspective of Article 1105 of NAFTA is that the Board was indeed established by Canada, and that such step provided the Claimant with an additional measure of due process.
160. In any event, there is no evidence on record suggesting that the PMRA thwarted or improperly influenced the process of setting up the Board of Review. In response to the Claimant's letters of 18 February and 14 March 2002, requesting the establishment of the Board of Review (Exh. WS-64, WS-65), the Minister advised the Claimant on 6 May 2002 that "Crompton Co/Cie's requests have been referred to the Pest Management Regulatory Agency for appropriate action" (Exh. WS-68). One month later, on 3 June 2002 the Claimant requested clarification of the role of the PMRA in the establishment of the Board of Review:

We are unclear as to the meaning or intent of your letter. It would appear that either you intend the PMRA to appoint the Board for the purpose of conducting the reviews contemplated by the Regulations

or that you intend the PMRA itself to conduct the review. Either interpretation offends principles of fairness and reasonable administrative decision-making (Exh. WS-69).

Only 9 days after such letter, without awaiting the reply from the Minister, the Claimant made an application before the Federal Court of Canada opposing the Minister's decision to refer the requests to the PMRA (Exh. R-84). The process of appointment of the Board of Review was then suspended pending the decision of the court. On 6 May 2003, a hearing was held by the Court in Vancouver, during which

Counsel for the Applicant said in open court in the course of his submissions in support of the orders sought that: (a) there was no suggestion on the part of the Applicant that the Minister could not consult the PMRA. (b) the Applicant was not asking the Court to tell the Minister how to conduct the appointment process. (c) the role of the PMRA in the process of appointing a Review Board under s. 24 of the Regulations was not an issue.

9. With these concessions by counsel for the Applicant, the way was cleared for the Minister to utilize the PMRA in the process of setting up a Review Board in the exercise of her powers under s. 24, which she started to do in May 2002 but stopped pending assurances that she was acting within the law.

10. By an Order dated 6 May 2003, Justice Gibson ordered that the hearing of the application be adjourned sine die, but that he remain seized of the matter, and that by agreement among the Court and counsel, counsel will report in writing to the judge through the Registry in Ottawa by close of business on Friday 16 May 2002 [sic] on any progress toward settlement of the issues here (Exh. WS-67).

161. Thereafter, the Minister moved forward with the constitution of the Board of Review, and on 22 October 2003, the Minister advised the Claimant that the Board had been established (Exh. B-76). On 8 January 2004, the Claimant requested the discontinuance of the matter raised in its application of 12 June 2002 (Annex R-104A). This sequence of events shows that the delay in the establishment of the Board of Review was primarily the result of the Claimant's application to the courts filed before receiving any reply from the Minister regarding the role of the PMRA. It also shows that the Claimant had no issue with the role of the PMRA in the appointment process. This evidence confirms the conclusion of the Tribunal that the fifth factual contention advanced by the Claimant cannot justify a finding of unfair, or bad faith behaviour by the PMRA.
162. On the basis of the foregoing considerations, the Tribunal cannot accept the Claimant's argument that the Special Review conducted by the PMRA gave rise to a breach of Article 1105. Specifically, the evidence adduced by the Claimant does not establish that the PMRA acted in bad faith or in breach of due process standards. As a result, the Tribunal sees no need to discuss the alleged interference of PMRA staff in the REN

process. Even if such interference in the scientific results of the REN were to be established, which is not the case, this would by no means indicate that the REN was biased. Moreover, the Claimant has referred to one internal document dated 31 August 2006 (Exh. JW-61) in which Mr. Worgan states that the PMRA has consulted with the Trade Law Bureau and that the latter recommended "to complete the review of lindane". This "would clarify/substantiate the position taken by the PMRA in 2001 and support the government's position in court". This mention is insufficient to prove that the REN was a *pro forma* exercise. First, the REN was launched several months before the date of the internal document just referred to as a result of the recommendations made by the Board of Review and it concerned several registrants (Exh. JW-37, JW-43, JW-47, JW-48, JW-49, JW-50, JW-51, JW-52). This is in particular evident from the first page of the internal document, which states that

[i]n response to the recommendations of the Lindane Review Board, the PMRA has initiated a follow-up review of lindane. This includes revisiting the occupational risk assessment as well as finishing environmental, cancer and dietary assessments that were not completed at the time of the original decision. The former lindane registrants affected by the 2001 decision were asked to provide data and information required to refine the assessment with a deadline for submission end of July (Exh. JW-61).

Second, the first page of this document also mentions that "[t]he ongoing review of lindane [was] resource-intensive for some science divisions, and increases timelines on re-evaluation of other active ingredients" (Exh. JW-61). This was further confirmed by Mr. Worgan at the hearing on the merits, when he stated the following:

We took this very seriously, and, you know, we have a scientific process that has a lot of integrity. We – in this particular case, we assigned a different group of evaluators than those that had worked on the lindane Assessment. We provided them with absolutely no direction with respect to what the outcome should be, what we were expecting. We had no vested interests, for example, in a particular outcome. The science will lead you where the science goes. It was not a foregone conclusion. We had some additional information on the worker exposure side. We had some additional toxicology that our scientists looked at. We also had – we undertook a review of some of the other areas that we had not completed previously. We took all of those into account in the decision. That is definitely not a foregone conclusion (Tr., 4 September 2009, 650:24-25, 651:1-13).

There is no doubt in the Tribunal's mind that the REN was not a biased exercise conducted for litigation purposes.

163. On the basis of the foregoing considerations, the Tribunal concludes that the first and the sixth specific measures identified by the Claimant in its Post-Hearing Brief were not in breach of Article 1105 of NAFTA.

c. Prohibition on planting treated seed after 1 July 2001

1. Claimant's position

164. The Claimant argues, generally, that the PMRA breached the Claimant's legitimate expectations with regard to the PMRA's commitments under the Withdrawal Agreement and the Canadian regulatory regime for seed treatment products. According to the Claimant, the key components of the Withdrawal Agreement were breached (Mem., para. 384 ff). In particular, the Claimant understood the Withdrawal Agreement as entailing that its lindane products could be used to treat canola seed until 1 July 2001, with no stated restrictions on when that treated seed could be sold or planted.
165. In its Post-Hearing Brief, the Claimant identified, as the second specific measure in breach of Article 1105(1) of NAFTA, the prohibition on the planting of treated seed after 1 July 2001, sanctioned by substantial fines. According to the Claimant, lindane product sales were coming up for the 2001 year and it was unlikely that treaters would treat or growers would plant seeds treated with lindane to the extent they could incur a heavy fine. The Claimant concludes that the PMRA's conduct in this regard was blatantly unfair, and its impact on the sales of lindane products was substantial and immediate.
166. Moreover, the decision to require the cessation of all sales and use of the Claimant's lindane products on canola/rapeseed on 1 July 2001 was contrary to previous discussions with and representations by the PMRA to registrants. It was also marked by an absence of transparency in breach of the Respondent's obligation to maintain a transparent regulatory environment (Mem., para. 432 ff).

2. Respondent's position

167. As a general matter, the Respondent replies that (i) the hearing confirmed that the Withdrawal Agreement was an industry-led agreement, driven by the industry's business concerns, and that the PMRA only intervened as a facilitator, subject to the condition that the agreement was voluntary and treated all registrants equally (PHB Resp., para. 119); (ii) the Claimant freely consented to the Withdrawal Agreement and took the benefit of it (PHB Resp., para. 119); (iii) the expectations or terms that the Claimant seeks to derive from such agreement were misstated or unreasonable and are not protected by Article 1105 of NAFTA (PHB Resp., para. 148 ff); (iv) in any event,

to the extent that the PMRA agreed to do anything in connection with the Withdrawal Agreement, it substantially lived up to expectations (PHB Resp., para. 168).

168. More specifically, the Respondent contends that the 1 July 2001 deadline was set for lindane canola products to be used up. According to the Respondent, this meaning is clear from the letters invoked by the Claimant, the rationale of the Withdrawal Agreement and the contemporary internal documentation of the Claimant. The terminated use encompassed not only the use of lindane products to treat canola seed but also any other uses, including the planting of previously treated seed. In this regard, the Respondent refers *inter alia* to canola industry requests that the PMRA allow leftover treated seed to be used in the 2002 planting season. Moreover, the cut-off date for use of lindane on canola being set, the PMRA would have been entirely justified in reminding growers of such date. Finally, as growers had no right to plant lindane-treated canola after 1 July 2001, the Claimant can not reasonably complain that it lost sales for a period when its product was no longer authorized. In any event, the evidence at the hearing confirmed that the PMRA made no threats, contrary to what the Claimant has argued (PHB Resp., para. 169 ff).

3. The Tribunal's determination

169. Contrary to the Claimant's allegations that the PMRA "fostered and exploited industry fears to pressure producers to voluntarily withdraw their products, as the only alternative" on the basis of a foregone conclusion on lindane (Cl. PHB, para. 60), the evidence in the record clearly suggests that the Withdrawal Agreement was an industry-led initiative involving the PMRA as a necessary partner. In addition to the written record (e.g. Exh. TZ-25) the Tribunal found the oral testimony of Mr. Tony Zatylny, at the time Vice-President of Crop Production and Regulatory Affairs at the Canola Council of Canada (CCC), particularly persuasive. Asked by one member of the Tribunal whether the initiative of the Withdrawal Agreement came from the PMRA, Mr Zatylny responded "It did not" (Tr., 4 September 2009, 725:7). Asked then whether the Claimant had been compelled by the PMRA to enter into the Withdrawal Agreement, Mr Zatylny replied as follows:

I would not say that's the case. This was the initiative of the growers. They were consistent in their response all through this process, that they no longer wanted to use a product. They did not want the health issues raised by nongovernment groups and consumer groups. They did not want issues at the border. It was their solution, and the PMRA was involved to facilitate the Agreement. It was--it was really the growers' solution. We analyzed the problem. Let's face it, all the lindane used in Canada

would amount to \$20 million at the most. The industry was worth \$1.8 billion, 600 million of which was exports to the U.S. When we balance from the growers, when the industry balanced the use of lindane against the health of the industry, there is really no choice, and the solution was--was hammered out and agreed to by the industry, by the participants, and presented to the PMRA looking for their support (Tr., 4 September 2009, 725:10-25).

170. This statement was corroborated by Mrs. Sexsmith, at the time Director of the Alternative Strategies and Regulatory Affairs Division of the PMRA, who testified as follows:

[...] I think the other issue is the point that PMRA has not made unanimous agreement among all Registrants. I mean, that wouldn't be a function, our function. I mean, obviously, the Agreement needed to be there in order for the voluntarily agreement to work, but that really wasn't up to us to do. That was up to the Canola Council (Tr., 5 September 2009, 786:2-7).

171. This conclusion provides the overall background for assessing the contents of the Withdrawal Agreement and, in turn, also the meaning of the date of 1 July 2001 which the agreement sets.

172. According to a letter sent by the then President of the CCGA to the PMRA's Executive Director on 26 November 1998,

Registrants of seed treatments containing lindane and other meeting participants agreed to the following:

1. The registrants Interprovincial Cooperative Ltd., Rhone-Poulenc Seed Treatments, Uniroyal Chemical Ltd. and Zeneca Agro will voluntarily remove canola/rapeseed claims from labels of registered canola seed treatments containing lindane by December 31, 1999.
2. All commercial stocks of products containing lindane for use on canola and lindane treated canola seed can not be used after July 1, 2001.
3. The Pest Management Regulatory Agency (PMRA) and the U.S. Environmental Protection Agency (EPA) will continue to work with registrants to facilitate access to lindane replacement products. The Canadian Canola Growers Association (CCGA) and the Canola Council of Canada (CCC) agree to work with the aforementioned bodies to facilitate these activities (Exh. B-12).

173. At the hearing, Mr. Zatylny confirmed that the results of the meeting of 24 November 1998 were, at the time, perceived as a deal with the industry:

PRESIDENT KAUFMANN-KOHLER: At the November 24th, '98, meeting, did you have the impression that there was an agreement reached?

THE WITNESS: Yes.

PRESIDENT KAUFMANN-KOHLER: On what?

THE WITNESS: Well, on the basis of we were committed to not leave the room until we had an agreement or sign off on an agreement being reached. I think it was around 3:00. We had a big board of issues that we were working through and dates and finally there was no more questions, so I asked the Registrants to confirm yes or no: Are they going to support the Voluntary Withdrawal Agreement? Every Registrant said yes, they're going to support the voluntary withdrawal agreement. So, we kind of leaned back and said, "We have a deal". The memory is burned in my mind because that was the critical point. We went through all the issues. We put an action plan together. We finally asked for the support, and we got the support. And starting the day after, the 26th, we started to get feedback on the Press Release. We started working with Registrants. I phoned Julie Langer from the World Wildlife Fund and said, "Lindane is going to be out of the canola business, and so leave us alone." So, lots of things happened after that. So, yes, in my mind, and I believe everyone's mind that sat in the room that day, there was an agreement reached for voluntary withdrawal of lindane seed treatments.

PRESIDENT KAUFMANN-KOHLER: And the agreement included the different conditions?

THE WITNESS: That included the three main points. Those are the ones you're referring to that every company would submit in writing to the PMRA that there would--they wanted canola taken off their labels, that we would work together on registration of new pesticides for canola and that there would be a phase-out period going to July 31 of 2001. And that was the three elements of—

PRESIDENT KAUFMANN-KOHLER: July 1st.

THE WITNESS: July 1st, sorry. Thank you (Tr., 4 September 2009, 729:20-25, 730:1-24).

174. This perception is further confirmed by the description of the contents of the said meeting in the letter which the CCGA sent on 26 November 1998 to the PMRA. Indeed, as part of the agreed work plan, the latter stated that by 30 November 1998, registrants would "agree in writing to the voluntary removal of canola/rapeseed claims from any seed treatments containing lindane by December 31, 1998". Moreover, "[n]o later than December 15, 1998 – a press release [was to be] issued by the CCGA announcing the voluntary removal of the canola/rapeseed claim from seed treatments containing lindane. Participants in the November 24, 1998 meeting [were to] review the press release before general distribution" (Exh. B-12). Furthermore, the CCGA "respectfully request(ed) your [the PMRA's] acceptance and support for the proposals outlined in this letter" and added that "[a] written response to the CCGA and registrants of seed treatments containing lindane would be greatly appreciated" (Exh. B-12).
175. Another element confirming that agreement on the terms of the Withdrawal Agreement was reached in November 1998 is the action taken thereafter by the PMRA and the EPA. As mentioned above at para. 17, on 2 December 1998, Canada and the United States entered into the ROU (Exh. B-13), which provided *inter alia* that "Canadian canola growers have requested Canadian registrants to agree voluntarily to remove canola/rapeseed claims from labels of registered canola seed treatments containing

lindane by December 31, 1999. All commercial stocks [of pesticide] containing lindane for use on canola and lindane treated canola seed would not be used after July 1, 2001. This is contingent on registrants requesting voluntary removal. EPA, PMRA, growers and registrants will continue to work together to facilitate access to replacement products". (Mem., para. 75; C-Mem., para. 100).

176. Thus, at the time when the Withdrawal Agreement was made, the date of 1 July 2001 had a clearly defined meaning; it was the deadline for the use of any lindane-treated seed.

177. During December 1998, the Claimant publicly conveyed its commitment to the Withdrawal Agreement as reached at the 24 November 1998 meeting, including the 1 July 2001 deadline for the use of lindane-treated seeds. At the same time, the Claimant made attempts at extracting more favourable treatment from the PMRA. As bluntly stated in a contemporaneous internal document of the Claimant:

Gentlemen, please find attached a copy of a letter provided to PMRA regarding voluntary withdrawal of Lindane. This letter is not to be shared with the industry. We have requested several regulatory concessions [sic] and do not wish to share this with our competitors.

The position we are talking [sic] publicly is, "We have agreed to the voluntary withdrawal of Lindane by January 31, 1999, at the request of the Canola growers". Upon input from growers and the industry we have requested expeditious registrations of our new Gaucho formulations (Exh. TZ-45).

178. The Tribunal must take into account this evidence to assess whether the PMRA acted unfairly and inequitably in interpreting the 1 July 2001 deadline as it was spelled out in the CCGA's letter of 26 November 1998, the ROU and understood by all the other actors, including the Claimant at least in its public statements.

179. In the Tribunal's opinion, the disingenuous position taken by the Claimant with respect to the content of the Withdrawal Agreement cannot justify a "reasonable" or "legitimate" expectation to be treated in disregard of the 1 July deadline in the meaning just established. Article 1105 of NAFTA seeks to ensure that investors from NAFTA member States benefit from regulatory fairness. When facilitating the conclusion of the Withdrawal Agreement, the PMRA precisely intended to ensure regulatory fairness. On cross-examination, Ms. Sexsmith confirmed such intent in the following terms:

Q. But my--I guess my question is: It wasn't the obtaining of the withdrawal of each Registrant, but that it be done on identical conditions for each. Was that within the purview of the PMRA? Or was that at the insistence of the PMRA, that the conditions on each would be identical?

A. Well, you know, under normal principles of regulatory fairness, it would have to be the case. I mean, normally, we try to treat Registrants in the same fashion. And under something like that, I don't see how an agreement could work if, in fact, one Registrant was getting one thing and another Registrant was getting another.

Q. Well, taxation authorities, for example, are perfectly happy to take more money away from people who have more than people who have less, and more referring to equality of treatment among equal participants would be appropriate in what you have just stated.

A. Well, certainly the intent under the Voluntary Agreement, for our role at least, was to treat all of the Registrants the same (Tr., 5 September 2009, 787:4-22).

180. Consequently, the Tribunal reaches the conclusion that the second measure identified by the Claimant in its Post-Hearing Brief was not in breach of Article 1105 of NAFTA.

d. Cancellation of Chemtura's lindane registrations on 11 and 21 February 2002

1. Claimant's position

181. As the third and fourth measures in breach of Article 1105(1) of NAFTA, the Claimant identified the termination of Chemtura's lindane registrations, despite the availability of less prejudicial avenues, and the prohibition imposed on Claimant to sell any lindane products thereafter. According to the Claimant, such breaches materialized on 11 and 21 February 2002. At the closing hearing, the Claimant specified that notwithstanding the reference on page 53 of its Post-Hearing Brief to "Cancellation of Chemtura's Lindane for Canola Registrations", it means to refer to its *non-canola* lindane registrations (Tr., 17 December 2009, 1460-1461). Thus, both the third and the fourth measures complained of by the Claimant concern *non-canola* lindane registrations.

182. The Claimant referred in this connection to the Pesticide Control Products Regulations which allow for a phase-out of the targeted products. The Claimant argues that it was unreasonably deprived of such phase-out right, despite having provided the sales and inventory information requested by the PMRA in order to be granted a phase-out, on the basis of the fact that Chemtura Canada had stated that it was not concurring with the proposed "voluntary" discontinuation and had not provided the required letter of "voluntary" discontinuance by the 31 January 2002 deadline (PHB Cl., para. 119). The Claimant considers such deprivation as a punitive measure taken by the PMRA against the Claimant because it had refused the PMRA's proposal that it "voluntarily" withdraw its lindane registrations for use on canola (PHB Cl., para. 115 ff).

2. Respondent's position

183. The Respondent objects in essence that (i) Article 1105 of NAFTA does not prescribe minimum phase-out periods, nor does it limit the discretion of regulators to take steps in compliance with their duty to protect public health and the environment (PHB Resp., para. 112); (ii) nothing in the evidence suggests an abuse of discretion that would amount to a breach of the international minimum standard of treatment (PHB Resp., para. 112); (iii) the Claimant was not unfairly deprived of a phase-out, as it was actually offered one pursuant to section 16 of the Regulations, like the other lindane product registrants, and refused it; (iv) the Claimant's products already delivered to vendors were in fact allowed to remain in the market until exhaustion, in accordance with section 22 of the Regulations (PHB Resp., para. 116 ff).

3. Tribunal's determination

184. The two measures challenged by the Claimant followed the results of the Special Review of lindane conducted by the PMRA. As already noted, there is no evidence in the record that such review was conducted unfairly or in bad faith; quite to the contrary, there is ample evidence that the use of lindane caused genuine concerns, both in Canada and abroad. This is the context in which the Tribunal must assess the Claimant's argument that it was deprived of a phase-out as a punitive measure taken by the PMRA.

185. Under the Pesticide Control Products Regulations, the Minister can cancel or suspend a registration of a control product when, on the basis of the current information available, the safety of that product is deemed no longer acceptable (Exh. R-2; PHB Cl., para. 115; PHB Resp., para. 114).

186. On the basis of the results reached by the Special Review of lindane, the PMRA held consultations with affected registrants. Following a conference call held on 13 December 2001, the PMRA advised the Claimant on 19 December that the termination of lindane products remained warranted and that "[s]uch termination could be effected through phase-out by suspension of registrations or voluntary discontinuation". The letter further stated that the PMRA felt that "the option of voluntary discontinuation, pursuant to section 16 of the Pest Control Products Regulations, proposed by some of the registrants would achieve the Agency's goal while addressing the identified needs of users" (Exh. B-56). This letter further requested registrants to provide information

regarding existing inventory and historical sales for registered products by 4 January 2002.

187. In a letter of 17 January 2002, the PMRA noted that the Claimant had not sent the information requested and that telephone calls to staff of the Claimant (Messrs. Parsons and Dupree) had not been returned. The PMRA nevertheless reiterated that it was "prepared to accept the phase-out of lindane products through voluntary discontinuation in accordance with the terms and conditions outlined in that letter [of 19 December 2001]" (Exh. B-57). It continued as follows:

Should you choose to voluntarily discontinue sales of your products as indicated, we request that you provide the information regarding existing inventory and historical sales requested in our letter of December 19, 2001 by January 24, 2002. If this information is not received by PMRA by January 24, 2002, this would be taken as indication of your intent not to discontinue sales of these products voluntarily, and, as a result, action would be taken under the authority of section 20 of the Pest Control Products to suspend the affected registrations on January 25, 2002 (Exh. B-57).

