Dockets: 2009-2430(IT)G
2014-3075(IT)G
2015-1307(IT)G

BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

2018 TCC 195 (CanLII)

Appeals heard on October 5, 2016, October 17 to 21, 2016, October 24 to 28, 2016, November 7 to 10, 2016, November 14 to 18, 2016, December 5 to 9, 2016, December 12 to 16, 2016, February 13 to 17, 2017, March 13 to 16, 2017, March 20 to 22, 2017, March 27 to 30, 2017, April 24 to 28, 2017, May 1 to 5, 2017, May 15 to 17, 2017, May 23 and 24, 2017, July 10 to 14, 2017 and September 11 to 13, 2017, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Al Meghji, Joseph M. Steiner, Peter Macdonald, Laura Fric, Mark Sheeley, Geoffrey Grove, Catherine Gleason-Mercier, Tamara Prince and Lia Bruschetta
Counsel for the Respondent:	Naomi Goldstein, Elizabeth Chasson, Sandra Tsui, Diana Aird, Peter Swanstrom, Alisa Apostle, Sharon Lee and Paralegal, Karen Hodges

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2003, 2005 and 2006 taxation years, the notices of which are dated December 17, 2010,

December 27, 2013 and May 22, 2014, are allowed and the reassessments are referred back to the Minister of National Revenue (the "Minister") for reconsideration and reassessment on the basis that:

1. none of the transactions, arrangements or events in issue in the appeals was a sham;

2. the Minister's transfer pricing adjustments for each of the taxation years shall be reversed;

3. the amount of $98,012,595 shall be added back in computing the resource profit of the Appellant for its 2005 taxation year; and

4. the amount of $183,935,259 shall be added back in computing the resource profit of the Appellant for its 2006 taxation year.

The parties have 60 days from the date of this judgment to provide submissions regarding costs. Such submissions shall not exceed 15 pages for each party.

Signed at Ottawa, Canada, this 26th day of September 2018.

"J.R. Owen"

Owen J.

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Citation: 2018 TCC 195
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BETWEEN:

CAMECO CORPORATION,

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REASONS FOR JUDGMENT

Owen J.

INTRODUCTION

[1] Cameco Corporation (the "Appellant") appeals the reassessment of its 2003, 2005 and 2006 taxation years by notices dated December 17, 2010, December 27, 2013 and May 22, 2014 respectively (individually, the "2003 Reassessment", the "2005 Reassessment" and the "2006 Reassessment" respectively, and collectively, the "Reassessments"). The Reassessments added the following amounts to the Appellant's income:

2003 Reassessment: $43,468,281
2005 Reassessment: $196,887,068
2006 Reassessment: $243,075,364

[2] In addition, the 2005 Reassessment and the 2006 Reassessment increased the resource allowance of the Appellant by $12,257,611 and $16,238,233 respectively. The outcome of the appeals regarding the resource allowance is dependent on the outcome of the appeals regarding the additions to the Appellant's income for 2005 and 2006.

[3] In issuing or confirming the Reassessments that increased the income of the Appellant for its 2003, 2005 and 2006 taxation years (the "Taxation Years"), the

Minister of National Revenue (the "Minister") relied on subsection 247(2) of the *Income Tax Act*[1] (the "ITA").[2] In these appeals the Minister relies first on sham, second on paragraphs 247(2)(b) and (d) and lastly on paragraphs 247(2)(a) and (c).

THE FACTS

A. The Fact Witnesses

[4] The Appellant called the following fact witnesses:

1. George Assie. Mr. Assie joined the Appellant in 1981 and retired on December 31, 2010. From 1981 to late 1999, Mr. Assie held a range of positions with the Appellant, including the following: director, market planning; director, marketing North America and vice-president, marketing. In August 1999, Mr. Assie was appointed as president of Cameco Inc. ("Cameco US"), a newly incorporated United States subsidiary of the Appellant. At the end of 2002, Mr. Assie was appointed as senior vice-president, marketing and business development of the Appellant, a position he held until he retired.

2. Gerhard Glattes. Mr. Glattes studied law in Germany and the United States. Mr. Glattes joined a German corporation called Uranerzbergbau GmbH ("UEB") as head of its law department in 1969 and was admitted to the Bar in Germany in 1974. From 1980 to 1995, Mr. Glattes was a managing director of UEB. From 1984 to 1995, Mr. Glattes was the chief executive officer and chairman of the board of three subsidiaries of UEB, including one Canadian subsidiary—Uranerz Exploration and Mining or UEM—that was a joint venture partner in the Key Lake and Rabbit Lake uranium mines in Saskatchewan. As well, from 1988 to 1995, Mr. Glattes was chairman of the advisory committee of the Euratom Supply Agency ("Euratom"), the European nuclear regulator. In 1996, Mr. Glattes provided services to the Appellant as a consultant because of restrictions imposed by a non-compete agreement with UEB. From

[1] Unless otherwise noted, all statutory references are to the ITA.

[2] Paragraph 10 of the Amended Amended Reply for 2003, paragraph 13.1 a. of the Amended Reply for 2005 and paragraph 10 of the Amended Reply for 2006. The Minister relied only on paragraph 247(2)(a) and (c) in reassessing the Taxation Years but added subsection 247(2)(b) and (d) in confirming the reassessments for 2005 and 2006. The Minister did not confirm the 2003 reassessment.

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1997 to June 1998, Mr. Glattes was the president of Kumtor Operating Company ("Kumtor"), a wholly owned subsidiary of the Appellant that operated a gold mine in Kyrgyzstan. Effective July 1998, Mr. Glattes entered into a consulting agreement with the Appellant in which he agreed to act as a senior representative of the Appellant in Europe. From July 1999 to October 1, 2002, Mr. Glattes was the president and chairman of Cameco Europe S.A. ("CESA"), a Luxembourg subsidiary of the Appellant with a branch in Switzerland. After the Swiss branch of CESA was transferred to a Swiss subsidiary of the Appellant—Cameco Europe AG (SA, Ltd.) ("CEL")—in October 2002, Mr. Glattes became the president and chairman of CEL and remained in that position until July 31, 2004, at which point he retired in anticipation of his 65th birthday in September 2004. After retiring as president of CEL, Mr. Glattes continued to serve as chairman of the board of CEL. Mr. Glattes was 77 at the time he testified at the hearing of these appeals.

3. William Murphy. Prior to 2000, Mr. Murphy was the director of international marketing of the Appellant. In late 1999, Mr. Murphy was appointed as the vice-president of marketing Canada and Asia at Cameco US. In the summer of 2004, Mr. Murphy replaced Mr. Glattes as the president of CEL, a position he held until the middle of 2007 when he retired.

4. Kim Goheen. Mr. Goheen joined the Appellant in May 1997 as treasurer. In 1999, he became vice-president and treasurer of the Appellant and in 2004 he became the chief financial officer of the Appellant.

5. Lisa Aitken. Ms. Aitken joined the Appellant in 1996 as a contract administrator but resigned in 1999. Ms. Aitken returned to the Appellant in 2010 as manager of marketing Canada, later becoming director of marketing Canada and intercompany transactions

6. Treva Klingbiel. Ms. Klingbiel is the president of TradeTech, a third-party consulting firm active in the uranium industry.

7. Ryan Chute. Mr. Chute joined the Appellant in 2004 as an accountant in the finance department and moved to the marketing department in

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December 2005 as a specialist in trading and transportation. His current title is manager of inventory and transportation.

[5] The Respondent called the following fact witnesses:

1. Loretta McGowan. Ms. McGowan joined Cameco in August of 1994 as a contract administrator. She subsequently became senior administrator for inventory and in 2005 she was appointed manager, marketing administration, which involved managing a team of contract administrators. In January 2010, Ms. McGowan left the employ of the Appellant.

2. Marlene Kerr. Ms. Kerr started working at the Appellant in 1980 and held a number of positions in the accounting and marketing departments. In late 1999, Ms. Kerr was appointed as manager of marketing for Asia of Cameco US. Effective January 1, 2003, Ms. Kerr was appointed as manager, marketing Europe of Cameco US, and effective August 1, 2004 Ms. Kerr was appointed as vice-president of marketing Asia of Cameco US. At some point after November 30, 2006, Ms. Kerr was appointed vice-president of marketing Europe. Ms. Kerr retired in 2009.

3. Tyler Frederick Mayers. Mr. Mayers joined the Appellant in January of 2001 as a contract administrator, a position he held for two and a half to three years. Subsequent to that he held a more specialized position in inventory management, focusing on UF_6 inventories. He left the employ of the Appellant on November 13, 2008.

4. Rita Sperling. Ms. Sperling joined the Appellant on September 29, 1986 as an accounting clerk. On April 12, 1999, Ms. Sperling became a specialist in marketing administration (also referred to as a contract administrator) in the marketing department of the Appellant, and in 2006 Ms. Sperling became a senior specialist in marketing administration.

5. Tim Gabruch. Mr. Gabruch joined Cameco in 1994 as a contract administrator in the marketing department. From 1995 to 1999, Mr. Gabruch was a sales representative for North America save for a brief secondment to the Uranium Institute in 1998. In late 1999, Mr. Gabruch was appointed manager of marketing North America of

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Cameco US. In 2004, Mr. Gabruch was manager of marketing for Asia and Canada, and in 2005 Mr. Gabruch was manager of marketing for Europe. At the beginning of 2007, Mr. Gabruch returned to the employ of the Appellant as manager of corporate development and in the same year became director of corporate development. In 2011, Mr. Gabruch was appointed to his current position of vice-president of marketing for Europe.

6. Shane Shircliff. Mr. Shircliff joined the Appellant in late 1998 as a contract administrator. Until 2003, Mr. Shircliff held a variety of other positions in the marketing department of the Appellant, including inventory administrator and fuel procurement and inventory specialist. From 2003, Mr. Shircliff was first an analyst and then a senior analyst in the corporate development and power generation department of the Appellant. After 2007, Mr. Shircliff was the manager of corporate development and then the director of corporate development and power generation of the Appellant. Mr. Shircliff left the employ of the Appellant sometime after becoming the director of corporate development and power generation.

7. Raymond Dean Wilyman. Mr. Wilyman joined the Appellant on March 19, 2001 in the contract administration group where he remained until 2005. Starting in 2005 he worked for a year in inventory management, managing $U_3 0_8$ inventory. Following that, he was manager of fuel supply, dealing with the Bruce Power fuel supply contracts, and then he became a member of the strategy group. All of Mr. Wilyman's positions were in the marketing department of the Appellant. Mr. Wilyman left the employ of the Appellant in January 2012. Prior to being employed by the Appellant, Mr. Wilyman was employed by the Canada Revenue Agency (the "CRA") for eleven years.

8. Sean David Exner. Mr. Exner joined the Appellant in January 1996 as a senior accountant in the finance group. From January 2003 to January 2007, Mr. Exner was the manager of financial planning, and since January 2007, Mr. Exner has been the director of corporate development of the Appellant.

9. Gerald Wayne Grandey. Mr. Grandey joined the Appellant on January 1, 1993 as senior vice-president of marketing and business

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development, a position he held until 1998 or 1999 when he was appointed executive vice-president. In 2000, Mr. Grandey was appointed president of the Appellant and in January 2003 he was also appointed chief executive officer of the Appellant. Mr. Grandey relinquished the title of president in 2009 or 2010 to allow for succession and retired on June 30, 2011.

10. Maxine Maksymetz. Ms. Maksymetz joined the Appellant in 1990 in the internal audit group. In 1992, Ms. Maksymetz transferred to the tax and royalty group of the Appellant where she eventually became a senior accountant before leaving the employ of the Appellant in 2000.

11. Fletcher T. Newton. Mr. Newton was appointed the general counsel of Power Resources Inc. ("PRI")—a United States subsidiary of the Appellant—in 1997. In 1999, Mr. Newton was appointed president of PRI and in 2004 he was appointed chief executive officer of PRI, a position he held until he left the employ of PRI in 2007. Mr. Newton also held senior positions with two other United States subsidiaries of the Appellant: Crowe Butte Resources, Inc. and UUS Inc.

12. Randy Belosowsky. Mr. Belosowsky started his career with KPMG in 1985 where he remained until 1995. In 1995, Mr. Belosowsky joined UEM in tax and special projects. In 1998, Mr. Belosowsky joined the Appellant as a senior accountant, tax and royalties, and in 2000 he was appointed manager, tax and royalties. In 2004, Mr. Belosowsky was appointed director, tax and insurance for the Appellant, and in 2005 he was appointed assistant treasurer of the Appellant. In 2009, Mr. Belosowsky was appointed director of special projects, tax. In addition to his positions with the Appellant, on May 6, 2004, Mr. Belosowsky was appointed managing director of CEL.

[6] Pursuant to subsection 133(1) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), the fact witnesses were excluded from the courtroom until called to give evidence. Pursuant to subsection 146(3) of the Rules, the Respondent cross-examined those witnesses called by the Respondent who are in the current employ of the Appellant.

B. The Expert Witnesses

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[7] The Appellant called a total of five witnesses who were qualified as expert witnesses:

1. Thomas William Hayslett. Mr. Hayslett was qualified as an expert in the uranium industry, in particular with respect to the types of contracts seen in the uranium industry and the particular contract terms and conditions seen in the uranium market during the 1999 to 2001 period.

2. Doctor Thomas Horst. Dr. Horst was qualified as an expert in transfer pricing.

3. Carol Hansell. Ms. Hansell was qualified as an expert on corporate governance, specifically with respect to commercial relationships between parent and subsidiary corporations within multinational enterprises.

4. Doctor William John Chambers. Dr. Chambers was qualified as an expert in issues of creditworthiness, particularly in the parent-subsidiary context.

5. Doctor Atulya Sarin. Dr. Sarin was qualified as an expert in transfer pricing and financial economics. Doctor Sarin co-authored his expert reports with Doctor Alan C. Shapiro, who was also qualified as an expert in the same areas but did not testify.

[8] The Respondent called a total of three witnesses who were qualified as expert witnesses:

1. Edward Kee. Mr. Kee was qualified as an expert in the nuclear power industry for the purpose of rebutting aspects of the reports of Doctor Horst and Doctor Sarin.

2. Doctor Anthony J. Barbera. Doctor Barbera was qualified as an expert in transfer pricing.

3. Doctor Deloris Wright. Doctor Wright was qualified as an expert in transfer pricing.

C. Credibility and Reliability of Fact Witnesses

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[9] The credibility of a witness refers to the honesty of the witness, or the readiness of the witness to tell the truth. A finding that a witness is not credible is a finding that the evidence of the witness cannot be trusted because the witness is deliberately not telling the truth.

[10] In *Nichols v. The Queen*, 2009 TCC 334, the Court summarized the approach to determining credibility as follows:

> This is a case where the decision depends entirely on my findings of credibility taken in the context of all the evidence adduced at the hearing. I must determine whether the Appellant has shown on a balance of probabilities that the Minister's assessments are incorrect. In considering the evidence adduced, I may believe all, some or none of the evidence of a witness or accept parts of a witness' evidence and reject other parts.
>
> In assessing credibility I can consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies (that is, whether the testimony changed while on the stand or from that given at discovery), prior inconsistent statements, and external inconsistencies (that is, whether the evidence of the witness is inconsistent with independent evidence which has been accepted by me). Second, I can assess the attitude and demeanour of the witness. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court. Finally, I can consider the overall sense of the evidence. That is, when common sense is applied to the testimony, does it suggest that the evidence is impossible or highly improbable.[3]

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time.[4] In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

> . . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

[3] Paragraphs 22 and 23.
[4] See, generally, David M. Paciocco and Lee Stuesser, *The Law of Evidence* (7th ed., Irwin Law, 2015) at pages 35 and 36.

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[12] With respect to each fact witness, I have considered the factors identified in *Nichols* and I have concluded that each fact witness is credible. Although there are at times inconsistencies between the oral testimony of a witness and the documentary record as accepted by me, I consider these inconsistencies to be a reflection on the reliability of the evidence of the witness and not the credibility of the witness. I will address specific examples later in these reasons.

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D. Summary of the Evidence

(1) The History of the Appellant

[13] The Appellant was incorporated under the *Canada Business Corporations Act* in June 1987 for the purpose of acquiring the assets of Saskatchewan Mining Development Corporation, a provincial Crown corporation, and Eldorado Nuclear Limited, a federal Crown corporation. The acquisition of these assets occurred in October 1988.

[14] During the Taxation Years, the Appellant and its subsidiaries (the "Cameco Group") constituted one of the world's largest uranium producers and suppliers of conversion services. The uranium-related activities of the Cameco Group included exploring for, developing, mining and milling uranium ore to produce uranium concentrates (U_3O_8) and selling produced and acquired uranium, uranium conversion services and uranium enrichment services to utilities. The Appellant had uranium mines in Saskatchewan and uranium refining and processing (conversion) facilities in Ontario. United States subsidiaries of the Appellant owned uranium mines in the United States.

[15] The Cameco Group also explored for, developed and operated gold properties, but those undertakings are not relevant to these appeals.

(2) The Uranium Market

[16] During the period 1999 through 2006, the uranium market was comprised essentially of producers, traders and utilities.[5]

[17] Uranium is most commonly purchased and sold in the form of either U_3O_8 or UF_6. The mining and milling of uranium ore produces uranium concentrate or

[5] Lines 6 to 15 of page 1651 of the Transcript of Proceedings (the "Transcript"). A trader is an entity that buys uranium to sell at a profit: lines 18 to 21 of page 1651 and lines 8 to 12 of page 111 of the Transcript.

yellow cake.[6] The uranium concentrate contains anywhere from 75% to 99% U_3O_8 depending on the producer.[7] U_3O_8 is comprised of essentially two uranium isotopes: uranium-238 (approximately 99.3% of the total uranium) and uranium-235 (approximately 0.7% of the total uranium). U_3O_8 is refined into UO_3 and then processed into either UO_2 or UF_6.[8]

[18] UO_2 is used in heavy water nuclear reactors and UF_6 is used in light water nuclear reactors. During the period 1999 through 2006 there were approximately 100 nuclear power stations[9] in the world, of which approximately 45 were located in the United States, 25 were located in Europe and 14 were located in Asia.[10] Approximately 40% to 45% of the western world's commercial demand for uranium comes from the United States with the remainder split between Europe and Asia.[11] Light water nuclear reactors in nuclear power stations create approximately 95% of the world's commercial demand for uranium.[12]

[19] To use UF_6 to generate electricity in a light water nuclear reactor, the UF_6 must first be enriched to increase the content of fissionable uranium-235 to approximately 4.5% and then the enriched UF_6 must be manufactured into fuel assemblies which are custom-made to meet the specifications of the purchasing utility.[13]

[20] The process that includes the mining and milling of uranium ore and the production of fuel assemblies is called the nuclear fuel cycle.[14] It takes approximately 12 to 18 months to go from the mining of the ore to the production of the fuel assemblies.[15]

[21] To convert U_3O_8 into UF_6, the owner of the U_3O_8 transports the U_3O_8 to the processing facility of an entity that provides conversion services (a "converter"). The owner of the U_3O_8 must have an account with the converter or must have the

[6] Lines 5 to 10 of page 1608 of the Transcript.
[7] Lines 5 to 11 of page 98 of the Transcript.
[8] Lines 14 to 19 of page 96 and lines 1 to 12 of page 3366 of the Transcript and Exhibit TA-001.
[9] A nuclear power station may include several nuclear reactors.
[10] Lines 8 to 18 of page 104 of the Transcript.
[11] Lines 3 to 10 of page 105 of the Transcript.
[12] Lines 15 to 19 of page 1607 of the Transcript.
[13] Lines 8 to 13 of page 97, lines 19 to 26 of page 1607, lines 27 to 28 of page 1614, lines 1 to 4 of page 1615, lines 24 to 28 of page 3784 and lines 1 to 4 of page 3785 of the Transcript and page 2 of Thomas Hayslett's expert report, entitled Uranium Contracts Review and dated April 21, 2016 (the "Hayslett Report") (Exhibit EA000529).
[14] Mr. Hayslett states at page 1 of the Hayslett Report that these steps are the "front end of the nuclear fuel cycle". He goes on to state that "[t]he back end of the nuclear fuel cycle deals with storage and disposal of the spent fuel assemblies once they are discharged from the nuclear reactor."
[15] Lines 10 to 14 of page 1612 of the Transcript.

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use of such an account. Ms. Klingbiel testified that related parties "quite often" share accounts with a converter.[16]

[22] The converter weighs and assays the U_3O_8 and credits the account with the number of pounds of U_3O_8 that were delivered to the converter by the owner of the U_3O_8.[17] It is then possible for the owner of the U_3O_8 to sell the U_3O_8 by book transfer to a purchaser that also has an account with the converter.[18] Ms. Klingbiel described the advantages of the book transfer system as follows:

> Well, there are a number of advantages. The primary advantage is that you don't have to actually physically transport the material from one location to another in order to effect the sale at the converter. It also allows, because it's not physically transported, that you can conclude a sale on any date the two parties agree to. The other advantage is that any size lot of material can be agreed to. It's not constrained by the cylinders or the canisters that are used for transport. And the other one is that it allows for confidentiality, because you don't involve other third parties like transportation companies or another third-party facility in the process.[19]

[23] The uranium industry is highly regulated and because of non-proliferation treaties and political and other considerations uranium is typically placed into two categories according to its country of origin: restricted and unrestricted. Restricted uranium is not subject to any restrictions–the "restricted" label applies because the uranium can be sold in restricted markets. On the other hand, unrestricted uranium is subject to restrictions—for example, import quotas or bans on importation—in many countries. During 1999 through 2006, Russian source uranium was unrestricted uranium and Canadian source uranium was restricted uranium.[20]

[24] U_3O_8 and UF_6 are each a fungible product.[21] U_3O_8 or UF_6 from one producer is physically interchangeable with U_3O_8 or UF_6 from another producer. The uranium content of U_3O_8 varies according to where it is produced, but this variation is removed from the determination of price when the U_3O_8 is assayed at a converter.[22] However, the price of U_3O_8 or UF_6 may be affected by the origin of

[16] Lines 13 to 19 of page 1609 of the Transcript.
[17] The measurement is of the number of pounds of U_3O_8 contained in the larger mass of concentrate: lines 4 to 28 of page 1617 and lines 1 to 5 of page 1618 of the Transcript.
[18] Lines 19 to 26 of page 1608 of the Transcript.
[19] Lines 1 to 12 of page 1609 of the Transcript.
[20] Lines 10 to 28 of page 102, lines 1 to 24 of page 103, lines 13 to 22 of page 1633, lines 5 to 21 of page 1713 and lines 6 to 20 of page 1714 of the Transcript.
[21] Lines 10 to 24 of page 1614 of the Transcript.
[22] Lines 5 to 11 of page 98 and lines 19 to 26 of page 1608 of the Transcript.

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the uranium–that is, whether it is restricted or unrestricted–with unrestricted uranium generally accorded a lower price than restricted uranium.[23]

[25] Uranium is bought and sold under bilateral contracts and is not traded on a commodity exchange.[24] U_3O_8 is sold at a price per pound and UF_6 is sold at a price per kilogram (kgU).[25] The price per kgU of UF_6 is calculated by multiplying the price per pound of uranium as U_3O_8 by a factor of 2.613 and then adding the price for creating one kilogram of UF_6 from U_3O_8.[26] The conversion factor is essentially the amount of U_3O_8 required to produce one kilogram of UF_6, taking into account the loss of uranium that occurs in the conversion process, and therefore the formula yields an approximation of the price of UF_6. The price of UF_6 in a particular contract for UF_6 may vary slightly from the result produced by the formula.[27]

[26] The conversion services required to convert U_3O_8 into UF_6 may be sold separately, in which case the purchaser delivers U_3O_8 to the converter and the seller delivers UF_6 to the purchaser at the same facility.[28]

[27] The price at which transactions in uranium occur is not publicly disclosed. However, two companies-Ux Consulting Company LLC ("Ux") and TradeTech LLC ("TradeTech")[29]-published price indicators during the period 1999 through 2006, although Ux did not start publishing long-term price indicators until May 31, 2004.[30] TradeTech was formerly Nuexco and sometimes the TradeTech price indicator is referred to as the Nuexco price indicator.[31]

[28] Ms. Klingbiel provided a description of the price indicators published monthly by her company, TradeTech, during the 1999 through 2006 period:

> . . . Basically there are two categories of material that are delivered in terms of time periods. There's the spot delivery window, and there's a long-term delivery window.
>
> The spot window will include anything that calls for delivery within the next 12 months from the transaction date. And then there are long-term contract prices, or

[23] Lines 14 to 20 of page 1634, lines 24 to 28 of page 1713 and line 1 of page 1714 of the Transcript.
[24] Lines 19 to 28 of page 1615 and lines 1 to 2 of page 1616 of the Transcript
[25] Lines 11 to 16 of page 125 of the Transcript.
[26] Lines 12 to 28 of page 125 and lines 1 to 3 of page 126 of the Transcript.
[27] Lines 4 to 19 of page 126 of the Transcript.
[28] Lines 6 to 27 of page 4432 of the Transcript.
[29] TradeTech LLC is a successor to the Nuclear Exchange Corporation, also known as Nuexco.
[30] Lines 17 to 28 of page 121, lines 1 to 28 of page 122 and lines 1 to 2 of page 123 of the Transcript.
[31] Lines 3 to 28 of page 1466 and lines 1 to 2 of page 1467 of the Transcript.

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agreements, and those are multi-year deliveries that occur at some time in the future.[32]

. . .

Q. And can you just read out what TradeTech's definition is of the spot indicator.

A. It's TradeTech's daily, weekly, and exchange value are the company's judgment of the price at which spot and near-term transactions for significant quantities of natural uranium concentrates could be concluded as of the close of business each day, the end of each Friday, or on the last day of the month, respectively.[33]

. . .

Q. The long-term TradeTech price indicator, could you read out the definition for that, that I understand is the TradeTech definition.

A. Yes.

"The long-term price is the company's judgment of the base price at which transactions for long-term delivery of that product or service could be concluded as of the last day of the month for transactions in which the price at the time of delivery would be an escalation of the base price from a previous point in time."

Q. This long-term price indicator was being published by TradeTech in the period 1999 to 2006?

A. It was.[34]

(3) Overview of Contracts for the Purchase and Sale of Uranium

[29] During 1999 through 2006, two broad categories of contract were used to purchase and sell uranium in the uranium market: spot contracts and long-term contracts.[35]

[30] A spot contract is a contract that provides for delivery of the purchased uranium within 12 months of entering into the contract. A long-term contract is a contract that provides for delivery of the purchased uranium more than 12 months

[32] Lines 7 to 15 of page 1619 of the Transcript.
[33] Lines 21 to 28 of page 1619 of the Transcript.
[34] Lines 12 to 24 of page 1621 of the Transcript.
[35] Lines 5 to 23 of page 1683 of the Transcript.

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after the entering into of the contract. Broadly speaking, these two contract types are the basis for differentiating between the spot price for uranium and the long-term price for uranium in the price indicators.[36]

[31] Mr. Hayslett opined in the Hayslett Report that the following list of terms should be addressed in a long-term contract for the purchase and sale of U_3O_8 or UF_6:[37]

1. Contract term
2. Annual quantity
3. Quantity flexibility
4. Delivery schedule, notices, flexibility
5. Delivery location(s), method
6. Material origin
7. Material specifications
8. Pricing
9. Payment terms

[32] Uranium contracts utilize four types of pricing mechanisms: fixed pricing, base escalated pricing, market-related pricing and hybrid pricing. A fixed pricing mechanism specifies a fixed price for the uranium (e.g., $15 for a pound of U_3O_8). A base escalated pricing mechanism specifies a base price for the uranium that is escalated over time according to a specified formula which typically accounts for inflation. A market-related pricing mechanism specifies a price that is determined by reference to one or more indicators of the market price of uranium (e.g., TradeTech or Ux spot price indicators) at one or more points in time. A hybrid pricing mechanism uses a combination of base escalated and market-related pricing mechanisms.

[36] Lines 5 to 15 of page 1619, lines 11 to 28 of page 1696 and lines 1 to 16 of page 1697 of the Transcript.
[37] Page 3 of the Hayslett Report. The report is reviewed in more detail in the section below summarizing the expert evidence.

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[33] A spot contract typically includes either fixed pricing or market-related pricing.[38] Mr. Hayslett states at page 3 of the Hayslett Report that "[s]pot transactions tend to be done at a fixed price agreed to between the seller and buyer at the time of contract signing."

[34] A long-term contract may include any of the pricing mechanisms.[39] Mr. Hayslett states at page 3 of the Hayslett Report:

> . . . There are two basic pricing mechanisms for [long-] term contracts: base-escalated and market-related. While there can be a number of variations (escalation mechanism, base date, market index to reference, floor price, ceiling price, etc.), pricing can generally be traced back to one, or a combination, of these two mechanisms. . . .

[35] A pricing mechanism may include a floor and/or a ceiling. A floor sets a minimum price for the uranium and a ceiling sets a maximum price for the uranium.

[36] A contract will specify the quantity of uranium being purchased and may provide the buyer with a flex option which allows the buyer to increase or decrease within a specified range the amount of uranium to be delivered by the vendor under the contract. To exercise a flex option, the buyer issues a flex notice to the vendor within the time frame stipulated in the contract.

[37] Mr. Hayslett states in the Hayslett Report:

> . . . Utility buyers have consistently indicated that in evaluating offers price and reliability of supply are the two dominant factors. While other terms, such as quantity flexibility and delivery notice requirements, may have value, they are typically viewed as "tie-breakers" between offers that are considered essentially equivalent as to supply reliability and price.[40]

(4) The Megatons to Megawatts Agreement

[38] In the late 1980's and early 1990's, Mr. Grandey was the president of the Uranium Producers of America. During this time frame, an anti-dumping case was brought against the former Soviet Union, which dissolved into separate states on December 25, 1991. In 1992, in exchange for the suspension of the anti-dumping

[38] Lines 14 to 28 of page 1684, pages 1685 to 1689 and lines 1 to 15 of page 1690 of the Transcript.
[39] Lines 8 to 13 of page 1739 of the Transcript and page 3 of the Hayslett Report.
[40] Page 4 of the Hayslett Report.

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case, Russia executed a suspension agreement (the "RSA"), which placed restrictions on the sale of Russian source uranium in the United States.[41]

[39] On February 18, 1993, the United States and Russian governments signed an agreement concerning the disposition of highly enriched uranium extracted from nuclear weapons. This agreement was also known as the Megatons to Megawatts Agreement (the "MTMA").[42] The general aim of the MTMA was to provide Russia with a means to sell uranium formerly used in its nuclear arsenal. The commercial arrangement contemplated under the MTMA was implemented through an agreement between the United States Enrichment Corporation (USEC) and Techsnabexport (Tenex) (the "USECTA").[43] The RSA was amended to ease the restrictions on the sale of Russian source uranium in the United States.[44]

[40] The uranium extracted from Russia's nuclear weapons had a high percentage of fissionable uranium-235 and consequently was known as highly enriched uranium (HEU). To be commercially marketable, the Russian HEU had to be blended down to low enriched uranium (LEU) in the form of enriched UF_6 that could be used to fuel light water nuclear reactors. To do this, HEU is blended with natural (i.e., unenriched) UF_6 to create the LEU.

[41] The blending down of the HEU took place in Russia and the resulting LEU (i.e., enriched UF_6) was delivered to USEC. In exchange, USEC was to deliver an equivalent quantity of natural (unenriched) uranium in the form of UF_6, which I will refer to as the "HEU feed",[45] and credits for the enrichment services that would be required to convert the natural UF_6 into enriched UF_6 (i.e., into the LEU delivered by Tenex).[46] The first delivery of LEU took place in June 1995.[47]

[42] The MTMA and USECTA did not contemplate how the HEU feed was to be marketed or paid for, and USEC took the position that it was not required to purchase or pay for the natural UF_6 resulting from deliveries of LEU by Tenex under the MTMA/USECTA.[48]

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[41] Lines 6 to 28 of page 6054 and lines 1 to 14 of page 6055 of the Transcript and Exhibit A151410.
[42] Lines 15 to 18 of page 6055 of the Transcript.
[43] Exhibit A001813.
[44] Lines 14 to 28 of page 6066 and line 1 of page 6067 of the Transcript and Exhibit A150845.
[45] I will use the term "HEU feed" to refer to the natural UF_6 to be delivered by USEC in exchange for the LEU delivered by Tenex under the MTMA and USECTA. This natural UF_6 was viewed by the Appellant as the equivalent of U_3O_8 plus the conversion services required in order to convert the U_3O_8 into UF_6: Exhibit A001813.
[46] Lines 1 to 27 of page 6059 of the Transcript.
[47] Exhibit A001813 at page 4.
[48] Line 28 of page 578, lines 1 to 23 of page 579 and lines 3 to 11 of page 6060 of the Transcript.

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[43] In April 1996, the *USEC Privatization Act* (the "USECPA") was enacted. The USECPA regulated the sale of HEU feed into the United States, allowed the Russian government to regain title to the HEU feed and formally released USEC from any obligation to purchase the HEU feed. In July 1998, the United States government privatized USEC and provided uranium to it. This raised concerns that the uranium market would be negatively affected by sales of uranium by USEC. To alleviate those concerns, in September 1998 the Department of Energy (the "DOE") agreed to withhold from the market for ten years approximately 30 million pounds of uranium. In October 1998, the United States government passed legislation which provided the DOE with US$325 million to purchase the HEU feed arising in 1997 and 1998 from deliveries of LEU by Tenex to USEC. The DOE also agreed to include the 28 million pounds of HEU feed purchased with the US$325 million in the 10-year suspension of sales. In exchange, Tenex was to conclude commercial arrangements for the sale of the HEU feed.[49]

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(5) The Agreement Between Tenex and the Western Consortium

[44] As early as February 24, 1993, the Appellant was considering the opportunities and issues that might flow from the arrangements under the MTMA.[50] Fletcher Newton described the Appellant's reason for this as follows:

> The feed deal, as it was called, was generating a tremendous amount of UF6, and the Russians needed to monetize that. So one way or another, that was going to come into the market. And Cameco felt that it was important for them to at least, to the extent that they could, participate in that agreement to at least try to control what happened to that UF6, how it got sold, when it got sold, and where it went, because that much UF6, if you just dumped it on the market, would have a tremendous impact.[51]

[45] Following the execution of the MTMA, the Appellant pursued discussions with the Russian Ministry of Atomic Energy ("MINATOM") and the United States government, prepared potential financial scenarios, retained the consulting services of a company owned by Tom Neff (who had originally proposed the megatons to megawatts scenario), sought assistance from the Canadian and Saskatchewan governments to secure an interest in the HEU feed and expressed concern to the United States government about USEC being be allowed to sell the HEU feed on

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[49] Lines 5 to 28 of page 628, pages 629 and 630, lines 1 to 15 of page 631, lines 19 to 28 of page 6112, lines 1 to 17 of page 6113, page 6114 and lines 1 to 3 of page 6115 of the Transcript and Exhibit A001813 at pages 4 and 5 and Exhibit A151758.

[50] Lines 4 to 16 of page 6063 of the Transcript and Exhibit A153198. In fact, even before the MTMA, the Appellant was considering opportunities regarding Russian source uranium: Exhibit A151519.

[51] Lines 26 to 28 of page 6373 and lines 1 to 7 of page 6374 of the Transcript.

the spot market.[52] In discussions regarding the HEU feed, Mr. Grandey was the lead negotiator for the Appellant.[53]

[46] Until sometime in 1996, the Appellant had attempted to secure the HEU feed on its own. Other competing parties included Cogema, a French state-owned uranium producer and competitor, and Nukem Inc. ("Nukem"), a privately owned United States trader in uranium. The Appellant did not want Nukem to control the HEU feed because of its concern that Nukem would dump the UF_6 on the spot market thereby depressing the price of uranium.[54]

[47] On January 27, 1997, the Appellant submitted a proposal to MINATOM that had been jointly developed by the Appellant and Cogema. The joint arrangement was considered necessary by both parties because of the magnitude of the potential commitment to Tenex to buy the HEU feed.[55] A short time later, Nukem was added as a party with an initial interest of 10 percent.[56] The three entities were colloquially known as the "western consortium" or the "western companies".

[48] On August 18, 1997, the Appellant issued a press release reporting the following:

> Cameco Corporation today reports that it has signed an agreement in principle to purchase uranium resulting from the dismantlement of Russian nuclear weapons.
>
> The agreement covers the purchase by Cameco, Cogema (a French 89% state-owned private company specializing in the nuclear fuel cycle) and Nukem Inc. (a privately owned US uranium trader), of the majority of the natural uranium hexafluoride (the uranium) becoming available through 2006 as a result of the dilution in Russia of weapons grade highly enriched uranium (HEU) to commercial grade low enriched uranium for delivery to the United States Enrichment Corporation (USEC).[57]

[49] The Appellant was not a party to the agreement described in the press release. Instead, Cameco Uranium, Inc. ("CUI")–a Barbados subsidiary of the

[52] Lines 16 to 28 of page 558, page 559, lines 1 to 20 of page 560, lines 17 to 28 of page 6075, lines 1 to 11 and lines 23 to 28 of page 6076, lines 1 to 28 of page 6077, lines 1 to 11 of page 6078, lines 13 to 28 of page 6088, pages 6089 to 6090, lines 1 to 5 of page 6091, lines 17 to 28 of page 6096 and lines 1 to 8 of page 6097 of the Transcript and Exhibits A150819, A153477 and A151099 through A151111.
[53] Lines 11 to 18 of page 267 and lines 18 to 24 of page 3725 of the Transcript.
[54] Lines 21 to 28 of page 261 and lines 1 to 9 of page 262 of the Transcript.
[55] Lines 11 to 28 of page 6079 and lines 1 to 19 of page 6080 of the Transcript.
[56] Lines 19 to 28 of page 6085 and lines 1 to 10 of page 6086 of the Transcript. Nukem's share was to increase to 15% in 2004: Exhibit A022377 at page 9.
[57] Exhibit A153421.

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Appellant-executed the agreement, which was in the form of a memorandum of understanding.[58]

[50] The memorandum of understanding did not result in an agreement with Tenex to acquire the HEU feed, and in 1998 there were numerous discussions regarding the HEU feed among the Appellant, Cogema, Nukem, MINATOM and Tenex.[59]

[51] Mr. Grandey explained the Appellant's role in the negotiations for the HEU feed:

> Q. Would it be correct also that Cameco Corporation took the lead in these negotiations on behalf of the western consortium?
>
> A. In the negotiations, Cameco was usually the lead party sort of conducting the negotiation with the French-state owned Cogema at the table and, later on, Nukem. Everybody obviously acting, but Cameco was looked at as the leader.[60]

[52] In a confidential memorandum dated January 4, 1999, Mr. Grandey stated the following:

> The United States government has provided a strong incentive for the Russian Parties to conclude a long term commercial arrangement on the HEU feed component by offering to purchase all of the 1997 and 1998 feed component deliveries for the sum of $325 million dollars. The purchased feed component (approximately 28 million pounds U_3O_8) would be added to the inventory of the U.S. Department of Energy ("DOE"). As a further inducement to the Russian Parties, approximately 58 million pounds U_3O_8 of DOE inventory, including the feed component purchased from the Russian Parties, would not be sold for a period of ten years. None of these DOE actions will occur unless the Russian Parties enter into a long term commercial arrangement on the displaced feed.
>
> Negotiations between the Western Companies and the Russian Parties recommenced in earnest in Washington D.C. in early December followed by further discussions in Paris on December 21 and 22. While the specific terms being discussed are confidential, the general approach is dictated by the demands

[58] The memorandum of understanding is Exhibit 143083. CUI is addressed further under the description of the reorganization.

[59] Lines 5 to 12 of page 628 of the Transcript. Also in 1998, Mr. Glattes held discussions with Euratom, on behalf of the Appellant, that addressed issues related to Russian source uranium in anticipation of an agreement regarding the HEU feed: lines 20 to 28 of page 3455, page 3456 and lines 1 to 21 of page 3457 of the Transcript.

[60] Lines 24 to 28 of page 6115 and lines 1 to 3 of page 6116 of the Transcript. Mr. Assie and Mr. Glattes described Mr. Grandey as the lead negotiator for the western consortium: lines 3 to 15 of page 287 and lines 20 to 24 of page 3725 of the Transcript.

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> of Russian law that a certain minimum value (i.e., price) be realized for the feed component and, if not realized within 180 days after delivery to the Russian Parties by the U.S. executive agent, the feed component be returned to Russia. In essence, the parties to the negotiations are discussing a series of options which would allow the Western Companies to purchase the feed component at prices related to the market price at the time of delivery, subject to a floor price which is equal to the "minimum" value demanded by Russian law. To the extent the options are not exercised, the feed component would be physically returned to Russia to be held in a specially designated stockpile (the "Russian Stockpile") subject to strict oversight by the U.S. government.[61]

[53] On March 24, 1999, CESA, Cogema, Nukem[62] and Tenex entered into the UF_6 Feed Component Implementing Contract (the "HEU Feed Agreement").[63] Also on March 24, 1999, the DOE and MINATOM signed an agreement facilitating the commercial arrangements under the HEU Feed Agreement.[64]

[54] Mr. Grandey, as president of CESA[65], and Mr. Bernard Michel, as authorized signatory, executed the HEU Feed Agreement on behalf of CESA. At that time, the board of directors of CESA had not approved the execution of the HEU Feed Agreement. The board of directors of CESA subsequently ratified the agreement at a meeting held on April 6, 1999.[66]

[55] The delay in the board approving the HEU Feed Agreement was the result of a delay in CESA obtaining the necessary licences,[67] events occurring on March 24, 1999 that required the Russian delegation to return to Russia a day earlier than the expected execution date of March 25, 1999, and difficulty in predicting when the HEU Feed Agreement would be executed by Tenex.[68] At the time the agreement was ratified, the regulatory issues had not been resolved and a

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[61] Exhibit A151758.
[62] Nukem and Nukem Nuklear GH were both parties to the HEU Feed Agreement but are referred to together as Nukem.
[63] Exhibit A002748.
[64] Exhibit A001813 at page 5.
[65] Mr. Glattes was appointed president of CESA in July 1999, replacing Mr. Grandey: lines 25 to 28 of page 3682 of the Transcript.
[66] Lines 13 to 16 of page 4476 of the Transcript and Exhibit A022049.
[67] The statement is made in Exhibit A142723, prepared by Maxine Maximus at the request of Kim Goheen (Exhibit A142724), that "[i]t appears that Cameco Europe S.A. doesn't need a trading license just to sign the HEU agreement, this is to be confirmed in writing ASAP"; lines 12 to 21 of page 4608 of the Transcript.
[68] Lines 27 to 28 of page 3676, lines 1 to 18 of page 3677, lines 11 to 28 of page 4477, lines 1 to 18 of page 4478, lines 9 to 28 of page 4613 and lines 1 to 17 of page 4614 of the Transcript.

condition of the ratification was that CESA comply with all applicable rules and regulations, including those imposed by Luxembourg.[69]

[56] Mr. Glattes was not present at the April 6, 1999 meeting of the board of directors of CESA, but he was represented by a proxy.[70] Prior to the April 6 meeting, Mr. Glattes had discussions in person and by telephone with the members of the board to inform them of the status of the negotiations with Tenex.[71]

[57] On April 13, 1999, Mr. Goheen made a slide presentation to the Executive Committee of the Appellant.[72] The notes accompanying a slide addressing the cost-benefit analysis with respect to establishing a Swiss trading company state:

> Marketing has estimated the gross profit from HEU to be 4% to 2002 and 6% thereafter.[73]

[58] Mr. Assie provided the estimated gross profit figures to Mr. Goheen.[74]

[59] On April 21, 1999, a law firm acting for CESA sent a letter prepared in consultation with Mr. Glattes to the Swiss nuclear energy regulator (the "BfE").[75] Following meetings with the BfE and Euratom, an arrangement was reached whereby the purchases and sales of UF_6 by CESA would be governed by the BfE and not by Euratom even though CESA was a Luxembourg corporation subject to the jurisdiction of Euratom.[76] However, CESA was required to obtain a specific authorization from the BfE for each purchase or sale of UF_6.[77] In cross-examination, Mr. Glattes testified that, from a narrow legal perspective, CESA/CEL was authorized to sell uranium only to affiliated corporations but that the Swiss authorities probably did not care if CESA/CEL sold to third parties.[78]

[60] On May 19, 1999, the Appellant executed a guarantee (the "Tenex Guarantee") in favour of Tenex relating to CESA's obligations under the HEU Feed Agreement.[79] The Appellant guaranteed that CESA would make "due and

[69] Exhibit A022049 at page 2 and lines 22 to 28 of page 4479 and lines 1 to 17 of page 4480 of the Transcript.
[70] Lines 15 to 23 of page 3671 and lines 5 to 16 of page 3678 of the Transcript.
[71] Lines 5 to 26 of page 3676 of the Transcript.
[72] Lines 14 to 25 of page 4546 of the Transcript.
[73] Exhibit A142787.
[74] Lines 9 to 28 of page 257 and line 1 of page 258 of the Transcript.
[75] Lines 4 to 20 of page 3465 of the Transcript and Exhibit A143182.
[76] Lines 16 to 28 of page 3468, page 3469 and lines 1 to 24 of page 3470 of the Transcript.
[77] Lines 5 to 28 of page 3528 and line 1 of page 3529 of the Transcript.
[78] Lines 13 to 28 of page 4063 and lines 1 to 17 of page 4064 of the Transcript and Exhibit A018140.
[79] Exhibit A002750.

