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AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

CHEMTURA CORPORATION  
(formerly Crompton Corporation)

Claimant

and

GOVERNMENT OF CANADA

Respondent.

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**PROCEDURAL ORDER NR. 5**

30 July 2009

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**ARBITRAL TRIBUNAL:**

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)  
The Honourable Charles N. Brower  
Professor James Crawford

Secretary of the Tribunal  
Dr. Jorge E. Vinuales

## **I. PROCEDURAL BACKGROUND**

1. Pursuant to paragraphs 37 and 39 of Procedural Order No. 1 of 21 January 2009 ("PO No. 1"), the Tribunal held a pre-hearing telephone conference with the Parties on 20 July 2009 to address all outstanding organizational and procedural matters in connection with the hearing, including possible submissions by the governments of the other States parties to the NAFTA. Pursuant to the Tribunal's letter of 11 June 2009, the pre-hearing telephone conference took place on 20 July 2009 at 7:00 p.m. (Ottawa time) and was conducted by the Presiding Arbitrator alone by delegation of her co-arbitrators.
2. By letter of 15 July 2009, the Mexican Government advised that it intended to make a submission in accordance with Article 1128 by no later than 31 July 2009. The United States Government had previously advised on 17 April 2009 that it had not yet reached a final decision on whether to make a submission in accordance with Article 1128 of NAFTA in the present arbitration and that, if made, such a submission would be filed by 31 July 2009.
3. By letter of 17 July 2009, the Claimant requested that the Tribunal admit 9 additional exhibits into the record (the "Claimant's Request"), to which the Respondent replied on 24 July 2009.
4. On such basis, the Tribunal issues this present order:

## **II. DECISION**

### **A. Dates, venue and schedule of the hearing**

5. Pursuant to paragraph 37 of PO No. 1, the hearing shall take place from 2 to 10 September 2009 (11 September being a reserve day), without Sunday 6 September 2009.
6. The hearing shall be held in Ottawa at the Government Conference Centre.
7. The daily schedule shall be from 9:00 a.m. to 5:30 p.m., with a one-hour lunch break and two short coffee breaks each day. These times are indicative and may have to be changed to suit the needs of the examinations.

### **B. Fact and expert witnesses**

8. The following witnesses shall be heard on behalf of the Claimant:

8.1. Fact witnesses:

- Alfred F. Ingulli
- Paul Thomson
- John Kibbee
- Edwin Johnson

8.2. Expert witnesses:

- James V. Aidala
- Manuel Abdala, Andrés Chambouleyron and Pablo Spiller

9. The following witnesses shall be heard on behalf of the Respondent:

9.1. Fact witnesses:

- JoAnne Buth
- Cheryl Chaffey
- Suzanne Chalifour
- Claire Franklin
- Wendy Sexsmith
- John Worgan
- Tony Zatylny
- Peter Chan

9.2. Expert witnesses:

- Lucio Costa
- Lynn Goldman
- Brent Kaczmarek

**C. Sequence of the hearing**

10. The hearing shall be structured as follows:

- Claimant's opening statement
- Respondent's opening statement
- Examination of Claimant's fact witnesses
- Examination of Respondent's fact witnesses
- Examination of Respondent's scientific expert (Dr. Lucio Costa)
- Examination of Claimant's regulatory expert (Mr. James V. Aidala)
- Examination of Respondent's regulatory expert (Dr. Lynn Goldman)

- Examination of Claimant's experts on quantum (Messrs. Abdala, Chambouleyron, Spiller)
- Examination of Respondent's expert on quantum (Mr. Kaczmarek)
- Claimant's closing statement
- Respondent's closing statement

11. The Parties are invited to confer and submit to the Tribunal, if possible jointly, a tentative schedule setting out the order in which they wish to examine the fact witnesses as well as the anticipated time (half day) of the examinations, by no later than 21 August 2009.

#### **D. Time allocation**

12. The time allocation during the hearing shall be as follows:

- (i) Each Party shall have a maximum of 2 hours for its opening statement and of 2 hours for its closing statement;
- (ii) In addition, the Claimant shall have 20 hours and the Respondent 16 hours for fact and expert witness examinations;
- (iii) If the remaining available time permits and the circumstances justify it, the Tribunal may in its discretion grant a brief extension of the times set out in (ii).