188. By letter of 23 January 2002, the Claimant provided 5-year sales figures and inventory information with respect to a number of products. It stated however that "[i]n providing this information Crompton in no way concurs with the PMRA's proposal for voluntary discontinuance under the Pest Control Products Act" (Exh. B-58).

189. Thereafter, by letters of 11 and 21 February 2002, the PMRA advised the Claimant that, under the circumstances, it observed that the Claimant had chosen not to accept the option of voluntary discontinuation of sales (Exh. B-59, B-61). It therefore suspended the registrations of the eight products referred to in those letters.

190. As noted above, the Claimant argues that the cancellation of its remaining lindane registrations was a punitive measure. The Tribunal does not agree. The record shows that the PMRA was not legally required to grant a phase out through voluntary discontinuation. At the hearing, Ms. Sexsmith testified that the phase-out procedure was a standard regulatory practice in the context of re-evaluation of older products:

Typically for older products that have been on the market for a long time, the whole purpose of re-evaluation is to examine those products and make sure they meet current standards, and in this case lindane did not. And so a reasonable course of action is that it can be allowed to be phased out of the marketplace as opposed to, you know, an urgent kind of action with imminent risk. And this is quite a normal process for regulatory programs all over the world (Tr. 5 September 2009, 845:3-10).

191. The question then becomes whether the PMRA followed its standard regulatory practice with respect to the Claimant. As shown by the evidence reviewed above, this was clearly the case. At the hearing, Ms. Sexsmith confirmed that the Claimant was offered the same options as the other registrants, and decided not to make use of them:

Q. So, I guess I don't understand how the refusal to exercise a discretion assisted in the management of risk. If anything, it accentuated it by, if I could put it this way, playing hard ball?

A. Mm-hmm.

Q. Didn't it?

A. Well, I don't see it that way. I think Chemtura had the same options that the other Registrants had. They chose not to take it. PMRA was left with no option, given the unacceptable risk issue. They had to take a stand and take an action, and so that's what was done (Tr., 5 September 2009, 845:21-25, 846:1-6).

192. Under the circumstances, the Tribunal considers that the offer made in December 2001, and reiterated in January 2002 despite the elusive behaviour of the Claimant, was sufficient to satisfy the standard of treatment required by Article 1105 of NAFTA. Taking into account that the PMRA had discretion as to whether or not to offer a phase out through voluntary discontinuation, as it is acknowledged by the Claimant in the very question put to Ms. Sexsmith, and that in the exercise of such discretion it afforded the Claimant the same treatment as all the other affected registrants, the Claimant's argument of "punitive" behaviour on the part of the PMRA is obviously unfounded.

193. As a result, the Tribunal is of the opinion that the third and fourth measures identified by the Claimant in its Post-Hearing Brief were not in breach of Article 1105 of NAFTA.

e. Treatment of Gaucho CS FL

1. Claimant's position

194. The fifth and last measure identified by the Claimant as a breach of Article 1105 is the PMRA's failure to accord expedited treatment to the registration of Gaucho CS FL contrary to the Claimant's and Crompton Canada's legitimate expectation arising from the PMRA's commitment under the Withdrawal Agreement. According to the Claimant, this breach lasted from 27 March 2000 to 17 July 2002.

195. The Claimant further argues, that the PMRA "unnecessarily and, indeed inexplicably, thwarted the timely registration of Gaucho CS FL at every turn, while pushing Helix and Helix Xtra through the registration at breakneck speed" (PHB Cl., para. 121), thus discriminating between Chemtura Canada and Syngenta, the manufacturer of Helix and Helix Xtra. More specifically, despite the commitments of the PMRA under the Withdrawal Agreement and despite the fact that the Gaucho CS FL registration was simpler from the regulatory and chemical perspectives (as a category B submission), the registration of Gaucho CS FL took twice as long as the standard timeline, whereas the registration of Helix and Helix Xtra (a more complex category A submission) took far less than the standard time. The Claimant stresses that each stage of the registration process was marked by disparities between the registration of Gaucho CS FL, on the one hand, and that of Helix and Helix Xtra, on the other hand (PHB Cl., para. 120 ff).

196. Furthermore, the PMRA failed to maintain a transparent regulatory environment, as its management of registration applications for lindane replacement products lacked transparency and was highly suspect:

The critical point for the Tribunal to understand is that PMRA processed the Helix/Helix Xtra submissions incredibly quickly, without following its own procedures, and making numerous concessions to ensure its rapid approval. In the case of Helix, in order to meet the demand for an alternative to lindane, PMRA cut corners and conducted an incomplete scientific review, and granted Helix a temporary registration, notwithstanding the numerous deficiencies in the registration application (PHB Cl., para. 142).

2. Respondent's position

197. As noted in paragraph 167 *supra*, the Respondent argues as a general matter that (i) the hearing confirmed that the Withdrawal Agreement was an industry-led agreement, driven by the industry's business concerns, and that the PMRA only intervened as a facilitator, subject to the condition that the agreement was voluntary and treated all registrants equally (PHB Resp., para. 119); (ii) the Claimant freely consented to the Withdrawal Agreement and took the benefit of it (PHB Resp., para. 119); (iii) the expectations or terms that the Claimant wants to derive from such agreement were misstated or unreasonable and are not protected by Article 1105 of NAFTA (PHB Resp., para. 148 ff); (iv) in any event, to the extent that the PMRA agreed to do anything in connection with the Withdrawal Agreement, it substantially lived up to the expectations it may have created (PHB Resp., para. 168).

198. More specifically, the Respondent argues that the PMRA gave only limited undertakings, in connection with the replacement products. It stresses that the documents on which the Claimant relies to establish the terms of the Withdrawal Agreement, namely the letters exchanged by Mr. Ingulli and Dr. Franklin on 27 and 28 October 1999, do not mention replacement products. It further emphasizes that the letter of 26 November 1998 from the CCC, which the Claimant invokes in respect of replacement products, aside from being otherwise inconsistent with the Claimant's case, contained only a general commitment to work with registrants. Moreover, when in its letter to the CCC of 23 February 1999, the PMRA committed to review three expedited replacement products, Gaucho, Helix, and Premiere Z, Gaucho CS FL was not even in the queue, since it was submitted more than a year later in March 2000 (PHB Resp., para. 179).

199. The Respondent's further submission is that the PMRA fulfilled its commitment as far as the Claimant is concerned through the registration of Gaucho 75ST and Gaucho 480FL. Finally, it asserts that there is no indication that the PMRA favoured or had any reason to favour Helix to the detriment of Gaucho CS FL. The registration of Gaucho CS FL followed a standard procedure and any delay was substantially due to Chemtura's own failure to provide the data required for the review and Chemtura's decision to rely on potential data waivers. In any event, Article 1105 of NAFTA does not hold government agencies to a standard of perfection, nor *a fortiori* does it elevate an agency's internal and non-binding own good faith targets into a rigid standard of liability (PHB Resp., para. 177 ff).

3. Tribunal's determination

200. The fifth and last measure allegedly in breach of Article 1105 involves five contentions that the Tribunal deems it important to disentangle. First, the Claimant argues that, as part of the Withdrawal Agreement, the PMRA committed to an expedited review of replacement products. Second, the Claimant further argues that that commitment applied not only to the registration of Gaucho 75ST and Gaucho 480FL, but also to the registration of Gaucho CS FL. Third, according to the Claimant, the registration of Gaucho CS FL was unreasonably delayed as compared to the registration timeline normally applied by the PMRA. Fourth, the Respondent discriminated against it by delaying the registration of Gaucho CS FL compared to Helix.

201. Regarding the first and second contentions identified above, the Tribunal must assess whether and to what extent the PMRA obligated itself in the Withdrawal Agreement to expedite the registration of replacement products. As discussed in paragraphs 169-177 above, the Tribunal considers that the Withdrawal Agreement between the canola growers and the relevant registrants was reached in November 1998. The Claimant seems to acknowledge that the contents of the Withdrawal Agreement on this specific point must be assessed on the basis of the letter of 26 November 1998 from the CCGA to the PMRA (PHB Cl., para. 123, footnote 106). The Tribunal notes in passing that this is inconsistent with the Claimant's contention, made in the context of its other arguments, according to which the contents of the Withdrawal Agreement are to be found in the exchange of letters of October 27 and 28, 1999, between Mr. Ingulli and Dr. Franklin. Despite such inconsistency, the Tribunal is of the view that the relevant time for assessing the existence and the extent of any such undertaking by the PMRA is indeed November 1998.

202. The letter from the CCGA to the PMRA of 26 November 1998 stated in relevant part that

Registrants of seed treatments containing lindane and other meeting participants agreed to the following:

[...]

3. The Pest Management Regulatory Agency (PMRA) and the U.S. Environmental Protection Agency (EPA) will continue to work with registrants to facilitate access to lindane replacement products. The Canadian Canola Growers Association (CCGA) and the Canola Council of Canada (CCC) agree to work with the aforementioned bodies to facilitate these activities (Exh. B-12)

203. The letter went on to state, under the heading "related issues" that

1. [M]eeting participants agreed to the following work plan: 1. Stakeholder meetings to be scheduled for June and October to review progress toward the approval of lindane replacement products

[...]

5. Action time line:

a) November 30, 1998 – registrants agree in writing to the voluntary removal of canola/rapeseed claims from any seed treatments containing lindane by December 31, 1999. Written agreement sent to Dr. Claire Franklin, Executive Director PMRA.

[...]

c) December 31, 1998 – any registrant wishing to gain approval for a lindane-free seed treatment in time for the 1999 canola seeding must make a formal request to PMRA. This applies only to requests in which lindane is removed from existing formulations of approved seed treatments (Exh. B-12).

204. On 17 December 1998, the Claimant wrote to the Executive Director of the PMRA stating that it agreed to voluntarily remove canola from the product labels of its lindane-based seed protectants by the end of 1999 subject to a number of provisos, including the following:

2. PMRA has granted the registration of the imidacloprid insecticide-based formulations Gaucho 75ST and Gaucho 480 for use on canola for planting in Canada at least six-months prior to the withdrawal of canola from the labels of Uniroyal Chemical Co. Lindane-based seed treatments. Research permits shall also be granted by PMRA by March 1, 1999 to allow large scale-evaluation of the performance of these products for the control of flea-beetle under a wide variety of end-use conditions

[...]

4. A "lindane-free" carbathiin-thiram fungicide formulation will be approved for registration by PMRA for use on canola by February 1, 1999. Uniroyal Chemical Co. will make a registration submission for this product to PMRA by December 31, 1998, and as discussed with PMRA, the submission will consist of a completed Product Specification Form and draft Product Label. Also as agreed, the "lindane-free" formulation will consist essentially of one of the currently registered Uniroyal Chemical Co. Carbathiin-thiram-lindane formulations as a basis, but with the lindane insecticide removed, and the remaining formulation re-balanced with inert formulants.

5. A "lindane substitution" product will be approved for registration by July 1, 1999, consisting of the active ingredients carbathiin-thiram-imidacloprid, and based on the currently registered Vitavax rs Dynaseal formulation containing carbathiin-thiram-lindane. Tolerances for carbathiin will be established and harmonization activity between PMRA and EPA will ensure this product is also registered in the U.S. (Exh. B-12).

205. The PMRA's Executive Director, Dr. Franklin, responded on 9 February 1999. She mentioned that the Claimant had "submitted a lindane-free fungicide formulation for use on canola and is interested in a priority review" and then noted that

[the] PMRA has committed to fast tracking these simple formulation changes, given the importance of lindane-free formulations to the grower community.

I understand your interest in having alternative products to fill the void that would be created by voluntary removal of lindane from your current canola/rapeseed dressing formulation. This same need, not surprisingly, is also seen by other suppliers. Recognizing the scope of this challenge and the range of clients requesting fast track consideration, we are in the process of developing an orderly approach to this special need situation. It will be important to respond to all of these requests in an equitable manner.

Regardless of the process that emerges, it will not entail a predetermined position to register products prior to reviewing supporting information. The Agency cannot establish the outcome of an assessment in advance of the review process. The Agency will be in touch with you and other interested clients as soon as possible regarding appropriate process and procedures to expeditiously handle lindane applications (Exh. B-15).

206. The Claimant replied on 2 March 1999, noting *inter alia* that "[the] company's offer to remove canola/rapeseed from [sic] the labels of Uniroyal Chemical seed treatments that contain lindane was subject to several provisions, including the issuance of several registrations, assuming of course, a clean PMRA review" (Exh. B-16). In response, Dr. Franklin wrote on 25 March 1999 that the PMRA had not committed to register replacement products but only to work in good faith with growers and registrants towards this end:

Although the voluntary agreement does not promise registration of replacements for lindane seed treatments for Canada, the Pest Management Regulatory Agency (PMRA) is committed to working with growers and registrants to facilitate access to alternatives.

To this end, we are working with registrants and a number of active ingredients that may emerge as viable alternatives for lindane in canola seed during applications. The Agency cannot establish the outcome of an assessment in advance of the review process, and therefore, cannot predict whether Uniroyal and Gustafson will have a registered product replacement (Exh. B-17).

207. As evidenced by the letter of 26 November 1998 and the following exchange of correspondence, the PMRA did not commit to the expedited registration of replacement products. It committed to work in good faith to facilitate such expedited registration, without thereby jeopardizing the standards of review of each application. It is undisputed that, by November 1999, the PMRA had issued registrations for two of the Claimant's replacement products, namely Gaucho 75ST and Gaucho 480FL. This is a strong indication of PMRA's efforts in facilitating expedited registration.

208. As to the question whether the same commitment applied also to Gaucho CS FL, such a commitment is neither specifically acknowledged nor excluded in the aforementioned correspondence. There is evidence however that the commitment extended to products that were in the queue between the end of 1998 and the beginning of 1999.

209. A letter which Dr. Franklin sent to Mr. Zatylny of the CCC on 23 February 1999 is relevant in this connection:

The Agency currently has registration submissions on hand for three active ingredients that may emerge as viable alternatives for lindane in canola seed dressing applications. In addition, we have been approached by manufacturers regarding additional compounds that may be of future interest; however, these additional compounds are some time away from actual submission.

The Agency is cognisant of the trade implications arising from the current divergence in lindane's regulatory status, the U.S. versus Canada, and is interested in addressing this challenge in the most efficient and effective way possible. This will entail priority review of each of the three current

candidates and continuing to advance only those that have a complete and reviewable submission, with a view to having at least one lindane alternative available for the 2000 crop year.

The Agency will not entertain additional candidates within these time frames. To do so would jeopardize the chances of having any candidate emerge successfully and on time to be of value for the year 2000.

Registrants are encouraged to submit applications as soon as possible so that there is the potential for other products to be assessed and available for the 2001 crop year (Exh. JB-13).

The Tribunal understands that the PMRA intended to focus its resources on expediting the review of the products already submitted at the time. Although the letter is not entirely clear as to whether other products submitted "as soon as possible" would also be considered for expedited review, the context of the latter passage suggests that Dr. Franklin meant to refer to the products of "future interest" mentioned in the first passage. Moreover, the letter clearly states that "[t]he Agency will not entertain additional candidates within these time frames", which seems to exclude other products from the expedited timeframe. In any event, the application for Gaucho CS FL would only be submitted much later, more than 13 months after that letter.

210. This understanding is confirmed by the internal documents of the Claimant itself. In an email dated 13 July 1999 referring to the results of a meeting organized by the CCC which representatives of the registrants, the PMRA, the CCC and the North Dakota Grower's Association attended, Mr. Ingulli wrote that: "my interpretation of the cc Mail which follows is that Gaucho will be registered for canola before 12/30/99 causing us to proceed with a voluntary cancellation of canola uses for RS. Is this correct?" (Exh. R-336). Mr. Dupree, who had been present at the meeting, replied as follows: "Al: This is correct. I was contacted by PMRA yesterday and they informed me the review for the two Gaucho formulations is nearing completion. The two products will be granted a registration for one year which will have to be renewed. A full registration will be approved once the residue data from Canada has been reviewed" (Exh. R-336). At the hearing, Mr. Kibbee, at the time Formulation Manager and Manager of Registrations with Gustafson Partnership, recognized that the two products which, if registered, would cause the Claimant to proceed with the voluntary cancellation of canola uses for RS (i.e. Vitavax RS Flowable, Tr., 3 September 2009, 361:16) under the terms of the Withdrawal Agreement, were Gaucho 75ST and Gaucho 480FL (Tr., 3 September 2009, 361:1-4). This is further confirmed by the letter of 21 October 1999 from Dr. Franklin to Mr. Ingulli, which after restating the conditions agreed in November 1998, states that "with respect to PMRA's commitment to facilitate access to replacement

products, Gaucho™ was registered¹⁴ for use in Canada in July, as a result of a priority review; three lindane free formulations have been registered; and reviews are continuing on the two other products" (Exh. B-23).

211. As a result, the Tribunal considers that the commitment of the PMRA to work in good faith to facilitate the registration of replacement products did not apply to Gaucho CS FL, which was only submitted months later in March 2000. Therefore, in order to establish a breach of Article 1105 of NAFTA, the Claimant must prove that the PMRA did more than merely not expediting the review of Gaucho CS FL. It must demonstrate that the PMRA unfairly delayed the registration process.
212. The Claimant sought to establish this by comparing the time that was actually required for the registration of Gaucho CS FL to the registration timeline normally applied by the PMRA, and the time that was required for the registration of two competing replacement products, namely Helix and Helix Xtra (PHB Cl., Appendix A, para. 2). Its argumentation is set out in detail in Appendix A to its Post-Hearing Brief.
213. In Appendix A, the Claimant complains about several "queues" that unnecessarily extended the time in which the PMRA reviewed the application for Gaucho CS FL through the different phases of the evaluation process. The Claimant stresses that in many cases once the application was picked up by a PMRA officer after a long queuing period, it required a relatively short time for the application to be evaluated and moved to the following level. The Claimant further notes that overall the registration process of Gaucho CS FL took 848 days (28 months), when it should not have taken more than 15 months (PHB Cl., para. 129). By contrast, the process for Helix Xtra and Helix, which, according to the Claimant, were more complex replacement products (category A instead of category B, as was Gaucho CS FL), took 742 and 79 days respectively.
214. The Respondent has replied, relying mostly on the testimony of Ms. Chalifour, a senior PMRA official involved in evaluations, that deficiencies in the Claimant's submissions resulted in additional delays. According to the Respondent, discounting the delays attributed to the Claimant, the total days spent by the PMRA on the application between the date of submission and the date of registration amounted to 779 days, as compared with a standard performance rate of 612 days (Exh. 366). The Respondent also notes that Helix Xtra and Helix were evaluated according to a different process,

¹⁴ The Tribunal understands the term "registered" used in Dr. Franklin's letter as "approved for registration" in the meaning used by both parties (Exh. R-366; PHB Cl., Appendix B).

the Joint Review with the EPA, and took much longer than the regulatory target (PHB Resp., para. 194). Helix Xtra's first submission was even rejected. The Respondent has further stressed that in all events "[t]he 'delay' in reviewing Gaucho [CS FL] was one calculated in relation to the PMRA's own internal, non-binding performance standards. Article 1105 does not hold government agencies to a standard of perfection, nor a *fortiori* does it elevate an agency's own good-faith targets (which it might not establish at all) into a rigid standard of liability" (PHB Resp., para. 187).

215. In assessing whether the time used by the PMRA to register Gaucho CS FL was excessive and discriminatory to a point that it entailed a breach of Article 1105, the Tribunal must take into account the obvious fact that the operation of complex administrations is not always optimal in practice and that the mere existence of delays is not sufficient for a breach of the international minimum standard of treatment. This is not to say that a violation must be outrageous in order to breach such standard. As noted by the tribunal in *Waste Management v. Mexico*, by reference to two previous decisions by NAFTA panels:

Both the Mondev and ADF tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the Neer case, i.e. to treatment amounting to an "outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".¹⁵

In *GAMI v. Mexico*, the tribunal derived four implications from *Waste Management* that are particularly apposite for the present discussion:

Four implications of *Waste Management II* are salient even at the level of generality reflected in the passages quoted above. (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole – not isolated events – determines whether there has been a breach of international law.¹⁶

¹⁵ *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)00/3, Award of 30 April 2004, para. 93.

¹⁶ *GAMI Investments, Inc v. Mexico*, NAFTA case (UNCITRAL), Award of 15 November 2004, para. 97.

It is in this light that the Claimant's contentions must be assessed. Such assessment must take into account that, unlike in *GAMI*, the standards allegedly breached are regulatory performance targets or commitments to collaborate in good faith.