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punctual payment" of all amounts owing to Tenex under the HEU Feed Agreement and that CESA would promptly and completely perform all of its obligations under the HEU Feed Agreement. The Appellant was not called upon to honour the Tenex Guarantee.[80]

[61] Mr. Assie testified that the guarantee was requested by Tenex because CESA was a new company. The Appellant asked the Russian Federation for a similar guarantee of Tenex's obligations under the HEU Feed Agreement, which Mr. Assie understood was given to the Appellant.[81] Mr. Grandey testified that the guarantee was required by Tenex because the structure was relatively new; historically Tenex had been dealing with the Appellant, and Tenex wanted the assurance of the Appellant regarding the performance of CESA under the HEU Feed Agreement.[82] Fletcher Newton provided the following explanation:

> At some point in the discussions with Tenex -- and I couldn't tell you exactly when, but it was fairly early on -- Cameco made it clear that, hopefully, when we signed this agreement, they would use a subsidiary to actually purchase the feed. And the Russians, having had some bad experiences with bankruptcies and subsidiaries, said, "Okay. That's fine. Use whatever Cameco subsidiary you want, but just make sure that we get a Cameco guarantee to go with it, because ultimately we want to know that Cameco, the corporation, is standing behind this."[83]

[62] On or about August 20, 1999, Mr. Glattes secured Euratom's tentative agreement not to impose restrictions on the entry of the HEU feed into Europe.[84] This allowed CESA and CEL to sell HEU feed to European utilities without restriction.

[63] On February 18, 2000, CESA, Cogema and Nukem[85] signed a UF_6 Feed Component Administration Agreement (the "Administration Agreement").[86] The Administration Agreement was signed by Mr. Glattes on behalf of CESA.[87]

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[80] Lines 26 to 28 of page 263 and lines 3 to 5 of page 3691 of the Transcript.
[81] Lines 16 to 25 of page 263 of the Transcript.
[82] Lines 3 to 17 of page 6166 of the Transcript.
[83] Lines 13 to 22 of page 6374 of the Transcript.
[84] Lines 24 to 28 of page 3688 and lines 1 to 24 of page 3689 of the Transcript and Exhibit A005810.
[85] Nukem and Nukem Nuklear GH were both parties to the Administration Agreement but are referred to jointly as Nukem.
[86] Exhibit A143395. Mr. Glattes explained the purpose of the Administration Agreement at lines 18 to 28 of page 3707 and lines 1 to 11 of page 3708 of the Transcript.
[87] Lines 21 to 28 of page 3706 and lines 1 to 8 of page 3707 of the Transcript.

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[64] Under section 8.1 of the Administration Agreement, an administrative committee was appointed to administer those aspects of the HEU Feed Agreement that required common decision making. Each of CESA, Cogema and Nukem appointed one individual to the committee. CESA initially appointed Mr. Glattes.[88]

[65] Under section 9.1 of the Administration Agreement, the administrative committee appointed an administrator. The Nukem representative on the administrative committee proposed that Cameco US be appointed the administrator, and that was approved by the committee.[89] Mr. Glattes and Mr. Assie explained that this was because Cameco US had the capabilities to fulfil this role, and Mr. Assie also stated that Cameco US was "the face to the market" and that Cogema and Nukem were familiar to the marketing people at Cameco US.[90] Mr. Assie described the administrator's role as being to provide administrative services and as involving no decision-making authority.[91]

[66] Mr. Glattes attended the meetings of the administrative committee in person, by video conference or by telephone.[92] Draft minutes of each meeting were prepared and were circulated for comment before being finalized.[93]

[67] In October 2002, Mr. Glattes advised the BfE that the Swiss branch of CESA would be transferred to CEL effective October 1, 2002.[94] Mr. Glattes also negotiated with the BfE a new arrangement pursuant to which the BfE granted a global authorization for CEL's transactions in uranium effective January 1, 2003.[95]

[68] The HEU Feed Agreement provided CESA, Cogema and Nukem with exclusive first and second options to purchase the majority of the HEU feed resulting from the delivery by Tenex to USEC of LEU in 1999 and subsequent years until Russia's commitment under the MTMA to deliver the remaining balance of 440 metric tonnes of HEU, or the equivalent in LEU, was satisfied.[96]

[88] Lines 16 to 18 of page 3708 of the Transcript.
[89] Lines 13 to 28 of page 266 and lines 1 to 10 of page 267 of the Transcript.
[90] Lines 19 to 28 of page 3708, lines 1 to 8 of page 3709, lines 12 to 17 of page 269 and lines 11 to 23 of page 268 of the Transcript.
[91] Lines 19 to 28 of page 267, lines 1 to 10 of page 268 and lines 12 to 28 of page 264 of the Transcript.
[92] Lines 9 to 28 of page 3709, lines 1 to 3 of page 3710 and lines 18 to 24 of page 269 of the Transcript.
[93] Lines 4 to 28 of page 3710, page 3711 and lines 1 to 6 of page 3712 of the Transcript and Exhibit A147498.
[94] The agreement effecting the transfer is Exhibit A015501. The agreement was signed on October 30, 2002.
[95] Lines 2 to 28 of page 3529, pages 3530 to 3531, lines 1 to 12 of page 3532, lines 19 to 28 of page 3533 and lines 1 to 10 of page 3534 of the Transcript and Exhibit A015520.
[96] Article VIII of the HEU Feed Agreement (Exhibit A002748).

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[69] A first option was exercised by delivering a first option exercise notice (a "FOEN") to Tenex.[97] Under the default price mechanism in section 7.02(a) of the HEU Feed Agreement,[98] the price for the UF_6 was the greater of 92% of the "Restricted Spot Price" for the month of delivery and US$29 per kgU. The restricted spot price for a month was the arithmetic average of the restricted spot price per kilogram of uranium as UF_6 published by Ux and TradeTech for the immediately preceding month.

[70] Under sections 7.03(a) and (b) of the HEU Feed Agreement, a company exercising an option could elect in the FOEN to use a base escalated price mechanism or a capped market price mechanism.

[71] Under the base escalated price mechanism in section 7.03(a), the base price was the greater of 92% of the "Long Term Price" for the month the FOEN was delivered to Tenex and US$29 per kgU. The long-term price was the TradeTech long-term price indicator for U_3O_8 for the month prior to the month the FOEN was delivered to Tenex multiplied by 2.61285 plus the TradeTech long-term conversion price indicator for the same month. The base price so determined was escalated by the Gross Domestic Product Implicit Price Deflator Index published by the United States Department of Commerce.

[72] Under the capped market price mechanism in section 7.03(b), the price was the lesser of the price determined under the default price mechanism and 150% of the price that would have been determined under the default price mechanism if that price had been determined at the time the FOEN was given to Tenex.

[73] Mr. Assie was asked about the anticipated profitability of the HEU Feed Agreement at the time it was entered into in March 1999:

> Q. What was the view within the Cameco group as to the anticipated profitability of the HEU to be acquired, that could be acquired under the HEU agreement--
>
> A. Well--
>
> Q.--as at the time of entering into the agreement, in March of 1999?
>
> A. Right. Well, at the time of that the agreement was entered into, the expectation was that, at best, it would be marginally profitable. The reality was that the prices

[97] Lines 11 to 17 of page 253 of the Transcript.

[98] The terms addressing price are in Article VII of the HEU Feed Agreement (Exhibit A002748). Mr. Assie describes these terms at lines 17 to 28 of page 254, page 255 and lines 1 to 17 of page 256 of the Transcript.

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> here--the floor price was right in line with where the market prices were at the time. And that's the very reason why it was struck as an option arrangement. There were no firm purchase commitments made under the contract.[99]

[74] Mr. Goheen made a presentation to the executive committee of the Appellant on April 13, 1999 in which he stated that the "gross profit" from the HEU Feed Agreement was expected to be 4% through 2002 and 6% thereafter.[100] Mr. Assie testified that he provided Mr. Goheen with that estimate.[101]

[75] Mr. Assie explained the low profit expectations in the following exchange with counsel:

> Q. Why did you have such low expectations with respect to the profitability of the HEU agreement?
>
> A. Well, as I have just stated, the agreement contained a floor price which was, in effect, really pretty much at the level of the market price at the time the agreement was being entered into. And, you know, at that time, in the spring of 1999, those were not, I will say, heady times in the uranium market. We were not particularly optimistic about price over the next several years.
>
> And you may recall from the marketing presentations we looked at yesterday, whenever we were giving our price projections--and they were often called hockey stick projections--we would qualify the near-term projections by saying, you know, there's a lot of uncertainty in the near term. We would keep pointing to the longer term with the view that the secondary supplies would ultimately, you know, be consumed or drawn down and prices would be more reflective of production. But in the near term, none of us could see that happening. So we had--in our view it was, as to the profitability here, was not high.
>
> The other thing to keep in mind is the way the pricing mechanisms worked, you elected an option, and you were going to receive either an 8 percent discount off the market at the time of delivery, or you were going to pay a--if you elected a base price mechanism, you were going to get an 8 percent discount if prices were high enough, an 8 percent discount from the long-term price at the time you elected it.
>
> If you look at it from a, you know, in some respects, from a trader's point of view, to the extent that you were then placing that material, turning around and placing it with utilities, what could you reasonably expect to earn on it? Well, the maximum would be 8 percent, but you would have to deal with all your costs, you

[99] Lines 18 to 28 of page 256 and lines 1 to 3 of page 257 of the Transcript.
[100] Sixth page of Exhibit A142787.
[101] Lines 9 to 28 of page 257 and line 1 of page 258 of the Transcript.

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> know, your costs of marketing, any exchange fees, you know, market contracts, any discounts in them.
>
> So, you know, coming up with an estimate as to the profitability of being 4 to 6 percent, that would have been with the view that, in effect, we were going to be able to elect options under the agreement.[102]

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[76] All of the uranium purchased by the western consortium under the HEU Feed Agreement was delivered to the western consortium at USEC and did not pass through Luxembourg or Switzerland. The UF_6 would have been delivered to USEC even if the Appellant instead of CESA had been a party to the HEU Feed Agreement.[103]

[77] The HEU Feed Agreement was amended a total of eight times between 1999 and 2006.[104] Mr. Glattes stated that the fourth and eighth amendments were important but that the fourth amendment was the most important. The other amendments were minor and addressed matters such as banking arrangements and changes of address.[105]

[78] The fourth amendment came about because Russia was not happy with the quantities of UF_6 being purchased by the western consortium in 2000 and 2001. Mr. Grandey explained the issue at a meeting of the board of directors of the Appellant on May 31, 2001:

> Mr. Grandey told the board under the HEU transaction, the floor price is $29 per kilogram which is the equivalent of about $9.40 per pound. We believe this is a minimum price below which the Russians would not sell. It is difficult to exercise options in a weak market and pay $9.40 a pound. Through 2000 and 2001, the spot price was less than the Russian floor price. In 2000, Cameco, Cogema and Nukem bought the quota amount from the Russians to demonstrate to Russia and the US government that even in a weakening market, we will play our part in the highly enriched uranium contract. In 2000, we gave notice that we would not purchase in 2001. We met with the Minister of Atomic Energy Adamov in November. He acknowledged and understood our position. If the market was too weak, the Russian feed material was to be returned to Russia. . . .
>
> Russia at the same time was looking for other sources to purchase this uranium. They were talking to USEC about buying the feed component. This would be a breach of our agreement, but we are in a difficult position. We do not want to buy

[102] Lines 25 to 28 of page 258, page 259 and lines 1 to 10 of page 260 of the Transcript.
[103] Lines 8 to 28 of page 225 and lines 1 to 10 of page 226 of the Transcript.
[104] Lines 19 to 24 of page 3713 of the Transcript.
[105] Lines 25 to 28 of page 3713 and lines 1 to 7 of page 3714 of the Transcript.

> it and to say no one else could buy it is difficult to present to the Russians. Another possibility for the Russians would be to increase the delivery of LEU, to sell more enrichment to USEC. This would bring about more feed component in the market, although by the agreement it would have to be shipped back to Russia. This would put more pressure on the market. Therefore, for a variety of reasons, the western companies decided to negotiate a transaction with the Russians with a discount and for certain volumes to be paid in 2001.[106]

[79] The fourth amendment to the HEU Feed Agreement was negotiated in 2001.[107] Mr. Grandey led the negotiation of the fourth amendment on behalf of the western consortium. The negotiation included meetings with Tenex in Moscow, Sochi and Paris. Mr. Glattes did not attend the meetings with Tenex in Moscow and Sochi but did attend the meeting in Paris and signed the amendment for CESA at that meeting on November 16, 2001.[108] Mr. Glattes read the fourth amendment before signing the document.[109] Mr. Glattes kept the board of directors of CESA apprised of the negotiations and the board authorized the execution of the fourth amendment at a meeting on November 8, 2001.[110]

[80] Mr. Glattes testified that he attended a meeting of the administrative committee held on August 29, 2001, which preceded the meeting in Sochi. The purpose of the meeting was to consider a working paper that set out the framework for the discussions to be held at the meeting in Sochi.[111] Mr. Glattes also attended a breakfast meeting held in London, England in conjunction with a World Nuclear Association (WNA) conference.[112]

[81] Mr. Glattes testified that he was involved in internal discussions about the fourth amendment, as well as discussions with Cogema and Nukem, through his participation on the administrative committee. The internal discussions took place during twice-weekly sales meetings (described below) and were led substantially by John Britt but also included George Assie, Gerald Grandey, Kim Goheen and Sean Quinn.[113] Mr. Glattes received and reviewed protocols which resulted from

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[106] Exhibit A022377 at page 8. See, also, lines 12 to 28 of page 3717, pages 3718 to 3719 and lines 1 to 21 of page 3720 of the Transcript.
[107] The amendment was sometimes referred to as amendment No. 5 but ultimately it was the fourth amendment to the HEU Feed Agreement: lines 3 to 28 of page 3755 and lines 1 to 17 of page 3756 of the Transcript.
[108] Lines 3 to 13 of page 286, lines 3 to 15 of page 287, lines 27 to 28 of page 3715, lines 1 to 3 of page 3716. Lines 18 to 28 of page 3725, lines 1 to 6 of page 3726, lines 12 to 28 of page 3762 and lines 1 to 7 of page 3763 of the Transcript.
[109] Lines 12 to 14 of page 3716 of the Transcript.
[110] Lines 8 to 28 of page 3760 and lines 1 to 24 of page 3761 of the Transcript.
[111] Pages 3729 to 3733 and lines 1 to 5 of page 3734 of the Transcript and Exhibit A150191. The working paper is Exhibit A150193. The draft minutes of the meeting are Exhibit A147499.
[112] Lines 26 to 28 of page 3734 and lines 1 to 16 of page 3735 of the Transcript and Exhibit A140660.
[113] Lines 11 to 26 of page 3726, lines 25 to 28 of page 3724 and lines 1 to 17 of page 3725 of the Transcript.

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the various discussions.[114] Mr. Glattes testified that his main counterpart in the internal discussions was John Britt, with whom he had had a long-standing very close relationship.[115]

[82] The fourth amendment required the western consortium to exercise first options for delivery of UF_6 in 2002 through 2013 in exchange for a reduction in the base price of the UF_6.[116] In addition, the price to CESA and Nukem of 950,000 kilograms of UF_6 to be delivered in 2001 under two FOENs exercised on June 29, 2001 was reduced to $26.30 per kgU.[117]

[83] CESA exercised two FOENs in compliance with the fourth amendment.[118] One covered deliveries in 2002 to 2013 and the other covered deliveries in 2004 to 2013.

[84] Regarding the fourth amendment, Fletcher Newton had the following exchange with counsel for the Appellant in cross-examination:

> Q. Based on your experience and knowledge having attended the negotiations there, was it a difficult decision for the western parties to enter into Amendment No. 4?
>
> A. It was extremely difficult. Remember that, as I said earlier, the price of uranium hadn't moved for 10 years. It had not gone above $10 a pound. And now we're in 2001, and I don't recall exactly where the price of uranium was at that point, but it still hadn't began to move. And none of us at that time expected to see what eventually happened. There were a few hopeful signs that maybe the price might strengthen.
>
> But the gist of the meeting in Sochi was that the Russians wanted us, the three companies, to, number one, commit absolutely to purchase a certain amount of material, which up until then we really hadn't; it had been more in the form of an option, and, two, agree to pay them a minimum price, and the number that sticks in my head was $29 a kilogram.
>
> You know, this is a long time ago, so maybe it was a different number. But that number, whatever it was, at that time, was still $2 or $3 above the then market price. So they're asking us to buy a lot of material at a price that's already above

[114] Lines 27 to 28 of page 3726, page 3727 and lines 1 to 12 of page 3728 of the Transcript.
[115] Lines 13 to 19 of page 3728 of the Transcript.
[116] The agreement implementing the fourth amendment is Exhibit A149930. The agreement to exercise FOENs is in section 3.03 of the amendment and the price reduction is in sections 7.10 and 7.11 of the amendment. The form of the FOEN is attached as Schedule B to the amendment.
[117] Section 7.09(b) of Exhibit A-149930.
[118] Exhibits A143087 and A153327.

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> the spot market price. And I remember we all stood around, and Gerry was in the group, and Gerry said, "Listen, you guys, we've got to make a decision. Either we're going to do this, take the risk of what happens to the price, because it could have gone down just [as] easily as it went up, or not. What are we going to do?"
>
> And they agreed, after a lot of back-and forth, that, yes, we'll go ahead and do it, but, yes, it was a difficult decision.[119]

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[85] Mr. Glattes testified that he was directly involved in the negotiation of the eighth amendment with Tenex.[120] The amendment addressed issues relating to the uranium covered by the second options under the HEU Feed Agreement[121] and was signed by Mr. Glattes in Paris on April 29, 2004 with effect as of January 1, 2004. The board of directors of CEL approved the eighth amendment in a conference call held prior to April 29, 2004 and authorized Mr. Glattes to execute the amendment for CEL.[122] This approval was noted at a board of directors' meeting held on May 6, 2004.

[86] In cross-examination, Mr. Glattes agreed with counsel for the Respondent that most if not all of the external meetings he attended in respect of the Tenex transaction were either for the purpose of signing an agreement or held in conjunction with a uranium conference.[123]

[87] Mr. Murphy was not involved in any of the negotiations regarding the HEU Feed Agreement and the amendments to that agreement as those negotiations preceded his appointment as president of CEL.[124]

[88] In 2006, Cameco US provided CEL with a proposal summary dated March 17, 2006 addressing the exercise of additional FOENs provided for in the eighth amendment to the HEU Feed Agreement. Mr. Murphy reviewed and approved the proposal on behalf of CEL.[125] He testified that "it was a reasonable proposal and a good deal for Cameco Europe".[126]

(6) The Urenco Agreement

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[119] Lines 25 to 28 of page 6406, page 6407 and line 1 of page 6408 of the Transcript.
[120] Lines 22 to 27 of page 3771 of the Transcript.
[121] Lines 17 to 28 of page 3769, page 3770 and lines 1 to 21 of page 3771 of the Transcript and Exhibit A215398.
[122] Lines 24 to 28 of page 3773 and lines 1 to 16 of page 3774 of the Transcript and item 2 in Exhibit A008269.
[123] Lines 24 to 28 of page 4314 of the Transcript.
[124] Lines 22 to 28 of page 2796 and lines 1 to 2 of page 2797 of the Transcript.
[125] Lines 3 to 28 of page 2797, page 2798 and lines 1 to 3 of page 2799 of the Transcript and Exhibit A170488.
[126] Lines 6 to 7 of page 2799 of the Transcript.

[89] On September 9, 1999, CESA entered into an agreement (the "Urenco Agreement") with Urenco Limited and three of its subsidiaries (collectively, "Urenco") to purchase natural UF_6.[127] The Appellant guaranteed "the payment to Urenco of all amounts due to Urenco" under the Urenco Agreement.[128]

[90] Urenco was a uranium enricher that had struck a deal with Tenex to have the tails resulting from its enrichment activities re-enriched to the level of natural uranium.[129] Urenco would deliver its tails to Tenex and in exchange would receive from Tenex an equivalent amount of uranium as natural UF_6. The natural UF_6 was considered to be of Russian origin regardless of the source of the uranium that created the tails.[130]

[91] Mr. Assie testified that CESA accomplished two things by entering into the Urenco Agreement. First, the arrangement avoided Urenco dumping the UF_6 in the market. Second, the arrangement provided CESA with the opportunity to profit from the purchase and sale of the UF_6.[131]

[92] Mr. Assie testified that starting in the spring or early summer of 1999 he and John Britt led the negotiations, but that Mr. Glattes was involved in the discussions regarding the Urenco Agreement, the regulatory issues raised by the agreement and the development of the proposal to Urenco. Mr. Assie did not recall whether Mr. Glattes attended meetings with Urenco.[132]

[93] Mr. Glattes testified that he attended meetings when he could and that he had a close relationship with the head of Urenco and with the head of Urenco's legal department. Mr. Glattes testified that the lead negotiator for the deal was John Britt but that, as with any third-party agreement, every step was addressed at the twice-weekly sales meetings.

[94] Mr. Glattes testified that the management committee of CESA was apprised of the proposed agreement with Urenco at a meeting held on September 7, 1999 and that the management committee authorized Mr. Glattes to sign the

[127] A transaction summary and recommendation to the board of the Appellant for financing is Exhibit A002797. The agreement is Exhibit A002752.
[128] Lines 20 to 26 of page 524 and lines 16 to 20 of page 1103 of the Transcript and Exhibit R004090.
[129] The tails were a by-product of the enrichment process and had a uranium-235 content of between 0.25% and 0.35% compared to 0.7% for natural uranium.
[130] Lines 11 to 28 of page 3784, pages 3785 and 3786 and lines 1 to 16 of page 3787 of the Transcript.
[131] Lines 11 to 26 of page 297 of the Transcript.
[132] Lines 19 to 28 of page 298, page 299 and lines 1 to 22 of page 300 of the Transcript.

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agreement.[133] The board of directors approved the agreement on September 28, 1999.[134]

[95] Mr. Glattes testified that he was responsible for addressing the European regulatory issues raised by the purchase of the UF_6 from a European vendor and the sale of the UF_6 to European utilities. Mr. Glattes dealt with the same three individuals at Euratom that he had dealt with in the context of discussions regarding the HEU Feed Agreement.[135]

[96] The Urenco Agreement fixed the price of the UF_6 as a base escalated price starting at US$25.05 plus 50% of the amount by which the CIS spot price exceeded US$30.10. The CIS spot price was the average of the spot price indices for UF_6 published by Ux, TradeTech and Nukem. Section 7.04 of the Urenco Agreement provided CESA with an option to request that the price be renegotiated if the CIS spot price remained below US$25.05 per kilogram of UF_6 for any period of six consecutive months. If the parties failed to renegotiate a price then CESA could terminate the agreement.

[97] The Urenco Agreement was amended a total of five times.[136] Amending Agreement No. 1 ("Amendment No. 1") is dated August 8, 2000 with effect as of January 1, 2000. The amendment reduced the price for 2000 from US$25.05 to US$22.50 per kgU and amended the base escalated price for 2001 and thereafter to $22.50 plus 50% of the amount by which the CIS spot price exceeded US$27.55. The amendment also changed the benchmark price in section 7.04 of the Urenco Agreement to reflect the new base escalated price of US$22.50.[137]

[98] Amending Agreement No. 2 ("Amendment No. 2") is dated April 11, 2001 with effect as of January 1, 2001. The amendment reduced the price for 2001 from US$22.50 to US$20.50 per kgU, amended the price for the first 500,000 kilograms of UF_6 delivered in 2002 and 2003 to $21.00 and amended the price for all other UF_6 to a base escalated price of US $22.50 plus 50% of the amount by which the CIS Spot Price exceeded US$25.00. The amendment also deleted section 7.04 of the Urenco Agreement and acknowledged the continuation of certain carve-out

[133] Lines 7 to 28 of page 3793, page 3794, lines 1 to 27 of page 3795 and lines 7 to 19 of page 3797 of the Transcript and Exhibits A021754 and A021755.
[134] Lines 20 to 28 of page 3797, page 3798 and lines 1 to 3 of page 3799 of the Transcript and Exhibit A021740.
[135] Lines 26 to 28 of page 3787, pages 3788 to 3789 and lines 1 to 9 of page 3790 of the Transcript and Exhibit A005810.
[136] The five agreements amending the Urenco Agreement are Exhibits A002753, A003088, A002775, A002782 and A225966.
[137] Lines 14 to 28 of page 1131 and lines 1 to 21 of page 1132 of the Transcript and Exhibit A002753.

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arrangements entered into by CESA and Urenco. Exhibit A to the amendment lists a total of five carve-out agreements executed between September 13, 2000 and January 5, 2001.[138]

[99] The carve-out agreements were entered into by Urenco and CESA to reduce the risk otherwise resulting from selling UF_6 purchased from Urenco to utilities under long-term contracts at base escalated prices.[139] The risk arose because of the market-linked component of the price payable under the Urenco Agreement. In exchange for removing that component of the price, Urenco was paid a higher base price than provided for in the Urenco Agreement. Each carve-out agreement was associated with a specific agreement with a utility to sell UF_6 to that utility.[140]

[100] Amending Agreement No. 3 is dated May 10, 2002 with effect as of January 1, 2002. The agreement amended the definition of CIS spot price to limit the price indices used to the Ux and Nukem indices.

[101] Amending Agreement No. 4 ("Amendment No. 4") is dated February 12, 2003 and is between CEL and Urenco. The recitals state that the Urenco Agreement was assigned to CEL by an agreement among CESA, CEL and Urenco made October 1, 2002.

[102] Amendment No. 4 extends the term of the Urenco Agreement to 2009, amends Schedule A of the Urenco Agreement, amends the price for deliveries on or after January 1, 2005, adds a clause that allows CEL to request renegotiation of the price if the CIS spot price remains below US$25.00 for 12 months or more, adds a clause that allows Urenco to request renegotiation of the price if the CIS spot price remains above US$38.00 for 12 months or more,[141] confirms the carve-out arrangements and lists in Exhibit A those carve-out arrangements entered into after Amendment No. 2. Exhibit A lists three carve-out agreements dated June 12, 2002, October 14, 2002 and November 4, 2002.[142]

[103] Amending Agreement No. 5 ("Amendment No. 5") is dated December 22, 2006 with effect as of January 1, 2007. The amendment replaces Schedules A and B of the Urenco Agreement.

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[138] These five carve-out agreements are Exhibits A007843, A007842, A007841, A007840 and A007812.
[139] The sale to the utility would be made by Cameco US. Cameco US would buy the UF_6 from CESA and CESA would buy the UF_6 from Urenco.
[140] Lines 15 to 28 of page 306 and lines 1 to 25 of page 307 of the Transcript.
[141] If renegotiation of the price fails, then the party with the renegotiation right may cancel the contract.
[142] These three carve-out agreements are Exhibits A002783, A002758 and A002759.

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[104] In cross-examination, Mr. Assie was asked about the negotiations with Urenco relating to Amendments No. 1 through No. 4 to the Urenco Agreement and relating to the carve-out agreements identified in Amendments No. 2 and No. 4.[143] Some of the e-mails from John Britt about the negotiations with Urenco were copied or forwarded to Mr. Glattes.[144] Mr. Assie testified that Mr. Glattes was kept apprised of developments during the twice-weekly sales meetings.[145]

[105] Mr. Glattes testified that he was involved in the internal decision making which happened during the sales meetings and that he was kept informed by John Britt. Mr. Glattes testified that he tried to attend meetings with Urenco but that it was not always possible, and that he could not recall any particular meeting.[146]

[106] In cross-examination, Mr. Glattes agreed with counsel for the Respondent that John Britt was the lead negotiator for the amendments and the carve-out agreements.[147] Counsel for the Respondent alluded to evidence that Mr. Glattes did attend at least one meeting with Urenco but Mr. Glattes could not recall having done so.[148]

[107] Mr. Murphy did not participate in the negotiations with Urenco regarding Amendment No. 5 to the Urenco Agreement. Mr. Murphy did review a proposal summary dated March 17, 2006 and his initials appear on the summary. Mr. Murphy testified that he was kept apprised of developments in the negotiation of Amendment No. 5 during the twice-weekly sales meetings and probably also through activity reports.[149]

(7) The Reorganization of the Cameco Group

[108] Following the creation of the Appellant in the late 1980's, the business activities of the Appellant had been focused on Canada. By the mid-1990's, the Appellant was pursuing opportunities elsewhere. In the fall of 1997, the Appellant

[143] Pages 1129 to 1132, 1139 to 1179 and 1186 to 1200 of the Transcript.
[144] For example, Exhibits A104631, A104425 and A033728.
[145] Lines 4 to 15 of page 308, line 28 of page 1180 and lines 1 to 9 of page 1181 of the Transcript.
[146] Lines 7 to 19 of page 3801 of the Transcript.
[147] Lines 3 to 14 of page 4360 of the Transcript.
[148] Lines 8 to 21 of page 4357 of the Transcript.
[149] Lines 18 to 28 of page 2799, pages 2800 to 2801 and lines 1 to 27 of page 2802 of the Transcript and Exhibit A170415.

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undertook its first public offering of equity and in 1998 the Appellant undertook its first public offering of debt.[150]

[109] In early 1999, the Appellant reorganized its corporate structure. Mr. Assie described the reason for the reorganization as follows:

> Q. What was your understanding at the time of why the concept of restructuring arose?
>
> A. Well, in large part, it related to the highly-enriched uranium agreement or the Tenex agreement, whereby we were going to, hopefully at some point acquire this large quantity of natural uranium. And the concept was, as I understood it, to maximize the profits of the company in respect of that agreement by doing the transaction in as tax efficient way as possible.[151]

[110] Mr. Goheen stated that he came up with the idea to restructure the Cameco Group and he was responsible for leading the day-to-day planning of the restructuring.[152]

[111] Mr. Goheen stated in cross-examination that he was not aware that the idea of using a corporation in a low-tax jurisdiction had previously been raised by Mr. Grandey and that CUI had entered into the memorandum of understanding signed by Cogema and Nukem in 1997.[153] However, after being presented with an agreement between CUI and Trafalgar Management Services Ltd. entered into on November 6, 1997, he confirmed that as at that time using a Barbados subsidiary to hold the HEU Feed Agreement did make commercial sense.[154] He also agreed that his initial choice of jurisdiction was Barbados because he was familiar with the people there and that, as of January 5, 1999, the expectation was still that CUI would be a party to the HEU Feed Agreement and that internal discussions regarding which jurisdiction to use continued into 1999.[155] I note that Mr. Goheen was being asked to recall events that took place 18 to 20 years ago and that minor lapses in memory are hardly surprising in the circumstances.

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[150] Lines 7 to 27 of page 4506, lines 5 to 28 of page 4508 and lines 5 to 28 of page 4510 and lines 1 to 8 of page 4511 of the Transcript.
[151] Lines 27 to 28 of page 210 and lines 1 to 7 of page 211 of the Transcript. See also lines 2 to 9 of page 646, lines 6 to 21 of page 3681, lines 24 to 28 of page 4548, lines 1 to 9 of page 4549 and lines 10 to 28 of page 4631 of the Transcript.
[152] Lines 12 to 18 of page 4511 of the Transcript.
[153] Lines 14 to 18 of page 4581 and lines 19 to 24 of page 4592 of the Transcript and Exhibit A143083.
[154] Lines 3 to 12 of page 4584 of the Transcript and Exhibit A154355.
[155] Lines 17 to 23 of page 4585, line 28 of page 4587, lines 1 to 9 of page 4588 and lines 4 to 18 of page 4592 of the Transcript and Exhibit A142748, which was entered into the record at pages 6244 and 6245 of the Transcript.

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[112] With respect to the impetus behind the reorganization, Mr. Goheen testified that in 1998 the price of uranium was low and the Appellant was seeking to contain costs. One of those costs was tax.[156] Mr. Goheen explained his initial rationale for the reorganization as follows:

> Q. What were your conclusions regarding how Cameco could minimize its tax expense?
>
> A. Well, we had a choice which -- you know, I had had opportunities before, comparable. The company Cameco had a choice to make. With these new opportunities, such as HEU and offshore purchases and such, we could continue to run the company Saskatchewan focused. Everyone would remain in Saskatoon. All of this material would be brought back in to Cameco Corp., the Canadian parent. It would be sold through them and all that activity would be as it had always been. Everything ran through Cameco. Then nothing really would have changed. I would have the same tax bill. The same items would be included in the tax calculation as it always had been, so nothing would have changed.
>
> But then I'd turn around and say, "Well, from a cost reduction perspective, I haven't done anything. What can the company do? What can Cameco do to change that?" And the idea came up to say, well, in particularly the HEU material, it's Russian. It's equivalent over the life of it to about 80 million pounds for Cameco, which is a very substantial uranium mine. It had no connection to Canada. Why bring it here, subject that uranium to Canadian tax when it never was from Canada in the first place?
>
> So that started me down the road of saying, "All right. If you move the HEU material -- or if you don't move it. If you put the HEU material offshore so that it never, in the first place, becomes part of the Canadian company, if you make your third-party purchases other than that offshore for material that's never part of Canada, all of that material, then, is not part of the Canadian tax system. So that was the start of it.[157]

[113] Mr. Goheen also explained how his focus expanded to Canadian source uranium:

> Q. So take us through this. That was the start-up, and then how did you progress?
>
> A. Well, when I'm down at that stage, I say, "Well, that's fine. That's a very large piece of this. But what else can we do?" And the thought came to be that there was two other aspects to this from the Canadian side. There is uncommitted production that Cameco expects to produce, you know, uranium it expects to

[156] Lines 19 to 28 of page 4511 and lines 1 to 25 of page 4512 of the Transcript.
[157] Lines 26 to 28 of page 4512, page 4513 and line 1 of page 4514 of the Transcript.

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> produce in the future that has not been committed to an existing sales contract, and there's the uranium inventory that Cameco has in its name.
>
> So the thought behind that was, well, all right. Now that we've been down this road with the HEU and third-party purchases, how can we build this into an even bigger entity? And those two pieces from Cameco, I said, "Well let's includes [*sic*] those in this pot as well." The driver there was that, under all circumstances, the uranium coming out of Canada to this third party had to be sold across at fair market value. That was an absolute unviolatable principle.
>
> Q. Sold across to whom?
>
> A. To a wholly-owned subsidiary offshore.
>
> Q. Why did this plan of the wholly-owned subsidiary getting the HEU and acquiring domestic uranium at fair market value make sense to you?
>
> A. Okay. Well, there was a number of avenues. The tax one, directly first, is that, again, internally, we were optimistic that prices couldn't fall lower. In fact, they did, but that's kind of what companies do. They'll have multiple opinions internally as to where uranium prices are going to go or whatever commodity it is.
>
> And at the time, at $8, well, it was $16 a year ago. It can't go much farther down. I said, well, all right. To the extent that that may be true, then entering contracts to move this material, sell this material to our wholly-owned sub offshore at the current fair market value provides an opportunity. If subsequent to that, some of these forecasts turn out to be true and prices rise, then that difference between the transfer price and the realized price will be taxed offshore. And the offshore rate would be a lower rate.[158]

[114] Mr. Goheen explained the other considerations that went into the restructuring:

> Q. So you have talked about the tax advantages. Were there any other considerations that went into this?
>
> A. Well, yes. Wherever the entity would be and wherever the -- to complete the structure, you needed to choose location, country, and so on. Wherever that had to be, it had to make sense, and it had to be commercial. We weren't going to create an entity in some part of the world just because it had a low tax rate but it made no commercial sense. That doesn't fly. It wouldn't get anywhere with the board. I wouldn't have proposed it in the first place.

[158] Lines 2 to 28 of page 4514 and lines 1 to 14 of page 4515 of the Transcript.

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> Q. Mr. Goheen, you talk about it making "commercial sense." So in terms of the structure, as you envisaged it at the time with this plan –
>
> A. Mm-hmm.
>
> Q. -- what did the structure look like that you envisaged, and why did it make sense?
>
> A. Sure. Sure. Well, if you will, from a single entity in Saskatchewan, we were breaking this into three pieces. The Canadian arm, the Canadian entity, would continue to be a producer and seller of uranium. The other aspect of it, being what I'll call price risk, infiltrating, we would create an offshore entity. And then the third arm would be a brokerage equivalent who would be the marketing group that would be out looking for, you know, people that would buy the uranium or sell their uranium to us. So it's three arms.
>
> And how that made sense, then, is you kind of focused each piece on where they had been, or focused Cameco Corp. on what it had been, a miner, producer of uranium. It created a new entity, Cameco Europe, as the trader in a jurisdiction that I thought made a lot of sense. And then we put the sales force into the U.S., Minneapolis, because they were close to the customer base. Two-thirds of our customers are in the U.S.[159]

[115] Mr. Goheen explained his view of the core functions of CESA/CEL and how other requirements would be addressed:

> Q. You described to us how you envisaged the structure to be, and you described Cameco Europe as a trader. As part of your restructuring, did you have a plan or ideas on how Cameco Europe would acquire services that it needed?
>
> A. Sure. I have to come back for a moment as to what does a trader have to do. You know, to me a trader has three things. It has to be a competent trader. It has to understand the market that it's operating within; it has to decide when to buy and sell and the terms; and it has to enter [into] contracts that fulfil its obligations to buy and sell. Beyond that, there is nothing that a trader needs to do itself that it cannot outsource elsewhere.
>
> Q. So what was your plan with respect to the trader and the services it needed?
>
> A. We focused on the three main functions that a trader needs to do and other activities were then outsourced to Cameco for the back office aspects of things, the contracts admin, and so on. And with Cameco Inc. then on the marketing side

[159] Lines 15 to 28 of page 4515 and lines 1 to 21 of page 4516 of the Transcript.

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> for buying and selling, direct contact with customers and clients, they were engaged to provide that service.[160]

[116] Finally, Mr. Goheen explained how the restructuring changed the Cameco Group:

> Q. Mr. Goheen, how did Cameco change after the restructuring? If you were to look at the before and after pictures, what was the difference in the Cameco organization?
>
> A. Very dramatic. From everything focused through Saskatoon, all activity based there, to three separate entities doing three separate tasks, three separate businesses. Instead of Cameco, we now had Cameco Corp., if you will, the Canadian side, being the producer, miner and producer. We have Cameco Europe being the trader, the price speculator. And we have Cameco Inc. being the broker, the one who finds the customers. That's quite a change.[161]

[117] In order to proceed with the reorganization, Mr. Goheen had to involve the management committee of the Appellant, which was comprised of the six senior officers of the Appellant and the vice-presidents that reported to them. Ultimately, Mr. Goheen required the approval of Bernard Michel, who, as CEO, had the final say as to whether the matter would proceed to the board of directors of the Appellant.[162]

[118] On February 3, 1999, Mr. Goheen made a presentation to the management committee.[163] At that point in time, the proposal for a reorganization had been around for some time and was not new to the management committee.[164] The February 3, 1999 proposal envisioned the use of a Luxembourg corporation (temporarily) and a Swiss corporation.[165] Accordingly, the jurisdictions for the new companies had been settled by February 3, 1999.

[119] On March 2, 1999, Mr. Goheen sent a memo to the six senior officers of the Appellant summarizing the proposed reorganization and the guidelines that were to

[160] Lines 15 to 28 of page 4520 and lines 1 to 8 of page 4521 of the Transcript.
[161] Lines 9 to 20 of page 4521 of the Transcript.
[162] Lines 26 to 28 of page 4522, lines 1 to 15 of page 4523, lines 6 to 28 of page 4524 and lines 1 to 14 of page 4525 of the Transcript.
[163] Lines 22 to 28 of page 4526 and lines 1 to 4 of page 4527 of the Transcript and Exhibits A143273 and A000082.
[164] Lines 4 to 17 of page 4531 of the Transcript.
[165] Lines 18 to 28 of page 4531 and line 1 of page 4532 of the Transcript. The Luxembourg corporation was to be used while the United States-Switzerland tax aspects of the plan were being resolved.

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be followed by CESA/CEL and Cameco US.[166] Mr. Goheen explained the purpose of the guidelines as follows:

> Q. . . . What was your purpose in laying this out in the detail that you did?
>
> A. I wanted to make sure that the officers understood there were clear guidelines, rules, that had to be followed. And, again, this would not have been the first time. They were quite aware of it. I was just putting it down to make sure that there was no ambiguity. These were the rules that had to be followed.[167]

[120] The memorandum also indicated that the Appellant would provide administrative services to both CESA/CEL and Cameco US. Mr. Goheen explained the rationale for this approach as follows:

> Q. Let's go to page 4 of your note, the top bullet point under "Miscellaneous":
>
> "Cameco's market planning and contract administration can provide services to both trading companies on a fee-for-service basis."
>
> What was that about?
>
> A. Well, again, just breaking these into three separate businesses. The brokerage arm or the trading arm don't need to have market planning and contract admin staff within them. Whether you are trading or you are looking for customers, you don't need those services in order to fulfil your direct function.
>
> And prior to the reorganization, there was a central group performing these tasks. They were very good at what they did, and it made no economic sense to duplicate that activity or distribute that activity overseas and down into Minneapolis, so we retained that in Saskatoon and then charged out to the two entities for that service.[168]

[121] Mr. Goheen also explained the rationale for using entities in Switzerland and Minneapolis:

> Q. Mr. Goheen, why was Switzerland chosen as the location for the new entity?
>
> A. Well, as I say, what I wanted to put -- a driver behind these structures, what I want – it's not really what I wanted. The driver behind these structures is to make sure that you have something that makes sense that's not going to put you in a worse situation than you were before.

[166] Lines 3 to 21 of page 4535 of the Transcript and Exhibit A142722.
[167] Lines 6 to 13 of page 4536 of the Transcript.
[168] Lines 23 to 28 of page 4537 and lines 1 to 12 of page 4538 of the Transcript.

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> When it comes to Switzerland and uranium, there are nuclear reactors in the country. It has a nuclear regulatory regime, if you will. It is a western country. It's easy to get in and out of. It has laws that are established. It is a place that people do business in. It fits. And, as I say, as compared to other jurisdictions in the world which may have many of the same things, but do not have the nuclear history associated with it.
>
> So capture the nuclear friendliness, the modern legal system, the ease to get in and out of. It made sense to go there, and we weren't worse off.
>
> Q. Why was Minneapolis chosen as the location for Cameco Inc.?
>
> A. The U.S. made sense because 60 percent or two-thirds of Cameco's customers are based in the U.S., are U.S. utilities.
>
> Minneapolis itself, Northwest Airlines, a hub for -- easy to get around the U.S. and internationally from there.
>
> As to more than that, that was a marketing department decision. They kind of decided Minneapolis is where they wanted. Those are the reasons I remember.[169]

[122] On March 15, 1999, Mr. Goheen made a presentation to the executive committee of the Appellant, which was made up of the six senior officers of the Appellant.[170] The presentation addressed Mr. Goheen's March 2, 1999 memorandum.