13. The Tribunal may adjust the time allocation contemplated in paragraph 12 above if this appears necessary as a result of the intervention of a non-disputing State party to the NAFTA.

#### **E. Transcript and demonstrative exhibits**

14. Pursuant to paragraph 32 of PO No. 1, Live Note transcription with same day transcript will be used.

15. Demonstrative exhibits that the Parties intend to use in their opening statements shall be presented to the other Party no later than 1 September 2009 at 10:30 a.m. (Ottawa time) and shall be limited to information which is already in the record. If other demonstrative exhibits (also limited to information on record) are used during the hearing, they shall be communicated to the other Party as soon as possible and no later than the night (at 10:30 p.m. Ottawa time) before the hearing day on which they will be used.

16. The Tribunal may in its discretion grant a Party leave to use demonstrative exhibits that have not been communicated as provided in paragraph 15 above if it considers that such course of action does not impair the due process rights of the other Party.

## **F. Chronological index of exhibits, hearing bundles and agreed statement of facts**

17. The Parties shall confer in order to establish, if possible jointly, the following items:

- (i) A consolidated chronological list of all the exhibits submitted in these proceedings by both Parties;
- (ii) Hearing bundles containing those documents that the Parties consider as the most important ones for the resolution of the present dispute (in CD-Rom and paper format);
- (iii) An agreed statement of the facts that the Parties view as undisputed.

18. Items (i) and (ii) above shall be made available to the Tribunal and the Secretary at the hearing. The deadline for the submission of item (iii) contemplated in paragraph 37 of PO No. 1 is hereby extended until 21 August 2009.

## **G. Confidentiality**

19. Pursuant to paragraph 10 of the Confidentiality Order of 21 January 2008 ("CO"), the hearing shall be held *in camera* and may only be attended by the persons referred to in paragraph 5 of CO.

20. Each Party shall bear the responsibility for ensuring that the confidentiality requirements set forth in CO are respected by persons present on its side of the hearing room.

## **H. Post-hearing submissions**

21. At the end of the hearing, the Tribunal will discuss with the Parties whether post-hearing submissions will be filed and if so within what time limit.

## **I. Intervention under Article 1128 of NAFTA**

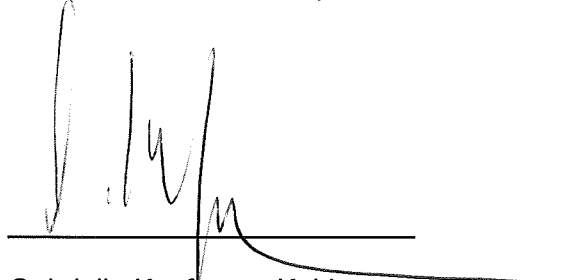
22. The Tribunal notes that the Mexican Government has expressed its intention to make a submission in accordance with Article 1128 of NAFTA by 31 July 2009. The Tribunal further notes that the United States Government has reserved its right to make such a submission before 31 July 2009.

23. The Tribunal will, as the case may be, revert to the Parties with any adjustments to the present procedural order that may appear necessary in view of the submissions contemplated in paragraph 22 above.

## **J. The Claimant's Request**

24. Having considered the arguments of both Parties regarding the Claimant's Request, the Tribunal decides to admit the 9 exhibits identified in the Claimant's letter of 17 July 2009 into the record.
25. The Tribunal considers that such documents may be relevant for the resolution of the present dispute. This said, given the late time of the Claimant's Request, in order to ensure that the due process rights of the Respondent are duly safeguarded, the Tribunal grants an opportunity to the Respondent to file brief comments and/or rebuttal documents by 21 August 2009.
26. The Tribunal stresses that this decision does not imply any endorsement on its part of positions advanced by the Claimant in connection with the sufficiency of the Respondent's document production and it takes due note of the Respondent's position in this regard.
27. The Tribunal further notes that the costs of the Claimant's application will be determined in its final award on the merits.

For the Arbitral Tribunal,



Gabrielle Kaufmann-Kohler  
Presiding Arbitrator