216. The record as a whole shows that the concerns about lindane were legitimate and that, in participating in the process leading to the Withdrawal Agreement, the PMRA was only facilitating an industry-led process. The record further shows that the PMRA acted in good faith in expediting the registration of two of the Claimant's replacement products, Gaucho 75ST and Gaucho 480FL. This is the general context in which the delays identified by the Claimant must be assessed.
217. As noted above, the Claimant stresses that the process of registration took roughly twice as much time (28 months instead of 15 months) as it should have taken, with unjustified delays, especially at levels B (which took 118 days instead of the standard 45 days) and D of the evaluation process (where it remained in the queue for 360 days, before being treated and completed in 20 days). The evidence adduced by the Respondent to explain such delays points mostly to insufficiencies in the Claimant's application for the registration of Gaucho CS FL.
218. The evidence shows that the responsibility for the delays cannot be attributed in its entirety to either the PMRA or the Claimant. The Claimant's initial application was incomplete. Although the deficiencies pointed by the PMRA were then rectified, such back-and-forth process entailed additional queuing periods, a fact attributable to the Claimant. By contrast, some of the queuing periods were very long. Part of the delay may have been justified by the need to process other applications, but the excessive length of some queuing periods appears due to action of the Respondent.
219. However, this factual conclusion does not mean that, in the light of the record as a whole, the delays attributable to the PMRA give rise to a breach of the international minimum standard. Although not conclusive, one may repeat, there is no indication of bad faith on the part of the PMRA. The registration of Gaucho 75ST and Gaucho 480FL suggests the opposite conclusion.
220. Moreover, the time used by the PMRA for the evaluation, respectively, of Helix Xtra, Helix and Gaucho CS FL, was not fundamentally different from that used by the EPA, even using the Claimant's figures. The tables prepared by the Claimant indeed show that the evaluation procedures in both Canada and the United States followed a similar

pattern, taking roughly 2 years for Helix Xtra, 3 months or less for Helix, and between 28 (Canada) and 33 (United States) months for Gaucho CS FL (PHB Cl., Appendix C). The Tribunal is aware that the processes before each regulatory agency are not exactly the same, but the similarity of the pattern suggests that the time used by the PMRA to evaluate these three products was not abnormal.

221. In addition, the Claimant's argument that the PMRA treated Gaucho CS FL in a discriminatory manner is inconsistent with the undisputed fact that the PMRA rejected the first submission of Helix Xtra. As acknowledged by the Claimant in its Post-Hearing Brief, after Helix Xtra was rejected "the only insecticide-fungicide product being considered by the PMRA that (in theory) could have been available in time for the upcoming 2001 season was Gaucho CS FL. One might have thought that the PMRA would be devoting resources to the Gaucho CS FL submission, given that the industry had no practical alternatives to lindane for 2001. As is now known, of course, Helix was available in time for the 2001 season [...]" (PHB Cl., para. 136). This comment suggests that there was some pre-established more favorable treatment agreed between Syngenta and the PMRA. Yet, evidence in the record contradicts this. After Syngenta resubmitted an application for Helix, including *inter alia* a new worker exposure study, the PMRA applied the same safety factor of 1000, which according to the Claimant was excessively conservative (Tr., 3 September 2009, 461:6-13).
222. Also, as noted by Ms. Sexsmith in her oral testimony, the PMRA did not support all the uses of Helix that were supported by the EPA: "Helix [...] is one [case] where both countries agreed to the canola use, but a number of other uses were not supported in Canada while they were supported in the U.S. at that point in time. Canada needed some additional data because of the way we did the risk cup in order for us to consider some additional uses." (Tr., 5 September 2009, 917:2-8).
223. One might further think of measuring the materiality of the delays by looking at their economic impact. As the record stands at the close of this arbitration, this avenue leads nowhere. The Claimant claims no independent damages on this account (PHB Cl., para. 181, Table 1, row d). As it stated at the closing hearing in answer to a question from the Tribunal, another measure of the delays in the registration of Gaucho CS FL is provided by the impact on the economic situation of the Claimant. In both its Post-Hearing Brief and its closing argument, the Claimant derived no damages from the allegedly unreasonable delays in the registration of Gaucho CS FL (PHB Cl., para. 181, Table 1, row d). Asked at the hearing about this impact by one of the members of the

Tribunal, the Claimant stated the following: "obviously we haven't accounted for independent damages arising from the delay itself. Claimant's eggs are in the basket of the treatment of lindane itself for damages purposes as well" (Tr., 17 December 2009, 1446:18-21). It then added that:

"while it's obviously a positive number because it kept the material off the market for a calculable period of time, we do not have in the record a number that we can present as ascribable exclusively to the Gaucho delay" (Tr., 17 December 2009, 1147, see also 1146: 18-21).

In response to another question from the Tribunal (Tr., 17 December 2009, 1448: 1-9), the Claimant insisted that its case was "one of a consistent pattern of conduct driven to a particular agenda in relation to this particular Investor" (Tr., 17 December 2009, 1448:11-13). Claimant, having formulated its case to the end in this way, must be held to its formulation.

224. In sum, the Tribunal understands the position of the Claimant to be that the delays in the registration of Gaucho CS FL are in breach of Article 1105 of NAFTA because they are part of a consistent pattern of unfair conduct. However, as discussed in detail in the sections dealing with the different measures identified by the Claimant, the record does not show such a pattern of unfair conduct. Even if the delays were to be considered in isolation, they are not sufficient to prove bad faith or lack of fairness of the part of the PMRA amounting to a breach of Article 1105 of NAFTA.
225. As a consequence, the Tribunal holds that the fifth measure identified by the Claimant in its Post-Hearing Brief was not in breach of Article 1105 of NAFTA.

C. MOST FAVOURED NATION CLAUSE AND FAIR AND EQUITABLE TREATMENT

1. Claimant's position

226. The Claimant argues that if the Tribunal holds that the standard under Article 1105 is less favorable than the independent FET standard provided in third party BITs to which Canada is a party, the Claimant is entitled to receive the more favorable treatment by virtue of NAFTA Article 1103 combined with a third party BIT (Mem., par. 451). It refers to 16 BITs signed by Canada and entered into force after January 1, 1994, which provide for FET in accordance with "international law" or the "principles of international law" (Mem., par. 489), and which "stand in contrast to the NAFTA and to a limited number of bilateral treaties in which fair and equitable treatment is specifically tied to

the minimum standard of treatment provided for in customary international law" (Mem., par. 490).

227. According to the Claimant, the conduct of Canada of which it complained under Article 1105 of NAFTA, must in the alternative be deemed to breach the FET standard applicable by operation of Article 1103 of NAFTA (Mem., par. 494).

2. Respondent's position

228. The Respondent contends that Article 1103 is a limited MFN provision which does not import treaty standards at large (C-Mem., par. 16). Moreover, the standard of treatment in Canada's post-NAFTA investment agreements is not different from the NAFTA standard, as they all point to the customary international minimum standard of treatment (PHB Resp., para. 231). Furthermore, the Claimant's interpretation of Article 1103 of NAFTA ignores that Chemtura was treated in the same manner as all other registrants, whether Canadian or foreign.

229. More specifically, the Respondent argues that the Claimant has failed to establish any of the legal elements necessary for a breach of Article 1103. In particular, it fails to establish (i) that a "treatment" was accorded; (ii) that such treatment was "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments"; (iii) that such treatment was accorded "in like circumstances"; and (iv) that it was "less favourable" than the treatment accorded to investors or investments of a non-Party (C-Mem., para. 852, 859 ff).

230. Even if Article 1103 allowed the import of treaty standards at large, the PMRA accorded fair and equitable treatment to Chemtura at all relevant times, no matter how extensively one defines the scope of that phrase (C-Mem., para. 16, 852, 907 ff).

3. Tribunal's determination

231. In paragraphs 100-105 above, the Tribunal concluded that it had jurisdiction over the claim brought by the Claimant under Article 1103 of NAFTA.

232. Article 1103 of NAFTA reads as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the

establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

233. Aside from the initial allegation of less favorable treatment briefly stated in its second and third notices of intent, the Claimant has neither developed nor tried to substantiate its claim under Article 1103 pursuant to which its investment received less favourable treatment than the one afforded to the investment of an investor from another State. It has instead claimed that its investment was discriminated against (i) in breach of Article 1105 or (ii) in the alternative, in breach of an allegedly more favourable FET clause imported from another treaty concluded by Canada by the operation of Article 1103 of NAFTA.

234. As discussed in detail in the section devoted to the claim under Article 1105 of NAFTA, the allegation that the Claimant's investment was discriminated in any form has no factual basis in the light of the evidence on record. It is equally deprived of legal foundation.

235. This said, the Tribunal turns to the alternative claim that the Claimant's investment was treated in breach of a more favorable FET clause applicable through Article 1103 of NAFTA. The Respondent as well as the United States and Mexico in their Article 1128 interventions (US Submission, 31 July 2009; Mexico's Submission, 31 July 2009) firmly oppose of the possibility of importing a FET clause from a BIT concluded by Canada. The Tribunal can dispense with resolving this issue as a matter of principle. Indeed, even if it were admissible to import a BIT FET clause, the conclusions reached by the Tribunal on the basis of the facts would remain unchanged.

236. First, as noted in paragraphs 117-123 above, in determining the standard of treatment set by Article 1105 of NAFTA, the Tribunal has taken into account the evolution of international customary law as a result *inter alia* of the conclusion of numerous BITs providing for fair and equitable treatment. Second, the Tribunal has found no facts in the conduct of the Respondent that would even come close to the type of treatment required for a breach of the FET standard. Quite to the contrary, the record shows that the Respondent treated the Claimant and its investment in good faith and on an equal footing with other registrants of lindane-based products. Third, the Claimant has not

established that the FET clause of any of the treaties to which it indistinctly refers grants any additional measure of protection not afforded by Article 1105 of NAFTA. Fourth and last, the Claimant has in any case not established that the Respondent's conduct was in breach of such hypothetical additional measure of protection allegedly afforded by an imported FET clause.

237. Accordingly, the Tribunal holds that the Respondent did not breach of Article 1103 of NAFTA.

D. EXPROPRIATION

238. After discussing the applicable standard of expropriation, the Tribunal will analyze the facts alleged by the Claimant in connection with its claim of expropriation.

a. Applicable standard

1. Claimant's position

239. With respect to the applicable standard, the Claimant puts forward the following arguments: (i) the concept of "measure" is defined in Article 201(1) NAFTA as "any law, regulation, procedure, requirement or practice"; (ii) an expropriation may be direct or indirect, as recognized *inter alia* by the tribunals in *Metalclad v. Mexico* and *Pope & Talbot v. Canada*; (iii) the threshold for an indirect expropriation is that of a "substantial deprivation", as noted in *Pope & Talbot*; (iv) the intent behind a measure is irrelevant, as noted in *Tippetts, Biloune v. Ghana*, and *Vivendi II*; (v) expropriation may affect tangible or intangible property, as recognized by *S.D. Myers v. Canada* (Mem., para. 495 ff).

2. Respondent's position

240. According to the Respondent, NAFTA tribunals, and particularly those in *Pope & Talbot v. Canada*, *Metalclad v. Mexico*, and *Methanex v. United States*, have developed a three-step methodology to assess an expropriation claim. The first step consists in determining whether there is an investment capable of being expropriated. The Respondent argues that elements of the value of the enterprise such as goodwill, market share, and customers are not investments under Article 1139 and hence cannot be subject to expropriation. In the event that there is an investment, the next step is to

inquire whether that investment has been expropriated. If it has, then the third step is to assess whether the investment has been expropriated in a manner consistent with the conditions found in Articles 1110(1)(a) to (d), i.e. whether the expropriation is lawful or not (C-Mem., para. 503). The Respondent also notes that under international law an act of compulsion by the expropriating State is required for a finding of expropriation (C-Mem., para. 16, 500, 651 ff).

3. Tribunal's determination

241. Article 1110(1) of NAFTA reads in relevant part as follows:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment [...] except

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

242. For a measure to constitute expropriation under Article 1110 of NAFTA, it is common ground that (i) bad faith on the part of the Respondent is not required, and (ii) the measure must amount to a substantial deprivation of the Claimant's investment (Reply, para. 550; C.-Mem., para. 531). Nor is it disputed that, in assessing an expropriation claim, the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)-(d) have been satisfied. However, there is some divergence of views between the Parties on two issues.

243. The first controversial issue is whether elements such as goodwill, customers or market share are covered by the definition of investment given in Article 1139 of NAFTA (C.-Mem., para. 494-529). For purposes of the present case, the Tribunal does not need to determine whether such elements may be considered as investments *per se*, as the Claimant has expressly recognized that this was not its argument (Reply, para. 548). The Tribunal notes, however, that such elements may be accessory to one of the forms of "investments" within the meaning of Article 1139. Thus, goodwill or market position

may indeed be seen as accessories of an "enterprise", which is *per se* an investment under Article 1139 of NAFTA.

244. The second issue in dispute concerns the definition of the "substantial deprivation" test. While both Parties refer to essentially the same NAFTA cases, their understanding of the "substantial deprivation" test diverges, particularly with respect to the use of the criteria identified in *Pope & Talbot v. Canada*, and to the weight of *Metalclad v. Mexico*. Because of this divergence, the Tribunal deems it useful to clarify the content of that test.
245. In *Pope & Talbot*, the tribunal referred to a number of criteria to determine whether there had been an indirect expropriation, including: (i) whether the investor remained in control of its investment, (ii) whether it directed its day-to-day operations, (iii) whether its officers and employees were detained by the State, (iv) whether the State supervised the work of the investor's officers and employees or not, (v) whether the State had taken the proceeds of sales other than through taxation, (vi) whether the State interfered with management or shareholders' activities, (vii) whether the State prevented the distribution of dividends to shareholders, (viii) whether the State interfered with the appointment of directors or management, and (ix) whether the State had taken any other actions ousting the investor from full ownership and control of the investment.¹⁷
246. The Claimant has argued that "whilst the degree of control retained in the investment following an alleged indirect expropriation may be a factor that a tribunal could consider in determining whether a governmental act (or acts) rises to the level of a treaty breach, it is not the exclusive or even a necessary factor in this determination" (Reply, para. 554). The Respondent places much stronger emphasis on the degree of interference with the investor's ownership and control of its investment as part of the substantial deprivation test.
247. In the opinion of the Tribunal, the divergence of views between the Parties regarding the use of the criteria mentioned in *Pope & Talbot* is not fundamental. Indeed, the Respondent has not seriously argued that each such criterion or at least some of them must be present for a deprivation to be "substantial". The criteria must thus guide the inquiry of the Tribunal when it seeks to determine whether the effects of the measures

¹⁷ *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award of 26 June 2000, para. 100.

challenged are to "substantially" deprive the investor of the benefit of its investment. This is a matter of degree and not one of specific conditions.

248. This being so, the Parties also disagree on the degree required for deprivation to be substantial. The Claimant has referred to *Metalclad v. Mexico*, where the tribunal reasoned that "expropriation under NAFTA includes [...] also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."¹⁸ Mexico sought judicial review of this award before the Supreme Court of British Columbia on various grounds.¹⁹ Although the award was not set aside on the issue of the definition of expropriation, Justice Tysoe noted that the tribunal's characterization of expropriation was "extremely broad."²⁰ The award in *Metalclad v. Mexico* has given rise to some controversy as to the degree of the required deprivation.

249. The Tribunal is however of the view that it does not need to settle that legal controversy to decide the case before it. The determination of whether there has been a "substantial deprivation" is a fact-sensitive exercise to be conducted in the light of the circumstances of each case. This observation has also been acknowledged by the Parties (Reply, para. 557; C.-Mem., para. 503). One important feature of fact-sensitive assessments is that they cannot be conducted on the basis of rigid binary rules. It would make little sense to state a percentage or a threshold that would have to be met for a deprivation to be "substantial" as such *modus operandi* may not always be appropriate. For instance, one could think of cases where one specific asset (a building, a piece of land, a line of business) which represents a part of the value of all the different assets held by a foreign investor in the host State has been entirely expropriated. In such case, applying a percentage or threshold approach to the overall assets held by the investor in the host State would preclude the deprivation from being "substantial", whereas applying the same assessment to the specific asset in question would lead to the opposite conclusion. Given the diversity of situations that may arise in practice, it is preferable to examine each situation in the light of its own specific circumstances.

¹⁸ *Metalclad Corporation v. United Mexican States*, CASE No. ARB(AF)/97/1, Award of 2 September 2000, para. 103.

¹⁹ *United Mexican States v. Metalclad Corporation*, decision of 2 May 2001, 2001 BCSC 664.

²⁰ *Ibid.*, para. 99.

250. The Tribunal turns then to the analysis of the measures allegedly amounting to an expropriation in breach of Article 1110 of NAFTA.

b. Cancellation of Chemtura's lindane registrations

1. Claimant's position

251. The Claimant argues that the PMRA's suspension of Crompton Canada's lindane product registrations were measures tantamount to expropriation (Mem., par. 519-520). These measures were not taken for a public purpose, as the PMRA had no new, pertinent or reasonable scientific rationale. The measures were in fact triggered by trade considerations and the related pressure from the United States (Mem., para. 521 ff). Moreover, the expropriation of the Claimant's lindane products business in Canada violated due process and was in breach of international law (Article 1105(1) of NAFTA), for reasons explained under the minimum standard heading (Mem., para. 527 ff). Finally, Canada paid no compensation (Mem., para. 531-532).

2. Respondent's position

252. The Respondent argues that only Chemtura Canada, the Claimant's enterprise as a whole, qualifies as an investment capable of being expropriated. Elements of the value of the enterprise such as goodwill, market share, and customers are not investments under Article 1139 and, hence, cannot be expropriated investments for the purposes of NAFTA (C-Mem., para. 500, 516).

253. Further, according to the Respondent, there has been no substantial deprivation of the Claimant's investment (C-Mem., par. 531 ff) because (i) the Withdrawal Agreement and PMRA's subsequent decision to phase out lindane use in general (not only for canola) had only a limited impact on Chemtura Canada; (ii) Canada never controlled the Claimant's investment, directed its operations, took proceeds of sales, intervened in management or shareholder activities, or otherwise interfered with it in any manner that can be characterized as expropriation or conduct tantamount to expropriation. In reality, the Claimant controlled all aspects of Chemtura Canada's operations; was granted an extended phase-out period during which it could deplete its lindane stock; was permitted to sell two replacement pesticide products in Canada even before the beginning of the phase-out period; and was consistently profitable before, during, and after the ban on lindane was instituted (C-Mem., para. 500). According to the

Respondent, the hearing further confirmed that the Claimant was not substantially deprived of its investment (PHB Resp., para. 217 ff).

254. Even if the Tribunal concluded that there was a substantial deprivation of the Claimant's investment, there was still no expropriation because the PMRA's decision to phase out all agricultural applications of lindane was a valid exercise of Canada's police powers to protect public health and the environment (C-Mem., para. 500 and para. 565 ff). The decision of the PMRA to de-register lindane meets the test of this doctrine because (i) it was not made in an arbitrary manner since it respected due process and was based on valid science (C-Mem., para. 596 ff); (ii) it was non-discriminatory (C-Mem., para. 613 ff); (iii) it was not excessive (C-Mem., par. 622 ff); and (iv) it was made in good faith to combat the serious occupational exposure risks posed by lindane (C-Mem., para. 630 ff; PHB Resp., para. 219-220).
255. The Respondent further notes that the hearing confirmed that the Claimant entered into the Withdrawal Agreement voluntarily. As result, it cannot now claim that its investment with respect to lindane use on canola was expropriated (PHB Resp., para. 221 ff).
256. Finally, as there is no expropriation for the Respondent, there is no need to consider the conditions set by Article 1110(1)(a) to (d) for a lawful expropriation (C-Mem., para. 660).

3. Tribunal's determination

257. As noted above, in assessing a claim of expropriation, NAFTA tribunals have followed a three-step approach inquiring (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)-(d) had been satisfied. The application of the test is not disputed in the present case, and the Tribunal sees no reason to depart from such approach. There is, however, some divergence of views between the Parties on two issues.
258. The first issue is whether the Claimant had an investment in Canada capable of being expropriated. Despite some initial disagreement as to the identification of the Claimant's investment, the Parties agree that the investment allegedly expropriated is Chemtura Canada (or its predecessors in title) (Reply, para. 537; C-Mem., para. 504ff). Such investment falls squarely under the definition of "investment" given in

Article 1139 of NAFTA, according to which "investment means: (a) an enterprise [...]". The Tribunal also considers, as noted in the foregoing section, that elements such as goodwill, customers or market share, or those covered under the more generic heading of the Claimant's "lindane business" in Canada, are part of the overall investment which Chemtura Canada represented. Therefore, the Tribunal concludes that the first part of the test is satisfied.

259. The second part of the test focuses on whether the Claimant's investment, Chemtura Canada, was in fact "expropriated" or "taken". As discussed above, in assessing whether the Claimant has suffered an indirect expropriation or a measure tantamount to expropriation, the Tribunal must determine whether the measures challenged under this heading, i.e. the cancellation of Chemtura Canada's lindane registrations, amounted to a "substantial deprivation" of the Claimant's investment. As noted by the Tribunal in paragraph 249 above, the determination of whether there has been a substantial deprivation must be based on a fact-sensitive assessment. The Tribunal will thus consider the facts on record which may give the measure or degree of the deprivation allegedly suffered by the Claimant.
260. A first indication of the impact of the measures challenged on the Claimant's overall investment is provided in the Damages Assessment Report presented by the Claimant. In explaining why the book value approach is not suitable in this case, the Claimant's expert states that "prior to the measures Crompton's lindane products represented a small share of its overall business" (LECG Report, para. 57). This assertion is further elaborated in a footnote, stating that "[p]rior to the measures in 1999, lindane based products represented around 6.3% of Crompton's overall Canadian business measured by output (pounds) and approximately 17.6% measured by net sales" (LECG Report, para. 57, footnote 27).
261. Second, at the hearing, Mr. Thomson, at the time Formulations Manager of Chemtura Canada, testified (i) that Claimant's crop protection business was at all relevant times only 10% of the sales of the company (Tr., 3 September 2009, 321:9-14), (ii) that 80% of the crop protection business of Chemtura Canada was seed treatment (the percentage of crop protection business relative to the overall business of Chemtura Canada was not specified by the witness) (Tr., 3 September 2009, 322:22-25, 323:1-2), and (iii) that sales from lindane products were no more than 5% of the overall sales from the crop protection business (itself a subset of the overall sales) of Chemtura Canada (Tr., 3 September 2009, 324:24-25, 325:1-9).