[123] On March 16, 1999, CESA was incorporated.[171] The initial board of directors of CESA was comprised of Gerhard Glattes, Gerald Grandey, Gary Chad, Teunis Akkerman, Eleonora Broman, Maggy Kohl-Birget and Rui Fernandes Da Costa.[172]

[124] On April 13, 1999, Mr. Goheen made a slide presentation to the executive committee.[173] The presentation included business reasons for the new structure. In cross-examination, Mr. Goheen was asked to explain the rationale for including business reasons in the description of a tax-driven restructuring:

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[169] Lines 10 to 28 of page 4540 and lines 1 to 11 of page 4541 of the Transcript.
[170] Mr. Goheen noted that the minutes of the meeting, Exhibit A004158, erroneously referred to the management committee, which was a larger group. However, the attendees were the six senior officers of the Appellant: lines 11 to 22 of page 4545 of the Transcript.
[171] Exhibits A021929 and A142723.
[172] Exhibit A021929.
[173] Lines 14 to 25 of page 4546 of the Transcript. Mr. Goheen's slide presentation to the executive committee is Exhibit A142787. A version with his handwritten notes is Exhibit A001414.

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> Q. Why were you presenting business reasons, then, for the restructuring?
>
> A. The tax aspects of this were known to the board for some time, the idea that we were to look at restructuring to minimize taxes going forward. But that, in and of itself, for a conservative company like Cameco, was an important and critical factor, but wasn't enough.
>
> They wanted to see, well, okay. What's the--as I mentioned on one of the slides, the uncertainty of how long this might last was always in there. So what else might there be here that at least would not put us in a worse position than where we were if we kept everything in Saskatoon?
>
> So understanding that tax was -- you know, future taxes was the driver behind much of this, what else might I show to the board and say, "Well, at least here is some other aspects that at least would not make us worse off than where we were"?
>
> Q. Is another reason for articulating these business reasons to provide non-tax reasons to the Canada Revenue Agency and the IRS if they requested them?
>
> A. No.
>
> Q. That never entered your mind?
>
> A. No. . . . [174]

[125] On April 30, 1999 Mr. Goheen made a slide presentation to the board of directors of the Appellant.[175] The board of directors approved the reorganization on April 30, 1999.[176] The minutes of the board state the following:

> Mr. Goheen indicated that in order for this proposal to be profitable the prices must rise in the future. It is clear that if prices fall we will not make money in the trading companies and the sales company, so there is business risk always present.[177]

[126] On July 29 or 30, 1999, Gerry Grandey resigned as a director of CESA and Mr. Goheen was elected a director of CESA in his place.

[174] Lines 17 to 28 of page 4635 and lines 1 to 12 of page 4636 of the Transcript.
[175] Lines 10 to 22 of page 4549 of the Transcript. Mr. Goheen's presentation to the board is Exhibit A143301.
[176] Lines 10 to 22 of page 4551 of the Transcript and Exhibit A154653.
[177] Page 6 of Exhibit A154653.

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[127] On August 11, 1999, Mr. Goheen was appointed to the management committee of CESA.[178] In cross-examination, Mr. Goheen described his role on that committee as follows:

> Q. Did the management committee of the Swiss branch, between September 1, 1999 and October 2002, carry on actual management of the Swiss branch, or was that like you just described, a "sounds like" but doesn't really do anything?
>
> A. The people in Switzerland managed the company. I would have had no involvement in that.
>
> Q. When you say the people in Switzerland --
>
> A. It would have been Gerhard and the -- we were looking for Justus Dornier and Rudolf Mosimann. So, again, I don't remember who was on those boards. I do know that, from a management perspective, I stayed out of it.
>
> Q. Even though you were on what's titled the "Management Committee of the Swiss Branch"?
>
> A. It would be much like when I was a director of Cameco Inc. I was there to understand what was going on, but I understand the rules pretty clearly. I wasn't a decision-maker for Cameco, but I was trying to be very careful not to be involved in the decisions that Cameco Inc. or Cameco Europe made.[179]

[128] On August 30, 1999, Cameco Services Inc. ("CSI") was incorporated in Barbados.[180]

[129] On September 15, 1999, CEL was incorporated in Zug, Switzerland as Cameco Switzerland AG (SA, Ltd).[181] The shareholders of CEL are listed as Cameco Investments AG (SA, Ltd) as to 98 shares and Justus Dornier and Rudolph Mosimann as to one share each. On June 29, 2001, the name of Cameco Switzerland AG (SA, Ltd.) was changed to Cameco Europe AG (SA, Ltd), that is, CEL.[182]

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[178] Lines 12 to 18 of page 4615 of the Transcript.
[179] Lines 21 to 28 of page 4616 and lines 1 to 13 of page 4617 of the Transcript.
[180] Lines 22 to 26 of page 4658 of the Transcript and Exhibit A010731.
[181] Exhibit A021939 is an English translation of the notarial deed evidencing the incorporation of Cameco Switzerland Ltd. The German version is Exhibit A021938.
[182] Exhibit A021934 is an English translation of the notarial deed evidencing the change of name. The German version is Exhibit A021933. Exhibit A021936 is an English translation of the Articles of CEL following the change of name. The German version is Exhibit A021935.

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[130] In 2001, CESA entered into a services agreement with CSI "made effective as of" January 1, 2001.[183] The contract was signed in late 2001.[184] It stated that, in exchange for the co-ordination and monitoring of all administrative, operational and marketing activities of CESA carried on outside Switzerland, CESA would pay CSI 50% of its gross trading profit as defined in the agreement. CESA/CEL paid the services fees to CSI but CSI did not provide any services to CESA. This arrangement reduced CESA's income subject to tax in Switzerland by approximately 50%.[185]

[131] The arrangements between CESA and CSI were put in place pursuant to the terms of a Swiss tax ruling issued by the Canton of Zug to CESA on July 15, 1999.[186] A second ruling was issued by the Swiss federal tax administration to CEL on January 29, 2003.[187] Mr. Glattes described the ruling as a well-known measure used by Swiss authorities to entice international investors to move their activities to Switzerland.[188] Mr. Glattes stated that the Swiss tax authorities were aware that CSI would not be providing services to CESA, and that CESA's tax returns in Switzerland were never questioned or reassessed by the Swiss tax authorities.[189]

[132] On October 30, 2002, CESA and CEL executed an Asset Purchase and Transfer of Liabilities Agreement pursuant to which all the assets of CESA's Swiss branch were transferred to CEL and CEL assumed all the liabilities of CESA's Swiss branch. The transfer was to have effect as of October 1, 2002.[190]

[133] The Swiss branch of CESA and the Swiss office of CEL were each located in Zug, Switzerland in office space rented from MeesPierson Trust. The arrangement included access to boardrooms and a fireproof safe.

[183] Lines 6 to 22 of page 4019 of the Transcript and Exhibit A012477.
[184] Lines 5 to 22 of page 4020 of the Transcript and Exhibits A012477 and A211635.
[185] Lines 27 to 28 of page 2920, lines 1 to 25 of page 2921, lines 11 to 17 of page 2930, lines 10 to 15 of page 3063, lines 3 to 8 of page 3844, lines 24 to 28 of page 4004, lines 1 to 4 and 11 to 17 of page 4005 and lines 22 to 24 of page 4560 of the Transcript.
[186] An English translation of the CESA ruling and the original ruling in German is Exhibit A0225973.
[187] An English translation of the CEL ruling and the original ruling in German is Exhibit A225979.
[188] Lines 2 to 22 of page 3840, lines 25 to 28 of page 3844, lines 1 to 3 of page 3845, lines 4 to 28 of page 3846 and lines 1 to 7 of page 3847 of the Transcript.
[189] Lines 8 to 11 of page 3847 and lines 1 to 11 of page 3850 of the Transcript.
[190] The front page of the agreement states that the agreement is "dated as of October 1, 2002" while the signature page states that "the parties hereto have duly executed this Agreement on October 30, 2002": Exhibit A015501.

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MeesPierson Trust also provided administration services to CESA/CEL until late 2006.[191]

[134] The principal service provider for CEL at MeesPierson Trust was Markus Bopp. Mr. Bopp became an employee of CEL in August 2006. Until that time, the sole employees of CESA/CEL had been first Mr. Glattes and then Mr. Murphy.[192] After he became an employee Mr. Bopp began to participate in the sales meetings and had access to "Contact!", the Cameco Group's confidential marketing database.[193]

[135] Mr. Murphy testified that because CEL was dealing with approximately 20 to 25 new contracts per year, two employees with his and Mr. Bopp's experience were sufficient to do the job and three would have been too many.[194]

(8) The Financing of CESA/CEL

[136] CESA/CEL had two bank accounts: one with ABN for administrative expenses and one with AIB International Financial Services Limited located in Ireland (the "AIB Account").[195] The arrangements for the AIB Account were made by Mr. Goheen because the Appellant had a pre-existing relationship with AIB.

[137] AIB, CESA and the Appellant entered into a services agreement dated April 11, 2000 (the "AIB Services Agreement"). Section 11(e) of the AIB Services Agreement provides that CESA and the Appellant accept the risk of any instruction or instrument being given to AIB or issued by an unauthorized person and that CESA and the Appellant jointly and severally agree to hold AIB harmless and indemnify AIB against all claims. [196]

[138] Counsel for the Respondent asked Mr. Glattes about an e-mail dated April 13, 2000 from David Doerksen, a member of the treasury group of the Appellant. In the e-mail, Mr. Doerksen writes:

> Gerhard, further to our telecon earlier today and with regard to our approval request for the AIBFS agreement, we fully recognize the board's right and

[191] Lines 10 to 28 of page 2692, lines 4 to 10 of page 2701, lines 27 to 28 of page 2705 and lines 1 to 9 of page 2706 of the Transcript.
[192] Lines 18 to 22 of page 2704 of the Transcript.
[193] Lines 27 to 28 of page 2704 and lines 1 to 26 of page 2705 of the Transcript.
[194] Lines 10 to 28 of page 2706 and lines 1 to 23 of page 2707 of the Transcript.
[195] Lines 23 to 28 of page 4387 and lines 1 to 14 of page 4388 of the Transcript.
[196] Lines 15 to 27 of page 4388 of the Transcript and Exhibit A004555.

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> mandate to review, and modify as necessary, the agreement prior to approving it. Please accept our apologies for any concerns our approval process for the AIBFS agreement may have caused.[197]

[139] Mr. Glattes responded that the e-mail was sent because he had "complained a little bit that our involvement was not sufficient, in my view".[198]

[140] CESA/CEL was financed by an indirect subsidiary of the Appellant called Cameco Ireland Company ("CIC"). On November 24, 1999, CESA entered into a demand loan agreement with CIC to borrow US$32,500,000 interest-free.[199] On July 27, 2001, CESA entered into a demand loan agreement with CIC to borrow US$4,500,000 interest-free.[200] The funds borrowed by CESA under these agreements were used by CESA to purchase uranium from Tenex, Urenco and the Appellant.[201]

[141] On July 10, 2002, CESA entered into a revolving credit agreement with CIC for a credit facility of US$80,000,000 (the "facility"). The amounts borrowed under the facility did not bear interest but CESA was required to pay an annual commitment fee of 0.1% of the amount of the facility.[202]

[142] Mr. Goheen testified that the facility was put in place at the request of Mr. Dornier and Mr. Mosimann, who had expressed concern that the informal financing structure originally put in place did not work anymore and that a formal financing structure was required under unspecified Swiss rules. Mr. Goheen worked with advisers to put in place a solution that addressed the needs of CESA/CEL but did not create the capital tax issues in Switzerland associated with an investment in equity.[203]

[143] On November 26, 2002, CIC, CESA and CEL entered into a novation agreement pursuant to which CEL became the borrower under the facility and the amount of the facility was increased to US$120,000,000.[204] By a letter dated February 5, 2004, CEL requested that the amount of the facility be reduced to

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[197] Exhibit A057915.
[198] Lines 26 to 28 of page 4389 and lines 1 to 4 of page 4390 of the Transcript.
[199] Lines 14 to 21 of page 4393 of the Transcript and Exhibit A013628.
[200] Lines 4 to 11 of page 4394 of the Transcript and Exhibit A013624.
[201] Lines 25 to 28 of page 4394 and line 1 of page 4395 of the Transcript.
[202] Lines 2 to 14 of page 4395 of the Transcript and Exhibit A013591.
[203] Lines 20 to 28 of page 4556 and pages 4557 to 4558 of the Transcript.
[204] Lines 2 to 12 of page 4396 and Exhibit A014514.

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US$100,000,000 and an agreement effecting the change was signed on March 1, 2004.[205]

[144] In several cases, CESA/CEL requested loans directly from the Appellant because there was insufficient time to obtain the funding from CIC.[206]

[145] If CESA/CEL had surplus funds, then the Appellant would invest the surplus funds on CESA/CEL's behalf in CESA/CEL's name.[207]

[146] Counsel for the Respondent asked Mr. Glattes about the role of the Appellant's treasury group in determining CESA/CEL's financial requirements. Counsel presented an e-mail to Mr. Glattes dated March 21, 2002 in which a member of the treasury group wrote:

> Cameco Europe will be receiving USD14,091,900.00 from Cameco Corp on April 1, 2002. The cash forecast for Cameco Europe shows that these funds will not be required until later in the year. Please provide a notice to Cameco Ireland (copy Randy B and Treasury) to repay USD14,000,000.00 on April 2, 2002.
>
> Thank you for your assistance with this matter.[208]

[147] Mr. Glattes responded:

> Q. —This is an example of an individual in treasury making a recommendation, or telling Cameco Europe to make a repayment; correct?
>
> A. Yeah. There are contacts between CEL and the treasury about best use of the funds, and that has been the case there, and so that was nothing unusual, that there would be discussions about repayment and so on.[209]

[148] Mr. Glattes went on to testify that CESA/CEL had not transferred the task of monitoring CESA/CEL's financial requirements to the Appellant and that Markus Bopp also kept track of these requirements.[210] In two e-mails to Mr. Glattes dated March 12, 2003, an individual in the Appellant's treasury group writes:

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[205] Lines 24 to 27 of page 4396 and lines 13 to 16 of page 4397 of the Transcript and Exhibits A014508 and A014505.
[206] Lines 6 to 14 of page 4400 of the Transcript and Exhibit A012370.
[207] Lines 5 to 8 of page 4401 of the Transcript and Exhibits A003982 and A013553.
[208] Exhibit A013603.
[209] Lines 1 to 7 of page 4398 of the Transcript and Exhibit A010254.
[210] Lines 4 to 12 of page 4399 of the Transcript.

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> The Cameco Europe Ltd. cash forecast is showing a shortfall of approximately USD7,000,000 on March 31st due to payment to Cameco Corporation. You may want to consider requesting funds from Cameco Ireland in the amount of USD7,000,000 to be received by March 25, 2003 to ensure there are sufficient funds to also cover a payment of approximately USD150,000 on March 26th as instructed by Markus.
>
> . . .
>
> Further to my e-mail, do you have any information on the USD150,000 payment that Markus informed me about. I was wondering if it has to be paid on March 26th or could it possible [*sic*] wait until March 28th. If it can wait, we could move the funding request from March 25th to March 28th.[211]

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(9) The Twice-Weekly Sales Meetings and the Monthly Strategy Meetings

[149] Following the reorganization in 1999, Cameco US organized twice-weekly sales meetings (the "sales meetings") to discuss all matters relating to the marketing, purchase and sale of uranium by the Cameco Group.[212] Mr. Glattes and Mr. Murphy attended the sales meetings by telephone whenever their schedules permitted.[213]

[150] Initially, contract administrators attended the sales meetings but because these meetings addressed many issues not relevant to the contract administrators a separate meeting was set up to discuss contract administration.[214]

[151] Cameco US also organized monthly strategy meetings (the "strategy meetings") to discuss broader issues such as sales targets, market direction and opportunities for future purchases and sales of uranium.[215] Mr. Glattes and Mr. Murphy attended the SM1 and SM2 strategy meetings whenever possible,

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[211] Exhibit A019547.
[212] Lines 16 to 24 of page 92, lines 4 to 15 of page 308, lines 25 to 28 of page 328, lines 1 to 13 of page 329, lines 12 to 26 of page 335, lines 27 to 28 of page 413, lines 1 to 7 of page 414, lines 1 to 18 of page 505, lines 10 to 28 of page 1433, lines 1 to 3 of page 1434, lines 7 to 28 of page 2750, page 2751, lines 1 to 18 of page 2752, lines 2 to 17 of page 2811 and lines 22 to 26 of page 5991 of the Transcript.
[213] Lines 23 to 28 of page 338, line 1 of page 339, lines 5 to 7 of page 1484, lines 2 to 14 of page 2683, lines 9 to 21 of page 2749, lines 23 to 28 of page 3582, lines 1 to 10 of page 3583, lines 16 to 28 of page 3598, lines 1 to 7 of page 3599, lines 26 to 28 of page 5616 and lines 1 to 17 of page 5617 of the Transcript.
[214] Lines 14 to 27 of page 329, lines 19 to 28 of page 336 and lines 1 to 16 of page 337 of the Transcript.
[215] Line 28 of page 329, lines 1 to 7 of page 330, lines 9 to 28 of page 2786, line 1 of page 2787 and lines 2 to 13 of page 3585 of the Transcript.

usually by telephone but sometimes in person. The SM1 meetings were for the most senior management in the Cameco Group.[216]

[152] In cross-examination, Fletcher Newton testified that Mr. Glattes generally attended the strategy meetings and was an active participant in those meetings.[217] Mr. Newton then had the following exchange with counsel:

> Q. And, in your experience, what type of contributions, if any, would Mr. Glattes make in those discussions?
>
> A. Well, Gerhard was a key guy. I mean, he had been in the uranium business a long time. He had been the president of Uranerz, which had been a German producer. He was German, European. He knew all the European utilities. So he was an ideal guy to have in Europe, talking to the European utilities, talking to a company like Urenco – that's U-r-e-n-c-o -- and so he had a lot to contribute.
>
> Q. In your experience, you found Mr. Glattes to be knowledgeable about the nuclear industry?
>
> A. Extremely.
>
> Q. And you found him to be knowledgeable about the uranium markets?
>
> A. Yes.
>
> Q. And that would include about uranium prices?
>
> A. Inasmuch as anybody can predict or be knowledgeable about uranium prices, yes. Uranium prices are notoriously difficult to understand or project.
>
> Q. They're unpredictable?
>
> A. Extremely.[218]

[153] Cameco US did not keep minutes of the sales meetings or the strategy meetings, but documents such as proposal summaries were prepared after the meetings.[219] Mr. Assie did have some brief notes that he made in advance of or at sales meetings, but he did not always keep such notes.[220] Mr. Assie testified that on

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[216] Lines 11 to 28 of page 332, lines 1 to 12 of page 333, lines 3 to 24 of page 2748, lines 2 to 4 of page 2787, lines 1 to 26 of page 3583 and lines 18 to 23 of page 3584 of the Transcript.
[217] Lines 27 to 28 of page 6402 and lines 1 to 8 of page 6403 of the Transcript.
[218] Lines 9 to 28 of page 6403 and lines 1 to 4 of page 6404 of the Transcript.
[219] Lines 17 to 24 of page 334 and lines 5 to 15 of page 384 of the Transcript.
[220] Lines 14 to 27 of page 386 of the Transcript. Mr. Assie's notes made between October 2000 and November 5, 2007 are Exhibits A170255, A170256, A170257, A170258, A170259 and A170263. There are notes

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occasion he would "jot down notes from [the strategy meetings] if it was something [he] wanted to remember" but that he did not take comprehensive notes of those meetings.[221]

[154] Mr. Glattes took notes during the sales meetings only if a new deal was discussed for which there was no proposal summary. Mr. Glattes retained these notes until he received an offer letter that contained the major terms.[222] In cross-examination, Mr. Glattes testified that he did not destroy other notes.[223]

[155] Mr. Glattes did not take notes during the strategy meetings because he was provided with materials regarding those meetings.[224]

[156] Mr. Murphy took notes during the sales meetings from time to time but he did not keep the notes.[225] When asked why he did not keep the notes, he stated:

> A. Well, it wasn't necessary to, because anything that was agreed to was reduced to writing not long afterwards.
>
> Q. In what form?
>
> A. Well, the Cameco U.S. salesperson responsible would prepare a proposal summary and would add it to the marketing activity report for their region.[226]

[157] Mr. Murphy confirmed that after the sales meetings he did not send e-mails summarizing what had been discussed during the meetings.[227]

[158] Mr. Mayers described the sales meetings as follows:

> They were pretty casual. The Cameco Inc. group would go around the table and discuss -- just give an update on discussions they had had with utility customers or traders or word that -- any information they had on what the marketplace was

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within these Exhibits that are titled "Sales Mtg" or the like, but the dates suggest such notes were made only occasionally and certainly not at every sales meeting.

[221] Lines 6 to 11 of page 335 of the Transcript.

[222] Lines 14 to 28 of page 3599, lines 1 to 4 of page 3600, lines 15 to 17 of page 3904, lines 15 to 28 of page 3931, page 3932, lines 1 to 21 of page 3933, lines 27 to 28 of page 4468, lines 1 to 5 of page 4469 and lines 10 to 18 of page 4470 of the Transcript. See, also, lines 5 to 28 of page 3586 and lines 1 to 2 of page 3587 of the Transcript where, in response to a question regarding strategy meetings, Mr. Glattes appears to address both sales meetings and strategy meetings.

[223] Lines 19 to 28 of page 4470 and lines 1 to 20 of page 4471 of the Transcript.

[224] Lines 5 to 28 of page 3586 and lines 1 to 7 of page 3587 of the Transcript.

[225] Lines 6 to 8 of page 2755 and lines 14 to 25 of page 3122 of the Transcript.

[226] Lines 10 to 16 of page 2755 of the Transcript.

[227] Lines 6 to 8 of page 3035 of the Transcript.

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> doing. Cameco Corp. would then do the same thing, go around the table and raise any issues, any delivery or customer issues that they were having. And Cameco Europe would come in and give an update on anything that was happening in Europe.[228]

[159] Ms. Kerr had the following exchange with counsel for the Respondent regarding the role of sales meetings:

> Q. Did you meet with management before you made those offers or proposals to your customers? Did you meet with Cameco management?
>
> A. Yes. Did I meet with --
>
> Q. -- Cameco management before you made proposals to customers?
>
> A. Well, yes. We always discussed all of these things in our regular meetings. And so there would always be, you know, people from Cameco Inc., people from Cameco Europe, and typically somebody from Cameco Corp., if they were available, to be part of the meetings.
>
> And we would toss out ideas. And then, like I said, once I could get the ideas and come up with what I thought was a succinct proposal, we would go through all of that in a meeting again so everybody was aware of what was going on. And, you know, especially, for example, I would need to have talked to Cameco Europe to make sure that, if I was going to make that proposal, that they were going to be able to supply me with the material that I needed to fill that contract.[229]

(10) The Activity Reports

[160] The marketing group at Cameco US prepared activity reports twice a month that documented all the significant business activities of the Cameco Group. The activity reports included the terms and conditions of requests for quotation (RFQs) and transactions under negotiation during the period covered by the reports. This information was updated each time a new report was released. The twice-monthly activity reports were made available to CESA/CEL and to other corporations in the Cameco Group.[230]

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[228] Lines 17 to 25 of page 5647 of the Transcript.

[229] Lines 21 to 28 of page 5527 and lines 1 to 12 of page 5528 of the Transcript. In cross-examination, Ms. Kerr confirmed that the meetings referenced in this excerpt were the sales meetings: lines 26 to 28 of page 5616 and lines 1 to 5 of page 5617 of the Transcript.

[230] Lines 11 to 23 of page 347, lines 1 to 26 of page 349, lines 26 to 28 of page 428, lines 1 to 8 of page 429, lines 5 to 11 of page 2764, lines 10 to 23 of page 2765, lines 14 to 21 of page 3001, lines 6 to 28 of page 3405, lines 1 to 7

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[161] Mr. Glattes received copies of the activity reports while president of CESA/CEL.[231] Mr. Glattes testified that the activity reports contained important information for CESA/CEL and that he relied on the activity reports.[232] Mr. Glattes testified that he retained the activity reports only while the deals covered by the reports were being negotiated.[233]

[162] In cross-examination, Mr. Assie and Mr. Glattes each testified that Mr. Glattes did not prepare activity reports for CESA/CEL but that Mr. Murphy did prepare such reports after he joined CEL.[234] Mr. Murphy testified that he did not recall seeing, prior to his joining CEL, any activity reports prepared by CESA/CEL.[235]

[163] Mr. Murphy testified that he prepared activity reports for CEL.[236] The first such report covered the period from September 1 through November 15, 2004.[237] Mr. Murphy testified that soon after he completed the first report he started to prepare activity reports for CEL twice per month and he adopted a different format.[238]

[164] The first twice-monthly report using the new format covers the period December 1 to December 15, 2004 and includes the headings "Inter-Company Offers", "Contracting by CEL", "Issues Resolved", "Issues Ongoing", "Issues Pending", "Miscellaneous" and "Routine Business". Mr. Murphy testified that he used this format until he retired in mid-2007.[239]

[165] Mr. Murphy would send the reports to Mr. Assie's office in Saskatoon, at which point, he believed, the reports were entered into a computer database called "Contact!" maintained by the Cameco Group.[240] In cross-examination, Mr. Assie

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of page 3406, lines 25 to 27 of page 3640, lines 18 to 25 of page 5616 and lines 11 to 24 of page 5618 of the Transcript.

[231] Lines 17 to 24 of page 350, lines 12 to 28 of page 3639, lines 1 to 22 of page 3640, lines 20 to 28 of page 3643, pages 3644 to 3649, lines 1 to 18 of page 3650, lines 11 to 22 of page 3659, lines 15 to 19 of page 3663 and lines 10 to 20 of page 3664 of the Transcript and Exhibits A144537, A144538, A144539, A144540, A144541, A158081, A158082, A158083, A158084, A007249 and A007250. In addition, Exhibits A158079, A158080, A158077, A158078, A158075, A158076, A158072, A158073, A158074, A158070, A158065, A158066, A158067, A158068, A158062, A158063, A158059, A158060, A158052, A158053 and A158054 were entered into evidence on consent.

[232] Lines 8 to 14 of page 3642 of the Transcript.

[233] Lines 23 to 28 of page 3640 and lines 1 to 8 of page 3641 of the Transcript.

[234] Lines 9 to 20 of page 1435, lines 13 to 28 of page 4046 and lines 1 to 18 of page 4047 of the Transcript.

[235] Lines 8 to 11 of page 3406 of the Transcript.

[236] Lines 10 to 18 of page 2733, lines 16 to 25 of page 2850 and lines 12 to 17 of page 3406 of the Transcript.

[237] Exhibit A225749.

[238] Lines 1 to 4 and 13 to 18 of page 2851 and lines 10 to 14 of page 2853 of the Transcript.

[239] Lines 4 to 21 of page 2855 of the Transcript and Exhibit A225758.

[240] Lines 19 to 23 of page 2851 of the Transcript.

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testified that he would receive collated activity reports that incorporated the information from the CEL reports prepared by Mr. Murphy.[241]

[166] Mr. Assie testified that one reason there were no minutes of the sales meetings was that critical information from those meetings was included in the activity reports.[242] Mr. Murphy testified that he did not keep notes of the sales meetings because anything that was agreed to during the meetings was reduced to writing in the form of proposal summaries and activity reports.[243]

[167] In cross-examination, Mr. Assie testified that he would throw away his copy of an activity report once he was done with it.[244] Counsel for the Respondent asked Mr. Assie about retention of reports:

> Q. Was there a central repository where these kind of reports were kept?
>
> A. I don't know. It was nothing I ever worried about too much because it was intended to be a real-time report of activities that were underway. If they were done, from my -- from my point of view, I wasn't concerned about it.
>
> Q. So you are not sure if there was one person who was responsible for ensuring the hard copy documents of the activity reports were kept?
>
> A. Yes. I'm not aware that anybody was assigned the responsibility of keeping all of these reports.[245]

[168] In cross-examination, Marlene Kerr had the following exchange with counsel for the Appellant regarding activity reports and sales meetings:

> Q. Did you have any role in preparing activity reports?
>
> A. Yes. That was all of our roles was to update these activity reports on a regular basis, because it was a big information source for everybody. Put in all of our RFQs, all of our pending business, everything that was going on in each of our market regions so that everybody was aware exactly where we were at.
>
> Q. You mentioned regular meetings in your testimony earlier today. How often were these regular meetings held?

[241] Lines 21 to 28 of page 1435 and lines 1 to 19 of page 1436 of the Transcript.
[242] Lines 5 to 15 of page 384 of the Transcript.
[243] Lines 6 to 16 of page 2755 of the Transcript.
[244] Lines 20 to 22 of page 1436 of the Transcript.
[245] Lines 23 to 28 of page 1436 and lines 1 to 7 of page 1437 of the Transcript.

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A. Well, typically it was twice a week. If there was a lot of activity, you know, lots of RFQs or lots of things going on, we may call an extra meeting in a week. It just depended what the activity was. But generally they were planned for twice a week.

Q. And were activity reports ever discussed on these twice a week regular meetings?

A. Yes. I never went to a meeting without my activity report because it would have, you know, all of the things that I was working on.

Q. And did Mr. Glattes participate in these regular meetings?

A. Yes, he did.

Q. And during his time as president of Cameco Europe, did Mr. Murphy participate in these sales meetings?

A. Yes, he did.

Q. I would like to take you to an activity report that is already an exhibit. It is Exhibit A158056. This is an activity report from May 2003. And this is the period when you are the manager marketing, Europe at Cameco Inc.; correct?

A. Yes, I think so.

Q. Do you recall whether you would have been involved in preparing this activity report or not?

A. Well, you know, again, I can't specifically say. I look at this as something I did, but this was a regular activity that we all participated in, and it was something that was consistently done, so I cannot imagine that I wouldn't have.

Q. And if we go to page 2 of this activity report, we can see the item at the top is "EdF UF6 Conversion." Is that correct?

A. Yes.

Q. And would this have been an item that would be updated from time to time as negotiations progressed with EdF?

A. Yes.

Q. And, at the bottom, we can see under the heading "Proposals-Under Discussion," we have "EdF U3O8." Is that another proposal that would have been updated as negotiations progressed?

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> A. Yes. And the way this report worked too, for example, when a proposal was -- it kind of -- it would move up on the activity list too.
>
> So, you know, when it was under RFQ, when the RFQ was accepted, then it moved up, and then, you know, all of the comments moved with it. So you always knew at a glance what was -- what new business you had gotten accepted, what were just proposals outstanding, what were RFQs that had just come in and any future RFQs that you were thinking might come in.[246]

(11) The Contract for Services Between the Appellant and CESA/CEL

[169] In a letter dated August 25, 1999 from CESA to the Appellant, Mr. Glattes states that CESA "requires services in respect of contract administration, legal, accounting etc".[247] In a letter dated September 22, 1999, from the Appellant to CESA, Mr. Petroff lists services that the Appellant proposes to provide, including:

> Market Contract Administration-including administration of both uranium purchase and sales contracts, administration and management of inventory, monthly reporting of sales, revenues, and inventories, administrative assistance in preparation of periodic plans, forecasts and budgets.[248]

[170] The Appellant and CESA entered into a services agreement effective September 1, 1999 (the "Services Agreement"). Mr. Glattes and Mr. Mosimann signed the agreement for CESA.[249]

[171] Mr. Assie testified that, under the Services Agreement, CESA retained the Appellant to provide administrative and back-office services, including administration of CESA/CEL's uranium contracts, assistance in market forecasting, legal services, human-resources-related services, and financial, bookkeeping and accounting services, and that those services were provided under the Services Agreement.[250] Mr. Murphy and Mr. Glattes provided similar descriptions of the services provided by the Appellant to CESA/CEL under the Services Agreement.[251]

[172] Mr. Assie characterized the services as "administrative-type, back-office-type accounting, bookkeeping services" and "routine contract administration-type

[246] Lines 18 to 28 of page 5616, page 5617 and lines 1 to 24 of page 5618 of the Transcript.
[247] Lines 3 to 12 of page 4120 of the Transcript and Exhibit A000850.
[248] Lines 13 to 19 of page 4120 of the Transcript and Exhibit A000849.
[249] Lines 7 to 26 of page 3572 of the Transcript and Exhibit A158459.
[250] Lines 23 to 26 of page 507, lines 4 to 22 of page 508 and lines 7 to 17 of page 509 of the Transcript.
[251] Lines 5 to 13 of page 2708 and lines 4 to 16 of page 3573 of the Transcript.

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functions and services", which could have been obtained from a source other than the Appellant. However, the Appellant had a pool of trained people in Saskatoon and outsourcing to the Appellant worked extremely well.[252]

[173] Mr. Belosowsky testified that the Services Agreement was signed in March 2001 and that no amounts were paid under the agreement until 2001.[253]

[174] In cross-examination, counsel suggested to Mr. Glattes that the Services Agreement was not signed until November 2001; however, Mr. Glattes only recalled that it was signed after the September 1, 1999 effective date. Mr. Glattes stated that the services were provided to CESA in 1999 and 2000 and that it took time to finalize the language of the Services Agreement to ensure both parties' interests were reflected in the agreement.[254] CESA's annual accounts for the period ending December 31, 2000 show administrative expenses of US$1,432,134 for the period March 16, 1999 to December 31, 1999 and US$1,214,633 for the period January 1, 2000 to December 31, 2000.[255]

[175] Section 2.1 of the Services Agreement states:

> Subject to and in accordance with the terms hereof, Cameco Europe hereby engages CCO, and CCO hereby agrees, to perform certain services for Cameco Europe as requested from time to time (the "Services").
>
> The Services to be performed by CCO for Cameco Europe shall initially be as follows:
>
> • contract administration services as indicated in Appendix A,
>
> • assistance in market forecasting and research,
>
> • legal services on contract matters as directed by Cameco Europe,
>
> • assistance in human resource matters including the provision of employee placement services (up to, but not including, the hiring decision) as requested by Cameco Europe[,]
>
> • preparing monthly payroll and related information reports to satisfy compliance requirements,

[252] Lines 2 to 4 and 13 to 27 of page 246 of the Transcript.
[253] Lines 16 to 28 of page 7003 and lines 1 to 9 of page 7004 of the Transcript.
[254] Lines 9 to 28 of page 4122, page 4123 and lines 1 to 5 of page 4124 of the Transcript and Exhibit A052833.
[255] Lines 10 to 23 of page 7004 of the Transcript and Exhibit A154285.

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• preparing and maintaining all customary financial and accounting books in appropriate form and in sufficient detail to support an annual independent audit of the financial condition of Cameco Europe in accordance with instructions provided by Cameco Europe,

• making books and records available to audit and answering questions with respect to same,

• based on accounting records, calculating the fees and expenses of the supervisory directors in connection with attending meetings, non-Canadian taxes, non-Canadian filing fees and other costs and expenses incurred for the account of Cameco Europe,

• preparing quarterly and annual financial statements for Cameco Europe,

• calculating the amount of dividends that may be paid by Cameco Europe in accordance with guidelines provided by Cameco Europe,

• preparing monthly reports containing statements of net assets and liabilities, operations, changes in net assets and subsidiary or detailed reports, as may be requested by Cameco Europe,

• placing on ledgers any financial information based on information received from Cameco Europe, and

• any other related functions incidental to the foregoing.

Such Services shall not include the conclusion of any contractual terms on behalf of Cameco Europe.

[176] Appendix A of the Services Agreement states:

Under the direction of Cameco Europe, Cameco will provide the following services pursuant to this Agreement.

1. Ensure adherence to all of the terms and conditions of the Cameco Europe marketing agreements.

2. Ensure the delivery of all product and services pursuant to the Cameco Europe marketing agreements, including but not limited to, communication with the customer, communication with relevant conversion or enrichment facility, obtaining of all necessary regulatory and government approvals and shipping of product.

3. Ensure the timely and accurate submission of invoices and collections of funds for product and services sales, the timely and accurate processing for payment of

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> monies owing by Cameco Europe for product and services purchases, timely and accurate invoicing or processing for payment of other related revenues and expenses, such as transportation, weighing and sampling and storage.
>
> 4. Maintaining and reporting of inventory account balances owned and held by Cameco Europe.
>
> 5. Assistance in preparing budgets and forecasts, and periodic sales, purchase, inventory and other reports as requested.
>
> 6. Assistance with the drafting of legal agreements pertaining to various marketing transactions entered into by Cameco Europe.

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[177] Mr. Murphy testified that, in compliance with the last line of section 2.1 of the Services Agreement, the Appellant did not conclude contractual terms on behalf of CEL.[256] Mr. Assie testified that neither the Appellant nor Cameco US made decisions regarding the purchase and sale of uranium by CESA/CEL.[257]

[178] Mr. Glattes testified that, although this was not explicitly stated, the services described in Appendix A of the Services Agreement included the making of routine decisions about which of CESA/CEL's inventory would be allocated to uranium sales contracts. However, more important issues would be reported to Bernie Del Frari, who would raise the issues in the sales meetings. Mr. Glattes testified that the role of allocating CESA/CEL's inventory to the sales contracts fell under the general language of item 2 of Appendix A to the Services Agreement and that there was no disagreement between CESA/CEL and the Appellant on this point.[258]

[179] Mr. Murphy testified that, once CESA/CEL had agreed to supply uranium to Cameco US so that Cameco US could fulfil its obligations under a contract with a third party, the contract administrators were expected to deal with the delivery notice from the third party to prepare a delivery notice for CESA/CEL to sign, to prepare a transfer request in favour of Cameco US that was to be issued to the conversion facility were CESA/CEL's uranium was located and to obtain from the conversion facility acknowledgment of the transfer request.[259]

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[256] Lines 8 to 14 of page 2710 of the Transcript.
[257] Lines 3 to 9 of page 514 of the Transcript.
[258] Lines 16 to 28 of page 4124, pages 4125 to 4126 and lines 1 to 2 of page 4127 of the Transcript.
[259] Line 28 of page 2822, page 2823 and lines 1 to 17 of page 2824 of the Transcript.

[180] In an e-mail dated April 17, 2002, Bernie Del Frari stated in response to a query from Mr. Glattes about the fees for the services under the Services Agreement:

> Cameco charges Cameco Europe S.A. for services provided in administering all of the Cameco Europe S.A. purchase and sales contracts and maintaining inventory records and various reporting. Annually, Cameco estimates the cost of providing this service, which is primarily the amount [of] time spent by Contract Administration Department staff in providing these services for Cameco Europe. The Contract Administration Department also provides the same services for Cameco with respect to its marketing contracts and to other Cameco subsidiaries.[260]

[181] Mr. Glattes responded as follows on April 21:

> Thanks for the info. I will talk to our Swiss outside tax advisor as to whether this info is sufficient or whether we need any further evidence, eg time sheets or the like which we obviously want to avoid. I do not have the underlying Adm Agreement here in Germany, but I assume the procedure which you use is in accordance with its terms. Just out of curiosity: Wouldn't it be simpler to base the admin fees [on] the proportionate annual contract value of the companies in respect of which your department is involved in the the [*sic*] contract admin?
>
> I will get back to you following the discussion with the Swiss tax advisor in case I need anything else.

[182] In response to a question from the Respondent's counsel as to why he did not want to keep timesheets, Mr. Glattes stated that it was a matter of simplification of the process and that there was no other reason than being a bit more efficient.[261]

[183] Mr. Glattes was asked if he could recall when CESA paid for the services rendered in 1999 and 2000 and Mr. Glattes stated that his understanding was that payments were made but that he could not recall when the payments were made.[262]

[184] Mr. Murphy testified that he created spreadsheets to monitor various aspects of CEL's operations, including movements in and out of CEL's uranium inventory and the payment of invoices.[263] One of the spreadsheets is titled "DEL NOTICES"

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[260] Exhibit A053066.
[261] Lines 15 to 28 of page 4042 and lines 1 to 17 of page 4043 of the Transcript.
[262] Lines 9 to 28 of page 4135 and lines 1 to 27 of page 4136 of the Transcript.
[263] Lines 15 to 28 of page 2903, lines 1 to 20 of page 2904, lines 26 to 28 of page 2906, page 2907 and line 1 of page 2908 of the Transcript and Exhibit A154366.

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and it lists CEL's purchases, sales and exchanges of inventory from September 15, 2004 to a date after Mr. Murphy retired. The spreadsheet includes the name of the counter-party, the contract date, the contract reference number, the type of notice, the delivery dates, the quantity of uranium delivered, the origin of the uranium, the location at which the delivery took place and the associated invoice number. The spreadsheet also cross-references binders kept at CEL's offices.[264] Counsel for the Appellant asked Mr. Murphy what went into the binders:

> . . . We considered each contract as a separate entity. So within the section of the binder for a contract, we would have the intercompany offer, the contract, any significant correspondence. If the contract needed some type of special approval, that would be in there, transfers of title, delivery notices, invoices. Everything having to do with that contract from the time it started until it terminated would be in the contract file in the binders.[265]

[185] Mr. Murphy testified that CEL would use the information in the spreadsheets and the binders to check the information provided by the contract administrators, who were relied upon to keep track of the same information.[266]

[186] Ms. Klingbiel testified regarding the services provided by TradeTech to uranium industry participants during the period 1999 through 2006.[267] These services included price forecasting, pricing analysis, competitor and industry intelligence, strategic advice, modelling of a client's overall position, market analysis involving the forecasting of worldwide supply and demand, and contract portfolio analysis. Ms. Klingbiel elaborated on the terms "market analysis" and "contract portfolio analysis" as follows:

> . . . Market analysis would involve, really, all of the topics you have just outlined, but it would also include a price forecast and providing input about where we see the market going, what is directing and influencing the price, and it would also include perhaps recommendations about actions that the client should take in terms of their contract portfolio.
>
> . . .
>
> . . . [Contract portfolio analysis] would involve taking their existing contracts and their portfolio and looking at it in terms of, again, not just price, but the overall terms and conditions contained in those existing contracts.

[264] One transaction in 2004 is cross-referenced to a binder. All transactions after June 29, 2005 are cross-referenced. Some of the transactions in the first half of 2005 are cross-referenced.
[265] Lines 4 to 12 of page 2906 of the Transcript.
[266] Lines 8 to 14 of page 2905 of the Transcript.
[267] Lines 2 to 28 of page 1657, pages 1658 to 1672 and lines 1 to 15 of page 1673 of the Transcript.

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> We would look at it in relation to what we expected the market to do in terms of our forecast, and we would make recommendations and provide advice to our clients about how they should proceed, based on that input, in terms of exercising new contracts, exercising flexibilities or options, and a variety of actions that they might take, buying or selling, depending upon the client.[268]

[187] Ms. Klingbiel stated that during the period 1999 through 2006 TradeTech would charge a client between US$300,000 and US$500,000 per year for these services.[269] Ms. Klingbiel stated that the fees were fixed and were not based on the market movement of uranium.[270]

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(12) The Functions Performed by the Contract Administrators

[188] Mr. Wilyman, Mr. Mayers, Ms. McGowan, Mr. Shircliff and Ms. Sperling testified about the functions performed by the contract administrators employed by the Appellant in Saskatoon.