262. These indications are confirmed by the second report of the Respondent's quantum expert, where it is stated that: "after being provided with further financial statements for the crop protection division and the lindane product lines by Claimant, we were able to confirm our previous conclusions [...]. Chemtura Canada's financial statements reveal that net sales of lindane-based products represented approximately 10 percent of Crompton Canada's sales" (Second Navigant Report, para. 128).
263. The Tribunal gathers from this evidence that the sales from lindane products were a relatively small part of the overall sales of Chemtura Canada at all relevant times. Under these circumstances, the interference of the Respondent with the Claimant's investment can not be deemed "substantial".
264. This conclusion is also supported by the fact that Chemtura Canada remained operational and its yearly sales, although reduced in 2002, continued an ascending trend between 2003 and 2007 reaching levels comparable to those of 1997 to 1999 (Exh. NCI-3). Finally, there is no allegation that the Respondent interfered with Chemtura Canada's management, daily operations, or the payment of dividends. In other words, the Claimant remained at all relevant times in control of its investment.
265. In summary, the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment.
266. Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.²¹
267. Consequently, the Tribunal comes to the conclusion that the Respondent did not breach Article 1110 of NAFTA.

²¹ Cf. in a different context *Saluka Investments B.V. v Czech Republic*, UNCITRAL Rules, Partial Award of 17 March 2006, para. 262.

E. COSTS

268. Each Party has advanced costs in the amount of USD 410'000²², which gives a total advance of USD 820'000. The Claimant has filed a statement of legal and other costs in the amount of USD 1'294'640 while the Respondent's fees and expenses incurred in connection with this arbitration amounted to CAD 5'778'467.60. Considering the stakes involved in this case, these amounts appear reasonable.
269. The members of the Tribunal have spent time on this matter, as follows: The Honorable Charles Brower 30 days; Prof. James Crawford 25.5 days; and Prof. Gabrielle Kaufmann-Kohler 66.5 days. The Secretary of the Tribunal has spent 356 hours. The rates for time spent by the Tribunal and Secretary on this case were set in section C of PO 1 (USD 4'000 per day or 8 hours of work for the Arbitrators and USD 280 per hour for the Secretary). Accordingly, the total fees accrued for the Tribunal and the Secretary amount to USD 587'680.
270. The PCA's fees amount to USD 2'286 and the Tribunal's expenses to USD 98'253 (including in particular costs for the various hearings and deliberations).
271. Adding up expenses, PCA and Arbitrators' fees, the total costs of the arbitration amount to USD 688'219, with an unused remainder of the advance of USD 131'781
272. The Respondent has prevailed in the present proceedings. In the exercise of its discretion under Article 38 of the UNCITRAL Arbitration Rules in matters of allocation of costs, the Tribunal finds it fair that the Claimant bear the entire costs of the arbitration, i.e. USD 688'219. Since the Parties have advanced USD 820'000 in equal shares, the PCA will refund the totality of the remainder of USD 131'781 to the Respondent, out of which USD 65'890.50 will be credited towards the Claimant's remaining payment obligation on account of arbitration costs, which thus amounts to USD 278'219, i.e. $688'219 : 2 = 344'109.50$ minus 65'890.50.
273. The Tribunal finds it further appropriate and just that the Claimant bear one half of the fees and costs expended by the Respondent in connection with this arbitration, i.e. CAD 2'889'233.80.

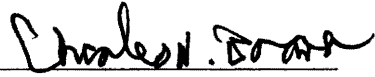
²² Canada's Submission on Costs states this amount in CAD 477'602.07.

V. DECISION

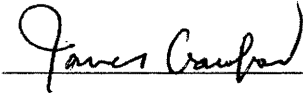
For the reasons set forth above, the Tribunal issues the following Award:

- a. The Tribunal has jurisdiction to hear the claims brought in the present proceedings;
- b. The Respondent has not breached Article 1105 of NAFTA;
- c. The Respondent has not breached Article 1103 of NAFTA;
- d. The Respondent has not breached Article 1110 of NAFTA;
- e. The Claimant shall bear the costs of the arbitration, which are fixed at USD 688'219. Consequently, the PCA shall pay the unused advance of USD 131'781 to the Respondent and the Claimant shall pay USD 278'219 to the Respondent within 30 days of notification of this award;
- f. The Claimant shall bear 50% of the Respondent's fees and costs incurred in connection with this arbitration and shall thus pay CAD 2'889'233.80 to the Respondent within 30 days of notification of this award;
- g. All other claims are dismissed.

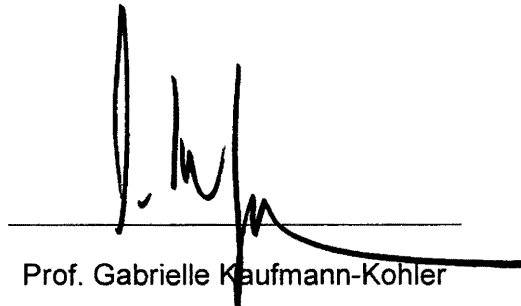
Date: 2 August 2010
Place of the arbitration: Ottawa, Canada



The Hon. Charles N.
Brower



Prof. James R. Crawford



Prof. Gabrielle Kaufmann-Kohler

LEGAL AUTHORITY CA-144

ARBITRAL AWARD

In the matter of a NAFTA arbitration under the
UNCITRAL Arbitration Rules
between:

International Thunderbird Gaming Corporation

Claimant

and

The United Mexican States

Respondent

Before the Arbitral Tribunal constituted under Chapter Eleven of
the North American Free Trade Agreement, and comprised of:

Lic. Agustín Portal Ariosa

Professor Thomas W. Wälde

Professor Dr. Albert Jan van den Berg (President)

Washington D.C., January 26, 2006

TABLE OF CONTENTS

I. THE PARTIES..... 3

II. PROCEDURAL HISTORY 4

III. SUMMARY OF FACTS..... 10

IV. ISSUES TO BE DETERMINED BY THE ARBITRAL TRIBUNAL 21

V. ANALYSIS OF ISSUES FOR DECISION 30

 A. General 30

 B. Jurisdiction and/or Admissibility 33

 C. Merits – General..... 41

 D. Merits – Articles 1102, 1105 and 1110 of the NAFTA..... 56

 E. Merits – Damages..... 68

VI. COSTS 68

VII. DECISIONS 73

I. THE PARTIES

1. Claimant:

INTERNATIONAL THUNDERBIRD GAMING CORPORATION
Thunderbird Greeley Inc.
11545 West Bernardo Court Suite 307
San Diego, CA 92127
United States of America

hereinafter: “Thunderbird” or “Claimant.”

2. Thunderbird is a publicly held Canadian Corporation, with its principal offices in San Diego, California, U.S.A.

3. In these proceedings, Thunderbird is represented by its duly authorised attorney James D. Crosby, California, U.S.A, and by Professor Todd Weiler, Ontario, Canada.

4. Respondent:

THE UNITED MEXICAN STATES
General Directorate of Legal Consulting of Negotiations
Ministry of Economy
Mexico, DF, Mexico

hereinafter: “Mexico” or “Respondent.”

5. In these proceedings, the government of Mexico is represented by Mr. Hugo Perezcano Díaz, *Director General de Consultoría Jurídica de Negociaciones, Secretaría de Economía.*

II. PROCEDURAL HISTORY

6. On 21 March 2002, Thunderbird submitted a “Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement,” alleging that Mexico had breached its obligations under the North American Free Trade Agreement (“NAFTA”), more specifically under Article 1102 (National Treatment), Article 1103 (Most-Favoured Nation Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation and Compensation) of the NAFTA.
7. On 1 August 2002 (and received by Mexico on 22 August 2002), Thunderbird submitted a Notice of Arbitration and Statement of Claim against Mexico pursuant to the provisions of Chapter Eleven of the NAFTA and under the UNCITRAL Rules of Arbitration (the “Notice of Arbitration”).
8. In the Notice of Arbitration at ¶34, Thunderbird sought the following relief: “i. Damages of not less than USD\$100,000,000; ii. Costs associated with these proceedings, including all professional fees and disbursements; iii. Pre-award and post-award interest at a rate to be fixed by the Tribunal; iv. Tax consequences of the award to maintain the integrity of the award; v. Such other and further relief that counsel may advise and that this Tribunal may deem appropriate.”
9. By letter dated 4 September 2002, Mexico raised objections regarding the language of the proceedings and alleged further that the Notice of Intent did not fully satisfy the NAFTA requirements. Correspondence was subsequently exchanged between the Parties regarding Mexico’s objections.
10. On 14 March 2003, the Arbitral Tribunal was constituted. The Tribunal is composed of Professor Dr. Albert Jan van den Berg (appointed as President of the Tribunal by the Secretary-General of ICSID), of Dutch nationality, residing in Tervuren, Belgium; Professor Thomas W. Wälde (appointed by Thunderbird), of German nationality, residing in Dundee, Scotland, United Kingdom and Mr.

Agustin Portal Ariosa (appointed by Mexico), of Mexican nationality, residing in Mexico DF, Mexico. Mr. Gonzalo Flores of ICSID was designated to serve as Secretary of the Tribunal.

11. The first session of the Tribunal was held, with the Parties' agreement, in Washington D.C. on 29 April 2003. During that session, after having heard the Parties' arguments, the Tribunal informed the Parties that the arbitration would be conducted in the English and Spanish language; that the place of arbitration in the legal sense would be Washington, D.C.; and that Mexico was invited to inform Thunderbird and the Tribunal whether it pursued objections based on lack of jurisdiction and/or inadmissibility (the "Preliminary Question"), following which the Tribunal would issue a ruling on the question of bifurcation of the proceedings with respect to the Preliminary Question. It was agreed further that the Secretariat of ICSID would render administrative services in relation to the arbitral proceedings similar to those rendered in arbitrations under the ICSID Additional Facility Rules.
12. Order No. 1 (by Consent) was issued by the Arbitral Tribunal on 27 June 2003, in which the sequence of the proceedings and a number of procedural matters were set out.
13. On 29 May 2003, Thunderbird submitted a Request for Production of Documents; Mexico filed objections to said request on 27 June 2003. By Order No. 2 dated 31 July 2003, the Tribunal ruled on the Request for Production of Documents and offered Thunderbird the possibility to submit timely a renewed request that comported with Order No. 2.
14. On 27 June 2003, Thunderbird filed a Motion to Obtain an Interim Measure under Article 1134 of the NAFTA. Mexico filed observations on Thunderbird's motion on 17 July 2003. A telephone conference was held between the Tribunal and the Parties on 15 August 2003 to discuss Thunderbird's motion. During the telephone conference, a number of practical aspects relating to Thunderbird's motion were agreed, and in particular that the Parties would carry out a joint

visit of the sites. The joint visit took place on 5-7 November 2003. By letter of 26 November 2003, the Tribunal accordingly informed the Parties that it considered Thunderbird's motion to have become moot.

15. On 15 August 2003, Thunderbird filed a Particularized Statement of Claim.
16. On 27 August 2003, Thunderbird filed a Supplemental Request for Production of Documents, pursuant to Order No. 2; Mexico filed observations in response on 15 October 2003. By letter of 26 November 2003, the Tribunal informed the Parties that, in the absence of any reaction from Thunderbird, it inferred that the matter required no further action from the Tribunal.
17. On 29 August 2003, Mexico filed a Supplementary Request for Production of Documents; Thunderbird responded thereto on 22 September 2003. Subsequent correspondence was exchanged between the Parties. On 11 December 2003, the Tribunal ruled on Mexico's Supplementary Request (*see* Order No. 3).
18. On 18 December 2003, Mexico filed an "*Escrito de Contestación*" (Statement of Defence), including "*Excepciones de Incompetencia y Admisibilidad* [Exceptions of Jurisdiction and Admissibility]."
19. On 22 December 2003, Thunderbird filed a Submission on Whether to Bifurcate the Proceedings.
20. Pursuant to Order No. 4 dated 24 December 2003, the Tribunal ruled that the Preliminary Question was joined to the merits and it invited the Parties to address the Preliminary Question in their forthcoming submissions.
21. On 9 February 2004, Thunderbird filed a Statement of Reply.
22. On 24 February 2004, Mexico submitted a further Request for Production of Documents. Thunderbird filed objections thereto on 3 March 2004. The Tribunal ruled on Mexico's Request in Order No. 5 dated 12 March 2004.

23. On 7 April 2004, Mexico filed a Statement of Rejoinder.
24. On 9 April 2004, Thunderbird filed a Motion to Strike the Witness Statement of Professor Nelson Rose (submitted by Mexico); Mexico objected thereto on 14 April 2004. Thunderbird's Motion to Strike was denied pursuant to Order No. 6 dated 19 April 2004.
25. On 20 April 2004, a pre-hearing telephone conference was held between the Parties and the President of the Tribunal to discuss procedural matters relating to the Hearing; those matters were recorded in Order No. 7 dated 22 April 2004 (which was further supplemented by Order No. 8 dated 25 June 2004).
26. On 26 through 29 April 2004, a hearing for oral argument and witness testimony took place at the offices of ICSID, Washington D.C. (the "Hearing"). For Thunderbird appeared: Mr. James D. Crosby, Professor Todd Weiler, and Mr. Carlos Gomez. For Mexico appeared: Mr. Hugo Perezcano Díaz, Ms. Alejandra Treviño and Mr. Luis Marin of Secretaria de Economía; Mr. Stephan E. Becker, Mr. Sanjay Mullik, Ms. Suzanne Wilkinson and Ms. Zuraya Tapia Alfaro of Pillsbury Winthrop Shaw Pittman LLP; and Mr. Christopher J. Thomas and Mr. J. Cameron Mowatt of Thomas & Partners.
27. At the Hearing, testimony was heard from Mr. Jorge Montaña; Mr. Albert Atallah; Mr. Jack Mitchell; Mr. Peter Watson; Mr. Kevin McDonald; Mr. Luis Ruiz de Velasco; Mr. Steven M. Rittvo; and Mr. Carlos Gomez for Thunderbird. Testimony was heard from Professor I. Nelson Rose; Mr. Alberto Alcántara Martínez; and Mr. Luis Martínez for Mexico.
28. The Government of Canada was represented at the Hearing by Mr. Roland Legault. The Government of the United States of America was represented at the Hearing by Mr. Mark S. McNeill.

29. During the Hearing, the Tribunal circulated a draft tentative list of issues, which was subsequently revised pursuant to the Parties' comments on the draft. The Parties addressed the list of issues in their Post-Hearing Memorials.
30. On 28 April 2004, the Parties filed a *Dramatis Personae*.
31. On 21 May 2004, the Governments of the United States of America and Canada each filed a Submission pursuant to Article 1128 of the NAFTA.
32. On 2 August 2004, the Parties filed Post-Hearing Briefs.
33. On 3 August 2004, the Parties filed a jointly prepared chronology of events.
34. By letter of 3 August 2004, Thunderbird applied to the Tribunal to consider and admit new evidence regarding a complaint filed on 30 November 2001 with the Office of Internal Control of the Secretary of State of Mexico, and the latter's response thereto on 20 July 2004. By letter of 6 August 2004, Mexico objected to Thunderbird's request. By letter of 10 August 2004, Thunderbird applied to the Tribunal to consider and admit new evidence regarding the Bella Vista Entertainment Centre in Monterrey and the Reflejos facilities in Rio Bravo and Reynosa. By letter of 13 August 2004, further to its letter of 3 August 2004, Thunderbird requested the Tribunal to admit into evidence a copy of the Office of Internal Control file pertaining to the complaint. By letter of 17 August 2004, Mexico objected to the requests made by Thunderbird in its letters of 3, 10, and 13 August 2004.
35. Mexico filed a cost submission on 12 August 2004. Thunderbird filed a cost submission on 26 August 2004.
36. Pursuant to Order No. 9 dated 13 September 2004, the evidence submitted by Thunderbird in its letters of 3, 10, and 13 August 2004 was admitted into the record, without prejudice to the relevance, materiality and weight of the evidence in question.

37. On 22 October 2004, Mexico filed further observations regarding the new evidence submitted by Thunderbird. On 5 November 2004, Thunderbird filed reply observations.
38. On 19 November 2004, Mexico submitted a “Dúplica al escrito de réplica de la demandante”; On 22 November 2004, Thunderbird filed a Motion to strike Mexico’s submission. Pursuant to Order No. 10 dated 30 November 2004, Thunderbird’s motion to strike was denied and Thunderbird was afforded the possibility to submit a response to the “Dúplica”; said response was filed by Thunderbird on 8 December 2004.
39. The Tribunal deliberated on various occasions before issuing the Award.
40. In this Award, the Tribunal shall use the following method of citation:
- “Notice of Intent” refers to Thunderbird’s 21 March 2002 Notice of Intent to Submit a Claim to Arbitration;
 - “Notice of Arbitration” refers to Thunderbird’s 1 August 2002 Notice of Arbitration and Statement of Claim;
 - “PSoC” refers to Thunderbird’s 15 August 2003 Particularized Statement of Claim;
 - “SoD” refers to Mexico’s 18 December 2003 Statement of Defence;
 - “SoR” refers to Thunderbird’s 9 February 2004 Statement of Reply;
 - “SoRej” refers to Mexico’s 7 April 2004 Statement of Rejoinder;
 - “Tr.” refers to the Transcript made of the 26-29 April 2004 Hearing;

- “C-PHB” and “R-PHB” refer to the Post-Hearing Briefs filed by Thunderbird and Mexico on 2 August 2004.

III. SUMMARY OF FACTS

41. Thunderbird is engaged in the business of operating gaming facilities.
42. In the period late 1999 to early 2000, according to Thunderbird, Mr. Jack Mitchell, president and CEO of Thunderbird, with the assistance of Mr. Peter Watson, an American attorney, initiated investigations concerning potential “skill machine” opportunities in Mexico. Meetings were held with Messrs. Doug Oien and Ivy Ong (of A-1 Financial Ltd), both involved in gaming activities, and with Messrs. Julio Aspe and Oscar Arroyo, two Mexican attorneys who had allegedly represented a Mexican national, Mr. Jose Guardia, with respect to his gaming operations in Mexico.
43. In the period April through June 2000, according to Thunderbird, Mr. Luis Ruiz de Velasco of Baker & McKenzie, Mexican counsel of Thunderbird, met with Messrs. Aspe and Arroyo to discuss procedures utilized by Mr. Guardia to defend his gaming operations against actions by the Mexican government, such as “*amparo*” proceedings (temporary injunctive relief), but concluded that such procedures would not provide Thunderbird with the certainty necessary to proceed with its proposed operations in Mexico.
44. On 5 April 2000, Entertainments de México S.A. de C.V. (“EDM”) was formed by Messrs. Juan Jose Menendez Tlcatelipa and Alejandro Rodriguez Velazquez.
45. On 1 May 2000, EDM entered into a lease for a location in Matamoros (which was revised and extended for 5 years on 20 July 2000).
46. On 26 May 2000, Thunderbird and Messrs. Oien and Ong entered into a “Letter of Intent” regarding the operation of gaming facilities in Mexico.

47. On 22 June 2000, Juegos de México Inc. (“JDMI”) and A-1 Financial Ltd. entered into a “Revenue Share and Consulting Agreement” regarding the operation of gaming facilities in Mexico.
48. In July 2000, according to Thunderbird, following contacts between Messrs. Aspe and Arroyo and the Mexican government, Thunderbird decided to request an official opinion concerning the legality of its proposed gaming operations and if the response were favourable, Thunderbird would proceed with the opening and operation of its “skill machine” facilities in Mexico.
49. On 31 July 2000, EDM imported 50 Bestco Model MTL19U-8L video gaming machines.
50. On 3 August 2000, EDM presented a written request to the Director General de Gobierno de la *Secretaría de Gobernación* (“SEGOB”) concerning its proposed gaming operations in Mexico (the “*Solicitud*”). The full text of the *Solicitud* (English Translation submitted by Thunderbird) provides as follows (numbering between square brackets added):

JÚAN JOSÉ MENÉNDEZ TLACATELPA, legal representative of ENTERTAINMENS DE MÉXICO, S.A DE C.V. which accredits his personality by a certified copy of a notarized document attached hereby, and who has as conventional address, for receiving and hearing any type of communication and documents, Plaza Inverlat piso 12, Blvd. M. Avila Camacho n/ 1, C.P. 1 1009, Mexico D.F., authorizes, for this purpose, Mr. Luis Ruiz de Velasco y P. and with all respects I appear before you to say:

By the means of these writings, I come to request from you that this *Dirección General* give an opinion about the activities that the party I represent is carrying out and which consist in the commercial exploitation of video game machines for games of skills and ability in accordance with the following:

1. - Entertainments de México, S.A. de C.V., is a legal entity incorporated in accordance with the Laws of the Republic of Mexico with the public deed 38,765, which was issued and granted by the Public Notary Number 53, Mr. Rodrigo Orozco Perez, in Mexico D.F. as in proven by the attached notarial affidavit; and which is also registered in the Federal Registry of Taxpayers under the symbol EME-000405 -LQ7.

2. - The entity which I represent opened a business, at Av. de las Rosas N° 70-A, Colonia Jardin in the city of Matamoros, Tamaulipas, under the commercial name “La Mina de Oro”, which operates video game machines for games of skills and ability, and complies with all Municipal requirements.

3. - The video game machines for games of skills and ability, which the entity I represent commercially exploits, are devices for recreation which have been designed for the enjoyment and entertainment of its users. In these games, chance and wagering or betting is not involved, but the skills and abilities of the user who has to align different symbols on the machine screen by touching the screen or pushing buttons in order to stop the wanted symbol from several other symbols which spin in a sequential manner in each of the lanes or squares of each video game. The user has to align symbols in an optimum combination to receive a ticket with points which can be traded for goods or services; as this is already done at different locations in the country.

4.- The video game machines for games of skills and ability which we operate, at this present time at the place indicated above on this writings, are trademark Bestco, model MTL19U-8L and S.C.I. model 17”UR; and the entity I represent is trying to place about 2,000 (two thousand) more machines at other locations in the Republic of Mexico and these machines are of the same identical mechanical nature and functioning as those described in point 3, above.

[5] For all I have declared above, I come to this *Dirección General* requesting your opinion about the commercial activities which hereby I have detailed, and, therefore, you can express your opinion about the video game machines for games of skills and ability, which we have referred hereby, in order to

determine if these games are regulated by the *Ley Federal de Juegos y Sorteos*.

[6] We are requesting an opinion from this *Dirección General* so the entity I represent has the certainty that the commercial exploitation of video game machines for games of skills and ability is legal; after an analysis of the nature of our machines, and the legal dispositions, we have concluded that our machines are not bound by *Ley Federal de Juegos y Sorteos* and, therefore, are not regulated by *Secretaría de Gobernación* or any other federal authority since the activity which this company is engaged in is not found within the faculties foreseen in Article 73, of Constitution General de la República and which in its Fraction X clearly indicates that the Congress of the Union has exclusive authority to legislate, in the whole of the Republic, about games with bets, wagers and drawings, and that the Executive Federal has the authority to regulate these activities; but in entertainment where skills and ability is involved, it is logical that these are not under federal authority since *La Constitución General de la República* doesn't indicate that the Congress of the Union can exclusively legislate in such matters. Consequently, the authority to regulate this type of entertainment is not granted exclusively to the Federation, and, therefore, this is excluded from *la Ley Federal de Juegos y Sorteos*.

[7] The nature of video game machines for games of skills and ability is not games of chance or games with bets, wagers or drawings, since, in the operation of these machines, the player seeks entertainment and is playing with our machines assuming an active position where his intelligence, his willpower, his experience and his skills to optimally answer to specific stimulus with the object of finding a combination, effect or boast on the machine, intervene; which can only be possible with ability, experience and control over the machine, and all of this is for the purpose of entertainment and enjoyment, and at the time, the player can receive points that he can trade for a prize as a reward for the skills achieved and in no way as the result of chance.

[8] For this, it is clear to us, that is the skills and ability of the person who produces the effect over the videogame machine, and it is not the chance, the possibility, the fortune, or bet since the determinant to get results is the skills and ability of players; something very different from games of bets and wagers where there is a previous pact or covenant between the company and the user and, therefore, there is an agreement to handle an amount of money or any other thing, and all of this depends on a chance, on the unforeseen, or is not subject to the willpower or control of the user.

[9] For that declared above, we have concluded that our operation is not of the type prohibited by *la Ley Federal de Juegos y Sorteos* since our video game machines do not use chance, bets or wagers, and these video games are only for the purpose of entertainment in which the users can obtain prizes for their skills and abilities, and I'm requesting from this *Dirección General* your opinion about this.

51. On 4 August 2000, EDM bought 30 SCI model 17" U R “*máquinas de video para juegos de habilidad y destreza,*” which were imported on 14 August 2000.
52. On 10/11 August 2000, JDMI acquired all EDM shares from Messrs. Tlacaltelpa and Velasquez. Mr. Mitchell was designated president of EDM’s board of directors.
53. On 10 August 2000, EDM filed an “Aviso de Apertura,” whereby it gave notice to local authorities of its intended operations in its Matamoros facility, called “La Mina de Oro.”
54. According to a draft letter dated 10 August 2000, Mr. Watson wrote to Messrs. Aspe and Arroyo to confirm payment of a “success fee” of US\$300,000 upon delivery of a letter from SEGOB “which indicates that, according to the applicable laws of Mexico, there is no opposition or limitation to operate our skill machine venture in the Republic of Mexico.” Thunderbird confirmed payment of US\$300,000 in a signed letter dated 15 August 2000 to Messrs. Aspe and Arroyo.

55. By letter dated 15 August 2000, SEGOB issued a formal response to Thunderbird's *Solicitud* (the "*Oficio*"). The *Oficio* was signed by Rafael de Antuñano Sandoval, *Director de Juegos y Sorteos*, in the name and on behalf of, Mr. Sergio Orozco Aceves, Director General of Government of SEGOB. The *Oficio* was copied to Messrs. Roberto Pedro Martinez Ortiz, Director General of Legal Affairs of SEGOB, and Sergio Orozco Aceves, Director General of Government of SEGOB. The full text of the *Oficio* (English translation provided by Thunderbird) provides as follows (numbering between square brackets added):

[1] Regarding your letter dated August 3, 2000, received on August 8, 2000 by the Directorate of Games and Sweepstakes, entity that depends from this Directorate, whereby you request this entity to issue a response regarding your representative's exploitation of machines that operate under the concept of ability and skilfulness of its users, please be advised as follows:

[2] As you may be aware, the Federal Law of Games and Sweepstakes, establishes with precision diverse dispositions that prohibit gambling and luck related games within the Mexican territory. Article I of such law establishes that "... - All gambling and luck related games are prohibited within the Mexican territory, under the disposition of this law."

[3] Likewise, Article 3 of such law establishes that, "The federal executive branch, by means of the Ministry of State, shall supervise the regulation, authorization, control and vigilance of all games when such games contact gambling of any kind; as well as the sweepstakes, with the exception of the National Lottery, which shall be governed by its own law."

[4] In the same light, Article 4 of such law establishes that "in order to establish or operate any open or closed place, in which gambling games or sweepstakes take place, the Ministry of State shall authorize such establishments or operations, specifying the corresponding requirements and conditions to be fulfilled in every case."

[5] According to the above mentioned, the provisions established under the Federal Law of Games and Sweepstakes are enforceable legal dispositions that specifically prohibit gambling and luck related games within the Mexican territory; notwithstanding the above mentioned, according to your statement, the machines that your representative operates are recreational video game devices for purposes of enjoyment and entertainment of its users, with the possibility of obtaining a prize, without the intervention of luck or gambling, but rather the user's ability and skilfulness.

[6] In this light, it is important to clarify that, if the machines that your representative exploits operate in the form and conditions stated by you, this governmental entity is not able to prohibit its use, in the understanding that the use of machines known as "coins-swallowers", "token-swallowers" or "slot machines", in which the principal factor of the operation is luck or gambling and not the user's ability of skilfulness as you stated, could constitute any of the hypothesis described under the Federal Law of Games and Sweepstakes, with the corresponding legal consequences that may be derived therefrom, under article 8 of such law.

[7] In that view, and based on articles 27, section XXI of the Organic Law of the Federal Government; 1, 2, 3, 4, 5, 7, 8 and other articles related and applicable to the Federal Law of Games and Sweepstakes; as well as articles 8 and 14, Section XVII of the Interior Regulations of the Ministry of State, thus Directorate, in accordance with the faculties previously conferred for such effect; warns you that in the machines that your representative operates there shall be no intervention of luck or gambling; warning that will not be in effect if the machines to be operated are video game devices that operate under the concept of ability and skilfulness.

[8] Please be advised that, even though the machines of your representative operate under the concept of the user's ability and skilfulness, it is necessary that the obligations and requirements set by the laws and regulations of each state and/or municipality be met.

56. On 16 August 2000, Thunderbird Greely, Inc., wired US\$300,000 to an entity called “Consultoria Internacional Casa de Cambio, S.A. de C.V.,” a Mexican Currency Exchange entity, for further credit to Rafael Ramos Velasco.
57. On 17 August 2000, Thunderbird announced that it had entered into an agreement with JDMI to operate a business of “*máquinas de destreza*” of games and video in Matamoros.
58. On 18 August 2000, according to Thunderbird, EDM-Matamoros opened “*La Mina de Oro*.”
59. On 25 August 2000, Mr. Ruiz de Velasco of Baker & McKenzie addressed a legal opinion to Mr. Mitchell of Thunderbird with respect to the 15 August 2000 *Oficio*, which provides as follows:

As requested, we hereby give you our opinion with respect to the official letter dated August 15, 2000, (the “Official Letter”) issued by the Mexican Ministry of Interior (“*Secretaría de Gobernación*”) in favour of Entertainments de México, S.A. de C.V. (“EDM”), and which refers to the operation in Mexico of video game skill machines. Copy of the Official Letter and the English translation thereof is attached hereto.

Based on the principal terms of the Official Letter, the Ministry of Interior states that it does not have any jurisdiction over the operation of said machines, since in accordance with the representations made by EDM in its application, the video games skill machines to be operated by EDM do not fall into the classification of “slot machines”, which are forbidden in Mexico pursuant to the applicable laws, in view of the fact that they are considered to be gaming and/or betting machines.

Furthermore, under the Official Letter the Ministry of Interior emphasizes that EDM can operate the video games skill machines as long as they do not become, in any manner whatsoever, as gaming or betting machines; provided; however,

that EDM complies with the states and/or municipal laws or regulations in Mexico.

Based upon the foregoing, we are of the opinion that EDM is allowed to operate in Mexico the video game skill machines as long as EDM complies with the administrative requirements set forth by the state or municipal laws and regulations in Mexico.

Evenmore, in the event the Ministry of Interior intends to close down EDM's operations, EDM will be able to appeal; in the understanding, that EDM must comply at all times with each and everyone of the requirements set forth by the competent authorities where the machines are operating.

Should you have any questions, please do not hesitate to contact us.

60. In October 2000, Thunderbird formed Entertainmens de Mexico-Monterrey S. De R.L. de C.V. ("EDM-Monterrey"). Thunderbird's intended Monterrey gaming facility never opened.
61. In November 2000, JDMI and Thunderbird Brazil formed Entertainmens de Mexico Laredo S. de R. L. de C.V. ("EDM-Laredo").
62. In December 2000, Mr. Vicente Fox's administration came into office in Mexico. Mr. Jose Guadalupe Vargas Barrera was appointed the new "*Director de Juegos y Sorteos.*"
63. On 21 December 2000, Mr. Albert Atallah wrote to Messrs. Oien and Ong "to confirm that A-1 Financial and its principals are no longer authorized to represent International Thunderbird Gaming Corporation, its affiliates and subsidiaries (including Entertainmens de Mexico) with respect to the Mexico Skill Game Operation" and stating, "Thunderbird does not believe that A-1 Financial met its obligations contemplated by the original agreement."

64. On 21 January 2001, EDM-Laredo opened a gaming facility in Nuevo Laredo.
65. On 25 February 2001, SEGOB proceeded to an official closure of the Nuevo Laredo facility.
66. On 16 March 2001, because of administrative irregularities affecting SEGOB's order for official closure of Nuevo Laredo, SEGOB lifted the seals of the Nuevo Laredo facility. Thunderbird reopened the facility on 20 March 2001.
67. On 12 April 2001, Thunderbird, Messrs. Oien, Ong and A-1 Financial entered into a Termination Settlement and Release Agreement.
68. On 5 June 2001, JDMI & Thunderbird Brazil formed Entertainmens de Mexico-Reynosa S. de R. L. de C.V. ("EDM-Reynosa").
69. On 20 June 2001, Thunderbird formed Entertainmens de Mexico-Puebla S. de R.L. de C.V. ("EDM-Puebla"). Thunderbird's intended Puebla gaming facility never opened.
70. On 10 July 2001, an administrative hearing was held at the offices of the *Director de Juegos y Sorteos* in Mexico City (the "Administrative Hearing"). Thunderbird was represented at the Administrative Hearing by Messrs. Watson, Jorge Montaña, Mauricio Girault, Carlos Gomez and Mr. Ruiz de Velasco. Thunderbird submitted documentary evidence and witness testimony, and Mr. Kevin McDonald of SCI appeared and provided a briefcase-sized machine for demonstration. On SEGOB's side, Mr. Guadalupe Vargas and Mr. Alcántara were present.
71. On 13 July 2001, Thunderbird formed Entertainmens de Mexico-Juarez S. de R.L. de C.V. ("EDM-Juarez"). Thunderbird's intended Juarez gaming facility never opened.
72. In August 2001, EDM-Reynosa opened a gaming facility in Nuevo Laredo.

73. On 10 October 2001, SEGOB issued a “*Resolución Administrativa*,” declaring that the EDM machines were prohibited gambling equipment under the *Ley Federal de Juegos y Sorteos* and ordering the official closure of the EDM-Matamoros and EDM-Laredo facilities (the “Administrative Order”). The Administrative Order was signed by Mr. Humberto Aguilar Coronado, Director General of Government of SEGOB.
74. On 11 October 2001, SEGOB proceeded to an official closure of the EDM-Matamoros and EDM-Laredo facilities.
75. On 15 October 2001, EDM filed a “*juicio de amparo*” before the “Juez de Distrito en Turno” seeking injunctive relief with respect to the official closure of the EDM-Laredo facility, which was denied by the court on 18 October 2001.
76. On 23 October 2001, EDM filed a “*juicio de amparo*” before the Mexican District Court seeking injunctive relief with respect to the official closure of the EDM-Matamoros facility, which was denied on 21 January 2002.
77. On 5 December 2001, EDM filed a “*juicio de nulidad*” for the annulment of the Administrative Order before the “*Tribunal Federal de Justicia Fiscal y Administrativa*.”
78. On 21 January 2002, SEGOB proceeded to the official closure of the Reynosa facility. EDM-Reynosa filed a “*juicio de amparo*” for temporary injunctive relief.
79. On 21 March 2002, Thunderbird initiated the present arbitration proceedings.
80. On 10 May 2002, EDM’s “*juicio de nulidad*” was denied by the *Tribunal Federal de Justicia Fiscal y Administrativa*.

81. On 30 May 2002, a “*Tribunal Colegiado*” denied EDM’s “*amparo*” with respect to the official closure of the EDM-Laredo facility. EDM-Laredo was subsequently closed down.
82. On 10 June 2002, the judge ratified the decision denying EDM’s “*amparo*” for Matamoros.
83. On 17 July 2002, EDM discontinued the “*juicio de amparo*” with respect to the official closure of the EDM-Reynosa facility.
84. On 21 August 2002, EDM discontinued the “*juicio de amparo*” with respect to the official closure of the EDM-Matamoros facility.

IV. ISSUES TO BE DETERMINED BY THE ARBITRAL TRIBUNAL

85. In resolving this dispute, the Tribunal shall determine the main issues by reference to the draft Tentative List of Issues referred to in ¶ 29 above:

A. General

1. What is the applicable law for resolving each of the Issues mentioned below?
2. Which of the Parties has the burden of proof for each of the Issues mentioned below?

B. Jurisdiction and/or admissibility

3. Does Thunderbird “own or control directly or indirectly” at the relevant times any of the companies listed below (the “EDM Companies”) that would entitle it to submit to arbitration a claim on behalf of them under Article 1117 NAFTA? If not, what are the consequences thereof?

- (a) Entertainmens de Mexico S. de R. L. de C.V. (“EDM-Matamoros”)
- (b) Entertainmens de Mexico Laredo S. de R. L. de C.V. (“EDM-Laredo”)
- (c) Entertainmens de Mexico Reynosa S. de R. L. de C.V. (“EDM-Reynosa”)
- (d) Entertainmens de Mexico Puebla S. de R. L. de C.V. (“EDM-Puebla”)
- (e) Entertainmens de Mexico Monterrey S. de R. L. de C.V. (“EDM-Monterrey”)
- (f) Entertainmens de Mexico Juarez S. de R. L. de C.V. (“EDM-Juarez”).

4. Does the filing by Thunderbird of waivers on behalf of EDM-Puebla, EDM-Monterrey and EDM-Juarez on 15 August 2003 comply with the requirements of Article 1121 NAFTA? If not, what are the consequences thereof?

Subject to the answers to Issues 3 and 4, the Issues regarding the merits are:

C. Merits – General

5. What is the role, if any, of Chapter Eleven of the NAFTA in the present case? Specifically:

5.1 Does Chapter Eleven of the NAFTA recognize and protect the right of a Contracting Party to regulate a certain conduct that it considers illegal?

5.2 If so, does the *Ley Federal de Juegos y Sorteos* of 31 December 1947 form part of Mexico’s law to regulate a certain

conduct that it considers illegal, and what are the consequences thereof?

5.3 What is the role and jurisdiction of the Tribunal in relation to the Mexican judicial system regarding the subject matter of Thunderbird's claims in the present case?

5.4 If and to what extent do administrative proceedings of SEGOB form part of Issue 5.3?

6. Is the functionality of the machines, technically or otherwise, operated by the EDM Companies relevant in the present case?

6.1 If so, is that question to be determined under the *Ley Federal de Juegos y Sorteos* of 31 December 1947 and/or on some other basis?

6.2 If so, by whom should that question be determined? In particular, is the Tribunal to defer to the determination by SEGOB? And if so, was that opinion relevant for the dispute?

(a) before 15 August 2000;

(b) between 15 August 2000 and 10 October 2001;
and/or

(c) after 10 October 2001?

6.3 Assuming that the question is to be determined by the Tribunal, what are the relevant criteria for such a determination? Specifically:

(a) Were the machines in question skill machines or slot machines?

(b) Is there a “uniqueness for Mexico,” as is contended by Thunderbird, and if so, is it relevant for such determination?

6.4 Assuming that the question is to be determined by the Tribunal and in light of the answer to Issue 6.3, did the machines in question meet the applicable criteria?

7. Was a legitimate expectation created by SEGOB’s letter of 15 August 2000 to the effect that it brings Thunderbird’s claims in the present case under Article 1102, 1105 and/or 1110 NAFTA? Specifically:

7.1 If and to what extent is a legitimate expectation legally relevant under Article 1102, 1105 and/or 1110 NAFTA?

7.2 What are the standards for a legitimate expectation in that respect?

7.3 What is the meaning and legal status of the SEGOB letter of 15 August 2000, and what is the relevance thereof?

7.4 Did EDM fail to disclose relevant facts, in particular in its *solicitud* of 3 August 2000, as it is alleged by Respondent, and if so, what is the relevance thereof?

7.5 What are the consequences of the answers to the foregoing Issues 7.1 -7.4?

D. Merits – Articles 1102, 1105 and 1110 NAFTA

8. Did Respondent breach the “National Treatment” standard under Article 1102 NAFTA?

8.1 Which of the following tests as postulated by the disputing parties is the test to be applied under Article 1102 NAFTA? Specifically:

(a) As it is contended by Thunderbird, is the Tribunal to apply a three-part test, being:

(i) identification of the relevant subjects of the national treatment comparison (the basis being the likeliness of comparators);

(ii) consideration of the relative treatment received by each comparator (the basis being the best level of treatment available to any other domestic investor operating in like circumstances); and

(iii) consideration whether factors exist which could justify any difference in treatment so found (to be construed narrowly and the burden of proof shifting to Respondent)?

(b) Or, as it is contended by Respondent, is the Tribunal to apply Article 1102 in the sense that it is directed only to nationality-based discrimination and proscribes only demonstrable and significant indications of bias and prejudice on the basis on nationality, which are to be proven by Thunderbird, “the like circumstances” of Article 1102 requiring an adequate comparison on the basis of the facts, thereby taking into account, in particular, compliance with local law relating to illegal conduct?

8.2 On the basis of the test to be applied, did Respondent actually breach Article 1102? Specifically, and to the extent relevant under the test to be applied:

(a) Does the fact that *Guardia* and *de la Torre* are allegedly operating machines essentially identical to the machines operated by the closed EDM Companies mean that Respondent has not accorded to the EDM Companies treatment no less favourable than that it accords, in the like circumstances, to its own investors under Article 1102?

(b) Are other “skill game” operators that have resorted to local remedies and that have obtained injunctive relief pending a final disposition of the legality of *Gobernación*’s closure order against them ‘in like circumstances’ to the EDM companies, as contended by Thunderbird?

(c) Did SEGOB take action against facilities of the kind of the EDM Companies, including those owned by *Guardia* and *de la Torre*, as it is alleged by Respondent, and if so, what is the relevance thereof?

(d) What is the relevance, if any, of the fact that EDM abandoned judicial redress in Mexico against the closure of its facilities?

9. Did Respondent breach the “Minimum Standard of Treatment” under Article 1105 NAFTA?

9.1 What does the “Minimum Standard of Treatment” under Article 1105 NAFTA mean and how is it to be applied by a NAFTA arbitral tribunal?

9.2 Subject to the answer to Issue 7 and 9.1 above, was there a detrimental reliance by Thunderbird on SEGOB’s letter of 15 August 2000, also in light of Thunderbird’s *solicitud* of 3 August 2000, and if so, did it constitute a breach of Article 1105 NAFTA?

9.3 Subject to the answer to Issue 9.1 above, was there a failure to provide due process, constituting an administrative denial of justice, in the proceedings relating to the ruling of 10 October 2001, and if so, did it constitute a breach of Article 1105 NAFTA?

9.4 Subject to the answer to Issue 9.1 above, was there manifest arbitrariness in administration, constituting proof of an abuse of right, in the proceedings before SEGOB, and if so, did it constitute a breach of Article 1105 NAFTA?

10. Did Respondent engage in an expropriation in violation of Article 1110 NAFTA?

10.1 Does the fact that Thunderbird did not submit to arbitration a claim on its own behalf under Article 1116 NAFTA, but rather on behalf of the EDM Companies under Article 1117 NAFTA, preclude it from obtaining compensation under Article 1110?

(a) In this connection, should, as it is requested by Thunderbird at pages 69-70 of its SoR, leave be granted to Thunderbird to amend its PSoC to include, in the further alternative, a claim for 100% of the damages caused to the businesses of each EDM Company as a result of Respondent's alleged breach of Article 1110, using Article 1116 NAFTA?

(b) Does a breach of Article 1110 NAFTA also constitute a breach of Article 1105 NAFTA, as it is contended by Thunderbird?

(i) In this connection, what is the relevance, if any, of Section B.3 of the Notes of Interpretation of Certain Chapter 11 Provisions by the NAFTA Free Trade Commission of 31 July 2001 ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)")?