[189] Mr. Wilyman testified that the contract administrators had a portfolio of third-party contracts that they administered and in doing so they worked closely with the sales group in Cameco US. Mr. Wilyman described the annual delivery schedule or delivery notice from a third-party utility as the driver behind the administration of a contract. Specifically, once a binding delivery notice or a schedule was received, the contract administrator would start planning for the delivery of the uranium under the contract. If a third party did not send an annual delivery schedule or a binding delivery notice, the contract administrator would advise the sales group in Cameco US and they would determine who would follow up with the utility.

[190] To make a transfer, the contract administrator would send a transfer notice to the facility where the delivery was to occur and on the day of the transfer the facility would acknowledge that the transfer had been made.

[191] Mr. Wilyman testified that, to his knowledge, a delivery had never occurred without a binding delivery notice having been received by the Appellant and that with third-party deliveries there was always some sort of delivery confirmation by the facility making the transfer.[271] In cross-examination, Mr. Wilyman acknowledged two instances in which he had asked a utility for a past-due binding

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[268] Lines 15 to 21 of page 1672 and lines 4 to 15 of page 1673 of the Transcript.
[269] Lines 11 to 25 of page 1670 of the Transcript.
[270] Lines 5 to 12 of page 1671 of the Transcript.
[271] Lines 6 to 28 of page 5970 and lines 1 to 22 of page 5971 of the Transcript.

delivery notice.[272] In re-examination, Mr. Wilyman clarified that the second example may have been a late annual delivery schedule.[273]

[192] In the following exchange with counsel for the Respondent, Mr. Wilyman described the respective roles of marketing and contract administration:

> Q. So, during this process, generally what sort of interaction would you have with the CCI salespeople?
>
> A. Well, the CCI salespeople would go out and sell the uranium to the end customer. From that, they would start the third-party agreements, and we would work with them and the legal group to finalize those agreements. Once everyone was comfortable that they were ready to be signed, they would typically be sent off to the sixth floor and get the executive group to sign them. Sometimes we would actually walk them up there to the sixth floor and get them to sign them, and then they would go to the sales group in Minneapolis, and they would get the end utilities to sign them.
>
> Once the contract was in place, the contract administration group was charged with administering those agreements and would have interactions with the third-party utilities. If there was anything that came up that was at all contentious, for example, a notice being missed, then typically you would advise the sales group and discuss the path forward to resolving that.
>
> Q. Other than if there was a notice missed, for example, did the CCI sales group take a hands-off approach once a contract had been signed with a third-party utility, or was there more interaction with the contract administrators?
>
> A. I would say that, you know, throughout the process, the sales group worked very closely with the contract administration group and, at times, the inventory group. It depended to some extent, I suppose, on the sales manager themselves and the end utility customer as to – you know, some utility customers were fabulous. They were never late with their notices. They followed those contracts to a T. Others were a little more laid back, I suppose, and you had to chase them down a little bit.
>
> Q. Did it ever occur, for example, that a third-party utility wanted to advance or defer a delivery?
>
> A. Yeah. That did happen from time to time, and sometimes you would get that information from the salespeople, because they would have been contacted first. If it came in, in a notice that sort of caught you off guard, then you immediately

[272] Lines 27 to 28 of page 5991, lines 1 to 27 of page 5992 and lines 11 to 26 of page 5993 of the Transcript and Exhibits A047805 and A044842.
[273] Lines 18 to 28 of page 5997 of the Transcript.

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> would contact the salespeople and have a discussion with them, and more often than not, they would then go to the third-party utility and have that discussion with them.[274]

[193] Counsel asked Mr. Wilyman about intercompany notices:

> Q. Now, you talked about the notices and the transfer requests and delivery confirmations for the third-party utilities. Were the notice provisions for intercompany transactions followed as diligently?
>
> A. No. Initially, when I first started there, they were, you know, a little bit random and haphazard. As time went on, there was more of a push to get that process, you know, sort of in place, and it got better.
>
> You know, I suppose in some ways it was impacted by who was -- who was sort of driving those – the third party or the -- pardon me -- the intercompany transactions. I know when Bill Murphy ended up at Cameco Europe, he was much more diligent in trying to drive those notices, make sure they were on time, and same thing with the intercompany agreements, to make sure that they were completed in a timely fashion.[275]

[194] Mr. Wilyman acknowledged that some of the notices were backdated and that he had backdated notices.[276] He explained the reason for this as follows:

> Q. And why did you do that?
>
> A. Well, it would have been to have the notices be dated within the terms of the contract and, you know, to have, I guess, the appearance that it was filed normally, on time, as you would expect with a third-party notice.
>
> Q. Even though they weren't?
>
> A. Correct.[277]

[195] Mr. Shircliff testified that his role as a contract administrator involved administering third-party contracts, which he described generally as looking after deliveries to customers, preparing notices, preparing invoices and generally abiding by the terms of the contract and ensuring that the contracts were

[274] Lines 2 to 28 of page 5972 and lines 1 to 17 of page 5973 of the Transcript.
[275] Lines 18 to 28 of page 5973 and lines 1 to 5 of page 5974 of the Transcript.
[276] Lines 6 to 10 of page 5974 of the Transcript.
[277] Lines 11 to 18 of page 5974 of the Transcript.

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fulfilled.[278] Eventually, he also looked after some of the administration of the bulk sale contracts.[279]

[196] Counsel for the Respondent asked Mr. Shircliff about an e-mail he sent to Mr. Glattes on January 25, 2001 which stated:

> I just spoke with Bernie and he informed me that Nufcor was looking for CSA to purchase the conversion material at USEC on March 19, 2001 rather than April 1, 2001. He asked that I get in contact with you to let you know if this was OK. From my estimates there should be no logistical or governmental problems with Nufcor's request.[280]

[197] Mr. Shircliff testified that this was an example of his deciding on the delivery date under an intercompany contract. Mr. Shircliff testified that generally he would discuss with Bernie Del Frari and Doug Zabolotney any third-party request for a delivery date and decide whether the date was acceptable. If it was accepted, he would make the recommendation to CESA/CEL.[281] Mr. Shircliff testified that the recommendation was not always accepted by CESA/CEL but he could not recall a specific example of non-acceptance.[282]

[198] Mr. Shircliff testified that he would make recommendations to CESA/CEL regarding the placement of Russian source uranium. He did not recall the details of what happened next but, if the recommendation was approved, the HEU feed would end up being delivered to the end-user.[283] He agreed with counsel that the binding delivery notices from third-party customers would determine the dates in the binding delivery notices issued by CESA/CEL to Tenex.[284]

[199] Mr. Mayers described his role as a contract administrator as follows:

> Cameco Corp. had contracts with utility companies around the world, and within those contracts were notice provisions, both that had to be given and had to be received. And, as a contract administrator, it was my job to make sure that any notices that had to be given were given, any notices that were due to be received were received on time and accurate to the contract, as well as provide notices to the next stage.

[278] Lines 7 to 28 of page 5851 and line 1 of page 5852 of the Transcript.
[279] Lines 2 to 8 of page 5852 of the Transcript.
[280] Exhibit A030950.
[281] Lines 23 to 28 of page 5871, pages 5872 to 5873 and lines 1 to 4 of page 5874 of the Transcript.
[282] Lines 5 to 16 of page 5874 of the Transcript.
[283] Lines 8 to 18 of page 5876, lines 7 to 28 of page 5882 and line 1 of page 5883 of the Transcript and Exhibit A114418.
[284] Lines 15 to 28 of page 5883 and lines 1 to 4 of page 5884 of the Transcript.

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> The facility in the next stage is a fuel cycle, whether that was a conversion facility or an enrichment facility, to transfer any uranium or any product that was being sold under the contract, as well as issuing the invoice to the client.[285]

[200] Mr. Mayers testified that the contract administration process began with a non-binding delivery notice or schedule from the utility. If there was a corresponding intercompany contract, then a corresponding intercompany notice was required to be issued. The second step was the receipt of a binding delivery notice from the utility. Again, if there was a corresponding intercompany contract, then a corresponding intercompany notice was required to be issued. The third step was the receipt of a transfer request from the utility, which in turn required the issuance of a transfer notice to the facility where the transfer was to take place. The fourth step was the receipt of a confirmation notice from the facility. The fifth step was the issuance of an invoice to the utility.[286]

[201] Mr. Mayers testified that he would faithfully follow these steps for third-party contracts and that typically the same process was followed for intercompany contracts.[287] Mr. Mayers did not recall specific instances where intercompany notices were missed but he did recall one instance in which a notice under a purchase and sale agreement between CESA/CEL and the Appellant was backdated, although he did not recall why.[288]

[202] Mr. Mayers testified that, as a contract administrator, he would rarely contact a utility directly but that when he did it would typically have been about an upcoming deadline for a notice or possibly the reliability of a non-binding notice.[289] Mr. Mayers did not call the transfer facilities (i.e., the conversion or enrichment facilities) as a contract administrator, but he did as an inventory administrator.[290] He described his role as an inventory administrator as follows:

> That was looking at the Cameco group of company commitments and making sure that the right inventory of the right origin of the right obligation was at the right place at the right time.[291]

[203] Mr. Mayers testified that the inventory was addressed on a consolidated basis.[292] The information in the non-binding notices was consolidated in three

[285] Lines 8 to 20 of page 5634 of the Transcript.
[286] Lines 21 to 28 of page 5634, page 5635 and lines 1 to 26 of page 5636 of the Transcript.
[287] Lines 27 to 28 of page 5636 and lines 1 to 15 of page 5637 of the Transcript.
[288] Lines 16 to 28 of page 5637 and lines 1 to 13 of page 5638 of the Transcript.
[289] Lines 14 to 26 of page 5638 of the Transcript.
[290] Lines 27 to 28 of page 5638 and lines 1 to 6 of page 5639 of the Transcript.
[291] Lines 12 to 15 of page 5639 of the Transcript.

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spreadsheets–one for each of the Appellant, Cameco US and CEL.[293] Mr. Mayers described the spreadsheets as follows:

> . . . Across the top of the spreadsheet was the origins and obligations, and then along the side was a calendar, January, February, March. And under each monthly heading would have been the one "Incoming Shipment" or "Expected Incoming Shipment," "Expected Incoming Purchases," "Expected Incoming Transfers," and then our expected outgoings, so the debits and credits. It worked like a bank account.[294]

[204] Mr. Mayers testified that it was normal that there would be insufficient inventory at a particular facility to meet the delivery obligations set out in the non-binding notices.[295] The solution was to physically ship inventory from a Cameco Group facility, to purchase inventory or to exchange inventory. Mr. Mayers did not recall shipping inventory for CEL.[296]

[205] Mr. Mayers described an exchange as one entity exchanging inventory at one facility for inventory of another entity at another facility. He explained that this was possible because the inventory was fungible. The entity doing the exchange could be a Cameco Group entity or a third party. Mr. Mayers testified that he would recommend a course of action to Mr. Glattes or Mr. Bopp and that they would always accept his recommendation. Mr. Mayers did not recall a circumstance in which CEL initiated an exchange, or a circumstance in which CEL had to purchase uranium but no contract was in place to allow for that purchase, or a circumstance in which CEL initiated the suggestion to purchase from a third party.[297]

[206] Mr. Mayers described how he decided to allocate inventory to particular contracts:

> Well, the first thing you would do would be to go to the contract to find out what the parameters were. Some contracts were very specific, whereas, if it was a conversion deal and you were delivered a certain origin of U3O8 feed material, that origin had to be delivered back in the form of UF6. So you always had to work within the confines of the contract.

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[292] Lines 16 to 19 of page 5639 of the Transcript.
[293] Lines 21 to 26 of page 5640 of the Transcript.
[294] Lines 4 to 11 of page 5641 of the Transcript.
[295] Lines 15 to 19 of page 5641 of the Transcript.
[296] Lines 20 to 28 of page 5641 and lines 1 to 11 of page 5642 of the Transcript.
[297] Lines 12 to 28 of page 5642, lines 1 to 13 of page 5643, lines 23 to 28 of page 5644 and lines 1 to 22 of page 5645 of the Transcript.

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> With respect to placement of the HEU, you were confined by the Department of Commerce antidumping laws and quotas that were put on to deliver to -- to the U.S. utilities at that location.[298]

[207] Mr. Mayers testified that it was contemplated from the outset that CESA/CEL would purchase more Russian source UF_6 (HEU) than the United States import quotas would allow into the United States. To address this, he would try to place the UF_6 with utilities located outside the United States such as utilities in Japan. Initially, Canadian utilities did not obtain enrichment services at USEC so selling to those utilities was not an option. However, that changed at some unspecified later date. The excess Russian source UF_6 remained in CESA/CEL's inventory until it was placed.[299]

[208] Mr. Mayers testified that he made the decision of how and where to place CESA/CEL's Russian source UF_6. The HEU feed would be delivered to either Cameco US or the Appellant, depending upon the structure of the contracts. The HEU feed would either be delivered to the Appellant, if it was being used for intercompany purposes, or be sold to Canadian utilities.[300] Counsel for the Respondent asked Mr. Mayers on several occasions whether he made decisions regarding the purchase or sale of inventory and Mr. Mayers consistently responded that he made recommendations and was not the decision-maker.[301]

[209] Ms. McGowan appeared unable to recall many of the details of her time with the Cameco Group and to address this I granted leave to counsel for the Respondent to ask leading questions under subsection 144(4) of the Rules. Ms. McGowan testified that the contract administration group did make decisions regarding the allocation of inventory to meet contractual obligations and that this was sometimes based on trading profits. As to what specific factors were considered with regard to trading profits, Ms. McGowan's only firm recollection was that transportation expenses were a factor. She did not recall whether placing profits in Switzerland was a factor.[302] Ms. McGowan testified that the contract administration group prepared monthly schedules that would show the inventory

[298] Lines 20 to 28 of page 5649 and lines 1 to 2 of page 5650 of the Transcript.
[299] Lines 3 to 28 of page 5650 and lines 1 to 14 of page 5651 of the Transcript.
[300] Lines 15 to 28 of page 5651 and lines 1 to 10 of page 5652 of the Transcript.
[301] Lines 8 to 12 of page 5645, lines 23 to 28 of page 5657, line 1 of page 5658, lines 24 to 28 of page 5658 and lines 4 to 8 of page 5662 of the Transcript and Exhibits A145965, A188257 and A193448.
[302] Lines 8 to 28 of page 5371, page 5372 and lines 1 to 26 of page 5373 of the Transcript.

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available to each entity at each location and that these schedules would be used to allocate inventory.[303]

[210] Ms. McGowan testified to the effect that the Cameco Group had an inventory policy as of 2003 and that one of her roles was to manage, report on, and monitor the Cameco Group's inventory in accordance with the policy.[304] Ms. McGowan agreed with counsel for the Respondent that she had been asked by Mr. Murphy on two occasions to provide CEL with its purchase commitments,[305] that she provided Mr. Murphy with summaries of CEL's purchases of conversion services,[306] that she provided CEL with monthly contract balance statements,[307] that she provided CEL with forecasts of intercompany transactions[308] and that she provided CEL with quarterly inventory reports.[309] Ms. McGowan also reviewed the statements of inventory balance received from the facilities holding the inventory for CEL[310] and prepared revenue forecasts for CEL that included a budget and a three-year business plan.[311]

[211] Ms. McGowan testified that book transfers of inventory among Cameco Group companies would not be entered into the Paradox system that produces the inventory allocation and acquisition schedule but that a spreadsheet was used to keep track of the transfers.[312] A revision or reversal of a transfer would require a new book transfer request before being entered on the spreadsheet.[313] A transfer would be recorded internally as a transfer between the accounts of the transferor and transferee, but no third-party would be notified of the transfer.[314]

[212] In cross-examination, counsel for the Appellant took Ms. McGowan to an e-mail in which she had stated that each month she would provide Mr. Glattes with a three-month rolling forecast of CEL's purchases, exchanges and sales. Ms. McGowan testified that the e-mail accurately described her practice and that Exhibit A004278 was an example of such a forecast provided to CEL.[315]

[303] Lines 4 to 24 of page 5378 of the Transcript.
[304] Lines 12 to 25 of page 5375 of the Transcript and Exhibit A038309.
[305] Page 5386 and lines 1 to 14 of page 5387 of the Transcript and Exhibits A187105 and A187123.
[306] Lines 26 to 28 of page 5388 and lines 1 to 21 of page 5389 of the Transcript.
[307] Lines 4 to 17 of page 5390 of the Transcript and Exhibit A041953.
[308] Line 28 of page 5390, page 5391 and lines 1 to 16 of page 5392 of the Transcript.
[309] Lines 14 to 23 of page 5396 of the Transcript.
[310] Lines 24 to 28 of page 5396 and lines 1 to 3 of page 5397 of the Transcript.
[311] Lines 1 to 6 of page 5398 of the Transcript.
[312] Lines 21 to 28 of page 5393, page 5394 and lines 1 to 19 of page 5395 of the Transcript.
[313] Lines 20 to 28 of page 5395 and lines 1 to 8 of page 5396 of the Transcript.
[314] Lines 13 to 28 of page 5407, page 5408 and lines 1 to 3 of page 5409 of the Transcript.
[315] Lines 4 to 28 of page 5463, pages 5464 to 5465 and lines 1 to 14 of page 5466 of the Transcript.

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Ms. McGowan testified that the trading reports were available in "Contact!" as of June 2002.[316]

[213] Ms. Sperling testified that the job description in her 2004 Job Information Questionnaire ("JIQ") described the role of all contract administrators.[317] The job summary on page two of the JIQ states:

> Responsible for managing a broad portfolio of short, medium, and long term uranium sales and related marketing agreements, generating revenues in excess of C$600 million annually (C$700 million in 2003), with a world-wide base of customers. Provide an interface with Cameco's customers, our Marketing Sales team, Legal Department, Fuel Services, and external regulatory bodies in order to co-ordinate deliveries of uranium, ensure that all contractual provisions are fulfilled and that Cameco's revenues are invoiced and collected.[318]

[214] Ms. Sperling summarily described her role by stating that she "administered contracts".[319]

[215] Ms. Sperling testified that it was not her role to decide whether a specific delivery should be made. However, she agreed with counsel for the Respondent that from an e-mail she had sent to Tim Gabruch on September 8, 2000 it appeared that she did make such a decision even though she should not have.[320] In the same e-mail chain, Tim Gabruch sends an e-mail to Scott Melbye in which he states:

> I think we should discuss this next week. I believe everything here is within Urenco's contractual rights, however, what worries me is [that] Rita did not discuss this with anyone before taking care of everything with Don. The rogue contract administrator strikes again. I spoke to Rita briefly to try and impress that someone (anyone!) should be brought into the loop even on little matters like this before she agrees to any request by a customer.[321]

[216] Mr. Gabruch testified that Ms. Sperling was not really agreeing to a sale because the contract was a "requirements-based" contract and therefore Urenco was entitled to request the additional material even if there was a bit of a timing issue. He also testified that he was not aware of another instance in which a

[316] Lines 3 to 13 of page 5469 of the Transcript and Exhibit A036976.
[317] Lines 6 to 28 of page 5681 and lines 1 to 4 of page 5682 of the Transcript.
[318] Exhibit A154363.
[319] Lines 19 to 24 of page 5684 of the Transcript.
[320] Lines 20 to 28 of page 5731, pages 5732 to 5733 and lines 1 to 22 of page 5734 of the Transcript and Exhibit A107147.
[321] Exhibit A107147.

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contract administrator agreed to an extra delivery or made a sale to a third-party utility without advising or consulting with a Cameco US salesperson.[322]

(13) Other Contractors and Employees

[217] In addition to being questioned regarding MeesPierson Trust and Mr. Bopp, Mr. Glattes was asked about two other consultants to CEL and one employee of a subsidiary of CEL.

[218] Counsel for the Respondent asked Mr. Glattes about two agreements between the Appellant and Resource Strategy Associates Inc. ("RSAI"), both made effective November 22, 1999.[323] Thomas Neff is the principal of RSAI. The Appellant guaranteed CESA's performance under both agreements.[324]

[219] Counsel for the Respondent took Mr. Glattes to two pieces of correspondence from Mr. Neff. The first piece of correspondence is an e-mail from Mr. Neff to George Assie, with a copy to Gerald Grandey, sent May 14, 2004. The e-mail states that "Attached is our annual UF6 Feed Component Consulting Report for 2003." Mr. Glattes did not recall if he received a copy of the report but he stated that he was familiar with the subject.[325]

[220] The second piece of correspondence is a letter dated March 4, 2004 from Mr. Neff to George Assie regarding the "RSA-Cameco HEU Feed Component Variable Compensation Agreement".[326] Mr. Glattes did not know why this letter was addressed to Mr. Assie.[327] Counsel asked Mr. Glattes about the following excerpt from the letter:

> Finally, we need to clarify lines of reporting. Our Agreement calls for us to report to Cameco Europe, with copies to the Executive Vice-President of Cameco in Saskatoon. This is, in part, a contractual issue as the Agreement is technically between Cameco Europe and RSA (though Cameco Corporation guarantees performance).
>
> In the past, our understanding has been that our reports would be sent by Cameco Corporation to Cameco Europe as deemed necessary by Cameco Corporation. We

[322] Lines 5 to 28 of page 5832 and line 1 of page 5833 of the Transcript.
[323] Lines 18 to 28 of page 4318, lines 1 to 5 and 18 to 21 of page 4319 of the Transcript and Exhibits A004123 and A004124.
[324] Lines 9 to 28 of page 4320 and lines 1 to 5 of page 4321 of the Transcript and Exhibits A004448 and A000449.
[325] Lines 5 to 15 of page 4324 of the Transcript.
[326] Exhibit A040299.
[327] Lines 26 to 28 of page 4324 and lines 1 to 4 of page 4325 of the Transcript.

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> should probably formalize this arrangement if you wish to continue in this manner.[328]

[221] Mr. Glattes testified that he had long-standing contact with Mr. Neff, that he was not aware of the issue identified in the letter and that he was not aware of any agreement with Mr. Neff regarding reporting other than the agreement in the contract between CESA and RSAI.[329]

[222] Counsel for the Respondent asked Mr. Glattes about a consulting agreement between CEL and Alexander Chvedov. Mr. Glattes agreed with counsel that the Appellant had entered into this contract on behalf of CEL. Mr. Glattes testified that the process was not initiated by CEL but that "we were all along informed and aware what's going on".[330]

[223] Counsel took Mr. Glattes to an e-mail from Mr. Bopp indicating that the Appellant had reached an agreement with Mr. Chvedov on behalf of CEL without the knowledge of Mr. Murphy, Mr. Glattes or Mr. Bopp. Mr. Glattes agreed with Mr. Bopp's comment that the Appellant entering into agreements over CEL's head was "not really good" but maintained that he was aware that there was an arrangement with Mr. Chvedov, possibly because it was mentioned during a phone call by Mr. Grandey or Mr. Newton. Mr. Glattes noted that by October 2004 he was no longer in Zug and therefore his suggestion in his response to Mr. Bopp that he was not aware of the contract may have been a miscommunication.[331]

[224] The final arrangement was with Paul Green. Mr. Glattes testified that Mr. Green was previously employed by British Nuclear Fuels Limited ("BNFL") and was experienced in the "whole conversion area". It was decided that it made sense for Mr. Green to be employed by a Luxembourg subsidiary of CEL.[332]

[225] Mr. Glattes was asked whether giving substance to the Luxembourg entity was a reason for placing Mr. Green in the Luxembourg subsidiary and Mr. Glattes responded that substance was a "side aspect" and that Swiss social security issues drove the decision. Counsel took Mr. Glattes to an e-mail from Randy Belosowsky dated April 27, 2006 in which Mr. Belosowsky stated, in part, "[t]here may, however, be a substance benefit" to having Mr. Green employed by the Luxembourg corporation. Mr. Glattes testified that the substance point raised by

[328] Exhibit A040299.
[329] Lines 5 to 25 of page 4325 of the Transcript.
[330] Lines 25 to 28 of page 4404 and lines 1 to 13 of page 4405 of the Transcript.
[331] Lines 14 to 28 of page 4405, page 4406 and lines 1 to 17 of page 4407 of the Transcript and Exhibit A145222.
[332] Lines 18 to 28 of page 4407, page 4408 and lines 1 to 3 of page 4409 of the Transcript.

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Mr. Belosowsky related to the withholding tax issue with respect to the Luxembourg corporation and CEL, and he agreed with counsel that substance meant "carrying on activities, et cetera".[333]

(14) The Sales of Uranium by the Appellant to CESA/CEL

[226] Mr. Glattes testified that the initial proposal considered in the summer of 1999 was for CESA to enter into two agreements with the Appellant: one spot purchase agreement for part of the Appellant's existing inventory and one long-term agreement for the purchase of the Appellant's future uncommitted uranium production.[334] A draft long-term agreement with a fax transmission date of August 3, 1999 was prepared and the management committee of CESA authorized Mr. Glattes to finalize and arrange for the signing of the contract. However, the contract was not signed.[335] Neither Mr. Glattes nor Mr. Goheen was able to recall why the draft long-term agreement was not signed.[336]

a) The Sale to CESA of the Appellant's Existing Inventory

[227] CESA/CEL and the Appellant entered into a total of ten spot sale contracts between October 25, 1999 and November 22, 2002 (I will refer to these ten contracts collectively as the "Spot Sale Contracts").[337] The first nine of these contracts were entered into in 1999, 2000 or 2001 and effected the sale of the existing inventory of the Appellant to CESA (I will refer to these nine contracts as the "Inventory Sale Contracts"). The deliveries under these nine contracts totalled 9.25 million pounds of U_3O_8. These deliveries were completed by the end of 2002. The following table summarizes the key terms of the Inventory Sale Contracts:

Exhibit #	Date	Quantity (lb)	Price (US $)	Year Delivered
A004807	25/10/1999	500,000	9.75	1999
A166897	30/11/1999	450,000	8.75	1999
A020785	01/01/2000	1,000,000	95% of Nuexco market value	2000
A020824	20/07/2000	500,000	8.65	2000
A020836	15/11/2000	1,500,000	Average of Ux	2001

[333] Lines 4 to 28 of page 4409 and lines 1 to 18 of page 4410 of the Transcript and Exhibit A186308.
[334] Lines 6 to 24 of page 4245 of the Transcript.
[335] Lines 9 to 11 of page 4247 of the Transcript and Exhibits A015649 and A008188.
[336] Lines 12 to 25 of page 4247 and lines 1 to 5 of page 4662 of the Transcript. In addition, Mr. Goheen could not recall why the spot purchase agreement was not executed.
[337] The Spot Sale Contracts are Exhibits A004807, A166897, A020785, A020824, A020836, A020859, A020961, A153626, A020969 and A164484.

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			and Nuexco market price indices (MPIs)	
A020859	15/11/2000	800,000	Lowest of MPIs in the 6 months before delivery[338]	2000
A020961	22/2/2001	500,000	7.05	2001
A153626	27/3/2001	2,000,000[339]	7.15	2002
A020969	04/04/2001	2,000,000	7.50	2001

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[228] The tenth Spot Sale Contract was entered into in 2002 and provided for the delivery on December 2, 2002 of 227,322 kgU of Russian-origin UF_6 at a price per kgU of US $30.00.[340] Mr. Assie did not know whether the Russian source UF_6 sold by the Appellant to CESA under this contract had been acquired by the Appellant from CESA, and no other witness was asked about the contract.[341]

[229] Mr. Assie was asked by counsel for the Respondent about the timing of the Inventory Sale Contracts and why the Appellant's uranium inventory was not sold to CESA immediately after the reorganization was completed. Counsel pointed to an e-mail from Mr. Goheen to Mr. Assie and Mr. Del Frari dated September 5, 2000, in which Mr. Goheen stated, in part:

> The underlying principle behind Cameco Europe is that CE is to purchase all available inventory from Cameco asap. We've let this slide, prudently as it has turned out, because of the concern for prices continuing to decline.
>
> Do you expect prices to fall further?[342]

[230] Mr. Assie testified that it was never his understanding that the Appellant's inventory had to be sold to CESA on day one, and that a single sale of 10 million pounds of U_3O_8 would have been completely unrelated to anything going on in the market and would have commanded a huge discount. Mr. Assie testified that Cameco US was to advise CESA, as a trader, as to when to be purchasing uranium and that the idea was to move the inventory within a reasonable period of time on

[338] The contract specifies the lowest month-end spot price for U_3O_8 in the six months prior to delivery.
[339] The total quantity of 2,000,000 lb was to be delivered in four tranches of 500,000 lb each: Schedule A of Exhibit A153626.
[340] Exhibit A164484.
[341] Lines 6 to 28 of page 960 and lines 1 to 11 of page 961 of the Transcript.
[342] Exhibit A060571.

terms that would generally reflect the market, although to expedite the transfer of the inventory the volumes were sometimes above market levels.

[231] Mr. Assie testified that, in the period following the reorganization, uranium prices were falling rapidly and CESA was not anxious to simply take 10 million pounds of UF_6 at what was generally perceived as being a high point in the market. He stated that averaging the price over a reasonable period of time "seemed like a logical thing to do."[343]

[232] Counsel for the Respondent also asked Mr. Goheen about his e-mail. Mr. Goheen testified that he was not involved in making decisions regarding the timing of sales and that his e-mail was an attempt to politely prod a peer in management to implement the agreements selling the Appellant's uranium inventory to CESA. Mr. Goheen acknowledged that he must have been informed that the expectation at the time was that uranium prices would be falling but since he had no knowledge of this himself he was simply making an inquiry to determine what was going on.[344]

[233] Counsel for the Respondent asked Mr. Goheen if the danger everyone wanted to avoid was selling the Appellant's inventory to CESA at a price above what CESA would earn when selling the uranium to Cameco US. Mr. Goheen stated that there was always a danger, when one relied on a forecast, that the price of uranium would fall after CESA acquired the inventory.[345]

b) The Sale to CESA/CEL of the Appellant's Uncommitted Uranium Production

[234] CESA/CEL and the Appellant entered into a total of thirteen long-term agreements between October 25, 1999 and August 20, 2004 under which the Appellant agreed to sell uranium to CESA/CEL (I will refer to these thirteen agreements collectively as the "Long-term Contracts").[346]

[235] Mr. Assie testified that the Long-term Contracts were a means to sell all the Appellant's uncommitted uranium production to CESA.[347] The number of Long-

[343] Lines 17 to 28 of page 742 and lines 1 to 21 of page 743 of the Transcript.
[344] Pages 4669 to 4670 and lines 1 to 23 of page 4671 of the Transcript.
[345] Lines 24 to 28 of page 4671 and line 1 of page 4672 of the Transcript.
[346] The thirteen Long-term Contracts are Exhibits A004808, A022414, A153564, A153597, A153609, A153615, A153624, A153633, A153642, A153695, A163425, A162970 and R-001399.
[347] Lines 4 to 28 of page 361 and lines 1 to 6 of page 362 of the Transcript. See also the testimony of Mr. Goheen at lines 2 to 28 of page 4514 and lines 1 to 14 of page 4515 of the Transcript, reproduced above.

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term Contracts was influenced by the fact that the participants at the twice-weekly sales meetings did not want to enter into 15 or 20 agreements per year but did want to be able to rely on what they knew was taking place in the market between arm's length parties. This placed a cap on the volumes that could be sold under a single contract.[348] Mr. Assie testified that the idea was to make the volumes comparable to what larger utilities could handle.[349]

[236] Nine of the Long-term Contracts provided for deliveries of uranium by the Appellant in one or more of the Taxation Years. These nine agreements were entered into between October 25, 1999 and April 30, 2001 (I will refer to these nine Long-term Contracts collectively as the "BPCs" and individually as a "BPC").[350]

[237] Mr. Assie, Mr. Glattes and Mr. Murphy testified that the terms of the BPCs were discussed and settled during the sales meetings.[351] No notes or e-mails were exchanged regarding the terms of the BPCs.[352]

[238] Mr. Glattes signed all but one of the Long-term Contracts for CESA/CEL. Mr. Murphy signed one of the Long-term Contracts—Exhibit R-001399—for CEL shortly after his appointment as president of CEL in August 2004. Mr. Murphy relied on Mr. Glattes to confirm the terms of the agreement prior to signing the contract.[353]

[239] The following table summarizes the key terms of the BPCs prior to any amendments:[354]

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[348] Lines 14 to 28 of page 362 and lines 1 to 28 of page 363 of the Transcript.
[349] Lines 13 to 24 of page 374 of the Transcript.
[350] Lines 20 to 28 of page 360 and lines 1 to 3 of page 361 of the Transcript. The nine BPCs are Exhibits A004808, A022414, A153564, A153597, A153609, A153615, A153624, A153633 and A153642.
[351] Lines 20 to 27 of page 360, lines 20 to 28 of page 369, line 1 of page 370, lines 1 to 19 of page 820, lines 7 to 15 of page 907, lines 19 to 28 of page 2760, lines 1 to 4 of page 2761, lines 6 to 14 of page 3079, lines 5 to 16 of page 3600, lines 5 to 8 of page 3604, lines 23 to 28 of page 3605, page 3606, lines 1 to 4 of page 3607, lines 23 to 28 of page 3613 and lines 1 to 17 of page 3614 of the Transcript.
[352] Lines 7 to 28 of page 907 and line 1 of page 908 of the Transcript.
[353] Lines 1 to 15 of page 340, lines 25 to 28 of page 3119 and lines 13 to 16 of page 3120 of the Transcript.
[354] The price in PO 7037 is per kgU of UF_6. This translates into $7.21, $8.08, $8.46, $10.47 and $11.23 per pound of U_3O_8 equivalent. For Contract PO 7040, the market price ceiling for 2005, 2006 and 2007 of $12.50 is subject to an escalation factor.

Contract PO	Date	Exhibit No.	Term	Option Year(s)	Quantity per Year (lbs)*	Quantity Flex	Pricing Mechanism	Ceiling if MP	Base Price
6920	Oct 25/99	A004808	2002-2007	2008, 2009	300,000	+/- 25%	BEP		$11.00
6957	May 03/00	A022414	2003-2007	2008, 2009, 2010	1,500,000	+/- 30%	MP	$12.00	
6958	Nov 24/00	A153564	2001-2005	2006, 2007, 2008	2001 1,000,000 2002-2005 3,000,000 2006-2008 3,000,000	+/- 30%	BEP		$9.00
7015	Nov 24/00	A153597	2003-2007	2008, 2009	1,500,000	+/- 20%	BEP		$8.75
7037	Feb 22/01	A153609	2002-2005	2006	200,000 kgU	+/- 25%	Fixed		2002 $22.50 2003 $24.75 2004 $25.75 2005 $31.00 2006 $33.00
7040	Mar 27/01	A153615	2002-2005	2006, 2007	2002 2,000,000 2003 3,000,000 2004 3,000,000 2005 2,000,000 2006 2,000,000 2007 2,000,000	+/- 20%	MP	2002 $11.00 2003 $12.00 2004 $12.50 2005 $12.50 2006 $12.50 2007 $12.50	
7041	Mar 27/01	A153624	2003-2008	2009, 2010	2003 3,000,000 2004 3,000,000 2005 4,000,000 2006 4,000,000 2007 5,000,000 2008 5,000,000 2009 3,000,000 2010 3,000,000	+/- 20%	BEP		2003 8.25 2004 $8.25 2005 $8.25 2006 $8.25 2007 $8.25 2008 $8.25 2009 $11.00 2010 $11.00
7047	Apr 03/01	A153633	2003-2007	2008, 2009	2,500,000	+/- 20%	35% BEP 35% MP (Dis 5%) 30% (Lesser of BP or MP)	$12.00	$8.25
7060	Apr 30/01	A153642	2005-2008	2009, 2010	4,000,000 * unless stated otherwise	+/- 20%	35% BEP 35% MP (Dis 5%) 30% (Lesser of BP or MP)	$12.00	$8.50

[240] One of the BPCs uses a fixed price, four use base escalated pricing (BEP) mechanisms, two use market based (MP) pricing mechanisms and two use a combination of base escalated and market based price mechanisms.

[241] Mr. Assie was asked by the Appellant's counsel how the mix of pricing mechanisms in the BPCs fit with the Cameco Group's target of 60 percent market-related and 40 percent base escalated pricing:

> Q. How does that square with the 60 percent market, 40 percent base escalated target that you mentioned, I think, yesterday?
>
> A. Right. So the target of the 60 percent market related, 40 percent base escalated, that was the target that the Cameco group had in respect of material that it would ultimately place with utilities. The ratio here of two-thirds/one-third as opposed to 40/60, I believe, was much more reflective of what was happening in the market. It was more a case that more utilities were interested in base-escalated contracts than in market-related contracts. And Cameco Europe, as a purchaser, was much

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> more interested in fixed-price contracts or base escalated contracts than market-related contracts.[355]

[242] Counsel for the Appellant asked Mr. Assie why CESA/CEL and the Appellant did not use the Appellant's price forecasts to establish the prices in the BPCs:

> Q. . . . Why didn't Cameco Corp. and Cameco Europe use the pricing that corresponded to Cameco's own forecasts?
>
> A. Well, you're not able to sell based on forecasts. So it wasn't a case of saying, "Oh, gee, our forecast was 15, so we'll sell at 15." Then you're not going to sell any uranium.[356]

[243] Counsel for the Respondent asked Mr. Assie whether anyone looked at the Appellant's cost of production and Mr. Assie responded:

> No. Typically what people looked at was the market forecasts. We're not in an industry that allows you to sell based on your cost of production.[357]

[244] Subsequently, Mr. Assie testified that the people negotiating the BPCs did look at market price indicators published by TradeTech and Ux but did not look at the Appellant's own forecasts.[358] Mr. Assie provided the following reason for not using the Appellant's forecasts:

> . . . Our forecasts were forecasts of future market prices. They were not prices that anybody would -- I mean, if you were going to contract at those prices, they would only contract on a market-related mechanism, not on a base-price mechanism at those prices.[359]

[245] Mr. Assie testified that the terms and pricing in the Urenco transaction had some influence in determining the terms and conditions of the BPCs, taking into account the unique aspects of the Urenco transaction, such as the fact that the uranium was the equivalent of natural uranium delivered in Europe as UF_6 and,

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[355] Lines 2 to 15 of page 375 of the Transcript.
[356] Lines 18 to 24 of page 377 of the Transcript. Timothy Gabruch made a similar comment regarding the relationship between price expectations and the market for uranium: lines 15 to 28 of page 5768 and lines 1 to 8 of page 5769 of the Transcript.
[357] Lines 16 to 21 of page 909 of the Transcript.
[358] Lines 23 to 28 of page 910 and lines 1 to 7 of page 911 of the Transcript.
[359] Lines 7 to 11 of page 911 of the Transcript.

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unlike the Appellant's uranium production, was not legal for sale in the United States.[360]

[246] Counsel for the Respondent asked Mr. Assie if the HEU Feed Agreement was considered and Mr. Assie responded:

> No. You know, that agreement was -- well, I mean, it's -- given the way that agreement was ultimately -- or the timing of which it was finalized, et cetera, you know, I guess it would have been informative to some degree in -- where was it -- the fall of 2001 when it was finalized, but it was a unique transaction as well.
>
> So I don't want to say that it didn't influence our thinking, and it clearly influenced market prices. But to say that we took that agreement and said, "Okay. Yeah, that's the price, you know, at which we should do a bulk purchase agreement," I don't think that's the case.
>
> I guess the point I am trying to make is we took into account everything that was occurring in the market, and it was not a situation where you could say, "Okay. Well, here, we can point to this, you know -- like, like here's a deal that -- all the exact terms." We're not in that sort of a market. So it was a case of coming up with what we believed represented a reasonable transaction between arm's-length parties.[361]

[247] Mr. Assie testified that no analysis of the Appellant's profit was undertaken because "the market is the market. Frankly, buyers don't care what your profit margin is."[362]

[248] Counsel for the Respondent asked Mr. Assie why the duration of the BPCs extended past 2004 when the marketing strategy at the time was to limit sales to third parties to before 2005. Mr. Assie responded that the marketing objective was to limit the term of contracts to before 2005 if possible but that strategy was not always successful. With respect to the BPCs, the understanding was that the terms had to reflect contracts between arm's length parties.[363] Similarly, the prices used in the BPCs were intended to reflect the market at the time.[364]

i. The Flex Options under the BPCs

[360] Lines 12 to 27 of page 911 of the Transcript.
[361] Lines 3 to 22 of page 912 of the Transcript.
[362] Lines 23 to 28 of page 912 and line 1 of page 913 of the Transcript.
[363] Lines 22 to 28 of page 917 and lines 1 to 16 of page 918 of the Transcript.
[364] Lines 21 to 28 of page 918 and lines 1 to 13 of page 919 of the Transcript.

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[249] All of the BPCs included flex options which ranged from plus or minus 20% to 30% of the quantity deliverable under the contract.

[250] Counsel for the Respondent presented Mr. Assie with a schedule indicating that in 2005 the maximum deliverable quantity of uranium under the BPCs was just under 23 million pounds.[365] Mr. Assie testified that he did not recall looking at an analysis of the Appellant's production forecasts, at the time the BPCs were negotiated, to determine if this quantity would be available. He testified that the Appellant had never had production issues to that point in time (2001) and the production plans would have been taken at face value. He agreed it was reasonable to assume that expected production would have included some production from the Cigar Lake mine.[366]

[251] Counsel for the Respondent asked Mr. Assie why the flex options in the BPCs were 20 to 30 percent of the contract volume when the marketing strategy at the time was to hold flex options to 15 percent of contract volume. Mr. Assie responded that at the time volume was king and that in high-volume contracts such as the BPCs the buyer could reasonably expect flex options in the range of 20 percent to 30 percent. Mr. Assie referenced the flex options in an August 2001 contract with Exelon, which was 20 percent.[367]

[252] With respect to the exercise of the flex options, Mr. Assie testified that at times the decision whether to exercise a flex option would be discussed but that the general understanding was that if the price under the BPC was reasonably expected to be below the market price at the time of delivery then the upward flex option would be exercised by CESA/CEL. If it was a close call, then the contract administrators would check with Cameco US and CESA/CEL.[368]

[253] Mr. Assie identified a fax dated October 2, 2001 in which he had made recommendations to Mr. Glattes regarding the exercise of flex options under three of the BPCs and an e-mail from Mr. Glattes dated October 4, 2001 in which Mr. Glattes indicated acceptance of the recommendations.[369] In cross-examination, Mr. Assie testified that he did not recall whether he gave written recommendations regarding flex options on other occasions but that the topic was something that

[365] Lines 7 to 11 of page 914 of the Transcript.
[366] Lines 8 to 28 of page 913, pages 914 to 915 and lines 1 to 15 of page 916 of the Transcript.
[367] Lines 25 to 28 of page 916, lines 1 to 15 of page 917 and lines 9 to 23 of page 442 of the Transcript, and Exhibit A153975.
[368] Lines 21 to 28 of page 478, page 479 and lines 1 to 4 of page 480 of the Transcript.
[369] Lines 5 to 28 of page 480, page 481 and lines 1 to 22 of page 482 of the Transcript and Exhibits A005833 and A005834.