(c) Does Article 1110 NAFTA impose an obligation of Respondent vis-à-vis the EDM Companies?

10.2 Subject to the answer to Issue 10.1 above, and having also regard to Issue 10.3 below, is it relevant to determine which is or are the expropriation standard or standards to be applied under Article 1110 NAFTA? If so, which is that standard or are those standards?

10.3 Subject to the answers to Issues 7, 10.1 and 10.2 above, did any rights legitimately acquired by the EDM Companies exist in the businesses conducted by them? Specifically:

(a) Did the EDM Companies operate on the basis of a business undertaking that is unlawful under Mexican law?

(b) Did the EDM Companies operate on the basis of a legitimate expectation, being similar to the detrimental reliance as alleged by Thunderbird under Article 1105?

(c) Assuming that the answers to Issues (a) and (b) of the present Issue 10 are in the affirmative, do the actions of SEGOB amount to expropriation within the meaning of Article 1110 NAFTA?

E. Merits – Damage

11. If the answer to Issues 8 and/or 9 and/or 10 above is in the affirmative, is Thunderbird entitled to damages, and if so for what amount?

11.1 What are the compensation principles to be applied to damages in the present case?

(a) Are these principles different with respect to breaches of Articles 1102, 1105 and 1110 NAFTA, and if so, what are the differences?

(b) Does a distinction arise from whether the act complained of is lawful or unlawful?

(c) At which date are the damages to be determined?

11.2 Is there a sufficient causal link between the breach and the damages claimed by Thunderbird?

11.3 Are the damages claimed by Thunderbird a reasonably foreseeable consequence of the act that constituted the breach by Respondent?

11.4 Subject to the answers to Issues 11.1 – 11.3 above, should the damages be valued on the basis of a fair market value of the EDM Companies calculated for anticipated future profits by a discounted cash flow (“DCF”) method, as contended by Thunderbird?

11.5 To the extent that it is not addressed under Issues 11.1 - 11.4 above, has Thunderbird proven the damages as claimed by it?

11.6 Subject to the answers to the foregoing Issues 11.1-11.5, what is the amount of damages?

11.7 As regards interest with respect to the damages:

- (a) What is the rate of interest to be applied, and which is the currency to be taken into account in that respect?
- (b) Is interest to be compounded?
- (c) For which period of time is interest to be applied?

F. Costs

12. What are the costs of the arbitration and which party shall bear those costs or in which proportion shall those costs be allocated between the parties?

V. ANALYSIS OF ISSUES FOR DECISION

86. The Tribunal shall now proceed to evaluate the issues *seriatim*. In this regard, the Tribunal has considered all arguments, documents, and testimony that form part of the record in this case, and shall address the contentions made by the Parties to the extent relevant to the Tribunal's decisions. The Tribunal's decisions are based on the entire record in this case.

A. General**Issue 1. What is the applicable law for resolving each of the Issues mentioned below?****(i) Thunderbird's position**

87. Thunderbird contends that the applicable law for resolving all issues presented in this arbitration consists of the claimed provisions of Section A of Chapter Eleven of the NAFTA and the applicable rules of international law. Further, according to Thunderbird, the Chapter Eleven of the NAFTA provisions should be interpreted in accordance with the customary international law rules of treaty interpretation and in light of the objectives of the NAFTA and its governing principles specified in Article 102.

(ii) Mexico's position

88. Mexico refers to Article 1131(1) of the NAFTA and contends that the Tribunal must decide the issues in dispute by reference to the relevant provisions of Chapter Eleven of the NAFTA and the applicable rules of international law. MEXICO adds that the jurisdiction of a NAFTA Tribunal is more limited in contrast with other tribunals such as those constituted under ICSID rules since NAFTA tribunals may not decide a dispute by reference to the internal law of a NAFTA Party.

(iii) The Tribunal's findings

89. Pursuant to Article 1131(1) of the NAFTA (captioned “Governing Law”), the Tribunal shall decide the issues in this arbitration “in accordance with this Agreement and applicable rules of international law.”

90. In particular, the Tribunal has regard to the sources of law listed in Article 38(1) of the Statute of the International Court of Justice, which provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

91. The Tribunal shall construe the terms of Chapter Eleven of the NAFTA “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (*see* Article 31 of the Vienna Convention on the Law of Treaties; *see also* ¶¶ 125-126 below).

Issue 2. Which of the Parties has the burden of proof for each of the Issues mentioned below?

(i) Thunderbird’s position

92. Thunderbird contends that it has the legal “burden of proof” upon its claims under the applicable rules of international law and that, conversely, Mexico has the legal burden of proof upon any affirmative defences raised. According to Thunderbird, the “burden of producing evidence” shifts upon a sufficient evidentiary showing. Thunderbird alleges further that it has made its *prima facie* showing of the NAFTA violations and that Mexico has failed to meet its burden of producing evidence to rebut such showing.

(ii) Mexico’s position

93. Mexico refers to Article 24 of the UNCITRAL Rules and international case law, arguing that a party asserting a fact or a claim is responsible for providing proof of all the elements thereof, and that the burden of proof may shift to the other Party on the basis of *prima facie* evidence.

(iii) The Tribunal’s findings

94. The present arbitration is governed by the UNCITRAL Rules. Article 24(1) of the UNCITRAL Rules provides:

Each party shall have the burden of proving the facts relied on to support his claim or defence.

95. The Tribunal notes that the Parties do not seem to diverge on the principles governing the burden of proof. The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to

international responsibility has the burden of proving its assertion¹. If said Party adduces evidence that *prima facie* supports its allegation, the burden of proof may be shifted to the other Party, if the circumstances so justify.²

B. Jurisdiction and/or Admissibility

Issue 3. Does Thunderbird “own or control directly or indirectly” at the relevant times the EDM Companies that would entitle it to submit to arbitration a claim on behalf of them under Article 1117 of the NAFTA? If not, what are the consequences thereof?

96. Article 1117 of the NAFTA provides:

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

¹ See Bin Cheng, GENERAL PRINCIPLES OF LAW APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, at p. 302 *et seq.* (1987)

² See in this regard *Feldman v. Mexico*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ICSID Case No. ARB(AF)/99/1, http://www.worldbank.org/icsid/cases/feldman_mexico_interim-en.PDF, which quotes *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 23 May 1997, WT/DS33/AB/R p. 14, in which the Appellate Body of the WTO stated:

[...] various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

(i) Mexico's position

97. Mexico objects to the jurisdiction of the Tribunal to hear Thunderbird's claim under Chapter Eleven of the NAFTA. According to Mexico, Thunderbird did not own or control any of the EDM companies that would entitle it to present a claim on behalf of them under Article 1117 of the NAFTA, namely, Thunderbird did not demonstrate that it owned Juegos de Mexico and Thunderbird Brazil; that these companies acquired the EDM companies; or that Juegos de Mexico and Thunderbird Brazil were the owners of the EDM companies.

98. As to control, Mexico maintains that the NAFTA requires that legal control be demonstrated, and that Thunderbird did not have legal control of EDM-

Matamoros, EDM-Laredo or EDM-Reynosa. Mexico argues further that Thunderbird has also not demonstrated that it had factual control of the companies in question.

(ii) Thunderbird's position

99. Thunderbird contends that it may properly proceed under Article 1117 of the NAFTA because it “owns or controls” the EDM entities. According to Thunderbird, it directly owned, and still owns, at all relevant times all outstanding shares of EDM-Puebla, EDM-Monterrey, and EDM-Juarez.
100. As to EDM-Matamoros, EDM-Laredo, and EDM-Reynosa, Thunderbird argues that, while it at all relevant times owned, and still owns, significant interests in those EDMs, it has never claimed full ownership thereof. Rather, Thunderbird maintains that it has at all times possessed, and still possesses, control of EDM-Matamoros, EDM-Laredo and EDM-Reynosa, directly or indirectly, at all relevant times, thus enabling Thunderbird to proceed under Article 1117 of the NAFTA. Thunderbird refers to case law of the Iran-US Claims Tribunal and to NAFTA case law (such as *S.D. Myers Inc.*) in support of its proposition that factual control may suffice to bring a NAFTA claim, and argues that it has brought a claim supported by substantial evidence that Thunderbird, as a matter of fact, controlled all of the EDM investments involved in its claim.

(iii) The Tribunal's findings

101. Mexico has objected to the jurisdiction of the Tribunal to hear Thunderbird's claim under Chapter Eleven of the NAFTA, because of an alleged lack of ownership or control by Thunderbird over the EDM Entities for the purposes of Article 1117.
102. Article 1117 of the NAFTA requires that the investor bringing a claim on behalf of an enterprise “own or control” the enterprise. Thunderbird must therefore establish that it owned or controlled the EDM entities. The Tribunal is satisfied

that Thunderbird has met the requirements of Article 1117 of the NAFTA, for the following reasons.

103. It is not disputed that Thunderbird owned the majority of the shares of EDM-Puebla, EDM-Monterrey, and EDM-Juarez. None of these entities effectively engaged in operations or business activities in Mexico.
104. On the other hand, Thunderbird had acknowledged that it had only a partial ownership of EDM-Matamoros (36.67%), EDM-Laredo (33.3%), and EDM-Reynosa (40.1%) (jointly the “Minority EDM Entities”).
105. Therefore, the present discussion turns on whether Thunderbird exercised control over the Minority EDM Entities. The question arises whether “control” must be established in the legal sense, or whether *de facto* control can suffice for the purposes of Chapter Eleven of the NAFTA. According to Mexico, to determine what constitutes “control” of a corporation, the Tribunal must turn to the corporate law of the Party under whose laws the enterprise was incorporated, and Article 1117 of the NAFTA therefore requires that legal control be demonstrated under Mexican corporate law.
106. The Tribunal does not follow Mexico’s proposition that Article 1117 of the NAFTA requires a showing of legal control. The term “control” is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or “*de facto*” control is, in the Tribunal’s view, sufficient for the purposes of Article 1117 of the NAFTA³. In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.

³ See in this regard the definition of control provided in an “Understanding” with respect to Article 1(6) of the Energy Charter Treaty (which is virtually identical in language to Article 1117 NAFTA): “For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an

107. Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of *de facto* control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM’s business endeavour in Mexico.
108. It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.
109. In the present case, having regard to the record as a whole, the Tribunal finds that without Thunderbird’s key involvement and decision-making during the relevant time frame, i.e., during the planning of the business activities in Mexico, the initial expenditures and capital, the hiring of the machine suppliers, the consultations with SEGOB, and the official closure of the EDM facilities,

Investment means control in fact, determined after such an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor’s (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. [...]” (emphasis added).

EDM’s business affairs in Mexico could not have been pursued. Namely, the key officers of Thunderbird and the Minority EDM Entities were one and the same (*see* Dramatis Personae of 26 April 2004: Mr. Jack Mitchell was President and CEO of Thunderbird and the EDM entities; Mr. Peter Watson, counsel to Thunderbird, was shareholder in Thunderbird and the EDM entities). The initial expenditures, the know-how of the machines, the selection of the suppliers, and the expected return on the investment were provided or determined by Thunderbird. Likewise, legal advice regarding the operation of the EDM machines in Mexico was addressed to Thunderbird (*see* Mr. de Ruiz de Velasco’s legal opinion of 25 August 2000 at Exh. R-112).

110. In the Tribunal’s view, it is clear from the record that without the consistent and significant initiative, driving force and decision-making of Thunderbird, the investment in Mexico could not have materialized. Accordingly, the Tribunal finds that Thunderbird exercised control over the Minority EDM Entities for the purpose of Article 1117 of the NAFTA, in a manner sufficient to entitle it to bring a claim on behalf of those entities under said provision.

Issue 4. Does the filing by Thunderbird of waivers on behalf of EDM-Puebla, EDM-Monterrey and EDM-Juarez on 15 August 2003 comply with the requirements of Article 1121 of the NAFTA? If not, what are the consequences thereof?

111. Article 1121 of the NAFTA, captioned “Conditions Precedent to Submission of a Claim to Arbitration”, provides:

[...]

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

[...]

(i) Mexico's position

112. Mexico submits that Thunderbird did not file waivers on behalf of EDM-Puebla, EDM-Monterrey, and EDM-Juarez in accordance with the requirements under the NAFTA. Specifically, Mexico contends that, pursuant to Article 1121 of the NAFTA, Thunderbird should have presented written waivers of the right to initiate or continue any actions in local courts or other fora at the time of submitting the claim to arbitration, i.e., at the time of presenting the Notice of Arbitration. As a result, Mexico argues, the claims of those three EDM entities are not admissible under the NAFTA.

(ii) Thunderbird's position

113. Thunderbird alleges that it satisfied all the requirements of Articles 1121(2) and (3) of the NAFTA with its delivery on 15 August 2003 (concurrent with the PSoC) of waivers for EDM-Puebla, EDM-Monterrey and EDM-Juarez, which had been inadvertently missing from earlier filings. Thunderbird argues in any event that even if it were assumed that the waiver letters were submitted after delivery of the “claim to arbitration,” previous NAFTA tribunals have found that such minor procedural defects cannot be used to defeat an otherwise meritorious

claim. Thunderbird adds that none of the EDM entities have commenced actions in breach of the Article 1121 waiver.

(iii)The Tribunal's findings

114. Mexico has argued that with respect to EDM-Puebla, EDM-Monterrey, and EDM-Juarez, Thunderbird failed to submit a claim to arbitration in compliance with the requirements of Article 1121 of the NAFTA.
115. Article 1121 of the NAFTA is concerned with conditions precedent to the submission of a claim to arbitration. One cannot therefore treat lightly the failure by a party to comply with those conditions. The Tribunal finds however that the waivers filed for EDM-Puebla, EDM-Monterrey, and EDM-Juarez were valid within the meaning of Article 1121 of the NAFTA, for the following reasons.
116. Thunderbird submitted a claim to arbitration by means of a Notice of Arbitration dated 1 August 2002 (and received by Mexico on 22 August 2002). Pursuant to Article 1121 of the NAFTA, Thunderbird would have been required to file the appropriate waivers under Article 1121 of the NAFTA at the time of the submission of its claim to arbitration, which was, pursuant to Article 1137(1) of the NAFTA, at the time of receipt by Mexico of the Notice of Arbitration under the UNCITRAL Rules. However, Thunderbird only filed written waivers for EDM-Puebla, EDM-Monterrey, and EDM-Juarez with its Particularised Statement of Claim of 15 August 2003. The issue at hand is therefore not an actual failure to file waivers for EDM-Puebla, EDM-Monterrey, and EDM-Juarez, but rather the (un-)timeliness of the filings in question.
117. Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers indeed that the requirement to include the waivers in the submission of

the claim is purely formal,⁴ and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner⁵.

118. In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure. In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.

C. Merits – General

Issue 5. What is the role, if any, of Chapter Eleven of the NAFTA in the present case?

(i) Thunderbird’s position

⁴ See in this regard the distinction made by the majority of the tribunal in *Waste Management, Inc. v. Mexico*, Arbitral Award, 2 June 2000, ICSID Case No. ARB(AF)98/2, http://www.worldbank.org/icsid/cases/waste_award.pdf, between “formal” and “material” requirements under 1121 of the NAFTA.

⁵ See *Mondev International Ltd. v. USA*, Award, 11 October 2002, ICSID Case No. ARB(AF)99/2, <http://www.state.gov/documents/organization/14442.pdf>. “Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.” (¶44)

119. Thunderbird accepts that Article 1114 NAFTA allows governments to label and regulate conduct they choose as being “illegal” for domestic purposes. A NAFTA tribunal may determine, Thunderbird contends, whether the NAFTA party has carried out its regulatory activities in a manner that does not violate its Chapter Eleven obligations. Thunderbird considers that the *Ley Federal de Juegos y Sorteos* of 31 December 1947 constitutes a “measure” under Chapter Eleven of the NAFTA, as do the various forms of enforcement activity arising from it.
120. Thunderbird accepts further that the Tribunal has no role in relation to the Mexican judicial system regarding the subject matter of this case – it does not stand as a domestic court of appeal or review – the Tribunal must simply determine whether Mexico has developed and executed the measures in question in a manner consistent with Mexico’s obligations under Chapter Eleven of the NAFTA. In this regard, Thunderbird characterises the SEGOB administrative proceedings as administrative fact-finding or quasi-judicial proceedings, to be adjudged against the standards of due process and procedural fairness applicable to administrative officials, rather than judicial officials.

(ii) Mexico’s position

121. Mexico contends that Chapter Eleven of the NAFTA recognises and protects the right of a Contracting Party to regulate certain conduct that it considers illegal, and that the *Ley Federal de Juegos y Sorteos* forms part of Mexico’s law to regulate such conduct that it considers illegal.
122. With respect to the role and jurisdiction of the Tribunal in relation to the Mexican judicial system regarding the subject matter of Thunderbird’s claims, Mexico argues that the Tribunal may not act as a court of appeal with authority to review the decisions of the domestic Mexican courts. According to Mexico, the Tribunal may only assess whether the conduct of the Mexican administration in enforcing domestic law was compatible with the three NAFTA provisions relied upon by Thunderbird. As to the administrative proceedings of SEGOB, Mexico points out that they were subject, at all stages, to Mexican judicial

review, and that the Tribunal may not review those proceedings in the manner of an appellate court.

(iii)The Tribunal's findings

123. The Parties do not dispute that Chapter Eleven of the NAFTA recognizes in principle the right of a Contracting Party to regulate conduct that it considers illegal.
124. The Tribunal notes that under Mexican law, specifically the *Ley Federal de Juegos y Sorteos* of 31 December 1947, gambling is an illegal activity.
125. The Tribunal's role in this arbitration is not to determine whether the EDM machines were prohibited gambling equipment under the *Ley Federal de Juegos y Sorteos*, as acknowledged by both Parties. It is not the Tribunal's function to act as a court of appeal or review in relation to the Mexican judicial system regarding the subject matter of the present claims, or in relation to the SEGOB administrative proceedings for that matter.
126. Rather, the Tribunal shall examine whether the conduct of Mexico and the measures employed by SEGOB in relation to the EDM entities were consistent with Mexico's obligations under Chapter Eleven of the NAFTA.
127. The role of Chapter Eleven in this case is therefore to measure the conduct of Mexico towards Thunderbird against the international law standards set up by Chapter Eleven of the NAFTA. Mexico has in this context a wide regulatory "space" for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct. The international law disciplines of Articles 1102, 1105 and 1110 in particular only assess whether Mexican regulatory and

administrative conduct breach these specific disciplines. The perspective is of an international law obligation examining national conduct as a “fact.”

Issue 6. Is the functionality of the machines, technically or otherwise, operated by the EDM Companies relevant in the present case?

(i) Thunderbird’s position

128. Thunderbird contends that the functionality of the machines is relevant in assessing Mexico’s justification (or lack thereof) for seizing Thunderbird’s investment enterprises; to the issue of detrimental reliance under Article 1105 in that use of similar equipment was already familiar to Mexican officials – prior to 15 August 2000 – due to their use in facilities already being regulated by Mexico (e.g. the Guardia facilities); and for Article 1102 to the extent that similar equipment has been, and remains, in use in other facilities while the EDMs remain closed.
129. Thunderbird contends further that the manner in which the functionality of the machines is relevant in the present case does not involve a determination by the Tribunal as to the legality of the EDM machines under Mexican law.
130. Thunderbird also argues that the determination of SEGOB concerning the functionality of the machines, at any given time, is only relevant to the issue of whether any actions taken on the basis of these determinations violates the relevant NAFTA provisions.
131. According to Thunderbird, the only criteria relevant for the Tribunal to determine the functionality of the machines is the standard set forth in the *Oficio* i.e., whether “the principal factor of the operation is luck or gambling and not the user’s ability of skilfulness.” Thunderbird contends that the machines in question met the applicable criteria and were as a matter of fact established by the evidence before the Tribunal, to be “skill machines” operated in accordance with the *Oficio*. Thunderbird

refers in this regard to the briefcase version demonstration carried out by Mr. McDonald at the Hearing.

(ii) Mexico's position

132. According to Mexico, the functionality of the machines is relevant to the issues of whether SEGOB could be deemed to have acted arbitrarily at international law in finding that such machines were prohibited equipment under Mexican law; and whether Thunderbird could have had a reasonable expectation that SEGOB would agree that the machines operated by EDM were not illegal gaming machines.
133. Mexico recalls that the Tribunal does not have jurisdiction to determine whether the gaming operations of EDM were legal, or whether the machines in question were prohibited under Mexican law. Mexico disputes however Thunderbird's characterisation of the machines as "skill" machines, arguing instead that the evidence produced by Mexico establishes that the EDM machines are no more than "video poker" or "slot" machines, similar or identical to machines that were held to be gambling equipment in U.S. legal proceedings, and previously described as gambling equipment by Thunderbird itself. Mexico refers in this regard to the expert testimony of Prof. Rose and Mr. McDonald's demonstration at the Hearing.

(iii) The Tribunal's findings

134. Both Parties have argued that the functionality of the EDM machines is relevant to certain issues pending before the Tribunal. Thus, Thunderbird has submitted evidence in support of its contention that the EDM machines are "skill" machines, whereas Mexico has provided evidence establishing, according to Mexico, that the machines in question are "*tragamonedas*" [slot machines] prohibited under Mexican law.