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would have been discussed from time to time in sales meetings or in strategy meetings.[370]

[254] In cross-examination, Mr. Assie was asked if flex options were offered to traders such as Nukem. Mr. Assie testified that spot sales to traders would not include a flex option because the quantity sold in a spot sale is fixed.[371] Mr. Assie testified that typically a flex option puts the risk of supplying the flex amount on the producer and that for 2002 he recommended to CEL an upward flex on the BPCs that would provide CEL with the greatest profit given the forecast purchase price under the contract.[372]

[255] Mr. Assie testified that for 2003 CEL exercised the downward flex option for three of the BPCs and the upward flex option for one of the BPCs.[373] For 2004, CEL issued non-binding delivery notices in mid-2003 that called for the delivery of the base quantity under all but one of the BPCs, and in respect of that one CEL flexed downward.[374] CEL exercised the maximum upward flex for 2006 and for the following few years.[375]

[256] Mr. Glattes testified that the contract administrators had standing instructions to exercise the flex option under a BPC if it made commercial sense, which generally meant that the price under the BPC was lower than the market price. If it was a close call, the contract administrators were instructed to consult their supervisor and ask for guidance, and if it was a really close call the issue would be addressed during a sales meeting.[376] Mr. Glattes did not have any specific knowledge as to why CEL issued no flex notices for 2004 under the BPCs.[377]

[257] Mr. Murphy testified that the contract administrators understood that if the market price was above the price in the BPC then they were to issue a flex notice to the Appellant exercising CESA/CEL's upward flex option. However, if the

[370] Lines 21 to 28 of page 924 and lines 1 to 7 of page 925 of the Transcript.
[371] Lines 14 to 28 of page 919, page 920 and lines 1 to 4 of page 921 of the Transcript.
[372] Lines 24 to 27 of page 921, lines 26 to 28 of page 922, lines 1 to 5 of page 923 and lines 1 to 5 of page 924 of the Transcript and Exhibits A005833 and A005835.
[373] Lines 5 to 28 of page 927 and lines 1 to 17 of page 928 of the Transcript. The downward flex notices are Exhibits A218522, A136029 and A160432.
[374] Lines 23 to 28 of page 929, pages 930 to 933 and lines 1 to 20 of page 934 of the Transcript and Exhibits A166861, A136021, A160965, A166639, A136652, A160525, A160423 and A160733.
[375] Lines 25 to 28 of page 942 and lines 1 to 8 of page 943 of the Transcript.
[376] Lines 6 to 28 of page 3635, pages 3636 to 3637 and line 1 of page 3638 of the Transcript.
[377] Lines 25 to 28 of page 4179, lines 12 to 28 of page 4195 and lines 1 to 17 of page 4196 of the Transcript.

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prices were close then the matter had to be discussed and a decision had to be made.[378]

[258] Ms. McGowan testified that she believed the contract administrators would have to base their recommendations as to whether CESA/CEL should exercise flex options on its requirements for inventory and on price. With respect to price, Ms. McGowan testified that "if the price was a good price, then we'd probably want to flex up."[379] Ms. McGowan did not recall advising Mr. Glattes about issuing flex notices, nor did she recall whether there were standing instructions with respect to flex notices or who initiated the preparation of flex notices.[380]

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ii. The Deferral of Deliveries under the BPCs

[259] Counsel for the Appellant asked Mr. Assie about the deferral of certain deliveries under the BPCs that took place in 2004 and 2005. Mr. Assie testified that the deferral was the result of a "water inflow" event at the Appellant's McArthur River mine which reduced the Appellant's production of uranium. CEL and the Appellant discussed the quantities involved, the best way of dealing with the issue and realistic solutions in light of the circumstances and reached an agreement to defer the delivery of uranium under the BPCs.[381]

[260] Mr. Assie testified that the focus was on meeting the Appellant's commitments to its customers. However, because the Appellant would ultimately honour its commitments to CEL, the value of the particular BPCs to CEL was preserved.[382] Mr. Assie then had the following exchange with counsel for the Appellant:

> Q. Was this proposal discussed with Cameco Europe before it was put on paper in this fashion?
>
> A. Yes, it was.
>
> Q. In what context was it discussed?

[378] Lines 8 to 28 of page 3179, lines 1 to 3 of page 3180, lines 20 to 28 of page 3181 and lines 1 to 15 of page 3182 of the Transcript.
[379] Lines 21 to 28 of page 5338 and lines 1 to 14 of page 5339 of the Transcript.
[380] Lines 24 to 28 of page 5339, page 5340 and lines 1 to 9 of page 5341 of the Transcript.
[381] Page 484 and lines 1 to 25 of page 485 of the Transcript.
[382] Lines 22 to 28 of page 487 and lines 1 to 7 of page 488 of the Transcript and Exhibit A135913.

> A. Well, obviously Cameco Europe would have preferred to have all of its material delivered, but it wasn't practical. This was a significant volume of uranium.
>
> I should highlight that, prior to 2003, I would say Cameco's operations always operated without a glitch, and so we had come to rely on the forecast of productions from operations. We took it almost as the Bible. And so you had a significant shortfall and how to deal with it. And this was what was proposed. And it was generally consistent with what was going on in the industry.[383]

[261] Eight of the nine BPCs were amended in 2004 and again in 2007 to provide for the deferral of delivery of uranium by the Appellant to CEL.[384]

[262] Mr. Assie testified that the Appellant did not rely on the *force majeure* provisions in the BPCs to address its inability to meet its delivery obligations because it had determined on the basis of exchanges with customers that those provisions did not provide the Appellant with the option to defer delivery. The Appellant did however start to incorporate provisions in its third-party agreements to address production interruptions or shortfalls.[385]

[263] Counsel for the Appellant asked Mr. Assie why CEL did not take the position that the Appellant should purchase the shortfall in the market so that it could meet its obligations to CEL and Mr. Assie responded:

> Cameco Europe was holding -- had significant inventory on hand, you know, so it was able to mitigate the impact to some degree. And, you know, frankly it just wasn't realistic to tell Cameco Corp., "Well you go out and buy 4 million pounds in the market." That wasn't in Cameco Europe's best interests. Ultimately we believed that it should deal with Cameco Corp. the same way that Cameco U.S. was proposing to deal with its utility customers, and that is, "We've got a production problem. We -- you know, we're asking for your indulgence to allow us to defer these quantities."[386]

[264] Mr. Assie described an example of a deferral agreed to by Cameco US with a customer because of a delay in the start-up of the Appellant's Cigar Lake mine in Saskatchewan. Under section 8.1 of the contract with the customer, Cameco US had the right to defer, reduce or cancel the deliveries of uranium required under the

[383] Lines 12 to 27 of page 488 of the Transcript.
[384] The only BPC not amended was Exhibit A153609. The 2004 amending agreements are Exhibits A022457, A135914, A153559, A138895, A029167, A029190, A137074 and A029243. The 2007 amending agreements are Exhibits A153544, A153550, A153558, A153592, A153612, A153619, A153629 and A153635.
[385] Lines 17 to 28 of page 490, page 491 and lines 1 to 28 of page 492 of the Transcript.
[386] Lines 7 to 17 of page 493 of the Transcript.

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contract if there was a shut down or interruption that reduced the production or supply of concentrates from Cigar Lake. Instead of cancelling, Cameco US proposed to defer delivery of the uranium on the same pricing terms and the customer agreed to accommodate Cameco US's request.[387]

[265] Counsel for the Respondent asked Mr. Assie about an agreement made effective November 1, 2004 that amended Exhibit A153624–one of the BPCs-and the proposal summary dated December 6, 2004 for that amending agreement.[388] Mr. Assie testified that he did not recall when the discussions about amending the BPCs began and that he did not recall any written notes, faxes, e-mails, et cetera that predated the proposal summary.[389] The third bullet point of the proposal summary states:

> During 2004, Cameco Corporation delivered 13,675,000 pounds U_3O_8 under contracts with Cameco Europe when Cameco Europe would have preferred to take delivery of the maximum volume of 18,225,000, a shortfall of 4,550,000.

[266] Initially, Mr. Assie was not able to explain why, notwithstanding the statement in bullet point three of the proposal summary, no upward flex notices or binding delivery notices requesting quantities greater than the base amounts under the BPCs were issued by CEL for deliveries in 2004. Mr. Assie agreed that such notices should have been issued. Mr. Assie stated that he would have taken the statements in the proposal summary at face value.[390] The following day, Mr. Assie volunteered the following explanation:

> . . . I believe that the reason there were no formal delivery notices was because that that was the very subject of the discussions that were ongoing between Cameco Corp. and Cameco Europe, but the realization that there was no way that Cameco Corp. was going to be able to deliver the nominal or certainly not the flex quantities under those contracts. And if we look at that December 6, 2004 proposal summary again, it notices in there that it was Cameco's -- Cameco Europe's desire to take upward flexibility. So I believe the reason the notices weren't given was because those discussions weren't [*sic*] ongoing.
>
> Now, I admit that, in the beginning of January of 2003, I no longer attended the twice weekly sales calls, but as the officer responsible for marketing, I was certainly apprised of the issue and that there were ongoing discussions.

[387] Pages 495 to 500 and lines 1 to 22 of page 501 of the Transcript and Exhibits A029513, A029516 and A172860.
[388] The amending agreement is Exhibit A029190 and the proposal summary is Exhibit A000792.
[389] Lines 10 to 25 of page 936.
[390] Lines 26 to 28 of page 936, page 937, lines 1 to 26 of page 938, lines 25 to 28 of page 940 and lines 1 to 3 of page 941 of the Transcript.

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> So to come back to the point, I just want to clarify. When I couldn't recall why there was no 2004 delivery notices, I believe it was because the matter was being dealt with by ongoing discussions between Cameco Corp. and Cameco Europe.[391]

[267] Mr. Assie confirmed that he had no knowledge of any notes, e-mails, or correspondence reflecting this discussion in the middle of 2003 about whether or not Cameco Europe should exercise an upward flex in respect of 2004.[392]

[268] Mr. Del Frari states in the first paragraph of a letter to Mr. Murphy dated February 9, 2005:

> Cameco Corporation confirms receipt of Cameco Europe's notices indicating its intent to take the maximum contract quantities for Delivery Year 2005 under the Long Term Uranium Sale and Purchase Agreements with Cameco Corporation. In addition, Cameco Corporation acknowledges that it was Cameco Europe's intent to take maximum contract volumes in Delivery Year 2004 under the same Agreements however Cameco Europe elected to take nominal or minimum quantities to assist Cameco Corporation who was still struggling with the impact of the McArthur River flood in 2003. Due to the delayed start-up of Cigar Lake mine and the delay in the increase to McArthur River and Key Lake production licenses, Cameco Corporation is unable to supply the cumulative maximum quantities under the existing Long Term Uranium Sale and Purchase Agreements in 2005.[393]

[269] On being shown contract summaries Mr. Assie agreed that, because of option years, the exercise of upward flex options, amendments and deferrals, the terms of eight of the BPCs were ultimately extended as set out in the following table:[394]

Exhibit Number	Original Expiration Year Including Option Years	New Expiration Year
A004808	2009	2012
A022414	2010	2015
A153564	2008	2011
A153597	2009	2013
A153615	2007	2009
A153624	2010	2015

[391] Lines 20 to 28 of page 958 and lines 1 to 13 of page 959 of the Transcript.
[392] Lines 27 to 28 of page 959 and lines 1 to 5 of page 960 of the Transcript.
[393] Exhibit A155258.
[394] Lines 9 to 28 of page 943, pages 944 to 946 and lines 1 to 19 of page 947 of the Transcript and Exhibits A022450, A135709, A153710, A138942, A135008, A153712, A153713 and A153714.

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A153633	2009	2013
A153642	2010	2015

[270] Mr. Assie was asked why three Long-term Contracts were entered into in 2004 (Exhibits A163425, A162970 and R-001399) if there were ongoing discussions about production shortfalls in 2003 and 2004. Mr. Assie testified that the proposal summaries would have been presented to him and he believed he signed the agreements. He testified that the contracts would have been based on the production forecasts for the years of delivery. Mr. Assie did not ask for production forecasts and did not remember seeing any analysis of production forecasts. Rather, he "took it on face value" that those considerations were taken into account.[395]

[271] Ms. McGowan testified that she made the recommendation to defer deliveries to CEL to Mr. Doerksen. The deferrals were caused by a lack of inventory that resulted from the flood at the McArthur River mine. Ms. McGowan did not recall any other reason.[396] Counsel for the Respondent took Ms. McGowan to an e-mail she had sent to Mr. Murphy on July 18, 2006 at 17:39 CDT in which she stated:

> To my knowledge there is no intention to extend any of the CEL sales agreements that end in 2006. If they were to be extended it would be at the request of the third party customer and I have not heard of any requests in that regards.
>
> In regards, to the amendments to the bulk agreements, we have concerns about not specifying a specific year for the delivery of the 2006 deferral quantity. I just want to clarify that it is an issue to mention any future year even if it is an existing contract delivery year. I raise this as it is not our intention to add any additional delivery years to the contract, but to add the 2006 deferred quantity to the last existing delivery year under each contract. We will need to revisit how to best handle the 2006 deferrals if we can not reference a future delivery year, as we would not offer such flexibility to a third party customer.[397]

[272] Counsel then had the following exchange with Ms. McGowan:

> Q. Could we go to the first page. In your e-mail to Mr. Murphy, in the last sentence, you indicate that you weren't sure that you could defer to a future delivery year as you wouldn't offer such flexibility to third-party customers. Do you see that?

[395] Lines 7 to 28 of page 975 and lines 1 to 10 of page 976 of the Transcript.
[396] Lines 1 to 20 of page 5442 of the Transcript.
[397] Exhibit A188078.

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A. Yes.

Q. Why would you be telling that to Mr. Murphy?

A. Because what was proposed was different than what we would offer third-party customers.

Q. How did you know what would be offered to third-party customers?

A. Because we'd seen the sales agreements.[398]

[273] In cross-examination, Mr. Glattes was asked about the deferrals of deliveries under the BPCs in the context of whether CEL had an inventory policy. Mr. Glattes testified that the policy of having six months' forward supply in inventory was a Cameco Group policy and that CEL's inventory policy was determined with reference to the strategic plan and other elements which fixed sales targets for the Cameco Group. CEL had to retain sufficient inventory to meet the portion of total sales it was expected to make.[399] However, the determination of inventory levels was a complex topic and sales targets were not the only determinant of inventory.[400]

[274] Mr. Glattes testified that the flex options are included in the ten-year strategic plan but that the actual decision whether to exercise a flex option is made at the time the option must be exercised. In that context, whether CEL needed the material for deliveries to CCI did not determine whether CEL exercised an upward flex option.[401]

[275] Mr. Glattes testified that the decision in 2003 to reduce inventory levels from 6 months to 4 months was a strategic decision of the Appellant's management resulting from a number of considerations, including the "water inflow" at the McArthur Lake mine.[402] Counsel for the Respondent asked Mr. Glattes why CEL was taking maximum flex under the BPCs while agreeing to defer deliveries in 2004, 2005 and 2006. Mr. Glattes responded that CEL had a contractual right to upward flex and had to look at its own interests in that regard. The deferrals were a separate issue and were the result of negotiation with the Appellant.[403] Mr. Glattes

[398] Lines 5 to 17 of page 5443 of the Transcript.
[399] Lines 4 to 28 of page 4277, pages 4278 to 4280 and lines 1 to 21 of page 4281 of the Transcript.
[400] Lines 1 to 17 of page 4285 of the Transcript.
[401] Lines 25 to 28 of page 4282, page 4283 and lines 1 to 23 of page 4284 of the Transcript.
[402] Lines 18 to 28 of page 4285 and lines 1 to 13 of page 4286 of the Transcript.
[403] Lines 9 to 28 of page 4287 and lines 1 to 20 of page 4288 of the Transcript.

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was asked to confirm that there were no notes about the deferral discussions and he stated:

> I can assure you there were long, long, long discussions about deferrals and the terms and conditions. I mean, in a corporation like Cameco, with this complex decision-making process, you cannot expect that everything is minuted and can be found 15 years later in some records.[404]

[276] Mr. Murphy testified that, because of a disruption in production at the McArthur Lake mine in 2003, lower than anticipated production volumes from McArthur Lake in 2004 and a delay in the commencement of production at Cigar Lake, the Appellant would not be able to supply the total volume of uranium that had been requested by CEL under the BPCs.

[277] Mr. Murphy also testified that commencing in 2003, while he was with Cameco US, there were lots of discussions at the sales meetings and strategy meetings about how to handle the situation. Mr. Glattes represented CEL during the meetings until Mr. Murphy became the president of CEL in August 2004.[405] In cross-examination, Mr. Murphy testified that CEL did not write to the Appellant regarding the shortfalls in 2004 because of the ongoing discussions in relation to them.[406]

[278] Mr. Murphy was asked by counsel for the Appellant if CEL had any input in the process:

> Q. Did Cameco Europe have input into the ultimate decision as to how to deal with it?
>
> A. Absolutely. It was everybody involved. We didn't want to lose revenue. So we're looking around at: Does Cameco Corporation need to buy from the spot market? Does Cameco U.S. -- what are they going to need to meet their commitments? That means: What is Cameco Europe going to need to meet its commitments? And when all was said and done, we all figured out that, you know, at this period, we can handle this by Cameco Europe simply drawing down its strategic inventory from something like six months to four months. And, in that way, Cameco U.S. was able to meet all of their commitments to the utilities. Cameco Europe was able to meet all of its commitments to Cameco U.S. And by these deferrals, it meant that -- it was actually advantageous to Cameco Europe, because we would be getting these quantities out in the future when we hoped the

[404] Lines 25 to 28 of page 4288 and lines 1 to 2 of page 4289 of the Transcript.
[405] Lines 10 to 28 of page 2909, page 2910, lines 1 to 15 of page 2911 and lines 1 to 26 of page 3256 of the Transcript.
[406] Line 28 of page 3266 and lines 1 to 4 of page 3267 of the Transcript.

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> market prices would be higher, and the prices for those volumes would be what were agreed to some years earlier under that contract when the deferrals were going to happen.[407]

[279] Mr. Murphy testified that he accepted the proposal summary for CEL after discussing approval issues with Mr. Glattes. On the offer from the Appellant, signed by Mr. Murphy, it is stated in Mr. Murphy's handwriting that the offer is accepted subject to the condition that CEL receive all necessary authorizations and approvals from BfE. Mr. Murphy described the amendments as being the extension of the term of the existing agreements by one year (the "additional year") and the delivery of the deferred quantities in the additional year.[408]

[280] Mr. Murphy described the amount deferred as "the difference between the maximum annual contract quantity and the delivered quantity for '04 delivery year plus the difference between the maximum annual quantity and the base quantity for 2005."[409] The actual quantities are set out in a table on the second page of the offer as follows:[410]

The following table details the applicable contracts and related volumes:

Contract Date	PO Number	2004 Shortfall Quantity (lbs U_3O_8)	2005 Shortfall Quantity (lbs U_3O_8)	Total Shortfall Quantity (lbs U_3O_8)	Additional Year
November 24, 2000	6958/0024	900,000	900,000	1,800,000	2009
May 3, 2000	6957/0022	900,000	450,000	1,350,000	2011
April 3, 2001	7047/0123	500,000	500,000	1,000,000	2010
March 27, 2001	7041/0114	600,000	800,000	1,400,000	2011
March 27, 2001	7040/0113	1,200,000	400,000	1,600,000	2008
October 25, 1999	6920/0020	150,000	75,000	225,000	2010
November 24, 2000	7015/0068	300,000	300,000	600,000	2010
April 30, 2001	7060/0132	0	800,000	800,000	2011

[281] Mr. Murphy testified that the price of the uranium delivered by the Appellant in the additional year was the price set out in the original contract.[411]

[282] Counsel for the Appellant asked Mr. Murphy about an e-mail from him to Mr. Glattes in which he asked Mr. Glattes about the offer and the requirement for authorizations. Mr. Glattes' response was as follows:

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[407] Lines 16 to 28 of page 2911 and lines 1 to 7 of page 2912 of the Transcript.
[408] Lines 23 to 28 of page 2912, lines 1 to 17 of page 2913, lines 16 to 21 of page 2915, lines 26 to 28 of page 2918 and lines 1 to 6 of page 2919 of the Transcript and Exhibit A155255.
[409] Lines 5 to 9 of page 2914 of the Transcript.
[410] Lines 10 to 18 of page 2914 of the Transcript and Exhibit A155255.
[411] Lines 19 to 22 of page 2914 of the Transcript.

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> I agree the proposed arrangements do not look unreasonable, even though I feel it is a borderline case. The yardstick is, of course, how unrelated parties would have acted. Under these circumstances the purchaser could have taken the position that the seller sells the maximum quantity resulting from the exercise of the quantitative flexibility and then re-purchases the differential quantity at the present market price. That would, of course, have quite a detrimental impact on CCO. In a nutshell, I would suggest that you sign the letter agreement, since we can think of sufficient reasons why we act in this manner. I assume Randy was involved in the decision-making in S'toon (you will not be able to check right now because he is on vacation until February 21). If not, he should probably be informed in passing after his return.
>
> In the context of the Bern authorization we have to apply for an amendment to the existing authorisation [*sic*] which was granted at the time when the global authorization did not yet exist. While the total quantity should be unchanged (provided that we have assumed maximum exercise of the quantitative flexibility which we have usually done), the delivery schedule will be extended by one year.[412]

[283] Mr. Murphy provides the following explanation why CEL did not insist that the Appellant deliver the uranium required under the BPCs:

> . . . Well, that may have been considered, but if you -- if you think about it in detail, it wouldn't really make any sense because, for Cameco Corp. to go to the market to buy these kinds of volumes, even if they were available in the market, it would cost Cameco Corporation a tremendous amount of money, and it would impact the market price, the spot market price.
>
> So, at first glance, you would say, "Well, that's great. Cameco Europe is going to benefit from an increased spot market price."
>
> Well, they're not really, because all of our market related contracts had ceilings, which were very low in those contracts. So we might have got a little bit of a bump from an increase in the spot market price, but we weren't going to get anything like what it would cost Cameco Corporation. And when you considered that we could handle this by just reducing our inventory and we were going to get these deferred quantities further out at low prices, it just -- it made infinite sense to do it this way.[413]

[284] Mr. Murphy agreed with counsel for the Respondent that if the Appellant had had to purchase the uranium in the spot market, assuming the quantity needed was available, it would have lost money selling the uranium to CEL at the prices in

[412] Exhibit A055882.
[413] Lines 18 to 28 of page 2917 and lines 1 to 8 of page 2918 of the Transcript.

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the BPCs.[414] Mr. Murphy also agreed that CEL would not have been worse off from a monetary perspective because of the deferral.[415]

[285] Counsel for the Respondent took Mr. Murphy through various documents relating to the amendment of one of the BPCs (PO 7015).[416] The proposal summary for the amendment (Exhibit A000792) is dated December 6, 2004. Mr. Murphy agreed that the contract amending the BPC[417] was signed after its effective date of November 1, 2004 and after a draft of the contract was received from Lorrie McGowan in May 2005.[418] The contract itself does not indicate when it was signed.

[286] Counsel for the Respondent asked Mr. Murphy about a proposal summary dated December 12, 2006 which provided for a second amendment to eight of the BPCs whereby the delivery of more uranium would be deferred to the additional year (i.e., to the additional year resulting from the first amendment of the BPCs). The amount of uranium whose delivery was to be deferred is the difference between the minimum and maximum quantity of uranium to be delivered in 2006 under the eight BPCs, and that difference totals 8,450,000 pounds of U_3O_8. The terms in the proposal summary are repeated in an offer from the Appellant to CEL dated December 19, 2006, which is accepted by Mr. Murphy on behalf of CEL and formalized in a letter agreement dated January 8, 2007.[419] The price of the uranium whose delivery was deferred under the second amendment is the price in the original BPCs.[420]

[287] Counsel for the Respondent asked Mr. Murphy about a proposal summary dated April 9, 2007 which provided for a third amendment to eight of the BPCs whereby a second additional delivery year (the "second additional year") would be added to these BPCs and the delivery of uranium deferred from 2007 to the second additional year. The amount of uranium the delivery of which was to be deferred is the difference between the minimum and maximum quantity of uranium to be delivered in 2007 under the eight BPCs, and that difference totals 14,950,000 pounds of U_3O_8. The terms in the proposal summary are repeated in an offer from the Appellant to CEL dated May 25, 2007, which is accepted by Mr. Murphy on

[414] Lines 9 to 19 of page 3258 of the Transcript.
[415] Lines 27 to 28 of page 3267 and lines 1 to 3 of page 3268 of the Transcript.
[416] The contract is Exhibit A153597.
[417] The contract amending Exhibit A153597 is Exhibit A138895.
[418] Lines 8 to 28 of page 3270 and lines 1 to 25 of page 3271 of the Transcript and Exhibit A211753.
[419] Lines 11 to 28 of page 3272, page 3273 and lines 1 to 16 of page 3274 of the Transcript and Exhibits A022407, A029245 and A153592.
[420] Lines 17 to 28 of page 3274 of the Transcript.

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behalf of CEL.[421] The price of the uranium the delivery of which was deferred under the third amendment is the price in the original BPCs.[422]

iii. Other Issues in Respect of BPCs

[288] Counsel for the Respondent asked Mr. Glattes about the origin of uranium delivered to CEL by the Appellant in January 2004 under PO 6920.[423] The contract provided for uranium of Canadian origin, but the uranium delivered was in part of Namibian origin. Mr. Glattes testified that Markus Bopp would have reviewed and approved the associated invoice under his supervision, but he did not recall whether Mr. Bopp had brought the issue to his attention.[424]

[289] Counsel for the Respondent asked Mr. Glattes about a binding delivery notice for a February 2005 delivery under PO 6920. The contract required that the notice be provided by November 1, 2004, but it was actually dated November 19, 2004. Mr. Glattes agreed that the notice was sent late.[425]

[290] Counsel for the Respondent asked Mr. Glattes about a discrepancy under PO 6958 between the annual delivery schedule for 2003 and the contract summary for that year. Mr. Glattes agreed with counsel that the contract administrators would have made the initial decision as to when, where, and how much to deliver under PO 6958 for 2003. Mr. Glattes also agreed that there would have been very little, if any, e-mail traffic between the Appellant and CEL explaining differences between the annual delivery schedule and the binding notices and the actual deliveries in 2003. Mr. Glattes testified that, because of the requirement for BfE approval, CEL had to be made aware of changes in delivery dates and therefore would usually be involved, indeed had to be involved, in any suggested changes. However, because of the "water inflow" event at the McArthur River mine in April 2003, 2003 was an atypical year and for that reason the change in this case did not surprise him.[426]

[291] Counsel for the Respondent asked Mr. Glattes about the Appellant's having refused to admit that no transfer request existed for a delivery in January 2002

[421] Lines 12 to 28 of page 3276, pages 3277 and 3278 and lines 1 to 6 of page 3279 of the Transcript and Exhibits A022442 and A022467.
[422] Lines 7 to 13 of page 3279 of the Transcript.
[423] PO 6920 is Exhibit A004808.
[424] Pages 4180 to 4181 of the Transcript and Exhibit A166847.
[425] Lines 6 to 16 of page 4182 of the Transcript and Exhibit A166840.
[426] Lines 10 to 28 of page 4188, pages 4189 to 4194 and lines 1 to 11 of page 4195 of the Transcript and Exhibits A161021 and A153710.

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under PO 6958, instead stating that the document could not be located. Mr. Glattes testified that any such document that existed would be in the manila folder maintained for that particular contract in Zug, Switzerland.[427]

(15) The Sales of Uranium by US Subsidiaries of the Appellant to CESA/CEL

[292] In 2002, 2003 and 2005, four United States subsidiaries of the Appellant entered into long-term uranium sales contracts with CESA/CEL. Six of the contracts were entered as exhibits.[428] The uranium production sold by the US Subsidiaries came from two mines in the United States.[429]

[293] Counsel for the Respondent put it to Mr. Assie that it appeared from an e-mail from Byron Little to Lorrie McGowan sent April 25, 2005 at 10:16 a.m., which is contained in a long e-mail chain started by Lorrie McGowan,[430] that he directed the US Subsidiaries to enter into the contracts signed in 2002 and 2003. Counsel also put it to Mr. Assie that he told Mr. Newton that as long as he was a president of a Cameco Group company he would do as Mr. Assie told him to do. Mr. Assie categorically denied these assertions.[431]

[294] Mr. Newton testified in chief that the US Subsidiaries did not negotiate anything with the Appellant and that as subsidiaries of the Appellant they did what the Appellant told them to do.[432]

[295] With respect to the contract dated as of December 19, 2005 (between CEL and PRI) and the contract effective as of January 6, 2006 (between CEL and Crowe Butte) (together, the "2005/2006 contracts"),[433] Mr. Newton testified that he received an initial proposal summary from CEL in February 2005 and that he had concerns that the price was too low and that PRI and Crowe Butte would not be

[427] Lines 9 to 28 of page 4187 and lines 1 to 9 of page 4188 of the Transcript.
[428] The four United States subsidiaries are Power Resources, Inc. ("PRI"), Crowe Butte Resources, Inc. ("Crowe Butte"), UUS Inc. and Geomex Minerals, Inc. (collectively, the "US Subsidiaries"). The six contracts are found in Exhibits A029032, R-008189, A029290, R-000914, A172962 and A172800. The contract with UUS Inc. (Exhibit R-000189) was assigned to Crowe Butte as of January 1, 2003. A contract with Geomex Minerals, Inc. was alluded to in the cross-examination of Mr. Newton, but was not tendered as an Exhibit: lines 27 to 28 of page 6419 and lines 1 to 26 of page 6420 of the Transcript.
[429] Lines 3 to 7 of page 6420 of the Transcript.
[430] Exhibit A140130.
[431] Lines 7 to 22 of page 1271 and lines 7 to 26 of page 1273 of the Transcript.
[432] Lines 9 to 28 of page 6384 and line 1 of page 6385 of the Transcript.
[433] Exhibits A172962 and A172800.

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able to deliver the requested volumes.[434] Counsel for the Respondent then had the following exchange with Mr. Newton:

> Q. Did you speak to Mr. George Assie about these concerns?
>
> A. At some point, yeah.
>
> Q. And what do you recollect about that discussion or those discussions?
>
> A. Well, at one -- some point, I don't remember when it was exactly, but George said, "Look, if I tell you to sign the contract, you're going to sign the contract. Now, you know, you've made your point. We hear you. Sign the contract."
>
> And so that was it. And I remember that because it was probably an acrimonious exchange, and I remember going back to Collings and Magnuson, because they were worried about this as well. In fact, they might have been the ones to bring it up in the first place.
>
> And I said, "Look, this is the deal, guys. I just got off the phone with George, and, you know, it's – it's their way or the highway." So . . . [435]

[296] In cross-examination, counsel for the Appellant asked Mr. Newton about the circumstances surrounding the execution of the two contracts made as of August 6, 2002.[436] Mr. Newton agreed with counsel that he had had discussions with Mr. Assie in Saskatoon regarding the terms of these contracts, that Byron Little and Shane Shircliff had worked out the details regarding the volumes to be included in the contracts and that on the cover sheet of the fax forwarding the proposal summaries to him Mr. Assie had stated "If you are in agreement, please sign where indicated and fax copies back to me."[437]

[297] Mr. Newton also identified an interoffice memo from him to Mr. Assie dated March 21, 2002 in which, in the first paragraph, he stated:

> This is in reply to your memo of March 19, 2002 and the proposed summary of terms for purchase of material from PRI, Geomex and UUS. We are agreeable to the terms you have suggested, with the proviso that perhaps Kim Goheen should review them to make sure they pass the "arms-length" test required for sales

[434] Lines 9 to 28 of page 6390 and lines 1 to 19 of page 6391 of the Transcript and Exhibit A140086. The parties agreed that the reference to February 28, 2004 on the face of the proposal summary is a typographical error and that the date should be February 28, 2005: lines 9 to 14 of page 6390 and lines 2 to 6 of page 6428 of the Transcript.
[435] Lines 20 to 28 of page 6391 and lines 1 to 9 of page 6392 of the Transcript.
[436] Exhibits A029032 and R-008189.
[437] Lines 25 to 28 of page 6415, page 6416, lines 1 to 8 of page 6417, lines 23 to 28 of page 6418 and lines 1 to 5 of page 6419 of the Transcript and Exhibits A156238, A156237 and A156239.

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> between companies with common ownership. Obviously, at these prices, PRI, Geomex, and UUS will lose a lot of money on the sales, however I don't think this is relevant given the fact that all of the financial and sales information for the Cameco companies is ultimately consolidated.[438]

[298] Counsel for the Appellant asked Mr. Newton about the circumstances surrounding the 2005/2006 contracts. Mr. Newton again testified that he had raised issues with Mr. Assie regarding the terms of a proposal summary dated February 28, 2005 and that the concerns focused on the proposed price formula, which effectively capped the price at US$24 per pound of U_3O_8, and the volumes, which PRI and Crow Butte may not have been able to provide. Mr. Newton identified an e-mail he had sent to Bill Murphy and John Guselle on March 8, 2005 regarding the February 28, 2005 proposal summary, in which he stated:

> I have read through the summaries of the proposed contracts and also Bill's comments.
>
> From PRI's perspective, as a subsidiary of Cameco, I don't mind selling all of our available production under whatever terms Cameco chooses. The mechanism you have outlined John seems like a good one since it would ensure that we are able to sell all of our available production, even if we're not entirely sure how much it's going to be at the end of each year. The one thing I do not want is to somehow create the illusion that PRI and CBR are committing to supply CEL with a certain amount of material come hell or high water. In other words, we'll sell all of our production, whatever that ends up being, and we should be able to give CEL a pretty good indication (e.g., the strategic plan) what that production is going to be. But if for some reason we can't deliver all that we've promised to deliver, well, we'll just deliver all we can and leave it at that. I don't want CEL (as another subsidiary of Cameco) raising hell that we haven't met our delivery commitments.
>
> As far as the price goes, again, we're following Cameco's lead on this. If we were truly an independent company there's no way we'd sign a contract like this (i.e., one that effectively limits the price paid to $24/lb in a market that is already above this) -- but we're not an independent company, so the question is irrelevant. My only concern is the question of transfer pricing and whether we can justify this contract price to the tax authorities in Wyoming and Nebraska. (This contract price will be used to determine certain kinds of taxes, and will also obviously have a huge impact on our income tax.) The mechanism you have outlined here, John, seems like a reasonable one, although I'm certainly no expert on the limits of transfer pricing. (I do wonder, however, when somebody in the Wyoming or Nebraska departments of revenue is going to take a closer look at our "contract prices" -- especially the current one which is just a little over $13/lb.) As far as royalties are concerned, we're going to use an independent market price indicator

[438] Lines 19 to 28 of page 6421 and lines 1 to 12 of page 6422 of the Transcript and Exhibit A143295.

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> (instead of the contract "price") to calculate the royalties we pay, so the contract price really doesn't matter here.
>
> Those are my thoughts for now.[439]

[299] Counsel for the Appellant then took Mr. Newton to an e-mail sent by John Guselle (at the time, vice-president, marketing (Europe) and trading at Cameco US) to him and Bill Murphy on June 2, 2005. Attached to the e-mail were a draft letter and a draft proposal summary each dated June 2, 2005. Mr. Newton agreed with counsel for the Appellant that the changes in the proposal summary terms contained in the draft documents responded to the concerns he had raised in his March 8, 2005 e-mail.[440] Mr. Newton acknowledged that he sent an e-mail to Mr. Murphy and Mr. Guselle on June 3, 2005 that stated:

> I just read the darft [*sic*] of John G's letter and think it's excellent. It explains everything we're trying to accomplish and will provide a clear record of our reasoning here.[441]

[300] Mr. Newton accepted the June 2, 2005 proposal summary by signing the document on behalf of PRI and Crowe Butte.[442] Mr. Newton subsequently signed the 2005/2006 contracts incorporating the terms set out in the June 2, 2005 proposal summary.[443]

(16) The Sales of Uranium by CESA/CEL to Cameco US

[301] Following the reorganization, Cameco US would sell uranium to customers outside Canada and would purchase uranium from CESA/CEL to fulfil its obligations to those customers. Between November 1, 1999 and December 15, 2006, CESA/CEL and Cameco US entered into a total of 90 agreements for the sale of uranium by CESA/CEL to Cameco US (the "Cameco US Contracts").[444] Each of the Cameco US Contracts mirrored an agreement

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[439] Lines 20 to 28 of page 6428, page 6429 and line 1 of page 6430 of the Transcript and Exhibit A140084.
[440] Lines 26 to 28 of page 6430, pages 6431 to 6432, lines 1 to 27 of page 6433, lines 8 to 28 of page 6435, pages 6436 to 6437 and lines 1 to 15 of page 6438 of the Transcript and Exhibits A141821, A141822 and A141824.
[441] Lines 1 to 12 of page 6440 of the Transcript and Exhibit A147886.
[442] Lines 7 to 21 of page 6441 of the Transcript and Exhibit A172575.
[443] Page 6442 and lines 1 to 22 of page 6443 of the Transcript.
[444] Exhibits A018072, A018078, A153567, A153569, A153572, A154110, A153574, A018095, A018178, A161130, A153581, A020939, Al53662, A153586, A169712, A162278, A162136, A153862, A013862, A153683, A154117, A168403, A168255, A153646, A153685, A153835, A169720, A153838, A153845, A153669, A029269, A153674, A022163, A153850, A153686, A153854, A153855, A016558, A153858, A153651, A160160, A153863, A153866, A164220, A154125, A163993, A163125, A153652, A153870, A021044, A172908, A172978, A029134, A172985, A172987, A172758, A177924, A029136, A029336, R-000940, A172974, A172980, A172910, A172967, A172801, A172937, A172932, A153866, A172856, A172819, A172849, A172870, A172948, A172902, A172893, A172946,

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entered into by Cameco US with a customer except that the price paid by Cameco US to CESA/CEL was 2% lower than the price paid to Cameco US by the customer.[445] Mr. Assie described the mechanics of these arrangements as follows:

> Q. And, similarly, the expectation was that Cameco Europe would sell inventory to Cameco U.S.?
>
> A. The expectation was that Cameco Europe would utilize the services of Cameco U.S. to place the material into the market. It didn't sell inventory to Cameco U.S. Cameco U.S. -- any delivery that Cameco U.S. took from Cameco Europe was immediately delivered on to the utility.
>
> Q. Cameco U.S.' only supplier, aside from some conversion services from Cameco Canada, was Cameco Europe; correct?
>
> A. Yes.
>
> Q. And it was never envisioned by the senior managers that Cameco Europe would decline to provide the necessary uranium to Cameco U.S.?
>
> A. Oh, no, no, no, no. As I have told you, quite a few times now, before a proposal was ever put in front of a utility, Cameco Europe -- we had to secure Cameco Europe's agreement that it would supply on those terms.
>
> So Cameco U.S. were a pretty knowledgeable group. We think we were pretty good at selling uranium. We knew Gerhard Glattes extremely well. He was a very gifted and talented individual. It was very much a collaborative discussion, if you will, as to what terms, et cetera, were required.
>
> If you are asking me: Did Mr. Glattes ever say, "No, absolutely not. I'm not selling on those terms," it never got to that from the point of view that, if -- we would be making recommendations based upon the market at the time. This is the way it looks, you know, on and on and on.
>
> Ultimately, Mr. Glattes had to make -- act on our recommendation. And, as I say, it was very collaborative. I don't want to suggest that, you know, he was -- we were just telling him, "Here are the deals. Take it or leave it." That wasn't the case. These were discussed at quite some length. So that's the way we operated.[446]

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A172828, A172989, A172916, A172919, A172809, A172877, A172882, A172815, A172927, A172786, A172837, A172952, A172783 and A201121.

[445] Lines 26 to 28 of page 198 and lines 1 to 21 of page 199 of the Transcript.

[446] Lines 18 to 28 of page 774 and page 775 of the Transcript.

[302] Mr. Assie, Mr. Glattes and Mr. Murphy each testified that the agreements between Cameco US and its customers were discussed during the sales meetings[447] and that Mr. Glattes and Mr. Murphy were active participants during these discussions.[448]

[303] Mr. Assie, Mr. Glattes and Mr. Murphy each testified that the understanding was that, to the extent that Cameco US agreed to sell uranium to a customer on terms discussed during the sales meetings, CESA/CEL would agree to sell uranium to Cameco US on the same terms less 2% of the sale price to the customer.[449]

[304] Mr. Wilyman testified that he did not believe that during the sales meetings he attended CESA/CEL was expressly asked to confirm its agreement to sell uranium to Cameco US, and Mr. Mayers testified to much the same effect.[450]

[305] Mr. Mayers described the sales meetings as including market information and updates on discussions with utilities, and Mr. Wilyman agreed with counsel for the Appellant that there was a sharing of market information and that there were discussions regarding the proposals that were going to be made to customers.[451]

[306] Counsel for the Respondent asked Mr. Glattes about the Appellant's refusing to admit that an origin notice for 2000 under PO 6983, certificates under section 6.2(d) of PO 6995 and a transfer request or a delivery confirmation notice for a June 30, 2003 delivery under PO 6995 did not exist, but stating instead that these documents could not be located. Mr. Glattes testified that any such documents that existed would be in the manila folder maintained for the particular contract in Zug, Switzerland.[452]

[307] In cross-examination, counsel for the Respondent asked Mr. Murphy about several of the intercompany contracts between CESA/CEL and Cameco US.

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[447] Lines 5 to 19 of page 343, lines 7 to 23 of page 356, lines 8 to 12 of page 357, lines 23 to 28 of page 434, lines 1 to 5 of page 435, lines 2 to 13 of page 733, lines 8 to 17 of page 1347, lines 3 to 8 of page 1444, lines 21 to 28 of page 2751, lines 1 to 12 of page 2752, lines 27 to 28 of page 2769, page 2770, lines 26 to 28 of page 3051, lines 5 to 16 of page 3600, lines 18 to 28 of page 5771, lines 1 to 7 of page 5772 and lines 22 to 26 of page 5991 of the Transcript.

[448] Lines 19 to 28 of page 382, lines 1 to 27 of page 383, lines 21 to 28 of page 2751, lines 1 to 12 of page 2752, lines 18 to 21 of page 2754 and lines 17 to 19 of page 3600 of the Transcript.

[449] Lines 1 to 13 of page 341, lines 13 to 21 of page 2750, lines 18 to 28 of page 2753 and lines 1 to 3 of page 2754 of the Transcript.

[450] Lines 2 to 7 of page 5979, lines 26 to 28 of page 5647 and lines 1 to 4 of page 5648 of the Transcript.

[451] Lines 17 to 25 of page 5647 and lines 3 to 26 of page 5991 of the Transcript.

[452] Lines 27 to 28 of pages 4213, pages 4214 to 4215, lines 1 to 16 of page 4216, lines 11 to 28 of page 4217, lines 1 to 14 of page 4218 and lines 20 to 25 of page 4218 of the Transcript.

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[308] The first intercompany contract addressed by counsel for the Respondent is an intercompany contract signed effective as of March 15, 2004 that supported a contract between Cameco US and ENUSA.[453] Mr. Murphy testified that the intercompany contract was not signed until at least September 2005.[454] In re-examination, Mr. Murphy testified that the intercompany offer letter setting out the terms in the intercompany contract was received by CEL by fax on July 11, 2003 and was signed by Mr. Glattes. The signature date is July 13, 2003.[455]

[309] The second intercompany contract addressed by counsel for the Respondent is an intercompany contract signed with effect as of September 28, 2006 that supported a contract between Cameco US and Exelon Generation Company, LLC.[456] Mr. Murphy testified that the quantities in the contract did not match the quantities in the offer letter introduced by counsel for the Respondent.[457]

[310] In re-examination, counsel for the Appellant took Mr. Murphy to another offer letter and to another intercompany contract. After reviewing the documents, Mr. Murphy testified that the terms of the intercompany contract in issue matched the terms in the offer letter introduced by counsel for the Appellant and that the terms in the offer letter introduced by counsel for the Respondent matched the terms in the contract introduced by counsel for the Appellant. As well, the notation used by CEL to identify the intercompany contract introduced by counsel for the Appellant matched the notation in the offer letter introduced by counsel for the Respondent.[458]

[311] The third intercompany contract addressed by counsel for the Respondent is an intercompany contract signed with effect as of February 2, 2005 that supported a contract between Cameco US and Public Service Electric & Gas.[459] Mr. Murphy testified that the quantities in the contract did not match the quantities in the offer letter introduced by counsel for the Respondent.[460]

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[453] Exhibit A160160.
[454] Lines 4 to 28 of page 3312 and lines 1 to 25 of page 3313 of the Transcript and Exhibit A148801.
[455] Lines 7 to 28 of page 3392, pages 3393 to 3394 and lines 1 to 4 of page 3395 of the Transcript and Exhibit A013144.
[456] Exhibit A172819.
[457] Lines 9 to 28 of page 3314, pages 3315 to 3318 and lines 1 to 24 of page 3319 of the Transcript and Exhibit A172498.
[458] Lines 20 to 28 of page 3384, pages 3385 to 3391 and lines 1 to 5 of page 3392 of the Transcript and Exhibits A207846 and A172636.
[459] Exhibit A172978.
[460] Lines 25 to 28 of page 3319, pages 3320 to 3321 and lines 1 to 20 of page 3322 and Exhibit A013093.