135. The Tribunal agrees that the nature and functionality of the machines may be relevant in considering certain issues in this arbitration. However, the Tribunal does not need to enter into a detailed technical discussion as to the precise nature and functionality of the machines, since both Parties acknowledge that it is not up to the Tribunal to determine the legality of the machines under the *Ley Federal de Juegos y Sorteos*.
136. The Tribunal notes that the machines operated by EDM are equipped with computerised random number generators and that it is possible to set the level of payouts, and thus the odds for winning. For example, the Bestco “Fantasy 5 Game Manual” that was found at the EDM-Laredo Facility provides that the default base pay rate “is set to 75%. This can be changed to a value within the range of 50%-95%.” (Ex. R-15, p. 13) The Tribunal notes further that the machine’s percentage of payout is not visible or otherwise known to the player (*see* McDonald at Tr. 498-502). The Tribunal infers that the operation of these video game machines with a built-in and modifiable random number generator involves a considerable degree of chance, and that by adjusting the payout rate, the machine operator can manipulate the odds for winning regardless of the skill of the player.

Issue 7. Was a legitimate expectation created by SEGOB’s letter of 15 August 2000 to the effect that it brings Thunderbird’s claims in the present case under Article 1102, 1105 and/or 1110 of the NAFTA?

(i) Thunderbird’s position

137. Thunderbird contends that this issue is relevant to the application of Articles 1105, 1110, and 1102 of the NAFTA.
138. As to the standard of protection for legitimate expectations, Thunderbird argues that if an investor or investment reasonably relies on the representations of government officials and suffers damages because of such reliance, the responsibility of the State is engaged under international law. Thunderbird cites

a number of cases in this regard⁶, arguing that detrimental reliance arises from the general international law principle of good faith and the customary international standard of fair and equitable treatment. Through its ratification of the NAFTA, Thunderbird contends, Mexico authored a set of legitimate expectations upon which an investor or investment could reasonably rely.

139. Thunderbird contends that, seeking certainty as to the legality and propriety of its intended operations in Mexico, Thunderbird and EDM solicited the Mexican government for an official opinion. According to Thunderbird, SEGOB’s response to the *Solicitud* provided the EDMs with written assurance or “negative clearance” to operate the specific machines identified in the *Solicitud*; and defined a standard in accordance with which Thunderbird could operate skill machines without regulation by SEGOB, the standard being that the machines had to be ones in which the “principal factor” of operation was the user’s skill and ability. Thunderbird does not assert that it had thus obtained a government permit or licence to operate. Rather, SEGOB generated, according to Thunderbird, a legitimate expectation upon which the EDMs should have been able to rely reasonably.
140. Thunderbird denies having failed to disclose relevant facts in the *Solicitud*. According to Thunderbird, the SEGOB officials who issued the letter must have been familiar with the skill machines whose operation was proposed by the EDMs, since, amongst others, Mexico had been involved in litigation with Guardia over similar machines and SEGOB did not request any additional information in relation to the EDM machines.

⁶ In particular, *Metalclad Corp. v. Mexico*, Award, 30 August 2000, ICSID Case ARB(AF)/97/1, <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>; *ADF Group Inc. v. USA*, Award, 9 January 2003, ICSID Case ARB(AF)/00/1, <http://www.worldbank.org/icsid/cases/ADF-award.pdf>; *Occidental Exploration and Production Company v. Ecuador*, Final Award, 1 July 2004, LCIA Case No. UN3467, http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

(ii) Mexico's position

141. Mexico denies that the *Oficio* created a legitimate expectation for Thunderbird with respect to its investments in Mexico. According to Mexico, the *Oficio* was an advisory opinion, not an approval or permit, based on the information provided by EDM in the *Solicitud*, stating that if the machines operated by EDM were as described in the *Solicitud*, then they fell outside SEGOB's jurisdiction. Mexico asserts that it clearly and expressly made known to EDM the nature of the machines that were prohibited by law and that the *Oficio* was a clear warning that the operations EDM was conducting could be illegal.
142. However, Mexico argues, EDM did not operate the machines in the form or manner described in the *Solicitud*, neither with respect to the element of "ability and skill" nor with respect to "betting," and EDM did not present any evidence on the operation of the machines. Mexico adds that the *Solicitud* did not allude to the fact that the EDM machines were similar or identical to those operated by Guardia.
143. Further, Mexico contends, EDM did not treat the *Oficio* as a permit or authorisation at the time it was issued by SEGOB, as evidenced by Mr. Ruiz de Velasco's legal opinion, which concurred with the *Oficio* (quoted at ¶ 59 above).
144. Mexico denies in any event that Thunderbird relied on the *Oficio* as the basis for its investments in Mexico, arguing that Thunderbird undertook actions before the *Oficio*'s issuance; that Thunderbird expressly advised investors in EDM that the *Oficio* was no specific entitlement for EDM's operations; that Thunderbird reported to its shareholders that it relied on private sector advisors in making the investment; and that it asserted in U.S. court proceedings that it was fraudulently induced to enter this business by Messrs. Oien en Ong.

(iii) The Tribunal's findings

145. EDM's *Solicitud* dated 3 August 2000 is quoted at ¶50 above. SEGOB's *Oficio* dated 15 August 2000 is quoted at ¶55 above.
146. Thunderbird has argued that it reasonably relied, to its detriment, upon the assurances provided by SEGOB in the *Oficio*. Mexico, on the other hand, denies that the *Oficio* gave rise to any legitimate expectations for Thunderbird to operate the EDM machines in Mexico.
147. Having considered recent investment case law and the good faith principle of international customary law⁷, the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.
148. The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA and the circumstances of the case. Whatever standard is applied in the present case however – be it the broadest or the narrowest – the Tribunal does not find that the *Oficio* generated a legitimate expectation upon which EDM could reasonably rely in operating its machines in Mexico.

⁷ Bin Cheng, *General Principles of Law applied by International Courts and Tribunals*, at p. 123 *et seq.* (1987); Joerg Mueller, *Vertrauensschutz im Voelkerrecht* (1971); E. Zoller, *La bonne foi en droit international public* (1977); F. Orrego Vicuña, *Regulatory Authority and Legitimate Expectations*, 5 *Intl Law Forum*, 188m 193 (2003); *Nuclear Test Case*, ICJ Reports 1974, 253 at p. 268.

149. The Tribunal considers that the point of departure in assessing whether Thunderbird could reasonably rely to its detriment on SEGOB's response to the *Solicitud* is to ascertain what was requested by Thunderbird in the *Solicitud*.
150. Given the lack of contemporaneous evidence on the record regarding the background of the *Solicitud* (such as witness evidence from Messrs. Aspe and Arroyo or from SEGOB officials in office when the *Solicitud* was submitted), the Tribunal cannot rely on presumptions or inferences, let alone speculation concerning that background. For instance, the Tribunal has noted the existence of a "success fee" arrangement between Thunderbird and Messrs. Aspe and Arroyo (who, according to Thunderbird, had numerous contacts with SEGOB officials in relation to Thunderbird's proposed operations). Thunderbird offered the two Mexican lawyers US\$ 300,000 to secure a letter from SEGOB authorising Thunderbird's gaming operations in Mexico (*see* correspondence at Exs. R-106, R-107, and R-121). According to Mr. Watson's draft letter of 10 August 2000, Thunderbird was prepared to pay Messrs. Aspe and Arroyo an additional US\$ 700,000 if the letter was "granted exclusively for Thunderbird [...] and that no other such permission would be granted to other potential competing parties; otherwise, no additional fees would be owed." (Ex. R-121) In the absence of any evidence on the record in relation to the "success fee" arrangement and the nature of the dealings between Messrs. Aspe and Arroyo and SEGOB, these facts do not have a bearing on the Tribunal's analysis below. Under those circumstances, the Tribunal can only interpret the 3 August 2000 *Solicitud* on its face value.
151. In the Tribunal's view, the information presented by EDM in the *Solicitud* is incomplete and, in particular, inaccurate in two regards.
152. First, it is asserted in the *Solicitud* that the machines operated by EDM do not involve luck or betting (*see* ¶3: "*In these games, chance and wagering or betting is not involved [...]*"). The Tribunal notes in ¶7 the use of the explicit terms "in no way": "*The nature of video game machines for games of skills and ability is not games of chance or games with bets, wagers or drawings [...] the player can*

receive points that he can trade for a prize as a reward for the skills achieved and in no way as the result of chance (“*de ninguna manera*” in the original Spanish version). To represent that luck does not affect the outcome of the game in any manner whatsoever contradicts the evidence on the record (*see* the Tribunal’s findings at ¶136 above).

153. Second, it is asserted in the *Solicitud* that the machines in question are “*devices for recreation which have been designed for the enjoyment and entertainment of its users*” (¶3), “*only for the purpose of entertainment in which the users can obtain prizes for their skills and abilities*” (*Solicitud* at ¶9; *see also* ¶8 “[...] *the determinant to get results is the skills and ability of players; something very different from games of bets and wagers where there is a previous pact or covenant between the company and the user and, therefore, there is an agreement to handle an amount of money or any other thing.*”). It is thus suggested that the machines operated by EDM do not involve any “agreement to handle an amount of money,” attributing instead prizes to the players. Such a representation is not accurate since the player must insert dollar bills to begin the game and any winning ticket is redeemable for cash.
154. In this regard, Mr. Ruiz de Velasco testified that had he known when he rendered his legal opinion on 20 August 2000 that the winning tickets were redeemable for cash, he would have most likely revised his opinion “because it probably could have bid in [*sic*] as gambling or betting.” (Ruiz de Velasco at Tr. 649-650)
155. The Tribunal is therefore of the opinion that the *Solicitud* is not a proper disclosure and that it puts the reader on the wrong track. The *Solicitud* creates the appearance that the machines described are video arcade games, designed solely for entertainment purposes.
156. Thunderbird has argued that SEGOB was well aware of the nature of the EDM machines since it had attempted to proceed with the closure of similar gaming facilities of Mr. Guardia. The Tribunal notes, however, that there is no

disclosure in the *Solicitud* that the machines operated by EDM were similar or identical to those of Mr. Guardia.

157. Likewise, Thunderbird's identification in the *Solicitud* of the trademark and model number of the machines ("Bestco, model MTL19U-8L and S.C.I. model 17"UR") cannot be deemed sufficient to establish the functionality of the machines. According to the evidence, the model references used in the *Solicitud* were not proper model numbers but rather a description of the size of the computer monitor used to display the video game (*see* Tr. 125-126 and Exs. C-36 and C-87; *see also* Tr. 1163-1165). The model numbers did not therefore elucidate the nature of the machines and furthermore appeared to be inaccurate or incomplete. For instance, in the Bestco invoice, the machines sold were identified under the model reference "7100 Fantasy 5" (Ex. C-87; *see also* operating manual captioned "Fantasy 5 Game Manual" at Ex. R-15), whereas in the *Solicitud* a random combination of abbreviations and numbers was used to identify the same machines ("MTL19U-8L"), without any reference to the name "Fantasy 5." In this respect, Mr. McDonald testified that he was not familiar with the Bestco model numbers (Tr. 445-446). Mr. Ruiz de Velasco also testified that he was not familiar with the meaning of the Bestco and SCI model numbers (Tr. 583-585). No operating manuals, catalogues, or photos of the machines were presented with the *Solicitud*.
158. The Tribunal finds no evidence on the record establishing that SEGOB was indeed familiar with the nature and operation of the EDM machines.
159. Thunderbird has also argued that in the event of doubt, SEGOB should have made a request for additional information regarding the operation of the machines, or for an inspection of the machines. Yet Thunderbird was the moving party presenting a "*Solicitud*" to the Mexican administration; one would therefore expect that the moving party supply adequate information and make a proper disclosure. In the Tribunal's view, the *Solicitud* did not give the full picture, even for an informed reader.

160. The Tribunal turns to the contents of the *Oficio*. Again, in the absence of any contemporaneous evidence surrounding the issuance of the *Oficio* (namely, the lack of witness testimony from SEGOB officials involved in the issuance of the *Oficio*, as well as that of Messrs Aspe and Arroyo; *see also* ¶150 above), the Tribunal cannot rely on presumptions or inferences, let alone speculation, regarding its issuance and can only analyse the letter on its face value. In addition, it is not up to the Tribunal to determine how SEGOB should have interpreted or responded to the *Solicitud*, as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country). Rather, the Tribunal can only assess whether the contents of the *Solicitud* gave rise to legitimate expectations for Thunderbird within the context of Mexico’s obligations under Chapter Eleven of the NAFTA.
161. SEGOB, in ¶¶ 2-4 of the *Oficio*, recalls the legal provisions applicable in relation to “gambling and luck related games.” In ¶5, SEGOB states: “[...] notwithstanding the above mentioned, according to your statement, the machines that your representative operates are recreational video game devices for purposes of enjoyment and entertainment of its users, with the possibility of obtaining a prize, without the intervention of luck or gambling, but rather the user’s ability and skilfulness”. In ¶6, SEGOB adds: “if the machines that your representative exploits operate in the form and conditions stated by you, this governmental entity is not able to prohibit its use, in the understanding that the use of machines known as “coins-swallowers”, “token-swallowers” or “slot machines,” in which the principal factor of the operation is luck or gambling and not the user’s ability of skilfulness as you stated, could constitute any of the hypothesis described under the Federal Law of Games and Sweepstake [...]”. The Tribunal understands the message conveyed by SEGOB in the *Oficio* to be that if the machines operate in accordance with EDM’s representations in the *Solicitud*, SEGOB does not have jurisdiction over said machines.
162. Thunderbird has argued that the *Oficio* defined a standard according to which machines that involved as “principal factor” the user’s skill and ability do not

fall within SEGOB’s jurisdiction. The Tribunal does not follow Thunderbird’s interpretation. In ¶ 6, SEGOB refers to slot machines (or “coin-swallowers” or “token-swallowers”). According to SEGOB, such machines are devices in which the “principal factor” (“factor *preponderante*” in the original Spanish text) of the operation is luck or gambling. SEGOB’s description of slot machines cannot be interpreted *a contrario* as describing a standard for skill machines, according to which machines in which skill is the “factor preponderante” cannot be treated as gambling equipment. SEGOB’s use of the term “preponderante” in reference to luck or gambling is not unusual. Prof. Rose testified, “gambling means that it is predominantly chance. Probably the easiest way to understand that is that if chance determines the outcome at any point, then it’s gambling. So skill has to determine the outcome at every point in the game.” (Tr. 729) Furthermore, Thunderbird was clearly cautioned in ¶ 7 of the *Oficio*, “in the machines that your representative operates there shall be no intervention of luck or gambling.”

163. As to Mr. Ruiz de Velasco’s legal opinion of 20 August 2004 (quoted at ¶ 59 above), the contents thereof reinforce the Tribunal’s view that Thunderbird could not have reasonably relied to its detriment upon the *Oficio* to operate its gaming facilities in Mexico. In his letter to Thunderbird, Mr. Ruiz de Velasco made clear that (i) the *Oficio* was based upon the EDM’s representations in the *Solicitud* (“[...] *the Ministry of Interior states that it does not have any jurisdiction over the operation of said machines, since in accordance with the representations made by EDM in its application, the video games skill machines to be operated by EDM do not fall into the classification of ‘slot machines’ [...]*” at R-112); and (ii) that EDM was prohibited from operating gaming or betting machines (“[...] *EDM can operate the video games skill machines as long as they do not become, in any manner whatsoever, as gaming or betting machines*” at R-112 (emphasis added)).
164. It cannot be disputed that Thunderbird knew when it chose to invest in gaming activities in Mexico that gambling was an illegal activity under Mexican law. By Thunderbird’s own admission, it also knew that operators of similar machines (Guardia) had encountered legal resistance from SEGOB. Hence, Thunderbird

must be deemed to have been aware of the potential risk of closure of its own gaming facilities and it should have exercised particular caution in pursuing its business venture in Mexico. At the time EDM requested an official opinion from SEGOB on the legality of its machines, EDM must also be deemed to have been aware that its machines involved some degree of luck, and that dollar bill acceptors coupled with winning tickets redeemable for cash could be reasonably viewed as elements of betting. Yet EDM chose not to disclose those critical aspects in the *Solicitud*.

165. Further, the fact that SEGOB took action against Thunderbird's gaming facilities in February 2001, i.e., approximately six months after the issuance of the *Oficio*, is insufficient to establish that prior to that date, SEGOB had authorised (or was intentionally tolerating) Thunderbird's operations. Six months under the circumstances is by any standard a reasonable period for a government to seek enforcement of local gambling legislation.
166. Considering the foregoing, the Tribunal finds that there was no legitimate expectation created by the *Oficio* to the effect of bringing Thunderbird's claims in the present case under Article 1102, 1105 and/or 1110 of the NAFTA.
167. Finally, the Tribunal questions to what extent Thunderbird invested in Mexico in reliance on the *Oficio*, considering the non-negligible steps that Thunderbird had completed for the operation of its gaming machines prior to the issuance of the *Oficio* on 15 August 2000. The record shows that before 15 August 2000: EDM had been incorporated; JDMI had entered into a detailed Revenue Sharing Agreement with Messrs. Ong and Oien regarding the operation of the gaming facilities in Mexico (Exh. R-98); EDM had opened bank accounts (C-6); EDM had obtained land use permits (Ex. C-7); EDM had entered into a lease for a gaming facility location in Matamoros (Exs. C-3 to C-5); EDM had imported 50 Bestco machines and 30 SCI machines (Exs. C-9, C-87 and C-15); EDM had filed an "Aviso de Apertura" for the establishment of "La Mina de Oro" (Ex. C-10); and by Thunderbird's own admission in ¶2 of the *Solicitud*, EDM had already "opened a business [...] in the city of Matamoros, Tamaulipas, under the

commercial name ‘La Mina de Oro’, which operates video game machines for games of skills and ability, and complies with all Municipal requirements.” (*see also the Solicitud* at ¶4)

D. Merits – Articles 1102, 1105 and 1110 of the NAFTA

Issue 8. Did Respondent breach the “National Treatment” standard under Article 1102 of the NAFTA?

168. Articles 1102 (1) and (2) of the NAFTA provide as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

(i) Thunderbird’s position

169. Thunderbird contends that Mexico has breached Article 1102 of the NAFTA by according different treatment to EDM and its investments than that what has been provided to domestic investors and investments operating in like circumstances.

170. According to Thunderbird, the Tribunal is to apply a three-part test under Article 1102 of the NAFTA, being identification of the relevant subjects of the national treatment comparison (the basis being the likeliness of comparators); consideration of the relative treatment received by each comparator (the basis being the best level of treatment available to any other domestic investor

operating in like circumstances); and consideration whether factors exist which could justify any difference in treatment so found (to be construed narrowly and the burden of proof shifting to Mexico). Thunderbird cites NAFTA and BIT case law in support of this three-part test⁸.

171. Thunderbird’s EDM enterprises were seized and closed by Mexico because the skill machines operated at those facilities were deemed illegal, Thunderbird argues, whereas domestic investors, operating skill machines under essentially identical circumstances, remain open and operating. Thunderbird cites Guardia’s “Club 21,” de la Torres’s Reflejos facility, and the Bella Vista Entertainment centre in Monterrey as appropriate comparators. Thunderbird disputes Mexico’s argument that the EDM entities were not in “like circumstances,” arguing instead that Mexico has not provided a sufficient evidentiary basis upon which to make the argument.
172. Finally, Thunderbird maintains that its decision to abandon recourse to judicial proceedings for relief in Mexico is irrelevant to the issue of whether Mexico breached its NAFTA obligations under Chapter Eleven of the NAFTA.

(ii) Mexico’s position

173. Mexico denies having accorded less favourable treatment to EDM than that accorded to Mexican companies in like circumstances. SEGOB has acted consistently, Mexico argues, in enforcing the law against all operators (including

⁸ *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, UNCITRAL (NAFTA), <http://ita.law.uvic.ca/documents/PopeandTalbot-Merit.pdf>; *S.D. Myers Inc. v. Canada*, First Partial Award, 13 November 2000, UNCITRAL (NAFTA), <http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>; *ADF Group Inc. v. USA*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, <http://www.worldbank.org/icsid/cases/ADF-award.pdf>; *Feldman v. Mexico*, Award, 16 December 2002, ICSID Case No. ARB(AF)/99/1, http://www.worldbank.org/icsid/cases/feldman_mexico-award-en.PDF; *Occidental Exploration and Production Company v. Ecuador*, Final Award, 1 July 2004, LCIA Case No. UN3467, http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

Mexican nationals) who have attempted to operate facilities with so-called “skill” machines, and it has proceeded with the closure of every similar facility of which it became aware of and defended its actions in every court of appeal initiated by the operators of machines similar or identical to those of EDM.

174. Mexico contends that Thunderbird has not succeeded in proving any discrimination against EDM, whether based on nationality or otherwise. In this regard, Mexico disputes Thunderbird’s three-part test Article 1102. According to Mexico, Article 1102 is directed only to nationality-based discrimination and proscribes only demonstrable and significant indications of bias and prejudice on the basis on nationality, which are to be proven by Thunderbird, “the like circumstances” of Article 1102 requiring an adequate comparison on the basis of the facts, thereby taking into account, in particular, compliance with local law relating to illegal conduct. Mexico adds that EDM is not “in like circumstances” with the operators of facilities that have been able to continue operating under temporary injunctive relief while their legal challenges were pending, as even if EDM filed “*juicio de amparo*” proceedings, it was not granted injunctive relief and moreover withdrew its appeals.

(iii)The Tribunal’s findings

175. In construing Article 1102 of the NAFTA, the Tribunal gives effect to the plain wording of the text. The obligation of the host NAFTA Party under Article 1102 of the NAFTA is to accord non-discriminatory treatment towards the investment or investor of other NAFTA Parties. It must therefore be established that discriminatory treatment was accorded to the foreign investment or investor.
176. The burden of proof lies with Thunderbird, pursuant to Article 24(1) of the UNCITRAL Rules. In this respect, Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican nationals.