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[312] In re-examination, Mr. Murphy was taken to a memorandum to him and Markus Bopp from Scott Hyman to which were attached three execution copies of the intercompany contract. The memorandum stated that "[a]s reported in previous discussions" the quantity of uranium in the contract had been reduced by 200,000 pounds for 2006. Mr. Murphy testified that he would be surprised if he was not a party to the discussions but that he had no specific recollection of the discussions and was not able to describe the substance of the discussions.[461]

[313] The fourth intercompany contract addressed by counsel for the Respondent is an intercompany contract signed effective as of June 30, 2005 that supported a contract between Cameco US and Southern Nuclear Operating Company ("SNOC") and Alabama Power Company.[462] Mr. Murphy testified that the quantities in the contract did not match the quantities in the offer letter introduced by counsel for the Respondent although he noted that the contract was in support of SNOC and Alabama Power while the offer letter referenced only SNOC.[463]

[314] The fifth intercompany contract addressed by counsel for the Respondent is an intercompany contract signed effective September 27, 2004 that supported a contract between Cameco US and WMC.[464] Mr. Murphy testified that the intercompany contract was signed after its face date of September 27, 2004 and before December 14, 2004.[465] He agreed with counsel for the Respondent that two invoices showed deliveries under PO 7286 (of 250,000 pounds in each case) made on each of October 1 and 15, 2004.[466]

[315] In re-examination, counsel for the Appellant reviewed the terms of PO 7286 and the two deliveries in October 2004 and then took Mr. Murphy to an intercompany offer letter dated August 16, 2004, in which Cameco US offered to purchase from CEL 500,000 pounds of U_3O_8 to be delivered in two equal tranches on October 1 and 15, 2004. The offer letter was faxed to Mr. Glattes on August 18, 2004 and was signed by Mr. Glattes and faxed back to Cameco US on August 19, 2004. Mr. Murphy testified that the uranium described in the offer

[461] Lines 26 to 28 of page 3395, pages 3396 to 3397 and lines 1 to 20 of page 3398 of the Transcript and Exhibit A159689.
[462] Exhibit A172985.
[463] Lines 27 to 28 of page 3323, page 3324 and lines 1 to 11 of page 3325 of the Transcript and Exhibit A013104.
[464] Exhibit A029336.
[465] Lines 12 to 28 of page 3325 and lines 1 to 24 of page 3326 of the Transcript and Exhibit A085611.
[466] Line 28 of page 3327, page 3328 and lines 1 to 4 of page 3329 of the Transcript and Exhibits A025759 and A025768.

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letter matched the quantity and origin of the uranium delivered by CEL to Cameco US on October 1 and 15, 2004.[467]

(17) Other Contracts Between CESA/CEL and Cameco US

[316] In addition to the Cameco US Contracts, CESA/CEL entered into a total of 11 conversion services contracts with Cameco US between March 27, 2001 and December 7, 2006.[468]

(18) The Sales of Uranium by CESA/CEL to the Appellant

[317] Between December 7, 1999 and December 6, 2006, CESA/CEL and the Appellant entered into a total of 22 agreements for the sale of uranium by CESA/CEL to the Appellant (the "CC Contracts").[469] Only two of the CC Contracts were entered into after 2004.[470]

[318] The terms of the CC Contracts were discussed during the sales meetings.[471] Once the terms of a contract were settled, a proposal summary or intercompany offer was prepared by the Appellant and forwarded to CESA/CEL and, after CESA/CEL confirmed its agreement to the terms, a formal contract was prepared and executed.[472] No notes or e-mails were exchanged regarding the terms of the CC Contracts.[473]

[319] In 2005, the Appellant determined that purchasing uranium from CEL created foreign accrual property income ("FAPI") in CEL. The Appellant and CEL took steps to rectify the situation by amending existing agreements and ensuring that new agreements were for conversion services only. Under the amended and new agreements, CEL sold conversion services to the Appellant instead of

[467] Lines 22 to 28 of page 3375, pages 3376 to 3380 and lines 1 to 12 of page 3381 of the Transcript and Exhibits A013728 and A013729.
[468] Exhibits R-003841, R-003844, R-000218, A153843, A153856, A016549, A154147, A225935, A209464, A202488 and A211357.
[469] Exhibits A018070, A018071, A018082, A018083, A020911, A143439, A020966, A020970, A022165, A020950, A020929, A000779, A021030, A021036, A023303, A143456, A004674, A020957, A021061, A021444, A172896 and A172841.
[470] Exhibits A172896 and A172841.
[471] Lines 22 to 28 of page 1004, lines 1 to 9 of page 1005, lines 4 to 8 of page 1010, lines 10 to 28 of page 2791 and lines 1 to 3 of page 2792 of the Transcript.
[472] Lines 10 to 16 of page 1005, lines 9 to 14 of page 1010, lines 4 to 28 of page 2792 and lines 1 to 26 of page 2793 of the Transcript.
[473] Lines 17 to 26 of page 1005 and lines 9 to 12 of page 1010 of the Transcript.

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uranium.[474] In mid-2005, Tyler Mayers prepared a PowerPoint presentation titled "HEU Product Flow". Mr. Mayers recalled that the exercise addressed inventory management and he had no recollection of the FAPI issue.[475]

[320] Counsel for the Respondent asked Mr. Glattes about the Appellant's refusing to admit that an advice of delivery location under section 2.03 of PO 6933 did not exist, but stating instead that one could not be located. Mr. Glattes testified that it would have been the contract administrators that would have made the suggestion as to delivery location, and that any such documentation would be in the manila folder maintained for that contract in Zug, Switzerland.[476]

(19) Other Contracts between CESA/CEL and the Appellant

[321] Between August 29, 2001 and November 26, 2006 CESA/CEL entered into 16 uranium exchange agreements with the Appellant; between April 14, 2003 and June 9, 2006, CEL entered into four uranium loan agreements with the Appellant; and on December 1, 2004, CEL entered into a conversion services agreement with the Appellant.[477]

[322] In addition to these agreements, counsel for the Respondent took Mr. Murphy to a series of documents relating to a conversion services agreement between the Appellant and BNFL. Counsel put to Mr. Murphy the propositions that the Appellant rather than CEL purchased the conversion services because BNFL required guarantees if CEL was the purchaser, that the purchase price paid by the Appellant was £2.85 (sterling) times an escalation factor, that CEL purchased the conversion services from the Appellant for £2.91 times an escalation factor, and that Cameco US purchased the conversion services from CEL for £6.00 times an escalation factor. Mr. Murphy generally agreed with these propositions.[478]

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[474] Lines 25 to 28 of page 1045, pages 1046 to 1071, lines 1 to 15 of page 1072, lines 14 to 19 of page 3033, lines 24 to 28 of page 3221, page 3222, lines 1 to 21 of page 3223, lines 26 to 28 of page 3228, pages 3229 to 3233 and lines 1 to 22 of page 3234 of the Transcript. Two examples of amendment agreements are Exhibits A168499 and A217602.

[475] Lines 11 to 28 of page 5652, pages 5653 to 5655 and lines 1 to 12 of page 5656 of the Transcript and Exhibit A041692.

[476] Lines 23 to 28 of page 4198, page 4199, lines 1 to 6 of page 4200 of the Transcript and Exhibit A166897.

[477] The uranium exchange agreements are Exhibits A016678, A156941, A016271, A156973, A157007, A157014, A203756, A204083, A204169, A203302, A203276, A203282, A203291, A203202, A203251 and A203146. The loan agreements are Exhibits A154086, R-001712, R-007080 and R-001715. The conversion services agreement is Exhibit A132634. The parties described Exhibit A016554 as an exchange agreement for an exchange in 2001 but it appears to be a letter authorizing a book transfer of uranium in January 2003.

[478] Pages 3280 to 3288 and lines 1 to 7 of page 3289 of the Transcript.

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[323] In re-examination, counsel for the Appellant revisited the above three purchase agreements.[479] Mr. Murphy agreed that, under the contract between the Appellant and BNFL, the Appellant shipped UO_3 to BNFL and BNFL converted the UO_3 into UF_6. After reviewing the recitals to the contract, Mr. Murphy explained the reason for this as follows:

> . . . In early 2001, BNFL made a public announcement that it would end production of UF6 at its facilities located in Springfield, England. And they were going to do that in March of 2006. BNFL is able to continue to operate their fuel facilities after March 31, 2006 if the feed supplied to the facilities is UO3. And Cameco is prepared to provide to BNFL all of the UO3 quantities BNFL requires to produce UF6. And then Cameco, which is Cameco Corporation, will purchase all of the conversion services provided in connection with the conversion of the UO3 to UF6 and will take delivery of all the UF6 produced from that UO3.
>
> And as a result of this, BNFL is prepared to defer decommissioning of their fuel facilities in order to sell to Cameco all of the conversion services required in connection with the conversion of the UO3 to UF6 and will deliver the UF6 produced to Cameco.[480]

[324] Mr. Murphy testified that the price for converting UO_3 to UF_6 under the contract between the Appellant and BNFL was £2.85 escalated per kgU of UF_6, that the delivery years were 2006 through 2016 and that the volumes were 2,500 metric tonnes in 2006, 5,000 metric tonnes in 2007 through 2015 and 1,250 metric tonnes in 2016, for a total of 48,750 metric tonnes.[481]

[325] Mr. Murphy next reviewed the contract between the Appellant and CEL and testified that under that contract the Appellant agreed to convert CEL's concentrates (i.e., U_3O_8) into UO_3 at its refining facility at Blind River and then have the resulting UO_3 converted to UF_6 at BNFL's conversion facility at Springfield, England.[482] The price for these services was broken down into a price for the refining of CAN$2.22 escalated and a price for the conversion of £2.91 escalated. Mr. Murphy believed both prices were per kgU of UF_6, although the unit on which for the refining price was based was not stated in the contract.[483] The total volume for the period 2007 through 2016 was 46,250 metric tonnes.[484]

[479] Exhibits R-000931, A200878 and A211257.
[480] Lines 2 to 18 of page 3367 of the Transcript.
[481] Lines 23 to 28 of page 3367 and lines 1 to 18 of page 3368 of the Transcript.
[482] Lines 26 to 28 of page 3368, page 3369 and lines 1 to 17 of page 3370 of the Transcript.
[483] Lines 22 to 28 of page 3370, pages 3371 to 3372 and lines 1 to 8 of page 3373 of the Transcript.
[484] Lines 9 to 21 of page 3373 of the Transcript.

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[326] Finally, Mr. Murphy reviewed the contract between CEL and Cameco US and testified that the contract was for both the refining of U_3O_8 into UO_3 and the converting of the UO_3 into UF_6.[485] The delivery years under the contract were 2007 through 2012 and the total quantity to be delivered was 1,200 metric tonnes of UF_6 as compared to 48,750 metric tonnes under the contract between the Appellant and BNFL.[486] The pricing of £6.00 escalated was for both the refining and conversion services.[487]

(20) Other Uranium Purchase Contracts between CESA/CEL and Third Parties

[327] In addition to the HEU Feed Agreement and the Urenco Agreement, CESA/CEL entered into 43 more contracts with third parties between November 16, 1999 and July 16, 2006, which provided for the purchase by CESA/CEL of uranium.[488]

[328] Counsel for the Respondent specifically addressed two of these contracts: Exhibits A030869 and A030955.

[329] The first contract, between CESA and USEC, was entered into as of December 7, 1999.[489] Timothy Gabruch testified that he prepared the documents for this transaction.[490] Both he and Maxine Maksymetz were asked about a handwritten comment on a draft letter to CESA setting out the terms of the purchase. The handwritten comment was "make it seem like the decision-making in the hands of CSA".[491]

[330] Mr. Gabruch testified that he did not recognize the handwriting and that he did not recall any discussion along the lines of the topic of the note. He also did not recall whether he had seen the note at the time.[492]

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[485] Lines 22 to 28 of page 3373 and lines 1 to 15 of page 3374 of the Transcript.
[486] Lines 16 to 28 of page 3374 and lines 1 to 8 of page 3375 of the Transcript.
[487] Lines 9 to 21 of page 3375 of the Transcript.
[488] Exhibits A024459, A031130, A031379, A031400, A031163, A031099, A030648, A030217, A030673, A030421, A030893, A030869, A030910, A030955, A168771, A022614, A030233, A022608, A030663, A031424, A031180, A022617, A031195, A017878, A031300, A031142, A016368, A027595, A213325, A200667, A200564, A204388, R-000958, A204376, A204416, A204335, A164467, A027598, A030811, A030285, A031232, A031111 and A031253.
[489] Exhibit A030869.
[490] Lines 8 to 21 of page 5751 of the Transcript.
[491] Exhibit A032461.
[492] Lines 18 to 28 of page 5757 and lines 1 to 18 of page 5758 of the Transcript.

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[331] Ms. Maksymetz testified that she believed the note was hers.[493] She then had the following exchange with counsel for the Respondent:

> Q. So are you, in this fax that you are sending to Mr. Assie and Tim Gabruch, telling them to make it seem like the decision-making is in the hands of CSA?
>
> A. I think it would be that the decision-making was in the hands of CSA, and the contract wasn't obvious about that, so it was clarifying that.
>
> Q. So you think the reference to "seem" is to make the --
>
> A. -- is to clarify where the decision making was.[494]

[332] Counsel for the Respondent asked Mr. Gabruch about a subsequent amendment to the contract, made at the request of USEC, which added a further 1790 kilograms of uranium that did not meet the specifications in the original contract. Counsel put forward the proposition that a memo from Mr. Gabruch to Mr. Glattes suggested that the decision to amend the contract had been made before the amendment was put to CESA. Mr. Gabruch responded that the transaction was very small, that every arrangement with CESA/CEL would have been the subject of "its own discussion" and that the fact that the material did not meet the specifications was really only an issue for the production facility.[495]

[333] The second contract was made between CESA and Kazatomprom on August 15, 2000.[496] Kazatomprom was an entity controlled by the Kazakhstan government and a joint-venture partner of the Appellant in a uranium-mining project in Kazakhstan called Inkai.[497]

[334] Mr. Grandey testified that in 2000 the Appellant had agreed to purchase 150 tonnes of uranium from Kazatomprom. A brief description of the arrangement is set out in an e-mail from Mr. Grandey to Fletcher Newton sent on May 20, 2000:

> Kazakhstan went as well as could be expected. All minor issues resolved. Cameco agreed to purchase 150 tonnes U over the next 3 years at a discount of 12% off of

[493] Lines 27 to 28 of page 6295 and lines 1 to 7 of page 6296 of the Transcript.
[494] Lines 8 to 17 of page 6296 of the Transcript.
[495] Lines 26 to 28 of page 5761, pages 5762 to 5763 and lines 1 to 23 of page 5764 of the Transcript and Exhibits A166904 and A166905.
[496] Exhibit A030955.
[497] Lines 24 to 28 of page 1236, lines 1 to 3 of page 1237, lines 3 to 17 of page 2988 and lines 13 to 21 of page 6222 of the Transcript. A second, identical, copy of the agreement is Exhibit A030208.

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> the restricted market price (non-CIS price). We really did not want it, but it is a favour to a partner. We will find a home somewhere.[498]

[335] Mr. Grandey explained the arrangement as follows:

> . . . Kazatomprom had a minor amount of uranium that they wanted to sell. And, of course, it was restricted, so they were having a difficult time, so we agreed 150 tonnes, we could somehow handle.[499]

[336] Mr. Assie set out the proposed terms of the purchase in a letter to CESA dated July 21, 2000.[500] The letter concluded as follows:

> If this opportunity to purchase is acceptable to Cameco Europe S.A., please indicate by signing in the space below and fax same back to me at your earliest convenience.
>
> Once I have received your acceptance, we will forward you a draft contract with KazAtomProm for your review.[501]

[337] Mr. Glattes testified that, after Mr. Grandey's discussion with Kazatomprom, he became aware that Mr. Grandey had agreed to purchase uranium from Kazatomprom. Mr. Glattes testified that the relationship with Kazatomprom was important and that it was in CESA/CEL's interest that "things would move in a positive way in Kazakhstan". In his view, the 12 percent discount was attractive to CESA/CEL and he had no objection to the agreement under "these special circumstances".[502] By fax dated August 3, 2000, Mr. Glattes reported to Mr. Assie and Mr. Murphy that the management committee of CESA had approved the agreement with Kazatomprom.[503]

[338] Mr. Glattes agreed with counsel for the Respondent that the agreement with Kazatomprom was an example of the Appellant rather than Cameco US identifying a purchase opportunity for CESA/CEL.[504]

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[498] Exhibit A216314.
[499] Lines 10 to 13 of page 6182 of the Transcript. Mr. Grandey's use of the term restricted in this case refers to the fact that the uranium was subject to the suspension agreement with the United States: lines 14 to 21 of page 6182 of the Transcript.
[500] Lines 4 to 14 of page 1241 of the Transcript.
[501] Exhibit A008053.
[502] Lines 1 to 28 of page 4381 and lines 1 to 17 of page 4382 of the Transcript.
[503] Exhibit A024676.
[504] Lines 18 to 22 of page 4382 of the Transcript.

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[339] In 2001, Mr. Grandey was approached in London, England by Mr. Dzhakishev regarding Kazatomprom's obligation to deliver 390,000 pounds of U_3O_8 to CESA in 2002 under the August 15, 2000 contract.[505] Mr. Dzhakishev followed up this conversation with the following letter to Mr. Murphy at Cameco US, dated October 12, 2001:

> We highly appreciate the CAMECO support provided to us by contracting our uranium for 2000-2002 delivery years. We understand that CAMECO has entered into this contract to help KAZATOMPROM at hard time of market recession, even though Kazakh uranium supplies are only a minor part for CAMECO.
>
> To sell our uranium produced in excess to contractual obligations we have been trying hard not to add pressure on to the current price. And we have reached an agreement on uranium supply to a country, which until now was not considered as uranium purchaser.
>
> As I understand from my conversation with Mr. Grandey during the WNA Symposium earlier this month, it is no hurt to CAMECO to refuse further deliveries from Kazakhstan.
>
> In connection to the above we propose signing of an additional agreement to cancel 390,000 lbs U_3O_8 delivery due in year 2002 pursuant to the Contract between NAC KAZATOMPROM and CAMECO-EUROPE dated 15 August 2000.
>
> We thank you again for all your support and understanding. Hopefully, our mutual business will be developed further.[506]

[340] On October 13, 2001, Lorrie McGowan wrote in an e-mail to Mr. Glattes:[507]

> In the last paragraph of Kazatomprom's letter to Cameco Europe dated October 12 they ask us to inform them about a decision made on the delivery year '2000' for planning purposes. I assume they are referring to the 2002 delivery. It is my understanding that Kazatomprom would prefer to not make the 2002 delivery to Cameco Europe. I gather from their question that we have not sent them anything formal regarding the 2002 delivery. Please advise if you would like me to have legal prepare a letter agreement releasing Kazatomprom from their 2002 delivery obligation?

[341] Mr. Glattes responds to Lorrie McGowan on the same date:

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[505] Lines 25 to 28 of page 6181 of the Transcript and Exhibit A030991. Counsel for the Respondent refers to the 2002 WNA Symposium in her question, but the correct year is 2001 per the letter from Kazatomprom (Exhibit A030991) and other contemporaneous exhibits such as A157299 and A157296.
[506] Exhibit A030991.
[507] Exhibit A157299.

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> It is also my understanding that they are referring to the 2002 delivery in respect of which Jerry Grandey expressed willingness vis a vis Dschakichev in London to abstain from requesting delivery. I raised the matter of documenting this gentlemen's agreement in one of the recent sales meetings and George was going to contact Jerry for confirmation. George did not yet come back. So maybe you could raise it in one of next sales meetings[.] I will be travelling next week and can therefore not join in on both days.

[342] With respect to Mr. Glattes' reference to a sales meeting, Mr. Assie recorded the following note regarding a sales meeting on October 4, 2001:

> Kazakh U3O8 purchased – f/u w/GWG [Follow up with Mr. Grandey] as to whether we should initiate paperwork to eliminate 2002 delivery.[508]

[343] In a letter amending agreement dated November 16, 2001, CESA agreed to amend the August 15, 2000 contract to delete Kazatomprom's obligation to deliver 390,000 pounds of U_3O_8 to CESA in 2002. The letter amending agreement was signed by Mr. Kasabekov of Kazatomprom on December 4, 2001.[509]

(21) Other Contracts between CESA/CEL and Third Parties

[344] Counsel for the Respondent asked Mr. Glattes about a uranium exchange contract between CESA and Nufcor International Limited ("Nufcor").[510] Counsel took Mr. Glattes to several documents relating to this contract.[511] The first document was an e-mail from John Britt to Gary Stoker of Nufcor sent April 23, 2002 which states:

> We are 'good to go'.
>
> Would you like us to prepare the execution copies and have them sent to Gerhard Glattes at Cameco Europe for signing? He would then send them on to you.
>
> Please advise.[512]

[508] Line 6 to 12 of page 1245 of the Transcript and page 149 of Exhibit A170255.
[509] Lines 12 to 20 of page 1247 of the Transcript and Exhibit A030964. Mr. Assie referred to the fact that Mr. Kasabekov signed the letter amending agreement as president of Kazatomprom whereas Mr. Dzhakishev had signed the October 12, 2001 letter as president of Kazatomprom.
[510] Mr. Assie described Nufcor as a South African-based uranium trader: lines 25 to 28 of page 1363 and lines 1 to 14 of page 1364 of the Transcript.
[511] Lines 9 to 28 of page 4422, pages 4423 to 4426 and line 1 of page 4427 of the Transcript.
[512] Exhibit A051460.

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[345] The second document is a letter dated April 24, 2002 from an employee of the Appellant to Mr. Glattes enclosing three execution copies of an exchange agreement between CESA and Nufcor.[513]

[346] The third document is an e-mail from Mr. Glattes to John Britt sent on April 24, 2002, which states:

> It appears that a proposal summary for the Nufcor Exchange has not yet been prepared. Could you kindly arrange for the proposal summary to be faxed to the Swiss office.[514]

[347] The fourth document is a letter from George Assie of Cameco US to Mr. Glattes setting out the terms of the exchange and then stating:

> By completing this exchange, Cameco Europe will save the cost of transporting the U3O8 from Canada to Europe, a savings of approximately US $24,000. Please confirm that Cameco Europe will proceed with the exchange by signing and returning a copy of this fax to us. We shall then arrange for a draft contract to be sent to you.[515]

[348] The fifth document is a request dated April 29, 2002 from CESA to the BfE asking the BfE to authorize the exchange with Nufcor.[516]

[349] The final document is the cover sheet of a fax from Mr. Glattes to Mr. Assie dated April 30, 2002, to which was attached a signed copy of the April 25, 2002 letter. The fax cover sheet states, in part: "Thank you for arranging the U3O8 Exchange with Nufcor on CSA's behalf."[517]

[350] Mr. Glattes testified that he could not recall the specifics of the exchange agreement with Nufcor but that if it was important it would have been discussed in advance. He went on to state:

> So I was aware of the context, but whether it then worked out or not, obviously, I heard later on. But, again, I think, in these cases, there were usually sort of in-advance agreements. If we can secure an exchange, well, we will do it, even if it's a CCI person, then telling, in this case, Stoker from Nufcor, "Well, and CEL will

[513] Exhibit A164285.
[514] Exhibit A051522.
[515] Exhibit A000724.
[516] Exhibit A018434.
[517] Exhibit A018435.

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> be the exchange partner," and then that's all great. But it was -- it was really sort of -- there was agreement in advance being achieved.[518]

(22) CEL's Conversion Services Account with the Appellant

[351] In cross-examination, Ryan Chute testified that the Appellant maintained an account which recorded CEL's entitlement to conversion services (i.e., the services required to convert U_3O_8 into UF_6).[519] The account was maintained in accordance with a letter agreement dated December 1, 2004. The letter agreement required CEL, if it wished to deposit conversion credits to its account, to instruct the Appellant to add such credits to the account, and it also required CEL to provide the Appellant with 30 days' notice of withdrawal of conversion credits from the account.[520]

[352] Mr. Chute agreed with counsel for the Respondent that on one occasion CEL made a withdrawal from the account without the notice required by the letter agreement. This occurred because delivery to TXU—a customer of Cameco US—had been moved by the contract administrators from December 29, 2006 to December 15, 2006 and Mr. Chute was not advised of the change in time to amend the notice. Consequently, the notice he had originally prepared for December 29 was no longer correct. The delivery of UF_6 was made by CEL to Cameco US and by Cameco US to the customer on December 15, and CEL's account was debited for the required credits without the correct notice.[521] An e-mail from Mr. Murphy to Randy Belosowsky sent on November 15, 2006 indicates that Mr. Murphy was aware of the change in the delivery date because he complains to Mr. Belosowsky about the contract administrators making the change without consulting CEL.[522]

(23) The Evidence regarding the Intercompany Documentation

[353] Mr. Assie, Mr. Glattes and Mr. Murphy each testified in chief that there had been issues with the timeliness of documentation between CESA/CEL and Cameco

[518] Lines 21 to 28 of page 4426 and line 1 of page 4427 of the Transcript.
[519] Lines 12 to 18 of page 5119 of the Transcript.
[520] Exhibit A225957.
[521] Lines 18 to 28 of page 5123 and lines 1 to 21 of page 5124 of the Transcript and Exhibit A203157.
[522] Lines 7 to 15 of page 3354 of the Transcript and Exhibit A192951.

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US and between CESA/CEL and the Appellant and that backdating of some intercompany documents had occurred.[523]

[354] The late and backdated documents identified by Mr. Assie, Mr. Glattes and Mr. Murphy fall within two general two categories of documents. I will address each category separately.

a) Notices and Schedules

[355] The first category of documents is comprised of non-binding delivery notices, binding delivery notices, delivery schedules and flex notices required under the terms of the contracts between CESA/CEL and Cameco US and between CESA/CEL and the Appellant (I will refer to this category of documents as the "intercompany notices").

[356] Generally speaking, if a contract for the purchase of uranium provides for non-binding delivery notices, binding delivery notices, delivery schedules or flex notices, the obligation to issue the notices falls on the purchaser.[524] As a result, the only intercompany contracts under which CESA/CEL had an obligation to issue intercompany notices were the Long-term Contracts.[525] Cameco US had the obligation to issue intercompany notices to CESA/CEL under the Cameco US Contracts that required notices and the Appellant had the obligation to issue intercompany notices to CESA/CEL under the CC Contracts that required notices.[526] The only exception to this is in Exhibit A020929, which required CESA to provide the Appellant with 5 days' notice of the delivery date within the delivery month specified in the contract.

[357] Mr. Assie testified that he was aware that there were late and backdated intercompany delivery notices.[527] Mr. Assie testified that critical information for scheduling deliveries was received from the customers and that the intercompany delivery, notices were not very important because the contract administrator was

[523] Mr. Murphy described backdating as any situation in which a document is signed on a date that is later than the signature date suggested on the face of the document: lines 23 to 28 of page 3052, pages 3053 to 3054 and lines 1 to 7 of page 3055 of the Transcript.
[524] Two typical examples of the notice requirements in an intercompany contract are found in Schedule A of Exhibits A021044 and A004808. The former is one of the Cameco US Contracts and the latter is one of the BPCs.
[525] The Spot Sale Contracts did not have notice requirements.
[526] Exhibit A020911 had the additional requirement that CESA provide non-binding notices to the Appellant of the monthly quantities of uranium expected to be acquired by CESA from Tenex in 2001 and 2002.
[527] Lines 22 to 24 of page 468, lines 26 to 28 of page 476 and lines 1 to 7 of page 477 of the Transcript.

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notifying himself/herself or a colleague of information that had already been received from the customer.[528]

[358] Mr. Assie testified that customers were sometimes late with delivery notices, that Cameco US would follow up with them and would make the delivery and that Cameco US had never refused delivery because of a late delivery notice.[529]

[359] Mr. Assie testified that he was aware that flex notices had been issued late. He believed the decisions to exercise the flex options were made in a timely manner, but the documentation was not always prepared in a timely manner. Mr. Assie also testified that he was aware that flex notices had been backdated. Mr. Assie testified that he did not know why the backdating of flex notices occurred but that the Cameco Group did not seek or obtain any commercial advantage as a result of flex notices being late or backdated.[530]

[360] Mr. Assie testified that Cameco management did not give any instructions to backdate either flex notices or delivery notices and that people were instructed not to backdate documents.[531]

[361] Mr. Glattes testified that backdating had been an issue since 1999 and that he had raised the issue with Mr. Zabolotney and others at the Appellant.[532] Mr. Glattes testified that senior personnel did not encourage or condone the problematic behaviour but that it nevertheless persisted.[533]

[362] Mr. Glattes testified that the backdating of intercompany notices originated with the contract administrators that provided services to CESA/CEL under the Services Agreement. Mr. Glattes testified that the delivery notices under the BPCs had no practical significance because the contract administrators employed by the Appellant who prepared the notices for CESA/CEL under the terms of the Services Agreement were essentially notifying themselves.[534]

[363] With respect to flex notices, Mr. Glattes testified that the delivery of a flex notice was a formality required by the terms of the BPC once the decision to exercise the flex option had been made and that the notice lacked relevance for the

[528] Lines 9 to 28 of page 471 and lines 1 to 26 of page 472 of the Transcript.
[529] Lines 14 to 28 of page 477 of the Transcript.
[530] Lines 2 to 19 and 25 to 28 of page 483 of the Transcript.
[531] Lines 20 to 24 of page 483 of the Transcript.
[532] Line 28 of page 4139, lines 1 to 7 of page 4140 and lines 11 to 16 of page 4166 of the Transcript.
[533] Lines 17 to 26 of page 4163 of the Transcript.
[534] Lines 14 to 28 of page 3633 and lines 1 to 12 of page 3634 of the Transcript.

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same reason as the delivery notices, i.e., the contract administrators were notifying themselves.[535]

[364] Counsel for the Respondent asked Mr. Glattes whether in light of the issues with late documents he had considered other options for the provision of services to CESA/CEL. Mr. Glattes responded that there were other options but that he had not pursued those options because of the resulting duplication of services and because of his optimism that the issue of timeliness would eventually work itself out satisfactorily.[536]

[365] Counsel for the Respondent asked Mr. Glattes about several specific examples involving the backdating of intercompany notices. Mr. Glattes agreed that each such notice was backdated, and that backdating occurred on annual delivery schedules, binding delivery notices and flex notices.[537] In response to a question as to why there were so many missed deadlines, Mr. Glattes replied:

> Again, the responsibility for these notices, we had a service provider in Saskatoon. It was their job. I mean, everything that was done here by Mr. Bopp and so on was, in principle, something which wouldn't have been necessary if Cameco Corporation would have diligently sort of fulfilled its job. So, I mean, that's the basis.[538]

[366] Mr. Glattes testified that the delivery notices had no function or importance because the contract administrators were notifying themselves and that, in terms of contract implementation, the backdating had no relevance and provided no benefit to CESA/CEL because the contract was fulfilled in the same way.[539]

[367] Mr. Glattes agreed with counsel for the Respondent that backdating the intercompany notices made it look as if the notices were within the requirements of the intercompany contracts and that the backdating was misleading to third parties,

[535] Lines 6 to 28 of page 3635, pages 3636 to 3637 and line 1 of page 3638 of the Transcript.
[536] Lines 8 to 28 of page 4140 and lines 1 to 16 of page 4141 of the Transcript.
[537] Lines 1 to 10 of page 4153, lines 5 to 18 of page 4154, lines 5 to 13 of page 4156, lines 10 to 28 of page 4159 and lines 3 to 7 of page 4167 of the Transcript.
[538] Lines 8 to 14 of page 4239 of the Transcript. An example of notices being provided to Mr. Glattes late is found in Exhibit A154606; see lines 22 to 28 of page 5410, page 5411 and lines 1 to 9 of page 5412 of the Transcript. Ms. McGowan testified that it was her decision to use the date stipulated in the contracts instead of the date the notices were signed: lines 24 to 28 of page 5412 of the Transcript.
[539] Lines 2 to 28 of page 4160 and lines 1 to 18 of page 4161 of the Transcript.

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but stated that the backdating yielded no economic benefit and no tax benefit and had no bearing on compliance with the intercompany contracts.[540]

[368] With respect to flex notices, Mr. Glattes testified that CESA/CEL did not receive any economic benefit from late flex notices and that CESA/CEL did not deliberately issue backdated flex notices to see how the market would play out.[541]

[369] Mr. Murphy testified that the delivery notices required under the Cameco US Contracts had no impact on the conduct of CEL's business and played no role in the operation of that business because the contract administrators already had the information about the deliveries, having received it from the customers of Cameco US. He explained that since each Cameco US Contract backed up a contract with a customer of Cameco US, CEL was required to deliver its uranium to Cameco US at the time and place that Cameco US had to deliver the same uranium to its customer. The delivery information was in the binding delivery notice received by Cameco US from its customer and the contract administrators providing services to CEL under the Services Agreement had that information.[542] Mr. Murphy testified that he expressed concern about the timeliness of the intercompany notices because his personality was such that he wanted to have "a proper set of documents".[543]

b) Intercompany Offers, Proposal Summaries and Contracts

[370] The second category of documents is comprised of the intercompany contracts between CESA/CEL and Cameco US and between CESA/CEL and the Appellant and the intercompany offers or proposal summaries that set out the proposed terms of these contracts (I will refer to this category of documents as the "intercompany contracts"). Mr. Murphy testified that intercompany offers typically came to CEL from Cameco US and that proposal summaries typically came to CEL from the Appellant.[544]

[540] Lines 24 to 28 of page 4159, lines 19 to 28 of page 4161 and lines 1 to 22 of page 4162 of the Transcript.
[541] Lines 2 to 8 of page 3638 of the Transcript.
[542] Lines 22 to 28 of page 2873, lines 1 to 9 of page 2874, lines 15 to 28 of page 2898, lines 1 to 24 of page 2899, lines 19 to 28 of page 3023, lines 1 to 13 of page 3024, lines 15 to 28 of page 3025 and lines 1 to 17 of page 3026 of the Transcript.
[543] Lines 16 to 24 of page 2899 of the Transcript.
[544] Lines 10 to 22 of page 3083 of the Transcript.

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[371] Counsel for the Respondent asked Mr. Glattes about two of the Long-term Contracts entered into in 2004.[545]

[372] The first Long-term Contract is Exhibit A163425. Mr. Glattes testified that this contract was signed by him after its effective date of January 1, 2004 and that the preceding offer from the Appellant to CEL dated November 24, 2003 was not received by CEL until after January 22, 2004. Mr. Glattes testified that his "vague recollection" was that the proposed agreement was discussed at the sales meetings in November 2003 and that the delay in executing the contract was a result of the Christmas break. He also stated that the agreement would only standout in his mind if the usual procedure for such agreements had not been followed.[546] Mr. Assie testified that he did sign the proposal summary dated November 3, 2003 for the Long-term Contract, but he could not recall when he did so.[547] Mr. Assie agreed that it appeared the offer and acceptance for the contract was signed on January 27, 2004 and faxed to the Appellant on January 28, 2004.

[373] The second Long-term Contract is Exhibit R-001399. Mr. Glattes testified that he did recall the details of this contract and that it was signed by Mr. Murphy shortly after its effective date of August 20, 2004. Mr. Glattes testified that Mr. Murphy took a few days' vacation in August 2004 on his way to Switzerland but that he was calling the Zug office quite frequently and being kept up to date by Markus Bopp regarding the contract.[548]

[374] It would appear from Mr. Murphy's testimony that he arrived in Zug on August 27 or 28. Since he had not been a party to the discussions regarding this contract, before signing the intercompany offer on August 27, 2004 and the contract sometime in September, he consulted with and relied on Mr. Glattes regarding the terms agreed to with the Appellant.[549] Mr. Assie testified that the proposal summary was dated August 16, 2004 and that the intercompany offer for the contract was dated August 20, 2004, which is the effective date of the contract.[550]

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[545] The Long-term Contracts are Exhibits A163425 and R001399.
[546] Lines 24 to 28 of page 4263, pages 4264 to 4268 and lines 1 to 26 of page 4269 of the Transcript and Exhibits A013099 and A039921.
[547] Lines 19 to 27 of page 967 of the Transcript. The proposal summary was prepared by Mr. Del Frari and signed by Mr. Assie and Mr. Grandey (Exhibit A000800).
[548] Lines 27 to 28 of page 4269, page 4270 and lines 1 to 26 of page 4271 of the Transcript.
[549] Lines 27 to 28 of page 2759, page 2760, lines 1 to 12 of page 2761, lines 22 to 28 of page 3118 and page 3119 of the Transcript.
[550] Lines 12 to 28 of page 1464 and lines 1 to 21 of page 1465 of the Transcript. The proposal summary is Exhibit A155558 and the offer is Exhibit A155557.

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[375] Mr. Glattes was asked about the base price in the contract of $18.75, which was $0.25 and $4.25 lower than the TradeTech long-term price indicator for July and August, respectively, of 2004. Mr. Glattes testified that the June 30 indicator of $18.75 was the basis for the price in the contract (even though the proposal summary was dated August 16, 2004).[551]

[376] Mr. Assie testified that the latest available price indicator at any time during a month would be the month-end prices for the previous month.[552] Mr. Assie testified that the $0.25 discount over the TradeTech long-term price indicator for July was attributable to the large volume of the contract.[553]

[377] Counsel for the Respondent asked Mr. Glattes about six other intercompany contracts and related documents:

1. UF_6 Conversion Services Agreement between Cameco US and CEL made with effect as of April 27, 2004.[554] The contract does not expressly state when it was signed but Mr. Glattes agreed that it was not signed on April 27, 2004 and that it is likely Mr. Murphy was the president of CEL when the document was signed. Mr. Glattes also agreed with counsel's English translation of an e-mail from Mr. Bopp dated December 27, 2004 in which Mr. Bopp states in German that the contract has arrived, that it must be dated before May 1, 2004, and that Mr. Glattes' signature is required.[555]

2. Uranium Concentrates Loan Agreement between CEL and the Appellant made with effect as of April 14, 2003.[556] The contract states on the signature page that "the parties have executed this Agreement effective as [of] the date first above written". Mr. Glattes agreed with counsel that the associated offer from CEL to the Appellant had a face date of April 14, 2003 but that the fax track indicated July 14, 2003 and that the delivery confirmation indicated the transfer took place on April 14, 2003. Mr. Glattes also agreed that he was not made aware of the transfer on or prior to April 14, 2003 and that he was sent signature copies of the contract by cover letter dated July 21, 2003.

[551] Lines 27 to 28 of page 4271, page 4272 and lines 1 to 6 of page 4273 of the Transcript.
[552] Lines 17 to 21 of page 366 of the Transcript.
[553] Lines 15 to 28 of page 1465 and lines 1 to 2 of page 1466 of the Transcript.
[554] Exhibit A225935.
[555] Lines 20 to 28 of page 4416, lines 1 to 21 of page 4417 and lines 13 to 27 of page 4418 of the Transcript and Exhibit A055803.
[556] Exhibit A154086.

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Mr. Glattes testified that the transfer of uranium to the Appellant occurred in the context of a crisis caused by a "water inflow" event at the Appellant's McArthur River mine, that the Appellant inadvertently overdrew against CEL's uranium account with the Appellant and that this error was rectified by treating the withdrawal as a loan effective as of the date of the withdrawal on April 14, 2003.[557]

> Mr. Assie testified that the Appellant's account was overdrawn on April 14, 2003 and that the loan was put in place after that date to address the shortfall. Mr. Assie agreed that the paperwork showed that CEL was informed of the loan on July 14, 2003.[558]

3. A Uranium Hexafluoride Conversion Spot Purchase Contract between CESA and Cameco US dated as of April 10, 2001.[559] The contract states on the signature page that "the parties have caused this Contract to be executed by their duly authorized officers as of the 10th day of April 2001".

   In an e-mail to Mr. Glattes dated April 16, 2001, Rita Sperling states:

   > Attached is a copy of the invoice for the sale of conversion (using Conversion Credits) by Cameco Europe to Cameco Inc. This delivery supported a sale of 170,000 kgU/UF6 by Cameco Inc. to APS at USEC on April 12, 2001 (PO 7029).
   >
   > I have prepared the invoice (and backup) and all calculations have been checked. The backup is also attached for your reference if needed.
   >
   > Please print the invoice on Cameco Europe letterhead and fax a copy to my attention. The original can be sent by the usual method. If you have any questions or need additional clarification, please don't hesitate to call me at 306-956-6273.[560]

   In an e-mail to Mr. Glattes dated April 17, 2001, Scott Melbye states:

[557] Lines 13 to 28 of page 4420, page 4421 and lines 1 to 8 of page 4422 of the Transcript and Exhibits A016221, A013161 and A009899.
[558] Line 28 of page 1293, page 1294 and lines 1 to 7 of page 1295 of the Transcript.
[559] Exhibit A165040. A version of the contract without the signature page is included in Exhibit R-003844.
[560] Exhibit A165035.

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> You were understandably left wondering where the offer and acceptance is that corresponds with the contract and invoice that you currently have before you. Let me explain:
>
> This CCI / APS deal was always intended to be sourced from CCO (we have a proposal accepted by Jerry Grandey dated March 14, 2001). In the week leading up to last Thursdays [*sic*] delivery to APS, Shane decided to instead source this deal using CSA conversion credits (the contract before you for execution will provide for that).
>
> What I will send to you today is a corresponding offer (for you [*sic*] acceptance) to close the loop.561

Mr. Glattes testified that the issue of how to optimize the use of CESA/CEL's conversion credits came up frequently but that it was "nothing of commercial -- really big commercial importance." Mr. Glattes agreed with counsel for the Respondent that the offer from Cameco US to CESA had a face date of April 4, 2001 but that the fax track indicated it was faxed to him on April 18, 2001. Mr. Glattes also agreed that the date of the contract was chosen because it was before the date of delivery, which was either April 11 or April 12, 2001.[562]

4. A UF_6 Conversion Services Agreement between CEL and Cameco US effective as of March 3, 2003.[563] The contract states on the signature page that "the Parties hereto have executed this Agreement under the hands of their proper officers duly authorized in that behalf." There is no reference to a signature date. Mr. Glattes agreed that (i) a letter dated March 4, 2003 stated that a delivery (of 125,694 kgU of UF_6) would take place effective March 25, 2003; (ii) a faxed copy of the same letter and the contract had a fax track indicating that these documents were faxed to him on April 9, 2003; (iii) a letter dated April 4, 2003 stating that a delivery of 125,807 kgU of UF6 would take place effective April 24, 2003 had a fax track of either April 26, 2003 or April 28, 2003, indicating that the letter was sent after the delivery date; and (iv) a transfer confirmation dated

[561] Exhibit A165036
[562] Lines 2 to 28 of page 4427, pages 4428 to 4430 and lines 1 to 16 of page 4431 of the Transcript and Exhibit A165038.
[563] Exhibit A016549.

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June 20, 2003 confirming a transfer made on June 16, 2003 was probably sent by Mr. Bopp by courier on June 27, 2003.[564]

5. Five notices confirming the transfer of uranium under a Conversion services Supply Contract between CESA and Cameco US signed by CESA on March 27, 2001 and by Cameco US on March 14, 2001.[565] The notices were dated September 1, 2001, January 29, 2002, February 26, 2002, March 29, 2002 and May 29, 2002. Mr. Glattes agreed that the five notices were issued after he received from Jackie Schlageter an interoffice memo dated August 23, 2002 in response to an e-mail he had sent to Lorrie McGowan on August 1, 2002 requesting clarification regarding the quantities delivered under the contract and asking that in the future the Appellant send delivery notices when the deliveries happened.[566] The interoffice memo states:

> After becoming familiar with the KHNP/Cameco Inc. conversion agreement (PO 6960))[*sic*], as the new administrator, and the corresponding intercompany deliveries under the CSA/CCI agreement (PO 7018/0071) I have noticed CSA did not receive written confirmation of the transfer of concentrates to your account at Cameco (6928) as part of the intercompany delivery correspondence. To date there have been a total of 5 deliveries involving CSA and the delivery of UF_6 (with one pending in October 2002).
>
> In order to make the files complete I have subsequently created the necessary concentrate transfer confirmations and dated them as appropriate for the corresponding delivery. Because Tim Kopeck would have normally signed these letters and he is no longer working at head office, Doug Z. suggested we have them signed by Bob Cherry who had previously administered the same agreement. (I of course could not sign them as I was away on maternity leave during this time.) We are hoping this exercise will satisfy any audit that would occur at a future date.
>
> Please feel free to contact me with any questions or concerns given the unusual nature of these letters.[567]

[564] Lines 19 to 28 of page 4434, pages 4435 to 4436 and lines 1 to 3 of page 4437 of the Transcript and Exhibits A016549, A016547, A016542 and A016531.
[565] The contract is Exhibit R-003841 and the five notices are Exhibits A162383, A162382, A162370, A162369 and A162368.
[566] Lines 19 to 28 of page 4437, pages 4438 to 4441 and lines 1 to 20 of page 4442 of the Transcript and Exhibits A053254 and A162387.
[567] Exhibit A162387.

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Mr. Glattes testified that he did not know which audit is being referenced in the interoffice memo, that there were no conversations with the contract administrators that specifically addressed completing documentation to satisfy audit concerns or in which the audit was the main aspect of the conversation, and that it was CEL's desire and concern that the books and the paperwork be in good order.[568]

Mr. Glattes was asked about an e-mail from Crystal Reich sent to him on September 12, 2002 in which Ms. Reich states:

> Dear Gerhard,
>
> Please sign the attached document and send back to Corp.
>
> ps: You should have a binding notice from Jackie for this delivery already. It was dated August 26, 2002 which is inside the delivery notice terms, therefore she is going to resend it to you via courier only. Please destroy your copy of her first notice and replace it with the new one dated August 16, 2002. Thanks Gerhard![569]

Mr. Glattes testified that he had no specific knowledge as to why the replacement notice was sent by courier and that he did not recall whether he asked at the time. Mr. Glattes then had the following exchange with counsel:

> Q. To your knowledge, did the Cameco Corporation administrator send you documents via courier only in order to avoid having fax tracks at the top of the document by which a date could be determined?
>
> A. No.
>
> Q. She notes:
>
> "Please destroy your copy."
>
> And then you send Markus a note, and you're basically telling him about this and asking him to look out for the notice.
>
> A. Well, I said:
>
> "Please review the quantity and delivery date in connection with the BfE approval."

[568] Lines 7 to 28 of page 4443 and lines 1 to 11 of page 4444 of the Transcript.
[569] Exhibit A053281. The two notices are Exhibits A162367 and A162384.

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> And he should keep an eye on the exchange of the notices.[570]

6. An Agreement for the Conversion of Uranium Concentrates and the Supply of UF_6 between CEL and Cameco US made effective as of July 1, 2003.[571] The contract states on the signature page that "the Parties hereto have executed this Agreement as at the day and year first above written under the hands of their proper officers duly authorized in that behalf." The contract states on the cover page that it is in support of EDF PO 7160. Mr. Glattes agreed that the contract was forwarded to him for his signature on October 16, 2003 and that Mr. Bopp returned two executed copies of the contract to the Appellant on October 21, 2003.[572] Mr. Glattes was then asked about a second contract, between the Appellant and Cameco US, which had the same effective date, was for the supply of the same quantity of UF_6, and stated on its cover page that it was supporting EDF PO 7160.[573] An interoffice memo from Dean Wilyman to George Assie and Jerry Grandey appears to show that the second contract may have been executed on or about October 8, 2003, although no one testified about the content of the memo. Mr. Glattes testified that he did not recall whether at the time he signed the first contract he had been made aware of the second contract.[574]

   Section 5.01 of the two contracts provided for the delivery of quantities of UF_6 in 2003, 2004, 2005, 2006 and 2007 "[u]nless otherwise agreed upon by the Parties". Mr. Glattes was asked about a letter dated August 15, 2003, which stated that, pursuant to section 5.01 of their contract, CEL and Cameco US agreed that the quantities of UF_6 to be delivered in 2003 and 2004 were zero, and about an interoffice memo from Dean Wilyman to Mr. Glattes dated November 25, 2003 in which Mr. Wilyman states:

   > Please find enclosed two copies of a Letter Agreement between Cameco Europe Ltd. and Cameco Inc. The Letter Agreement formalizes that pursuant to section 5.01 the Annual Quantity to be supplied by Cameco Europe Ltd. in 2003 and 2004 is equal to zero (0). Please have these documents signed, keeping one original for your records and

[570] Lines 4 to 18 of page 4447 of the Transcript.
[571] Exhibit A154147.
[572] Lines 10 to 28 of page 4449 and lines 1 to 22 of page 4450 of the Transcript and Exhibits A163997 and A163996.
[573] Exhibit A219402.
[574] Lines 3 to 7 of page 4452 of the Transcript and Exhibit A148752.

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> returning one original to me for furtherance. I will make a copy to retain here and forward the original to Cameco Inc.

Mr. Glattes testified that he had no recollection of why there were no deliveries by CEL to Cameco US in 2003 and 2004. He also did not recall whether there were discussions during the sales meetings about leaving open alternative sources to supply Cameco US. Mr. Glattes agreed with counsel that he would not have seen the letter agreement showing August 30, 2003 as the date on which he signed it until at least November 25, 2003.[575]

[378] Mr. Murphy testified about his preoccupation with the timeliness of intercompany contracts and with backdating and about his desire to have accurate and timely documentation.[576] Mr. Murphy raised the issue as early as November 2004 and he included the following in a draft activity report for November 15 through December 3, 2004:

> CEL, with the cooperation of CCI [Cameco US] and CCO [the Appellant], is trying to establish a "system" for ensuring that CEL receives inter-company offers "ICOs" in a timely manner.[577]

[379] Mr. Murphy described the issue as follows:

> In my opinion, I was not receiving the paper from Cameco U.S. that would show, in writing, our verbal agreement on terms and conditions. I wasn't receiving that paper as quickly as I thought I should receive it and as I wanted to receive it.
>
> And I was working with my colleagues in these two locations to try to improve the timing of that.[578]

[380] In an e-mail to John Britt and others dated December 17, 2004, Mr. Murphy writes

> Following up on our discussion during the December 16 sales meeting, here is a first attempt to describe what can and will be done to improve the existence and timeliness of documentation between CEL and CCI/CCO. Please pass this email on to whomever you think appropriate and please give me your comments, concerns and suggestions.

[575] Lines 2 to 28 of page 4453 and lines 1 to 9 of page 4454 of the Transcript and Exhibits A163995 and A163994.
[576] For example, lines 11 to 18 of page 3017 of the Transcript.
[577] Lines 10 to 25 of page 2853 of the Transcript and Exhibit A225748.
[578] Lines 27 to 28 of page 2853 and lines 1 to 5 of page 2854 of the Transcript.

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> Inter-Company Offers ("ICOs"):
>
> Within (5?) days after receiving an "Acceptance" from the third party, information will be sent to CEL. If the Acceptance is sufficiently clear, then such information will be in the form of an ICO, sent for CEL's acceptance. If the Acceptance is ambiguous, then a note containing the best available interim information (e.g. name of 3rd party, form of uranium, delivery years, volumes, flex, pricing mechanism) will be sent. This will allow CEL to create a slot for the pending ICO as well as a way to keep the pending ICO on the radar screen. The responsibility for sending the ICO (and the interim information, if applicable) rests with the respective (Vice President? Sales Manager?)
>
> Inter-Company Contracts ("ICCs"):
>
> 1) Preparation / Completion of the ICC: Responsibility for ensuring that the ICC has been prepared, reasonable time has been allowed for CEL to review and comment, and the ICC has been fully executed prior to the first delivery thereunder, rests with the respective (VP? Sales Manager?)
>
> 2) Deliveries not to be made unless the ICC is in place: Market Administration will not issue transfer/delivery instructions without first confirming that the ICC is in place. Responsibility for this rests with the respective (Specialist? Supervisor?) In addition, CEL will not sign transfer/delivery notices until it has confirmed that an ICC is in place. Responsibility for this rests with M. Bopp and WLM.[579]

[381] The responses to Mr. Murphy's e-mail suggest 15 days to prepare the intercompany offers, but Mr. Murphy replies that 15 days is too long. Mr. Murphy testified that, in any event, his proposal regarding the timing of intercompany documentation was not adopted in any form.[580]

[382] In 2006, Mr. Murphy created a spreadsheet that tracked the timeliness of the documentation between CEL and Cameco US.[581] The spreadsheet shows the following information:

[579] Lines 8 to 17 of page 2856 of the Transcript and Exhibit A043566.
[580] Lines 18 to 28 of page 2856, pages 2857 to 2858 and lines 1 to 3 of page 2859 of the Transcript.
[581] Lines 2 to 28 of page 2878 and lines 1 to 2 of page 2879 of the Transcript and Exhibit A225811.

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		Months since 3rd Party was Executed			
end of:	**Total**	**1-6 Months**	**7-12 Months**	**> 12 Months**	**Those > 12 Months**
Jan/06	15	11	3	1	Progress U3O8
Feb/06	17	13	3	1	Progress U3O8
Mar/06	15	12	2	1	Progress U3O8
Apr/06	17	13	2	2	Springfield conv, Progress U3O8

[383] In cross-examination, Mr. Murphy testified that one month to put an intercompany contract in place was reasonable but that his concern was with the intercompany contracts that were outstanding for more than six months.[582]

[384] Mr. Murphy testified that he raised the timeliness issue with Mr. Assie.[583] Mr. Murphy prepared notes for one of his discussions with Mr. Assie. He described those notes in cross-examination as follows:

> This was two years after I had started to get documentation, tried to get documentation more promptly. And I was preparing for a phone call. And, as I testified, this was like a Rick Mercer rant. It was using extreme examples. It was -- it was going over the top. I didn't intend to use all of these examples to say all of this to George. I wanted to get the point across, and I was having this in my mind as a result of my frustration.[584]

[385] Mr. Murphy testified that although the timeliness of the intercompany documents was an issue for him, the intercompany documents only papered the agreements already reached by CEL and Cameco US during the sales meetings and the paper was in place before any deliveries occurred under the agreements. Accordingly, the timeliness issue had no impact on CEL's business.[585]

[386] Mr. Murphy testified that in two cases he became aware of a suggestion by an individual he believed at the time to have been, in each instance, a contract administrator that documents between CEL and the Appellant be destroyed. The first case involved a specific intercompany contract for the sale of uranium by CEL to the Appellant. Mr. Murphy's description of the second case was vague but he

[582] Lines 15 to 25 of page 3058 of the Transcript.
[583] Lines 4 to 28 of page 2893, page 2894, lines 1 to 16 of page 2895, lines 22 to 28 of page 3006, lines 1 to 7 of page 3007 and lines 6 to 18 of page 3023 of the Transcript. Mr. Assie confirms these discussions with Mr. Murphy: lines 10 to 28 of page 446, pages 447 to 450 and lines 1 to 11 of page 451 of the Transcript and the fourth and fifth pages of Exhibit A170258.
[584] Lines 24 to 28 of page 3022 and lines 1 to 3 of page 3023 of the Transcript. The notes are Exhibit A225802.
[585] Lines 6 to 21 of page 2854, lines 23 to 28 of page 3027 and pages 3028 to 3030 of the Transcript.

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believed it involved a FAPI issue that resulted from CEL selling uranium to the Appellant.

[387] In the first case, the request was made by a contract administrator in an e-mail.[586] The e-mail states that the reason for the request is a regulatory issue. Although Mr. Murphy was not copied on the e-mail, he communicated his concern over the suggestion and his refusal to participate in destroying documents to Lorrie McGowan, and a different solution was implemented.[587] In cross-examination, counsel for the Respondent suggested that the regulatory issue cited by the contract administrator in the e-mail was in fact the FAPI issue. Mr. Murphy responded that he did not recall the issue being FAPI and that he did not recall what the issue was.[588]

[388] Mr. Murphy testified that in the second case he had "every indication" that the suggestion was made by a contract administrator; however, he had no further information.[589] Mr. Assie testified that he did not recall Mr. Murphy ever raising the issue of destroying documents in a conversation with him.[590]

[389] Mr. Murphy testified that he was not aware of any other instance during his tenure at the Cameco Group where a suggestion or request to destroy documents was made and that no documents were destroyed during his tenure at CEL.[591] Mr. Murphy also stated that if anyone with any authority in the Cameco Group had initiated such a suggestion he would have resigned.[592]

[390] Mr. Murphy testified that he made notes to himself that identified "things [he] was thinking about" or that he "may have been angry about".[593] Mr. Murphy found a copy of the notes on an external hard drive that he had used to back up his

[586] Exhibit A200130.
[587] Lines 21 to 28 of page 2865, pages 2866 and 2867, lines 1 to 23 of page 2868, lines 19 to 28 of page 3017, page 3018 and lines 1 to 7 of page 3019 of the Transcript and Exhibits A200130 and A200125. Other Exhibits relating to the transaction in issue are A200126, A200128, A200131, A200133, A200134, A200136, A200140, A200141, A200142, A200143 and A200145. Exhibit A200147 is a duplicate of Exhibit A200130.
[588] Lines 23 to 28 of page 3203, pages 3204 to 3206 and lines 1 to 20 of page 3207 of the Transcript.
[589] Lines 6 to 21 of page 2875 of the Transcript.
[590] Lines 19 to 25 of page 1067 of the Transcript.
[591] Lines 22 to 28 of page 2875 and lines 1 to 8 of page 2876 of the Transcript.
[592] Lines 12 to 21 of page 2875.
[593] Lines 16 to 28 of page 2860 and lines 1 to 13 of page 2861 of the Transcript and Exhibit A225804.

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computer while president of CEL.[594] Mr. Murphy was questioned extensively about the notes in examination-in-chief and in cross-examination.[595]

[391] Mr. Murphy explains on a number of occasions that the notes were not for public consumption and that he was working through a number of questions raised by his understanding that CEL was to operate independently from the other members of the Cameco Group–a concept that he had difficulty reconciling with the fact that CEL and the Cameco Group shared all sorts of information that arm's length parties would not share. Mr. Murphy observes of these notes:

> . . . I wasn't careful with how I worded these things that I was writing down for myself because I think it is normal, if you're making notes to yourself, you don't worry about grammar or anything else. And I tend to exaggerate.[596]

[392] The overall tenor of the notes is that Mr. Murphy was concerned about the ability of the corporate structure to withstand a tax audit considering the lack of timeliness of intercompany documentation, the two suggestions described above that documents be destroyed and what he perceived to be a lack of awareness among the sales and marketing administration people of what is and is not appropriate. Mr. Murphy's notes are interspersed with conjecture and questions indicating that in some instances he was not clear on whether the issue he was identifying was a real issue or the product of either overreaction or a misunderstanding of the concepts involved.

[393] Counsel for the Respondent asked Mr. Murphy about an amended and restated UF_6 conversion agreement that amended one of the contracts for the sale of UF_6 by CEL to the Appellant.[597] The terms of the amending agreement were set out in a proposal summary that was dated July 19, 2005.[598] The amended agreement states on the signature page that "the Parties have executed this Agreement as at the day and year first above written", which is July 20, 2005.

[594] Lines 9 to 28 of page 2876, page 2877 and line 1 of page 2878 of the Transcript.
[595] Lines 14 to 28 of page 2861, pages 2862 to 2877, line 1 of page 2878, lines 15 to 28 of page 3003, pages 3004 to 3005, lines 1 to 19 of page 3006, lines 22 to 28 of page 3009, pages 3010 to 3020, lines 1 to 3 of page 3021, pages 3031 to 3033, lines 1 to 17 of page 3034, lines 9 to 28 of page 3035, pages 3036 to 3047, lines 1 to 25 of page 3048, lines 22 to 28 of page 3358 and lines 1 to 5 of page 3359 of the Transcript.
[596] Lines 13 to 16 of page 2872 of the Transcript.
[597] The original agreement is Exhibit A021444 and the amending agreement is Exhibit A217602.
[598] Lines 24 to 28 of page 3221, page 3222 and lines 1 to 12 of page 3223 of the Transcript and Exhibit A217939.

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After reviewing an e-mail,[599] Mr. Murphy agreed that the amended agreement remained unsigned as of December 7, 2005.[600]

[394] Counsel for the Respondent asked Mr. Murphy about the way the date of the contract was presented in Exhibit A217602. In particular, the signature page states that "the parties have executed this Agreement as at the day and year first above written" and the front page states that "THIS AGREEMENT is effective as of the 20th day of July 2005."

[395] Mr. Murphy responded as follows:

> My only comment on this is that we relied on our legal advice, our legal advisers, who created these documents. We had them sign off that they were satisfied with it. I'm not a lawyer, so I didn't -- I didn't argue with them. I didn't notice it. I didn't argue with them.
>
> I look at the effective date on the face of the document.[601]

[396] Mr. Murphy testified that he did not recall why the agreement was amended and did not recall whether it addressed the FAPI concern identified in his notes.

[397] Counsel for the Respondent asked Mr. Murphy about an amendment to a contract for the sale of U_3O_8 by CEL to the Appellant.[602] The amending agreement states that "the Parties have executed this Amending Agreement under the hands of their proper officers duly authorized in that behalf" and is made effective as of November 1, 2005. Referring to an e-mail chain commencing December 6, 2005, counsel for the Respondent put it to Mr. Murphy that the amending agreement was backdated, and Mr. Murphy responded:

> It depends on how you describe "backdated." My understanding is that the parties can agree to execute a contract that has taken effect prior to the execution, made with effect as of a certain date. And that was my understanding of what took place in this case.[603]

[599] Exhibit A217935.
[600] Lines 24 to 28 of page 3223, pages 3224 to 3227 and lines 1 to 15 of page 3228 of the Transcript and Exhibits A217935 and A200167.
[601] Lines 13 to 20 of page 3225 of the Transcript. Mr. Murphy explained that the legal advisers were in the legal department of the Appellant.
[602] The original agreement is Exhibit A172896 and the amending agreement is Exhibit A209518.
[603] Lines 3 to 7 of page 3217 of the Transcript and Exhibit A200167.

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[398] In re-examination, Mr. Murphy testified that the letter proposing the terms of the amendment, signed by David Doerksen, was dated September 22, 2005 and that (having accepted those terms by signing the letter for CEL) he faxed the letter back to the Appellant on September 26, 2005.[604]

[399] Counsel for the Respondent asked Mr. Shircliff about a uranium sale and purchase agreement between the Appellant and CESA made the September 12, 2001.[605] The signature page stated that the contract was signed as of September 12, 2001. Counsel took Mr. Shircliff to an e-mail sent by him on September 19, 2001 that stated:

> We have received the original execution copies of this agreement back from Gerhard today however Jerry will not be available to sign these agreements until Sept 28 (the day of our first delivery). I suggest that we proceed on the assumption that this agreement will be signed and that we will take delivery of 650,000 lbs on September 28 and 600,000 on December 1.

[400] Mr. Shircliff testified that it appeared that the contract was signed by Mr. Grandey after September 19, 2001.

(24) Resource Allowance Issue

[401] The Appellant did not include the income and losses from the sale of purchased uranium in computing its resource profits for the Taxation Years. The Minister did not include in resource profits the income earned in 2003 from the sale of purchased uranium but assessed to deduct losses of $98,012,595 and $185,806,608 on the sale of purchased uranium in computing resource profits for 2005 and 2006 respectively.[606] The Appellant has since determined that the amount of its loss from the sale of purchased uranium in 2005 was $109,568,159 and that the amount of its loss from the sale of purchased uranium in 2006 was $183,935,257.[607]

E. The Expert Evidence

[604] Lines 10 to 28 of page 3415, page 3416 and lines 1 to 12 of page 3417 of the Transcript and Exhibit A172900.
[605] Lines 4 to 28 of page 5866 and lines 1 to 12 of page 5867 of the Transcript.
[606] Lines 21 to 28 of page 7026, lines 1 to 5 of page 7027, lines 5 to 8 of page 7030 and lines 17 to 23 of page 7031 of the Transcript.
[607] Lines 14 to 28 of page 7034, lines 1 to 8 of page 7035, lines 13 to 28 of page 7035 and lines 1 to 13 of page 7036 of the Transcript and Exhibit A225872.

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[402] The evidence of Doctor Horst, Doctor Barbera and Doctor Wright addresses the transfer price of uranium sold by CEL to the Appellant and uranium sold by the Appellant to CEL during the Taxation Years.

[403] The evidence of Doctors Shapiro and Sarin[608] addresses (i) the functions performed, assets employed and risks assumed by the Appellant and CEL, (ii) the arm's length price of certain services provided by the Appellant to CEL during the Taxation Years, and (iii) the Minister's analysis of transactions between CEL and the Appellant and between CEL and Tenex.

[404] The evidence of Carol Hansell addresses the questions: (i) what constituted a commercially normal relationship between a parent and its subsidiary within a large, complex multinational enterprise ("MNE") between 1999 and 2006 (the "Relevant Period"), and (ii) in light of assumed facts and information contained in certain documents, would the relationship between the Appellant and CESA/CEL be considered commercially normal?

[405] The evidence of Thomas Hayslett, Jr. addresses (i) whether the commercial terms in the BPCs were similar to the types of terms that would normally be present in uranium sales contracts concluded by industry participants, and (ii) whether the values attributed to the variable commercial terms (i.e., contract term; annual quantity; quantity flexibility; delivery schedule, notices and flexibility; delivery location and method; material origin; material specifications; pricing; and payment terms) were generally consistent with the range of values seen in uranium sales contracts offered and/or concluded by industry participants around the time the BPCs were concluded.

[406] The evidence of Doctor Chambers addresses the creditworthiness of CEL for the period between October 1, 2002 and December 31, 2006 (the "Rating Period").

[407] The evidence of Edward Kee was solely in rebuttal of certain aspects of the evidence of Doctor Horst and Doctors Shapiro and Sarin.

(1) Doctor Horst

[408] Doctor Horst identified twelve long-term contracts (the "Horst Long-term Contracts") and six spot sale contracts (the "Spot Contracts") between the

[608] Doctors Shapiro and Sarin co-authored their expert reports. However, only Doctor Sarin testified at the hearing of the appeals.

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Appellant and CESA/CEL that provided for deliveries of uranium in the Taxation Years (collectively, the "Contracts").

[409] Nine of the Horst Long-term Contracts are the BPCs and three of the Horst Long-Term Contracts are for the sale of uranium by CESA to the Appellant.[609] Doctor Horst summarizes the terms of the Horst Long-term Contracts in Table 3 of his expert report:[610]

TABLE 3: BASIC INFORMATION ABOUT LONG-TERM AGREEMENTS BETWEEN CCO AND CEL

	<a>	<b>	<c>	<d>	<e>	<f>	<g>	<h>	<i>	<j>	<k>	<l>	<m>	<n>
								Maximum Available Volumes (U3O8 Million Pounds)						
			Purchase		Date of	Pricing	Duration	Years at Issue					Lifetime	
	Seller	Buyer	Order	Product	Agreement	Method***	(Years)*	2003	2005	2006	Subtotal	Subtotal-%	Total**	Total-%
1	CCO	CEL	PO 6920	U3O8	25-Oct-99	EBP	10.3	0.4	0.4	0.4	1.1	1.6%	3.0	1.7%
2	CCO	CEL	PO 6958	U3O8	24-Nov-00	EBP	8.7	3.9	3.9	3.9	11.7	16.3%	28.6	15.9%
3	CCO	CEL	PO 7015	U3O8	24-Nov-00	EBP	9.2	1.8	1.8	1.8	5.4	7.5%	12.6	7.0%
4	CCO	CEL	PO 7041	U3O8	27-Mar-01	EBP	10.0	3.6	4.8	4.8	13.2	18.4%	36.0	20.1%
5	CCO	CEL	PO 6957	U3O8	3-May-00	CMP	11.0	2.0	2.0	2.0	5.9	8.2%	15.6	8.7%
6	CCO	CEL	PO 7040	U3O8	27-Mar-01	CMP	7.0	3.6	2.4	2.4	8.4	11.7%	16.8	9.4%
7	CCO	CEL	PO 7047	U3O8	3-Apr-01	Hybrid	8.9	3.0	3.0	3.0	9.0	12.6%	21.0	11.7%
8	CCO	CEL	PO 7060	U3O8	30-Apr-01	Hybrid	9.8	n.a.	4.8	4.8	9.6	13.4%	28.8	16.0%
9	CCO	CEL	PO 7037	UF6	22-Feb-01	Fixed Price	5.9	0.7	0.7	0.7	2.0	2.7%	3.3	1.8%
10	CEL	CCO	PO 7089	U3O8	12-Sep-01	EBP	4.4	3.6	0.7	n.a.	4.3	6.0%	11.7	6.5%
11	CEL	CCO	PO 7017	UF6	4-Dec-00	EBP	3.2	0.1	n.a.	n.a.	0.1	0.2%	0.8	0.4%
12	CEL	CCO	PO 7088	UF6	27-Jul-01	Fixed Price	4.6	0.5	0.5	n.a.	0.9	1.3%	1.4	0.8%
13	Total Volumes							23.1	24.9	23.7	71.6	100.0%	179.5	100.0%

* The duration of a contract is the time from the valuation date through the final delivery made under the contract, including any extensions made to the initial terms.
** Volumes stated in million pounds of U3O8 (or U3O8 required to produce volumes of UF6)
*** EBP = Escalated Base Price
CMP = Capped Market Price
Hybrid = Weighted Average of (1) EBP, (2) CMP, and (3) Lower of EBP & CMP

[410] On the basis of his review of the 1995 Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines (the "1995 Guidelines") and Information Circular 87-2R (the "IC"), Doctor Horst concludes that the most appropriate transfer pricing methodology for determining an arm's length price under the Contracts is the comparable uncontrolled price ("CUP") method, which is one of three traditional transaction methods identified in the 1995 Guidelines and the IC. In order to test the reasonableness of the results under the CUP method, Doctor Horst also uses the resale price method ("RPM"), which is another traditional transaction method.

[411] Doctor Horst observes that, although the traditional transaction methods are ideally applied to separate transactions, they can also be applied to bundled related transactions such as those occurring under long-term contracts for the supply of

[609] The latter three Horst Long-term Contracts are Exhibits A143439, A022165 and A020950.
[610] Expert Report of Dr. Thomas Horst dated June 3, 2016 (the "Horst Report"), Volume 3, Table 3, Exhibit EA000536.

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commodities or services. Doctor Horst explains why this approach is appropriate in the case of the Horst Long-term Contracts:

> . . . To understand why the aggregation of all deliveries over the life of an agreement may be appropriate, consider how a buyer of uranium products would view a long-term agreement that has a fixed base price that increases over time based on the rate of general price inflation. While the buyer under an Escalated Base Price agreement may initially pay a contract price that is higher than the current spot price, the increase in the contract price in subsequent years covered by the contract is limited to the rate of general price inflation. That is, under an Escalated Base Price agreement, the contract price in future years does not depend directly or indirectly on the contemporaneous spot price. The buyer would commit to an Escalated Base Price agreement if and only if the prices it expected to pay over the life of the agreement compared favorably both to the spot prices it expected to pay over that same period and to the prices it expected to pay under a long-term agreement with some alternative pricing formula (e.g., a Capped Market Price agreement).
>
> All of the pricing formulas and other provisions of a long-term agreement are negotiated as a package. Therefore, the forecasted prices over the entire life of the agreement also must be considered as a package in evaluating whether the pricing formula yields an arm's length result. Furthermore, the initial base price and the escalation formula to apply in future years are negotiated before the full agreement is ready for signature. An evaluation of that pricing formula must be based on market conditions (e.g., U_3O_8 spot prices, the TradeTech Long-Term Indicator for U_3O_8) and on forecasts of future U_3O_8 spot prices at the time the agreement is negotiated. That is, the economic analysis of transfer prices under a long-term agreement is properly based on economic circumstances and expectations when the pricing formulas and other contract terms were negotiated, not on the actual spot prices or other indices of economic circumstances occurring in later years when deliveries are made at contract prices pursuant to that long-term agreement.[611]

[412] With respect to other transfer pricing methodologies, Doctor Horst opines:

> The Canadian and OECD Guidelines present not only the three Traditional Transactional Methods just described, but also two Transactional Profit Methods: the Profit Split Method and the Transactional Net Margin Method ("TNMN"). In this particular case, the availability of comparable third-party agreements allows a reliable application of the CUP method and a test of its reasonableness using the RPM. By contrast, I could not see how either of the Transactional Profit Methods could be applied reliably in this case.[612]

[611] Horst Report at pages 35 and 36.
[612] Horst Report at page 38.

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[413] Doctor Horst identifies what he views as the five key elements of the Long-term Contracts: the "valuation date" of the agreement, the minimum and maximum deliveries to be made in each year covered by the agreement, the specific formulas for calculating contract prices for deliveries made in each year covered by the agreement, the "duration" of the agreement, and the "level of the market."[613] Doctor Horst's explanation of these elements can be summarized as follows:

1. The valuation date is the date on which the parties first agree to the volumes and prices of the uranium being purchased/sold. The agreement is typically evidenced by a signed offer and acceptance of the terms of the offer

2. The minimum and maximum deliveries to be made in each year covered by the agreement are the minimum volumes the buyer is obligated to purchase and the maximum volumes the buyer is entitled to purchase at the stipulated contract price in each year covered by the contract.

3. The specific formula for calculating contract prices for deliveries made in each year covered by the agreement is the pricing methodology used in the contract. Doctor Horst identifies the following five methods for calculating contract prices:

4. Fixed Price (FP)

5. "Escalated Base Price (EBP)"

6. Market Price (MP)

7. Capped Market Price (CMP)

8. Hybrid Price (a combination of "EBP" and MP or CMP).

9. The duration of a contract refers to the number of years between the valuation date and the end of the last year of scheduled deliveries (including any extension years).

10. The "level of the market" refers to the difference between purchases by a nuclear power plant operator or other end-user of the uranium

[613] Horst Report at page 40.

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> product or service and those by a distributor that is purchasing in large volume for ultimate resale in smaller volumes to nuclear power plant operators ("NPPOs") and other end-users.

[414] With respect to the fifth element, Doctor Horst goes on to explain:

> . . . The CUP method as applied to long-term agreements involves comparisons of the transfer prices between CCO and CEL to the prices paid under comparable long-term wholesale agreements between third parties. By contrast, the price paid under comparable long-term retail agreements between third parties is the starting point for applying the RPM.[614]

[415] In his glossary of terms, Doctor Horst defines a "wholesale agreement" as an agreement between a uranium supplier and a uranium distributor and a "retail agreement" as an agreement to sell uranium to a nuclear power plant operator.[615]

[416] In order to apply the CUP method to the Horst Long-term Contracts, Doctor Horst sought out and identified long-term wholesale agreements that he believed met all of the following three criteria:

1. The comparable third-party contract was negotiated in the same three-year period as the Horst Long-term Contracts.

2. Copies of the original contract and any amendments negotiated before the end of 2001 were available.

3. The pricing formulae under the third-party contract relied on one of the five methods identified in item 3 of the summary of Doctor Horst's explanation above.

[417] On the basis of these criteria, Doctor Horst identified the following comparables:

1. The terms under a February 24, 1999 amendment ("N-K Amendment 1") of a June 16, 1992 long-term contract between Nukem and Kazatomprom (the "N-K Contract"). The amendment provided for deliveries in 2006 through 2010. Doctor Horst viewed the amendment as a new agreement vis-à-vis the terms of the 2006 through 2010 deliveries.

[614] Horst Report at page 47.
[615] Horst Report at pages 173 and 175.

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2. The terms under a September 7, 2000 amendment ("N-K Amendment 2") of the N-K Contract that facilitated five retail agreements between Nukem and its customers. Doctor Horst remarks:

> The wholesale prices that Nukem paid Kazatomprom under this "carve-out" agreement are considered as additional comparables for purposes of my CUP analysis in Section IV. In addition, Nukem's fixed margin of $0.77 per pound on its resales to the five designated nuclear power plant operators is also a potential comparable for determining the appropriate resale margin in my application of the Resale Price Method in Part V below.[616]

3. The terms of a December 5, 2000 amendment (the "N-SN Amendment") to an April 10, 1992 long-term contract between Nukem and Sepva-Navoi (the "N-SN Contract") resulting from the exercise by Nukem of an option to extend the N-SN Contract for an additional five years (2002 through 2006). Doctor Horst viewed the N-SN Amendment as a separate long-term contract vis-à-vis the terms of the 2002 through 2006 deliveries.

4. The terms of three of five carve-out agreements (the "N-SN Carve-outs"), negotiated in 1999 to 2001, in which Nukem obtained modified pricing for certain quantities of uranium to be delivered by Sepva-Navoi under the N-SN Contract. The terms of the N-SN Carve-outs were amended in 2003. Doctor Horst disregarded those amendments on the basis that they could not have been anticipated at the time the N-SN Carve-outs were negotiated.

5. The terms of the original HEU Feed Agreement. Doctor Horst treated the exercise of each first option under the HEU Feed Agreement as a separate long-term contract between one of the western consortium companies and Tenex.

6. The terms of the six first options exercised by the western consortium companies following Amendment No. 4 to the HEU Feed Agreement. Doctor Horst considered each of these six first options as a separate long-term base escalated price agreement between Tenex and one of the western consortium companies.

7. The terms of the original Urenco Agreement.

[616] Horst Report at pages 51 and 52.

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8. The terms of the Urenco Agreement following Amendment No. 1. Doctor Horst evaluated these terms as if the amended agreement was a new agreement entered into on August 8, 2000.

9. The terms of the Urenco Agreement following Amendment No. 2. Doctor Horst evaluated these terms as if the further amended agreement was a new agreement entered into on April 11, 2001.

10. The terms of four of the carve-out agreements relating to the Urenco Agreement.

[418] With respect to the terms under the Urenco Agreement and Amendments Nos. 1 and 2 to the Urenco Agreement, Doctor Horst states:

> Under Urenco's agreement with Tenex, Tenex was not contractually obligated to supply re-enriched UF_6 to Urenco, but only to use its "best efforts" to supply the quantities indicated in the current agreement. Since Urenco was not a uranium distributor and did not want to risk a loss if Tenex failed to supply the re-enriched UF_6, Urenco agreed to supply the re-enriched UF_6 to CEL if and only if Tenex supplied UF_6 to Urenco. It is possible that the uncertainty about whether Tenex would supply UF_6 to Urenco and, thus, whether Urenco would supply that UF_6 to CEL may have had a negative effect on the prices that CEL agreed to pay Urenco. This fact could call into question the reliability of any comparisons of those prices to the transfer prices that CEL paid to CCO.[617]

[419] Doctor Horst uses three approaches to the CUP methodology to compare the prices under the Long-term Contracts with the prices under his chosen comparables. He summarizes these three approaches as follows:

1. My First CUP application compares the actual transfer prices that CEL paid to, or received from, CCO in 2003, 2005, and 2006 to the actual prices CEL paid in the same years under its long-term agreements with third-party suppliers. This First CUP application (1) uses Base Price Discount Factors to adjust for differences in the dates and, thus, the market conditions under which the pricing formulas in the various long-term agreements were determined, and (2) adjusts the equivalent U_3O_8 prices of UF_6 purchases to reflect the inherent preference for U_3O_8 over UF_6.

[617] Horst Report at page 64.

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2. My Second CUP application compares the forecasted transfer prices that CEL paid to, or received from, CCO over the entire life of the long-term agreement to the forecasted prices CEL, Cogema, and Nukem paid to third-party suppliers over the entire lives of their comparable long-term agreements. Like the First CUP application, my Second CUP application also (1) relies on Base Price Discount Factors to adjust for differences in valuation dates and market conditions and (2) makes an adjustment to the equivalent U_3O_8 prices of UF_6 purchases for the inherent preference for U_3O_8. As explained below, my Second CUP application, unlike the first application, uses Monte Carlo simulation to adjust the Base Price Discount Factors for the potential benefits for the buyer resulting from its options to increase or reduce the volumes purchased in various years. The principal disadvantage of the Second CUP application *vis á vis* the First CUP application is the complexity resulting from the need to project contract prices and volumes over the entire life of the long-term agreement and from using Monte Carlo simulation to quantify the potential benefits of the buyer's volume purchase options. That is to say, greater accuracy is obtained at the cost of greater complexity.

3. My Third CUP application differs from my Second CUP application in its reliance on Weighted Price Discount Factors, rather than Base Price Discount Factors, to provide benchmark prices for comparing effective contract prices under a long-term intercompany agreement with those under a comparable third-party agreement. Weighted Price Discount Factors provide a more reliable basis for comparisons, especially for long-term agreements that apply a Capped Market Price or a Hybrid Price formula. The principal disadvantage of my Third CUP application *vis á vis* my Second CUP application is the added complexity resulting from the need to calculate the appropriate weight to assign to Forecasted Spot Prices versus Escalated TT Base Prices in calculating the Weighted Price Discount Factor. Again, greater accuracy leads to greater complexity.[618]

[420] Doctor Horst concludes that the result under all three methods is the same: the transfer prices between CEL and the Appellant are generally consistent with, and in exceptional cases, higher than, the prices in comparable third-party

[618] Pages 66 and 67 of the Horst Report.

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agreements.[619] The results of Doctor Horst's third CUP analysis are found in Table 14-A of the Horst Report:

TABLE 14-A: TRANSFER PRICING ADJUSTMENTS TO CCO'S INCOME IMPLIED BY APPLICATION OF CUP METHOD #3

	<a> Table 13, <a>	<b> Table 13, <b>	<c> Table 13, <c>	<d> Table 13, <j>	<e> =Table 13 Min Lns 13-24	<f> =Average of <e> and <g>	<g> =Table 13 Max Lns 13-24	<h> Compare <d> with <e> and <g>	<i> = - (<d> - <f>) /<d>	<j>	<k>	<l>	<m> Sum of <j> to <l>	<n>	<o> <i> x <j> x <n>	<p> <i> x <k> x <n>	<q> <i> x <l> x <n>	<r> Sum of <o> to <q>
	CUP Method #3 Long Term			Weighted Price Discount	WP Discount Factor for Tenex FOENs			Comparison to Arm's Length	Indicated TP Adjustment to WP Discount	Total Invoices US$ Thousands U3O8 or Equivalent			Total Invoices 2003,		TP Adjustment to CCO's Income under CUP #3 Method			
	Seller	Buyer	Short Name of Agreement	Factor	Minimum	Midpoint	Maximum	Range	Factor	2003	2005	2006	2005-2006		2003	2005	2006	Total
1	CCO	CEL	PO 6920	87.7%	71.6%	80.4%	89.3%	In Range	0.0%	2,603	3,597	2,788	8,988	1	-	-	-	-
2	CCO	CEL	PO 6958	84.2%	71.6%	80.4%	89.3%	In Range	0.0%	27,919	29,145	20,961	78,025	1	-	-	-	-
3	CCO	CEL	PO 7015	86.1%	71.6%	80.4%	89.3%	In Range	0.0%	13,496	14,085	11,628	39,209	1	-	-	-	-
4	CCO	CEL	PO 7041	84.6%	71.6%	80.4%	89.3%	In Range	0.0%	25,198	34,480	28,256	87,934	1	-	-	-	-
5	CCO	CEL	PO 6957	86.9%	71.6%	80.4%	89.3%	In Range	0.0%	10,634	19,325	13,899	43,857	1	-	-	-	-
6	CCO	CEL	PO 7040	95.8%	71.6%	80.4%	89.3%	Above	-16.1%	27,837	26,530	21,694	76,061	1	(4,480)	(4,269)	(3,491)	(12,240)
7	CCO	CEL	PO 7047	83.2%	71.6%	80.4%	89.3%	In Range	0.0%	23,162	25,139	20,721	69,021	1	-	-	-	-
8	CCO	CEL	PO 7060	81.0%	71.6%	80.4%	89.3%	In Range	0.0%	-	41,294	33,938	75,232	1	-	-	-	-
9	CCO	CEL	PO 7037	84.2%	71.6%	80.4%	89.3%	In Range	0.0%	5,306	6,812	7,279	19,397	1	-	-	-	-
10	CEL	CCO	PO 7089	93.9%	71.6%	80.4%	89.3%	Above	-14.4%	28,500	-	-	28,500	-1	4,101	-	-	4,101
11	CEL	CCO	PO 7017	94.7%	71.6%	80.4%	89.3%	Above	-15.1%	1,203	-	-	1,203	-1	181	-	-	181
12	CEL	CCO	PO 7088	88.5%	71.6%	80.4%	89.3%	In Range	0.0%	4,657	-	-	4,657	-1	-	-	-	-
13	Total									170,516	200,407	161,163	532,086					
14	Increases to CCO's income														4,282	-	-	4,282
15	Reductions to CCO's income														(4,480)	(4,269)	(3,491)	(12,240)
16	Net increase (reduction) to CCO's income														(197)	(4,269)	(3,491)	(7,958)

[421] Doctor Horst also performed an RPM analysis as a check of the results under his CUP analysis. The results of the RPM analysis are found in Table 14-B (revised):[620]

TABLE 14-B (REVISED): TRANSFER PRICING ADJUSTMENTS TO CCO'S INCOME IMPLIED BY APPLICATION OF THE RESALE PRICE METHOD

	<a> Table 13, <a>	<b> Table 13, <b>	<c> Table 13, <c>	<d> Table 13, <j>	<e> See Explanation	<f> See Explanation	<g> = <d> + <e> + <f>	<h> =Table 18	<i> =Average of <h> and <j>	<j> =Table 18	<k> Compare <g> with <h> and <j>	<l> = (<g> - <i>) /<g>	<m>	<n>	<o>	<p> Sum of <m> to <o>	<q>	<r> <i> x <m> x <q>	<s> <i> x <n> x <q>	<t> <i> x <o> x <q>	<u> Sum of <r> to <t>
	Resale Price Method Long Term			Weighted Price Discount	Corrections for: Delivery Year Flexibility	Wrong Valuation Date	Weighted Price Discount	WP Discount Factor for Comparison			Comparison to Arm's Length	Indicated TP Adjustment to WP Discount	Total Invoices US$ Thousands U3O8 or Equivalent			Total Invoices 2003,		TP Adjustment to CCO's Income under Resale Price Method			
	Seller	Buyer	Short Name of Agreement	Factor			Factor-Adj.	Minimum	Midpoint	Maximum	Range	Factor	2003	2005	2006	2005-2006		2003	2005	2006	Total
1	CCO	CEL	PO 6920	87.7%	-2.0%	1.8%	87.5%	84.0%	87.5%	91.1%	In Range	0.0%	2,603	3,597	2,788	8,988	1	0	0	0	0
2	CCO	CEL	PO 6958	84.2%	-4.0%		80.2%	84.0%	87.5%	91.1%	Below	9.1%	27,919	29,145	20,961	78,025	1	2,545	2,656	1,910	7,111
3	CCO	CEL	PO 7015	86.1%	-4.0%		82.1%	84.0%	87.5%	91.1%	Below	6.6%	13,496	14,085	11,628	39,209	1	888	927	765	2,580
4	CCO	CEL	PO 7041	84.6%	-2.0%		82.6%	84.0%	87.5%	91.1%	Below	6.0%	25,198	34,480	28,256	87,934	1	1,503	2,057	1,686	5,247
5	CCO	CEL	PO 6957	86.9%	0.0%		86.9%	81.0%	85.2%	89.3%	In Range	0.0%	10,634	19,325	13,899	43,857	1	0	0	0	0
6	CCO	CEL	PO 7040	95.8%	0.0%		95.8%	81.0%	85.2%	89.3%	Above	-11.1%	27,837	26,530	21,694	76,061	1	(3,094)	(2,949)	(2,411)	(8,454)
7	CCO	CEL	PO 7047	83.2%	-2.0%		81.2%	84.0%	86.6%	89.3%	Below	6.7%	23,162	25,139	20,721	69,021	1	1,543	1,675	1,381	4,599
8	CCO	CEL	PO 7060	81.0%	-2.0%		79.0%	84.0%	86.6%	89.3%	Below	9.7%	-	41,294	33,938	75,232	1	0	4,007	3,293	7,300
9	CCO	CEL	PO 7037	84.2%	-2.0%		82.2%	78.9%	82.5%	86.1%	In Range	0.0%	5,306	6,812	7,279	19,397	1	0	0	0	0
10	CEL	CCO	PO 7089	93.9%	-2.0%		91.9%	78.9%	82.5%	86.1%	Above	-10.3%	28,500	-	-	28,500	-1	2,931	0	0	2,931
11	CEL	CCO	PO 7017	94.7%	0.0%		94.7%	78.9%	82.5%	86.1%	Above	-12.9%	1,203	-	-	1,203	-1	155	0	0	155
12	CEL	CCO	PO 7088	88.5%	-2.0%		86.5%	78.9%	82.5%	86.1%	Above	-4.6%	4,657	-	-	4,657	-1	216	0	0	216
13	Total												170,516	200,407	161,163	532,086					
14	Increases to CCO's income																	9,781	11,322	9,035	30,138
15	Reductions to CCO's income																	(3,094)	(2,949)	(2,411)	(8,454)
16	Net increase (reduction) to CCO's income																	6,687	8,373	6,624	21,684

[619] Horst Report at page 67.