177. It is not expected from Thunderbird that it show separately that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favourably than a national investor. That case is to be proven by a foreign investor, and, additionally, the reason why there was a less favourable treatment.⁹
178. In the Tribunal's view, Thunderbird has not sufficiently established – not even on a *prima facie* basis – that the EDM investments were treated, in like circumstances, worse than those of Mexican nationals (or any other nationals for that matter).
179. The record shows that SEGOB has sought to enforce Mexican legislation on gambling by pursuing the closure of numerous gambling facilities (most of which have been closed definitely), and that the official closure of Mexican gambling facilities was in fact pursued at the very same time SEGOB proceeded to the official closure of the EDM facilities in Nuevo Laredo and Matamoros (*see* Exh. R-9). The Tribunal notes that SEGOB met resistance from the gaming facilities in question, including those of EDM, before the Mexican courts. As a result, it appears that some of the facilities closed by SEGOB were able to continue to operate under temporary injunctive relief, but the record also shows that SEGOB legally challenged the court decisions granting injunctive relief in connection with SEGOB's official closure orders and that appeals are pending.

⁹ See *S.D. Myers Inc. v. Canada*, First Partial Award, 13 November 2000, UNCITRAL (NAFTA), <http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>; *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, 10 April 2001, UNCITRAL (NAFTA), <http://ita.law.uvic.ca/documents/PopeandTalbot-Merit.pdf>; *Feldman v. Mexico*, Award, 16 December 2002, ICSID Case No. ARB(AF)/99/1, http://www.worldbank.org/icsid/cases/feldman_mexico-award-en.PDF, *Occidental Exploration and Production Company v. Ecuador*, Final Award, 1 July 2004, LCIA Case No. UN3467, http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

180. As to the gambling facilities that apparently continue to operate without having obtained temporary injunctive relief, the Tribunal finds insufficient evidence on the record establishing that Mexico had knowledge of the existence of those facilities and deliberately allowed them to remain open. In this regard, it should be noted that some of the gambling facilities appeared to operate in a clandestine manner (*see* the videos submitted by Thunderbird).
181. With respect to the Guardia facilities, the Tribunal notes that this is a particular case where SEGOB has experienced long-standing legal altercations with Mr. Guardia. The Tribunal infers that even if any of the facilities operated by Mr. Guardia remain open today, one cannot talk of discrimination towards EDM since the record shows that SEGOB has repeatedly taken action to close Mr. Guardia’s facilities, but has met fierce legal and other resistance in the process (*see* Exs. R-97; R-114; R-31, R-32).
182. It thus appears from the facts of the case that SEGOB’s policy and actions in enforcing the *Ley Federal de Juegos y Sorteos* were directed at both Mexican and non-Mexican gambling operations and that they were overall consistent. Accordingly, the Tribunal finds that Thunderbird has not established a breach the “National Treatment” standard under Article 1102 of the NAFTA.
183. In any event, even if Thunderbird had established without doubt that Mexico’s line of conduct with respect to gambling operations was not uniform and consistent, one cannot overlook the fact that gambling is illegal in Mexico. In the Tribunal’s view, it would be inappropriate for a NAFTA tribunal to allow a party to rely on Article 1102 of the NAFTA to vindicate equality of non-enforcement within the sphere of an activity that a Contracting Party deems illicit.

Issue 9. Did Respondent breach the “Minimum Standard of Treatment” under Article 1105 of the NAFTA?

184. Article 1105(1) of the NAFTA provides as follows:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

(i) Thunderbird's position

185. With respect to the meaning of the “Minimum Standard of Treatment” under Article 1105 of the NAFTA and its application by a NAFTA tribunal, Thunderbird cites various NAFTA awards, alleging that the conduct of SEGOB officials in this case reflects exactly the kind and level of arbitrariness that the *Waste Management II* tribunal would conclude violates the minimum standard under Article 1105.
186. According to Thunderbird, three international law doctrines – detrimental reliance, denial of justice, and abuse of rights – can be used to inform the Tribunal’s interpretation of how “fair and equitable treatment” was not provided to Thunderbird or its investments. Hence, Thunderbird contends that the detrimental reliance by Thunderbird and the EDMs on the *Oficio* in pursuing their investments in Mexico and Mexico’s subsequent actions against Thunderbird and its EDM entities, in contravention to the content of the *Oficio*, establish a breach of Article 1105 of the NAFTA, adding that the EDMs were not only entitled to rely upon the SEGOB letter because of its contents, but also because of the expectations generated by Mexico’s ratification of the NAFTA. Thunderbird alleges further a failure by Mexico to provide due process, constituting an administrative denial of justice, in the proceedings relating to the ruling of 10 October 2001, which constituted a breach of Article 1105 of the NAFTA; and manifest arbitrariness in administration, constituting proof of an abuse of right, in the proceedings before SEGOB, in breach of Article 1105 of the NAFTA.

(ii) Mexico's position

187. Mexico denies having violated the “Minimum Standard of Treatment” of Article 1105 of the NAFTA.

188. According to Mexico, Thunderbird's complaints about the SEGOB administrative proceedings are factually incorrect and in any event pertain to issues of pure domestic law; and Thunderbird has not presented any evidence of failures of the Mexican judicial system that it argues prejudiced it and constituted the principal reason why it withdrew its judicial appeals.
189. Mexico contends that it has adopted a uniform and consistent line of conduct with respect to illegal gaming operations. In particular, Mexico argues that it has, to its knowledge, closed down all facilities where so-called slot machines were operating and has legally challenged all court decisions granting injunctive relief regarding SEGOB official closure orders.
190. With respect to any alleged detrimental reliance on the *Oficio*, Mexico contends that SEGOB's determination that it would consider the machines to be prohibited games cannot be considered arbitrary, given that Thunderbird itself knew the nature of the machines and knew of the existing risk that they would be inspected by SEGOB and it would reach that conclusion.
191. As to the SEGOB administrative proceedings, Mexico denies that they were illegal, arbitrary or unfair, arguing that the decision itself indicates that EDM's evidence was taken into account even when not in strict accordance with the applicable domestic legal requirements and the decision set out a reasoned basis for its conclusions; that the procedure was transparent and in compliance with Mexican laws, validated by EDM's lawyers who were experts in Mexican law; and that if there had been a violation during the proceedings, there were appropriate judicial remedies available to challenge it.

(iii)The Tribunal's findings

192. The Tribunal shall interpret Article 1105(1) of the NAFTA in accordance with the NAFTA Free Trade Commission's Notes of Interpretation of certain Chapter

Eleven Provisions (“Minimum Standard of Treatment in Accordance with International Law”) dated 31 July 2001¹⁰, which provides as follows:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

193. The Tribunal shall accordingly measure the Article 1105(1) of the NAFTA minimum standard of treatment against the customary international law minimum standard, according to which foreign investors are entitled to a certain level of treatment, failing which the host State’s international responsibility may be engaged.
194. The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.¹¹ Notwithstanding the

¹⁰ <http://www.dfait-maeci.gc.ca/tna-nac/Nafta-interpr-en.asp>.

¹¹ See in particular *Mondev International Ltd. v. USA*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, <http://www.state.gov/documents/organization/14442.pdf>; *ADF Group Inc. v. USA*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, <http://www.worldbank.org/icsid/cases/ADF-award.pdf>; *Waste Management Inc. v. Mexico*, Arbitral Award, 2 June 2002, ICSID Case No. ARB(AF)/98/2, http://www.worldbank.org/icsid/cases/waste_award.pdf; Final Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, http://ita.law.uvic.ca/documents/laudo_ingles.pdf.

evolution of customary law since decisions such as *Neer Claim* in 1926¹², the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence¹³. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards¹⁴.

195. In the present case, the Tribunal is not convinced that Thunderbird has demonstrated that Mexico's conduct violated the minimum standard of treatment, for the following reasons.
196. The Tribunal has already found that Thunderbird could not reasonably rely on the *Oficio* to its detriment (*see* the Tribunal's findings under Issue 7 above).
197. As to the alleged failure to provide due process (constituting an administrative denial of justice) and the alleged manifest arbitrariness in administration (constituting proof of an abuse of right) in the SEGOB proceedings, the Tribunal

¹² *USA (L.F. Neer) v. Mexico* (1926), 4 R.I.A.A. 60 (Gen. Cl. Comm'n 1926).

¹³ *See* in this regard *Alex Genin et al. v. Estonia*, Award, 25 June 2001, ICSID Case No. ARB/99/2, <http://www.worldbank.org/icsid/cases/genin.pdf>; *Waste Management Inc. v. Mexico*, Final Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, http://ita.law.uvic.ca/documents/laudo_ingles.pdf.

¹⁴ *See* in this regard *Alex Genin et al. v. Estonia*, Award, 25 June 2001, ICSID Case No. ARB/99/2, <http://www.worldbank.org/icsid/cases/genin.pdf>; *S.D. Myers Inc. v. Canada*, First Partial Award, 13 November 2000, UNCITRAL (NAFTA), <http://ita.law.uvic.ca/documents/SDMyers-1stPartialAward.pdf>; *Mondev International Ltd. v. USA*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, <http://www.state.gov/documents/organization/14442.pdf>; *ADF Group Inc. v. USA*, Award, 9 January 2003, ICSID Case No. ARB(AF)/00/1, <http://www.worldbank.org/icsid/cases/ADF-award.pdf>; *Azinian v. Mexico*, Arbitral Award, 1 November 1999; ICSID Case No. ARB(AF)/97/2, http://www.worldbank.org/icsid/cases/robert_award.pdf; *Loewen v. USA*, Award, 26 June 2003, ICSID Case No. ARB(AF)/98/3, <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>; *Case concerning Elettronica Sicula SpA (ELSI) (United States v. Italy)*, 20 July 1989, 1989 I.C.J. 15.

cannot find sufficient evidence on the record establishing that the SEGOB proceedings were arbitrary or unfair, let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment.

198. In particular, the Tribunal notes that Thunderbird was given a full opportunity to be heard and to present evidence at the Administrative Hearing, and that it made use of this opportunity. The Tribunal does not find anything reproachable about the Administrative Order. The 31-page document appears, in the Tribunal's view, to be adequately detailed and reasoned; it reviews the evidence presented by Thunderbird at the hearing; and discusses at length the legal grounds on which SEGOB based its determination that the EDM machines were prohibited gambling equipment (*see* Exh. R-93).
199. As to the official closures of the EDM facilities, the Tribunal does not find that the manner in which SEGOB proceeded for the official closure was arbitrary. In fact, the record shows that on one occasion, SEGOB itself recognized that the official closure order for Nuevo Laredo was irregular and accordingly rectified its error by lifting the seals of the Nuevo Laredo facility.
200. The Tribunal does not exclude that the SEGOB proceedings may have been affected by certain irregularities. Rather, the Tribunal cannot find on the record any administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment. As acknowledged by Thunderbird, the SEGOB proceedings should be tested against the standards of due process and procedural fairness applicable to administrative officials. The administrative due process requirement is lower than that of a judicial process. Hence, for instance, even if one views the absence of Lic. Aguilar Coronado (who signed the Administrative Order) at the 10 July hearing as an administrative irregularity, it does not attain the minimum level of gravity required under Article 1105 of the NAFTA under the circumstances.
201. Finally, the SEGOB proceedings (including the Administrative Resolution) were subject to judicial review before the Mexican courts. The Tribunal notes in this

regard that EDM filed a nullification (*juicio de nulidad*) of the 10 October Ruling before the federal tax and administrative court (in which it did not raise any complaint about Lic. Aguilar Coronado's absence at the Administrative Hearing). EDM went on to appeal the court's decision on the nullification (*juicio de amparo*), but subsequently withdrew from the proceedings, which decision cannot be attributed to Mexico.

Issue 10. Did Respondent engage in an expropriation in violation of Article 1110 of the NAFTA?

202. Article 1110 (1) of the NAFTA provides as follows:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1);
and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

(i) Thunderbird's position

203. With respect to Mexico's jurisdictional objections, Thunderbird contends that the purposes of the NAFTA would be completely frustrated if investors were not entitled to bring claims under Article 1110, on behalf of their investment enterprises established in the territory of another NAFTA Party. Thunderbird requests that leave be granted to Thunderbird to amend its PSoC to include, in the further alternative, a

claim for 100% of the damages caused to the businesses of each EDM Company as a result of Respondent’s alleged breach of Article 1110, using Article 1116 of the NAFTA.

204. Thunderbird contends that Article 1110 of the NAFTA, which requires the payment of full, prompt, and effective compensation for the taking of an “investment,” imposes an obligation upon Mexico vis-à-vis the EDMs. The standard for determining whether a taking has occurred is whether government action has resulted in substantial interference with the investment.
205. According to Thunderbird, the EDM Companies had legitimately acquired rights in the businesses they conducted. The actions of SEGOB amounted to expropriation within the meaning of Article 1110 of the NAFTA, Thunderbird argues, because the EDMs established their investments in Mexico on the general promise of fair and equitable treatment and with the added security of the “negative clearance” contained within the *Oficio*, and the official closure of these facilities destroyed the EDMs’ businesses, requiring the payment of fair market value for these investments so taken.

(ii) Mexico’s position

206. Mexico raises a jurisdictional objection to the effect that Thunderbird cannot succeed in its claim of expropriation because it failed to bring a claim on its own behalf as an investor of a Party under Article 1116 of the NAFTA. Thunderbird’s request in the SoR to amend its claim should be denied according to Mexico.
207. Mexico contends that SEGOB determined that EDM was operating prohibited gambling equipment and that, therefore, bona fide law enforcement actions by SEGOB, such as the closure of illegal gambling operations, do not amount to an expropriation. Further, Mexico argues, EDM filed appeals in the national courts that it subsequently withdrew.

(iii) The Tribunal’s findings

208. The Tribunal does not need to decide on Mexico’s jurisdictional objection regarding Thunderbird’s failure to present its claim under Article 1116 of the NAFTA, since the Tribunal has already found that the EDM Companies could not have operated based on a legitimate expectation in Mexico. Accordingly, as acknowledged by Thunderbird, compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.

E. Merits – Damages

209. The Tribunal has found that Mexico did not violate any of the NAFTA provisions relied upon by Thunderbird (*see* the Tribunal’s findings on Issues 8, 9 and 10 above). Accordingly, Thunderbird is not entitled to damages and the Tribunal does not need to address Issue 11.

VI. COSTS

210. In Thunderbird’s Cost Submission of 26 August 2004, Thunderbird claimed US\$ 995,934.50 for its legal fees and expenses. In Thunderbird’s Supplementary Statement of Costs of 31 March 2005, Thunderbird claims US\$ 1,163,375.20 (including previous sums claimed).
211. In Mexico’s Cost Submission of 12 August 2004, Mexico claimed US\$ 1,310,943.78 for its legal fees and expenses. In Mexico’s Supplementary Statement of Costs of 31 March 2005, Mexico claimed an additional US\$ 191,122.06.
212. Pursuant to Article 1135 of the NAFTA, a tribunal may “award costs in accordance with the applicable Arbitral Rules,” i.e., the UNCITRAL Rules. Pursuant to Article 38 of the UNCITRAL Rules, the “arbitral tribunal shall fix the costs of arbitration in its award.” Article 38 (e) includes within the scope of the definition of the “costs of arbitration” 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”. Articles 40 (1) and (2) of the UNCITRAL Rules provide as follows:

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.

213. The majority view in *S.D. Myers v. Canada* believed that there is a “subtle distinction” between these two paragraphs, the first emphasizing “success,” and the second “the circumstances of the case.”¹⁵ The present Arbitral Tribunal does not see the distinction between the two paragraphs in that way. The first paragraph too refers to “the circumstances of the case” whilst the second, as conceded by the majority view in *S.D. Myers*, also implies success. Rather, the difference between the two paragraphs is that the first paragraph sets forth a rule with an exception to that rule, whereas the second paragraph gives an arbitral tribunal unfettered discretion. According to the first paragraph, the costs of the arbitration “shall in principle be borne by the unsuccessful party,” whilst according to the second paragraph, an arbitral tribunal “shall be free” to determine which party bears the costs of legal representation (or may apportion such costs). In the present case, the Arbitral Tribunal does not see a reason to rely on that distinction, as the more objective benchmark for both types of costs is the rate of success of a party.

¹⁵ *S.D. Myers v. Canada*, Final Award, 30 December 2002, UNCITRAL (NAFTA), <http://ita.law.uvic.ca/documents/SDMyersFinalAward.pdf>

214. 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.
215. 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 applicable arbitration rules.” The treaty does not contain any limitation in regard of the award of costs.
216. The parties to the present case have themselves each claimed an award of costs (*see* Notice of Arbitration at ¶34 and SoD at ¶372). Although Thunderbird has contended that it is rarely appropriate for costs to be awarded to an unsuccessful NAFTA claimant, it has at the same time recognized: “[n]o Nafta provisions exist which would modify the application of [Articles 38 and 40 of the UNCITRAL] arbitration rules. Accordingly, it lies within the discretion of this Tribunal to award costs in the manner it determines to be the most appropriate and reasonable in the circumstances.” (*see* PSoC at p.121)
217. The Tribunal is mindful of other NAFTA awards such as the decision in *Azinian v. Mexico*,¹⁶ in which the tribunal considered four factors for deciding that the losing investor need not pay the costs of the respondent (state party):

¹⁶ *Azinian v. Mexico*, Arbitral Award, 1 November 1999; ICSID Case No. ARB(AF)/97/2, http://www.worldbank.org/icsid/cases/robert_award.pdf

The claim has failed in its entirety. The Respondent has been put to considerable inconvenience. 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 representation. This practice serves the dual function of reparation and dissuasion.

In this case, however, four factors militate against an award of costs. First, this is a new and novel mechanism for the resolution of international investment disputes. Although the Claimants have failed to make their case under the NAFTA, the Arbitral Tribunal accepts, by way of limitation, that the legal constraints on such causes of action were unfamiliar. Secondly, the Claimants presented their case in an efficient and professional manner. Thirdly, the Arbitral Tribunal considers that by raising issues of defective performance (as opposed to voidness *ab initio*) without regard to the notice provisions of the Concession Contract, the Naucalpan Ayuntamiento may be said to some extent to have invited litigation. Fourthly, it appears that the persons most accountable for the Claimants' wrongful behaviour would be the least likely to be affected by an award of costs; Mr. Goldenstein is beyond this Arbitral Tribunal's jurisdiction, while Ms. Baca – who might as a practical matter be the most solvent of the Claimants – had no active role at any stage.

218. With respect to the first factor, 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. As for the second factor, although it may be said that the Parties here presented their case in an efficient and professional manner, the Tribunal does not find it a decisive factor for awarding costs in deviation of the general principle. Finally, the third and fourth *Azinian* factors are not applicable in the present case.
219. In the present case, the Tribunal has found that Mexico is the successful party, except on issues of jurisdiction and/or admissibility.

220. Accordingly, the Tribunal finds that Mexico may in principle recover an appropriate portion of the costs of its legal representation and assistance. In this regard, the amount of US\$ 1,502,065.84 claimed by Mexico appears to be reasonable in light of the scope and length of the present arbitral proceedings. Mexico did not however prevail on all issues. In consideration of this fact, the Tribunal shall exercise its discretion and allocate the costs on a $\frac{3}{4}$ - $\frac{1}{4}$ basis. Accordingly, the Tribunal hereby determines that Thunderbird shall reimburse Mexico in the amount of US\$ 1,126,549.38 in respect of the costs of legal representation for this arbitration.
221. As regards the fees of the arbitrators, the Arbitral Tribunal has determined the fees of the Arbitrators to be US\$405,620. The disbursements of the arbitration, including rent of hearing rooms, travel, hotel accommodation and court reporters amount to US\$99,632.08. Consequently, the costs of the arbitration amount to US\$505,252.08 and will be paid out of the deposits made by the Parties. For the same reasons as expressed in the preceding paragraph, the costs referred to in this paragraph shall be allocated between Thunderbird and Mexico on a $\frac{3}{4}$ - $\frac{1}{4}$ basis. Accordingly, the Arbitral Tribunal hereby determines that Thunderbird shall reimburse Mexico in the amount of US\$126,313.02 in respect of the aforementioned deposits made by Mexico.

VII. DECISIONS

222. FOR THE FOREGOING REASONS, the Arbitral Tribunal renders the following decisions:

- 1) FINDS that Mexico did not breach Articles 1102, 1105 or 1110 of the NAFTA or otherwise;
- 2) DISMISSES Thunderbird's claims in their entirety;
- 3) DETERMINES the costs of the arbitration referred to in ¶ 221 above at US\$505,252.08, and further DETERMINES that these costs are to be shared by the Thunderbird and Mexico on a 3/4-1/4 basis, and are to be paid out of the deposits made by the Parties;
- 4) DETERMINES that Thunderbird shall reimburse Mexico in the amount of US\$ 1,126,549.38 in respect of the costs of legal representation and US\$126,313.02 in respect of the deposits made by Mexico for the fees and disbursements of the Arbitral Tribunal.

Made in Washington D.C., U.S.A., being the place of arbitration, on January 26, 2006,

Lic. Agustin Portal Ariosa,
Arbitrator

Professor Thomas W. Wälde,
Arbitrator
(see separate opinion)

Professor Dr. Albert Jan van den Berg,
President

LEGAL AUTHORITY CA-145

State of California

CIVIL CODE

Section 3289

3289. (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

(b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.

For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

(Amended by Stats. 1986, Ch. 176, Sec. 1. Effective June 23, 1986.)

LEGAL AUTHORITY CA-146

State of California

CODE OF CIVIL PROCEDURE

Section 685.010

685.010. (a) Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied.

(b) The Legislature reserves the right to change the rate of interest provided in subdivision (a) at any time to a rate of less than 10 percent per annum, regardless of the date of entry of the judgment or the date any obligation upon which the judgment is based was incurred. A change in the rate of interest may be made applicable only to the interest that accrues after the operative date of the statute that changes the rate.

(Repealed and added by Stats. 1982, Ch. 1364, Sec. 2. Operative July 1, 1983, by Sec. 3 of Ch. 1364.)