[620] Doctor Horst issued revised Table 14-B on November 13, 2016 (EA000559). The revised table reflects two corrections to the RPM analysis in the Horst Report, which Doctor Horst made to address evidence presented at the hearing that corrected two of the assumptions used in his RPM analysis. The first correction resulted from Mr. Hayslett's opinion that the delivery flexibility in the BPCs was more favourable to CEL than typical market terms.

The second corrected the valuation date of PO 6920 from September 3, 1999 to October 25, 1999 on the basis of Mr. Assie's testimony. Doctor Horst opined that the two corrections did not materially affect his CUP analysis.

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[422] Doctor Horst undertook a separate analysis of the CC Contracts (i.e., the contracts by which CESA/CEL sold uranium to the Appellant). Doctor Horst summarizes this analysis as follows:

> In all cases, I compared the transfer prices for intercompany deliveries in a year to the prices that CCO or CEL paid to third parties under spot purchase agreements for deliveries in that same year.
>
> I expressed the various contract purchase prices as percentages of the published spot purchase prices for the same month to adjust for month-to-month fluctuations in spot purchase prices. I refer to these percentages as the Spot Price Discount Factors for the various deliveries.
>
> I presented separate analyses of the transfer prices for the two periods 2003 and 2005-2006 because uranium spot market conditions changed considerably between those two periods.
>
> I concluded that the transfer prices paid in 2003 by CCO under three of the four intercompany spot agreements were arm's length values based on the prices that CEL and CCO paid and that CCI received in comparable spot transactions in 2003 with third parties.
>
> > While the volumes under two of the four intercompany spot purchase agreements were larger than the volumes in the typical third-party spot purchase agreement, third-party spot market suppliers were not offering volume discounts; they were charging volume premiums. Accordingly, I concluded that CCO's 2003 transfer prices, at 100% of the most recent published spot prices, did not generally exceed arm's length prices.
> >
> > However, for one of the 2003 intercompany spot sales agreements, PO 7197, I would increase CCO's reported income by $672 thousand to pass through to CCO the benefit of the (low) price that CEL paid to Rio Algom on its spot purchase of Russian-source UF6.

Supplies of U3O8 were very tight in 2005-2006, whereas supplies of UF6 were more plentiful. Thus, spot prices for U3O8 in 2005 often exceeded the U3O8 equivalent price for spot purchases of UF6. Accordingly, I conducted separate transfer pricing analyses of the transfer prices under CEL's 2005 short-term agreements for U3O8 and UF6, respectively.

> I could find no comparable short-term third-party agreements providing for a series of deliveries of U3O8 or UF6 over a one-year period. Therefore, I compared the transfer prices under the

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> two short-term intercompany agreements to contemporaneous third-party spot purchase prices for U3O8 or UF6.
>
> I concluded that the transfer prices paid in 2005 under the two short-term intercompany agreements were generally arm's length prices based on those CUP comparisons.

[423] Based on his analysis, Doctor Horst recommends that the Appellant's income for its 2003 taxation year be increased by $671,547. Doctor Horst summarizes all proposed adjustments.

[424] Doctor Barbera, Doctor Wright and Edward Kee each wrote rebuttal reports in response to the Horst Report and Doctor Horst wrote surrebuttal reports in response to these rebuttal reports.

[425] Doctor Barbera's criticisms of the Horst Report are as follows:

1. Doctor Horst incorrectly assumes that CEL's purchases from its third-party suppliers are comparable to CEL's purchases from the Appellant. While the contracts are similar in form, the economic circumstances under which the contracts were negotiated are materially different. In particular, the circumstances surrounding the signing of the HEU Feed Agreement and the Urenco Agreement were such that these agreements are not comparable to the intercompany agreements between CEL and the Appellant.

   With respect to the HEU Feed Agreement, Tenex had no marketing capability and needed the western consortium to sell its uranium to NPPOs. The US government's payment of $325 million in 1998 provided a further incentive to contract with the western consortium. Unlike the Appellant, Tenex did not have to spend vast quantities of capital investing in a uranium mine or engaging in extensive exploration expenditures. Finally, the Appellant's strong customer base gives the Appellant options that Tenex did not have and, at the same time, explains the need for Tenex to make a deal with the western consortium.

2. Doctor Horst fails to examine the Appellant's results in light of his conclusions regarding the intercompany transfer prices. Such an analysis reveals substantial and durable losses that mandate closer scrutiny of the transfer price obtained under the CUP method. The

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losses are contrary to the principle that prices are arm's length if those prices are judged to promote the interests of the Appellant viewed as an unrelated party. The key interest of the Appellant is to earn a level of profit that its (hypothetical) independent investors require.

3. Doctor Horst ignores the Appellant's economic incentives and available options. The reason for considering other options is that a company in the course of conducting business with unrelated parties would ordinarily assess its other realistic options when considering a particular transaction. Given the Appellant's price expectations, the Appellant had other options. Because other arm's length distributors would have been willing to accept lower margins than those CEL was reasonably expected to earn, the Appellant would never have sold its mined U_3O_8 to a third-party distributor at the low prices at which it sold U_3O_8 to CEL over the 2003, 2005 and 2006 period. Doctor Barbera provides an example of a possible alternative transaction based on the Appellant's spot price forecasts.

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[426] In his surrebuttal report addressing Doctor Barbera's rebuttal report, Doctor Horst criticizes Doctor Barbera for ignoring the fact that uranium is a fungible product and therefore its purchase and sale are governed by supply and demand and not by the costs of the supplier, for using hindsight in the form of the actual sales prices of the uranium sold by the Appellant to CEL to conclude that the Appellant incurred unacceptable losses and for failing to present any evidence that in 1999 to 2001 the Appellant expected the losses it actually incurred in 2003, 2005 and 2006.

[427] Doctor Horst states that, following the 1999 reorganization, Cameco US marketed CEL's and the Appellant's uranium and therefore the sales from Tenex to CEL were directly comparable to the sales from the Appellant to CEL. With respect to the $325 million payment by the US government, while a condition of the payment was that Tenex enter into a commercial agreement with acceptable western parties, the payment itself related to low enriched uranium delivered in 1997 and 1998 and did not alter the fact that Russia had a clear economic incentive to obtain the highest price possible and that the western consortium had an equally clear economic incentive to obtain the lowest price possible.

[428] Tenex pursued two strategies. The first strategy sought to obtain the highest possible price. The second strategy, implemented through Amendment No. 4, sought to obtain the highest possible sales volume. The Horst Report did not

suggest that the Appellant would have pursued either strategy–only that the prices under the HEU Feed Agreement before and after Amendment No. 4 provide an upper and lower limit to the range of arm's length transfer prices for the intercompany sales of uranium by the Appellant to CEL.

[429] Doctor Barbera's suggested alternative transaction terms effectively recharacterize the actual transactions. Doctor Barbera's hypothetical based on the margin earned by 76 distributors outside the uranium industry is not realistic as those distributors could not provide broad access to the retail uranium market.

[430] Doctor Wright's criticisms of the Horst Report are as follows:

1. Doctor Horst fails to address whether the circumstances underlying the intercompany transactions differ from those underlying the comparable transactions. In particular, Doctor Horst does not adequately address (or fails to address) each of the attributes of the transactions that must be considered to determine comparability, namely, (i) the characteristics of the property or services transferred, (ii) the functions performed by the parties (taking into account assets and risks), (iii) the contractual terms, and (iv) the economic circumstances and business strategies of the parties.

   With respect to these attributes: (i) the Horst Report does not consider whether U_3O_8 and UF_6 are sufficiently similar for a comparison under the CUP method and does not analyze whether the quotas on Russian source uranium have an impact on price; (ii) arm's length prices are the result of a comparison of the related-party transaction with transactions between unrelated parties where the functions performed, risks assumed and intangible property owned by each party are the same or substantially similar, yet the Horst Report does not discuss the functions performed by the parties and the risks assumed; (iii) contractual terms include volume, length of contract, the dates the contracts are signed, the currency used in the transaction and the risks borne by each party to the contract, yet, with the exception of the contract dates, the Horst Report only superficially addresses these terms; and (iv) the economic circumstances of Tenex and the western consortium were different from those of the Appellant and CEL. In particular, Tenex had the profit motivations of a government-owned entity, lacked a market outlet for its uranium, which reduced its bargaining power, and needed cash to satisfy the requirements of the

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Russian government. On the other hand, the western consortium was motivated to deal with Tenex because the western consortium wanted control over the uranium market. The analysis with respect to the Urenco Agreement is conceptually the same with the addition of the fact that Urenco was selling re-enriched tails.

2. Doctor Horst's CUP analysis is complex, does not address the differences in the terms of the Appellant's sales to CEL as compared to CEL's sales to the Appellant, does not address the price-limited nature of the Appellant's sales to CEL and fails to apply all three CUP methods to all of the contracts identified as comparables.

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[431] In his surrebuttal report addressing Doctor Wright's rebuttal report, Doctor Horst states that, contrary to what is suggested by the questions and issues raised by Doctor Wright regarding the Horst Report, the Horst Report fully addressed the difference between U_3O_8 and UF_6, fully supported the $0.08 per pound adjustment for the inherent preference of NPPOs for U_3O_8 over UF_6, provided (at pages 5 to 9) appropriate descriptions of the functions performed by the Appellant, CEL and Cameco US given the nature of the methods (CUP and RPM) utilized, properly excluded the two Nukem umbrella agreements in applying the first two CUP methods and properly included those two Nukem agreements in applying the third CUP method, carefully considered and, where appropriate, made well-supported adjustments for (1) the length of the various long-term contracts, (2) the contract volume amounts, and (3) the differences in the ability of the buyer to increase or decrease contract volumes, and used discount factors based on the pricing formulas under the 1999 Tenex Agreement and Amendment No. 4 to determine an upper bound and a lower bound, respectively, on the arm's length values for the Appellant's long-term agreements with CEL. Doctor Horst elaborates on each of these points in his surrebuttal report.

[432] With respect to the complexity of the CUP analysis, Doctor Horst states:

> . . . While a CUP analysis of spot transactions may typically be simple and straight forward, a CUP analysis of long-term agreements is complex because of the inherent complexity of the pricing formulas, the buyers' options, and other provisions of long-term agreements.[621]

[621] Horst Surrebuttal of Rebuttal Report Prepared by Deloris R. Wright, Ph.D., dated August 26, 2016 (the "HSW Report") at pages 1 to 2 (Exhibit T1-028).

[433] With respect to Tenex's bargaining power, Doctor Horst states that Doctor Wright ignores the fact that uranium is a fungible product and that the price that a distributor can obtain is constrained by the prices available in the retail market (i.e., sales to NPPOs). Doctor Horst opines:

> . . . It seems unlikely to me that Nukem or any other independent distributor would have been willing to pay higher prices to CCO than the prices available from other third-party suppliers (e.g., Tenex) because CCO was able to market its own uranium, but Tenex was not.[622]

[434] Doctor Horst also states that the Wright surrebuttal report ignores the role of Cameco US as the marketing arm of the Cameco Group following the 1999 reorganization. Doctor Horst summarizes his view as follows:

> In summary, under the April 1999 restructuring of Cameco's marketing activities, CEL would operate hand-in-glove with CCI. CEL's role was to be that of a trading company bearing most of the price risk in uranium markets, while CCI's complementary role was to arrange all new uranium marketing transactions to be supplied under back-to-back purchase agreements mainly with CEL. After CCI commenced operations in 1999, CCI (not CCO) was responsible for finding long-term customers for the uranium that CEL purchased from all suppliers, including CCO, Tenex, and Urenco. Because CCO's sales force had been moved to CCI, CCO (considered as a separate entity that produced uranium) no longer had the sales force to find long-term customers for the uranium that CCO sold to CEL under the long-term agreements at issue in this proceeding.[623]

[435] With respect to Tenex's profit motivation, Doctor Horst states that he sees no difference between the Russian government's need for cash and the goals that a commercial seller would have in seeking long-term agreements for the sale of uranium.

[436] Mr. Kee's criticisms of the Horst Report are summarized at the beginning of his rebuttal report as follows:

> 3. Dr. Horst assumes that future uranium prices of $12/lb or $8/lb were equally likely.
>
> 4. Dr. Horst notes correctly that "it is not realistic" to assume that future uranium spot prices could only take on two discrete values and presents an alternative approach that assumes that uranium prices have a log-normal probability distribution.

[622] HSW Report at page 12.
[623] HSW Report at pages 13 and 14.

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> 5. Chart 4 shows the log-normal probability distribution assumed by Dr. Horst. The prices in Chart 4 range from a low prices [*sic*] of about $5 and a high price of about $18.
>
> 6. The probability distribution for uranium prices used by Dr. Horst is inconsistent with actual historic uranium prices, is inconsistent with uranium industry forecasts, and is inconsistent with uranium industry fundamentals.[624]

[437] The balance of Mr. Kee's rebuttal report expands upon these points.

[438] In his surrebuttal report addressing Mr. Kee's rebuttal report, Doctor Horst states that Chart 4 of the Horst Report sets out a purely hypothetical example and does not show the basis of the expected future prices of uranium used in his Monte Carlo analysis, which is explained on pages 88 to 94 of Volume 1 and in Appendix G in Volume 4 of the Horst Report. After providing an illustration of the methodology used, Doctor Horst concludes that "the probability distributions of future spot prices actually used in my Monte Carlo analysis do in fact reflect uranium industry forecasts of future spot prices, not the hypothetical probability distribution of future spot prices shown in Chart 4."[625]

(2) Doctors Shapiro and Sarin

[439] In their report,[626] Doctors Shapiro and Sarin discuss the uranium mining industry, provide an overview of the Appellant, discuss the Respondent's selection of the best method to apply in analyzing the transactions between CEL and the Appellant, analyze CEL's and the Appellant's functions and risks, estimate the arm's length price for the services provided by the Appellant and seek to demonstrate that functions and risks are separable and that it is incorrect to assert that arm's length companies would not have allowed unrelated entities to participate in the HEU Feed Agreement. The Shapiro-Sarin Report does not specifically address the arm's length price of the uranium sold by the Appellant to CEL.

[440] The principal theme of the Shapiro-Sarin Report with respect to the intercompany transactions is that CESA/CEL was functioning as a trader and was assuming significant price risk when it entered into the BPCs with the Appellant. Doctors Shapiro and Sarin also provide an analysis of why, in their view, the profit

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[624] Edward Kee – Rebuttal of Horst, July 22, 2016 at page 1 (Exhibit ER000205).
[625] Horst Surrebuttal of Rebuttal Report Prepared by Edward Kee, August 26, 2016 (Exhibit EA000547).
[626] The report is titled Cameco Corporation Expert Report and is dated June 8, 2016 (the "Shapiro-Sarin Report") (Exhibit EA000528).

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split method is not an appropriate method for determining an arm's length price for the uranium sold by the Appellant to CEL and why the CUP method is the best method to apply in the circumstances.[627]

[441] Doctors Shapiro and Sarin describe price risk as follows:

> . . . Price risk stems from volatility and fluctuations in the prices of a company's products and services. As with all commodities, uranium prices are subject to volatility stemming from numerous factors, including but not limited to demand for nuclear power, political and economic conditions in uranium-producing and consuming countries, reprocessing of used reactor fuel, re-enrichment of depleted uranium tails, sales of excess civilian and military inventories, and production levels and costs.[628]

[442] According to Doctors Shapiro and Sarin, CEL was exposed to price risk because it was often committed to buying uranium in amounts that exceeded its commitments to sell uranium and because it purchased uranium under predominantly base escalated price contracts but sold uranium under predominantly market-priced contracts. If the spot price of uranium declined, then the price obtained under its market-based sale contracts would also fall.

[443] CESA/CEL's price risk meant that CESA/CEL could have a gain or a loss on the subsequent sale of the uranium it was purchasing under the BPCs, depending on the future price of uranium, which no one could know at the time the BPCs were signed. The profits earned by CESA/CEL were the result of the price risk assumed under the BPCs coupled with a significant and unpredicted rise in the price of uranium after 2002. The services provided by the Appellant to CESA/CEL did not alter the price risk assumed by CESA/CEL nor did they shift the price risk to the Appellant. Conversely, by providing the services, the Appellant did not take on any risk.

[444] Doctors Shapiro and Sarin state that since there is no futures market in uranium that can be used to hedge prices, fixed-price and base escalated contracts are a common way in which to mitigate price risk. Doctors Shapiro and Sarin illustrate the common use of such contracts in the United States in figure 5.9:[629]

[627] This analysis is found in Section XII of the Shapiro-Sarin Report, starting on page 83.
[628] Page 38 of the Shapiro-Sarin Report.
[629] Pages 27 and 28 of the Shapiro-Sarin Report.

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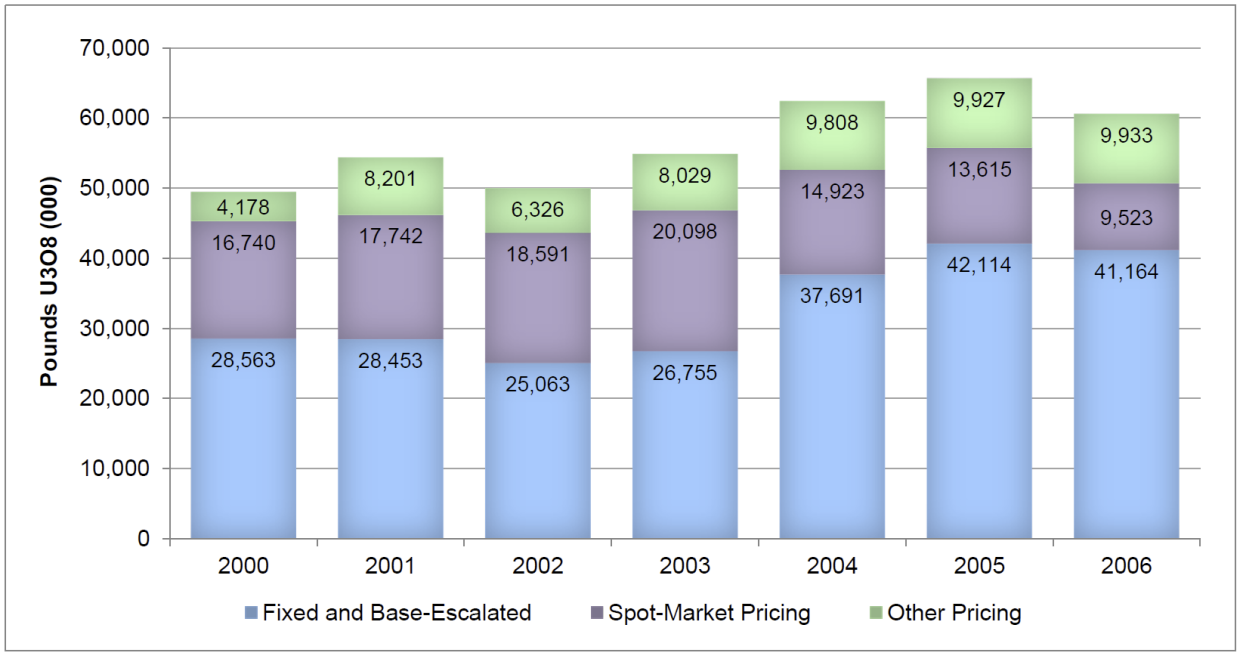
Figure 5.9: Composition of Contract Types Entered Into By U.S. Utilities, 2000–2006



[445] Doctors Shapiro and Sarin opine that without the benefit of hindsight no contracting option is unequivocally better than another, and none is *prima facie* irrational. They go on to explain:

> . . . Whether a supplier or consumer ends up better off under a base-escalated contract, a pure market-price contract, or a market-price contract with a ceiling, depends on the future price of uranium. Only in hindsight can one know whether a particular type of contract was the right one for a buyer or seller to enter into, and on an *ex-ante* basis, any choice could be reasonable depending on counterparty preferences and other market circumstances.[630]

[446] Doctors Shapiro and Sarin describe CEL's activities as follows:

> During 2003, 2005, and 2006, CEL purchased and aggregated uranium from both related and unrelated parties, sold uranium to CCO [the Appellant] and indirectly to external customers (with CCI acting as a limited-risk distributor for external non-Canadian sales), and reviewed and ensured compliance with Swiss regulations. CEL's key assets include its contracts, regulatory relationships, and uranium inventory.[631]

[630] Page 29 of the Shapiro-Sarin Report.
[631] Page 33 of the Shapiro-Sarin Report.

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[447] Doctors Shapiro and Sarin state that CEL's aggregation of uranium from multiple suppliers provided value to nuclear power station operators but also exposed CEL to significant price risk:

> By aggregating uranium from several sources, CEL is able to provide uranium buyers a secure source of supply that is insulated from the effects of an interruption to any one source of supply. A customer relying solely on the supply of CCO would face the risk that its supply of uranium could be disrupted by CCO production shortfalls. In contrast, a customer buying uranium from CEL would have the security of dealing with an aggregator with overall excess inventory and a diversity of supply, including uranium from CCO, US Mines, Tenex, Urenco, and others.
>
> By aggregating supplies from different sources, CEL is able to not only provide a reliable uranium supply, but also to cater to the varied preferences of the customers of its distributor, CCI. For example, some end customers focus on price regardless of sources, whereas Japanese utilities refuse uranium derived from HEU material. CEL is able to optimize profits by offering clients what they need at the best available price.
>
> In summary, if a utility sourced its uranium from a company that did not aggregate uranium from a variety of sources, it would be more prone to single-source supply interruptions and less assured of having its individual preferences met. By aggregating uranium, CEL thus provides a valuable function to customers.
>
> In its role as an aggregator, CEL was committed to buying most of the output of CCO and US Mines for years in advance. Typically, it also bought uranium from third parties when the opportunity presented itself. As a result, it often had purchase commitments that exceeded its sales commitments. This imbalance between purchases and sales, while a significant benefit to its utility customers, came at a cost to CEL of significant price risk. In a given period, it may not have been able to sell all of the uranium it was committed to buy and, even if it could have, it did not know *ex ante* at what price it would be able to sell this surplus uranium. Conversely, in another period, it may not have been able to buy enough uranium to fulfill its sales obligations and, even if it could have, it may not have been able to purchase at low enough prices to make a profit.[632]

[448] Doctors Shapiro and Sarin provide the following two tables as an illustration of the price risk exposure of CEL by virtue of these two factors:[633]

[632] Page 37 of the Shapiro-Sarin Report.

[633] Pages 40 and 44 of the Shapiro-Sarin Report. Table 7.3 assumes that the customers would exercise maximum upward flex and that CEL exercised maximum downward flex.

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Table 7.3: CEL's Exposure as of January 1, 2003 (volumes in millions of pounds)

Commitments for	Purchase Commitments	Sales Commitments	Exposure	Value At Risk ($ millions)
2004	21.3	19.1	2.2	$22.1
2005	20.3	12.0	8.3	$84.5
2006	16.9	3.1	13.8	$140.2
2007	17.9	0.9	17.0	$173.2
2008	14.5	0.0	14.5	$147.2
2009	7.8	0.2	7.6	$77.7
2010	7.8	0.2	7.6	$77.7
2011	7.8	0.2	7.6	$77.7
2012	7.8	0.0	7.8	$79.3
2013	6.2	0.2	6.0	$61.4
Total	**128.3**	**35.7**	**92.6**	**$940.9**

Table 7.5: Sensitivity of CEL's 2003 Revenues to Uranium Spot Price Changes (millions except for spot price)

Spot Price	Estimated Revenue	Difference
$6	$162.2	$12.5
$7	$174.7	$12.6
$8	$187.3	$11.0
$9	$198.3	$14.7
$10	$213.1	$14.6
$11	$227.7	$14.3
$12	$242.0	$11.9
$13	$253.9	$7.4
$14	$261.3	

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[449] Doctors Shapiro and Sarin consider whether the price forecasts prepared by the Appellant were reliable (as compared to those prepared by others) or contributed value to CEL. Table 8.2 summarizes the data for 1999 forecasts by the Appellant and others:[634]

Table 8.2: 1999 Forecasts and Forecast Errors

Forecast By	2000	2001	2002	Average
CCO	$12.78	$14.12	$15.40	$14.10
UxC	$11.75	$13.00	$14.25	$13.00
NAC	$10.74	$11.51	$12.75	$11.67
Actual	$8.29	$8.62	$9.83	$8.91
Forecast Error				
CCO	$4.50	$5.50	$5.57	$5.19
UxC	$3.47	$4.38	$4.42	$4.09
NAC	$2.45	$2.89	$2.92	$2.75
Forecast Error %				
CCO	54.3%	63.8%	56.7%	58.3%
UxC	41.8%	50.8%	45.0%	45.9%
NAC	29.6%	33.5%	29.7%	30.9%

[450] Doctors Shapiro and Sarin conclude that because of their inaccuracy the Appellant's price forecasts provided no marginal value to CEL. After reviewing data regarding forecasts, Doctors Shapiro and Sarin opine:

> Forecasting uranium prices is difficult, due to the myriad of factors affecting its supply and demand. The third-party forecasts on which CCO relied in making its own forecasts were relatively accurate in some years, and quite off the mark in others. For example, none of the third parties fully anticipated the sharp price increase from 2004 on. It is not surprising that CCO's forecasts were broadly similar to those of the third parties. In some years they were more accurate than those of the third parties, and in other years they were less accurate. There is no evidence that an organization would have been better off relying on CCO's forecasts than those of the third parties, or that the CCO forecasts provided any marginal value to CEL.[635]

[634] Page 56 of the Shapiro-Sarin Report.
[635] Page 59 of the Shapiro-Sarin Report.

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[451] Doctors Shapiro and Sarin consider whether the pricing of the services provided by the Appellant to CESA/CEL was arm's length pricing.[636] With respect to the administrative services, they apply the transactional net margin method ("TNMM") to data from various arm's length service providers and conclude that the 75th percentile mark-up for administrative services provided in 2003, 2005 and 2006 would be 14.9%, 17.5% and 25.3% respectively. These mark-ups would have resulted in additional income to the Appellant of CAN$8,940 in 2003, CAN$10,500 in 2005 and CAN$15,180 in 2006.

[452] With respect to the contract administration services, Doctors Shapiro and Sarin apply the same approach to data regarding contract administration service providers and conclude that the mark-ups ranged from 3.2% to 6.0% in 2003, from 3.8% to 6.1% in 2005 and from 4.4% to 6.0% in 2006. These mark-ups would result in additional income to the Appellant of CAN$18,000 in 2003, CAN$21,960 in 2005 and CAN$21,600 in 2006.

[453] Finally, Doctors Shapiro and Sarin observe that the Appellant did not charge CEL for market forecasting or research services. Relying on information from Ms. Treva Klingbiel, the president of TradeTech, they conclude that these services were worth no more than $500,000 per year.[637]

[454] Doctors Shapiro and Sarin summarize their conclusions regarding the services as follows:

> In the sections above we demonstrated that CCO's Market Forecasting and Research, Contract Administration, and General Administrative Services were routine and warrant nominal returns. These activities can also be contrasted with the uranium aggregation functions provided by CEL in that the CCO services involved the incursion of little to no risk. For example, CCO did not put significant capital at risk in performing these functions and did not take on price, inventory, contract or other risk. Instead, CCO merely provided services that could have been obtained in the market for cost plus a modest return, as shown above. While CCO forecast prices, tracked inventory, and monitored customer contracts, it was CEL, not CCO, that would have suffered losses if uranium prices fell, if inventory were lost, or if customers sought to renegotiate contracts.[638]

[636] The Respondent is not challenging the amounts paid for these services.
[637] Ms. Klingbiel testified about the services provided by TradeTech to uranium industry participants: lines 2 to 28 of page 1657, pages 1658 to 1672 and lines 1 to 15 of page 1673 of the Transcript. The reference to $500,000 is on page 1670 at line 24.
[638] Pages 69 to 70 of the Shapiro-Sarin Report.

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[455] With respect to the separation of the functions performed by the Appellant (i.e., the above-described services) and the price risk, Doctors Shapiro and Sarin state that price risk is an inherent characteristic of an asset that varies depending on the degree of uncertainty associated with the future cash flows from the asset. This risk is borne by the owner of the asset because the owner is entitled to the future cash flows from the asset. Potential owners of an asset will discount the price of that asset to reflect the risk they must bear if they buy the asset. A person who manages an asset but is not the owner of the asset does not bear the price risk. Doctors Shapiro and Sarin go on to state:

> Absent the ability and willingness of investors to bear risk, the rate of innovation would be much lower, fewer investment projects would be undertaken, productivity would be greatly reduced, economic growth would be much weaker, workers would be much worse off, the rate of saving would be much lower, and the world would be poorer and weaker.
>
> . . .
>
> Thus, to argue, as the CRA does, that the provision of administrative services to investors like CEL who supply risk capital is the equivalent of bearing the risks that capital is subject to is to denigrate the role of risk bearing while putting the engagement in routine functions on a pedestal. Simply put, it places the dinnerware on par with the meal.
>
> . . .
>
> Hierarchical structures separate management and control by allowing day-to-day decisions to be taken, and day-to-day functions performed, by employees who are often several layers of management removed from the managers directly appointed by the owners (the board of directors). Simply put, shareholders select the board of directors and outsource every other business function except for risk bearing.
>
> Other techniques for separating risk bearing from management include insurance contracts, forward and futures contracts, swaps, and options. These contracts each serve to shift risks to entities that are not involved with the ownership, management, or day-to-day functioning of the company. . . .
>
> . . .
>
> By shifting exchange rate, interest rate, and commodity price risks through the use of forward contracts and other derivative instruments, companies further separate risks from functions. The counterparties (the entities taking on the risk) do not participate in the functions of the company shifting the risk. Rather, they bear the

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> risk (in exchange for compensation), leaving the company to concentrate on its core functions.
>
> This is the function CEL performed. CCO performed its exploration, mining, and administrative functions and was compensated for the associated risks and costs; CCI performed marketing services and was compensated for the associated risks and costs; and CEL bore price risk and was compensated for bearing this risk. The fact that CEL was not involved in exploration, mining, administration, or marketing does not change the fact that it bore price risk and that this risk was significant.[639]

[456] Doctors Shapiro and Sarin opine that, even if the Appellant monitored and managed CEL's risk through the various service functions that it performed for CEL, that fact is not relevant to the question of which company bore the price risk:

> In the case of CEL and CCO, the CRA believes that CCO monitored and managed CEL's price risk through Contract Administration, General Administrative, and Market Forecasting and Research Services, and that this means that CEL could not have borne the price risk. Even if the CRA's assertion that CCO monitored and managed CEL's price risk is true, this is irrelevant to the question as to who bore the price risk. The CRA confuses risk monitoring with risk-bearing. If an investor hires a broker who recommends stocks based on research performed by the broker's company, the investor is still the one who gains (or loses) if the stock price rises (or falls). The performance of brokerage functions does not shift investment risk from the investor to the broker. Similarly, an investor may buy gold from a company that also provides gold transfer and storage, but this logistics support does not shift investment risk; the investor still bears the risk. Likewise, a financial advisor may monitor and track the risk in an investment portfolio and prepare investment statements, but this does not change the fact that the investor bears the risk of the portfolio's investments rising or falling in value.[640]

[457] The final topic addressed by Doctors Shapiro and Sarin is whether the Appellant would allow arm's length participation in the HEU Feed Agreement. They opine that the amount of time spent by the Appellant negotiating the contract is not relevant to this question because the cost of negotiation is a sunk cost and has no bearing on the expected future benefits and costs of the HEU Feed Agreement, which are the only factors a rational economic actor would consider.

[458] Doctors Shapiro and Sarin identify two benefits to the Appellant resulting from the HEU Feed Agreement: (i) the benefit of avoiding having the HEU

[639] Pages 73 to 75 of the Shapiro-Sarin Report.
[640] Page 75 of the Shapiro-Sarin Report.

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material flood the market and depress the value of CCO's uranium and (ii) the benefit of any direct contract value arising from being able to buy the uranium at below market prices.

[459] Doctors Shapiro and Sarin refer to the first benefit as a socialized benefit because it would be shared by all uranium producers and inventory holders. They contend that this benefit was the primary reason for entering into the HEU Feed Agreement, as evidenced by contemporaneous reactions from the business press, analysts and stakeholders both when the tentative agreement was reached in 1997 and when the final agreement was reached in 1999.[641] They summarize their position as follows:

> In summary, the primary benefit of the agreement was expected to be supply control. This benefit would be enjoyed by all producers and inventory holders, not just the ones who signed the agreement. As a result, there was no economic incentive for CCO to exclude other like-minded parties from participating in the contract; CCO would benefit whether the contract was held by it or by a company with aligned interests. In fact, as we explain in the next section, CCO would not just have been indifferent to sharing participation in the contract, but had a strong economic incentive to share participation so as to spread the contract risks.[642]

[460] Doctors Shapiro and Sarin state that while the HEU Feed Agreement provided the socialized benefit of stabilizing the supply of uranium into the market, it also exposed the participants to significant risks. These risks were borne by the parties to the HEU Feed Agreement alone and were therefore "privatized" risks:

> While the HEU agreement offered benefits, as described above, it also exposed participants to significant risks. These risks included 1) being compelled to exercise options under sub-optimal conditions so as to keep the deal alive; 2) being forced to buy uranium at above-market prices (after the options were converted to purchase obligations); and 3) counter-party risk (Tenex may not have honored the deal).
>
> With respect to the first two risks, for the first three years of the agreement, participants had a purchase option. Normally, in such a situation, the option holder would be protected from a price drop, as it could simply not exercise the option. However, in the case of the Tenex options, the supply security the deal would provide was so important that CSA was prepared to exercise its options to

[641] Pages 77 to 80 of the Shapiro-Sarin Report.
[642] Page 80 of the Shapiro-Sarin Report.

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> purchase from Tenex regardless of whether it would make a direct profit from those transactions.[643]

[461] Doctors Shapiro and Sarin describe what in their view were the economic circumstances of the HEU Feed Agreement and then provide their conclusion, as follows:

> The economic circumstances of agreement participation were thus as follows:
>
> - CCO would benefit from the agreement whether it signed the agreement or not (as long as companies with aligned interests did sign);
> - In light of the pricing, the agreement had limited direct contract value, so CCO would not be foregoing material benefits by sharing participation; and
> - The risks of the agreement would be borne by the signatories, so CCO would reduce its risk by sharing participation with other parties.
>
> Given these unique circumstances, CCO had an economic incentive to share participation in the agreement with parties whose interests aligned with its interests. This would allow CCO to still enjoy the primary expected benefit of the deal while divesting the risk of participating in the agreement. In fact, this is what happened, as Cogema and NUKEM participated in the agreement (without compensating CCO for its negotiating efforts or otherwise paying CCO for the right to participate in the deal).[644]

[462] Doctor Barbera, Doctor Wright and Mr. Edward Kee each wrote rebuttal reports in response to the Shapiro-Sarin Report and Doctors Shapiro and Sarin wrote surrebuttal reports in response to those rebuttal reports.

[463] Doctor Barbera states that, while Doctors Shapiro and Sarin opine that CEL bore price risk because it entered into the BPCs, they do not establish this conclusion in any rigorous way. Specifically, the Shapiro-Sarin Report does not consider the fact that the prices received under the BPCs did not compensate the Appellant for all of its production, exploration and administrative expenses in 2003, 2005 and 2006 and that an arm's length company would not accept such a circumstance.

[464] Doctor Barbera opines that the corollary of CEL bearing the price risk is that the Appellant did not bear risk. He states in this regard:

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[643] Page 80 of the Shapiro-Sarin Report.
[644] Pages 81 and 82 of the Shapiro-Sarin Report.

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> 11. Allocation of risk among related parties is addressed through the transfer pricing arrangements among the various entities within the group. The low risk entity charges (or pays) prices that yield a relatively low but assured level of profit over the life of the arrangement. The high risk entity receives whatever residual profit that remains within the system, which could be positive or negative. The pricing between CEL and CCI is a perfect illustration of a transfer pricing arrangement which effectively limits CCI's risk because CEL sells to CCI at prices that are a discount from CCI's resale price. This pricing structure assures that CCI will earn a profit. But since its risks are quite low, the level of profit, while assured, is not high or variable. To further minimize risk in CCI, purchases occur almost contemporaneously with its sales, as revealed by the fact that CCI reports virtually zero end-of-year inventory on its balance sheet over the three years.
>
> 12. I suspect that Shapiro / Sarin would agree that the CEL/CCI pricing arrangement is an effective way to allocate risk between CEL and CCI. And it should work for CCO as it does for CCI. If CCO was determined to be the low risk entity with regard to this transaction, sales prices should be set so that they produce for CCO a profit level that is definitely positive, definitely steady, but perhaps a bit lower than the profit CCO would ordinarily have the potential to attain in a more at-risk posture. That is, thinking of CCO as an independent party (as is necessary to determine arm's length prices), its investors would accept a slightly lower return on investment if, in return, those same investors faced lower risk. So the more risk CEL bears, the greater its potential profit (or loss). On the other hand, the more risk CEL bears, the less risk CCO bears. And bearing less risk means that CCO is more likely, rather than less likely, to charge prices that yield a stable profit acceptable to its investors.
>
> . . .
>
> 16. The point of this discussion is that, if CEL is claimed to be bearing high price risk, then that claim also embodies a separate claim that CCO is bearing relatively little risk. And if CCO is such an entity, then it should be earning a low but steady profit along the lines as described above. Shapiro / Sarin claim that CEL is the risk taker and that justifies CEL's profit. They must believe that CCO is the low risk entity. Therefore, CCO should be earning a profit. Yet it bears substantial losses. So the prices cannot be arm's length according to Shapiro / Sarin's own analysis.[645]

[465] In their surrebuttal report,[646] Doctors Shapiro and Sarin respond that their conclusions regarding CEL's price risk were independent of whether CEL paid

[645] Pages 4, 5 and 6 of the Rebuttal to Alan C. Shapiro & Atulya Sarin Expert Report, dated July 22, 2016 (the "Barbera Rebuttal of Shapiro-Sarin") (Exhibit ER-000013).

[646] Cameco Corporation Expert Report–Sur-rebuttal to Dr. Anthony Barbera's Rebuttal Report, dated August 25, 2016 (the "Shapiro-Sarin Surrebuttal of Barbera") (Exhibit EA000544). This surrebuttal report was

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arm's length prices to the Appellant. The price risk resulted from the difference between CEL's commitments to purchase and its commitments to sell and the resulting exposure to any fluctuation in the price of uranium. Doctors Shapiro and Sarin go on to state:

> As Dr. Barbera states (paragraph 6):
>
> > Under arm's-length purchase pricing terms, CEL would have the right to earn additional profits, or losses, beyond that of a typical distributors [sic] because it purchased from CCO based on long term contracts that were generally dependent on a base price plus inflation and resold based on shorter term contracts where pricing was generally related to spot prices.
>
> Dr. Barbera is correct, but what he says is not limited to arm's length pricing terms. Under CEL's actual pricing terms, whether arm's length for income tax purposes or not, CEL had the right to earn additional profits, or losses, beyond those of typical distributors, because it was exposed to risk beyond that of typical distributors.
>
> Dr. Barbera appears to be suggesting that if CEL had paid more on its purchases from CCO, it would have had lower profits. This is a tautology. As our affirmative report makes clear, we are not opining on the arm's length nature of the uranium product pricing between CCO and CEL, but demonstrating that given the pricing in place, CEL was exposed to significant risk.[647]

[466] Doctors Shapiro and Sarin state that mining companies typically do not enter into cost-plus contracts and do not set prices and therefore are exposed to the risk associated with fluctuating prices. Doctors Shapiro and Sarin opine that Doctor Barbera is incorrect when he states that no profit-maximizing company would accept pricing that did not compensate it for all of its production, exploration and administrative expenses. First, they assert, Doctor Barbera's statement is contradicted by the fact that most mining companies lost money from 2003 to 2006. Doctors Shapiro and Sarin provide the following table to illustrate the point:[648]

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subsequently corrected by the Cameco Corporation Expert Report – Corrections to Sur-rebuttal to Dr. Anthony Barbera's Rebuttal Report, dated June 9, 2017 (the "Shapiro-Sarin Corrections") (Exhibit EA000560).

[647] Page 3 of the Shapiro-Sarin Surrebuttal of Barbera.

[648] Page 4 of the Shapiro-Sarin Surrebuttal of Barbera.

Table 6.1: Most Mining Companies Had Operating Losses in 2003, 2005, and 2006

Year	Number of Mining Companies*	Number of Those With Operating Loses	Median ROA
2003	780	599 (77%)	-11.7%
2005	1,052	837 (80%)	-12.0%
2006	1,179	968 (82%)	-11.4%

*Companies in Compustat Global database with SIC Codes of 1000, 1040, or 1090 that had positive revenue.

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[467] Second, companies do not have perfect foresight regarding future expenses and may sign contracts that cover current expenses but are insufficient to cover future expenses. Doctors Shapiro and Sarin go on to state:

> This is especially true for companies that sell production forward, like CCO did. Dr. Barbera seems to have expected that CCO, from 1999 to 2001, would have been prescient not only about what uranium prices would be from 2003 to 2006, but also regarding what its costs would be from 2003 to 2006. This was obviously impossible. That being said, CCO tried to protect itself against the possibility of rising mining costs by including escalation clauses in its long-term base-escalated contracts with CEL. The escalation factors in these contracts adjusted the price of its future sales to [CEL] CCO by a factor tied to the rate of inflation. Unforeseeably, the increase in CCO's mining costs outpaced these escalation rates. At the same time, the Canadian dollar unexpectedly rose against the U.S. dollar, causing the Canadian-dollar equivalent of CCO's U.S.-dollar revenue (uranium is priced in USD terms) to decline while leaving its Canadian-dollar mining costs unchanged.[649]

[468] Doctors Shapiro and Sarin provide an analysis of the margins that the Appellant would expect to earn given its own cost estimates.[650] The calculations suggest that the Appellant's expected operating margins would have been 10.8% in 2003, 3.7% to 8.0% in 2005 and 2.3% to 8.5% in 2006.[651]

[469] Doctors Shapiro and Sarin also state that Doctor Barbera ignores the fact that the Appellant lost money on its base escalated contracts with third-party customers.[652] This suggests that factors other than non-arm's length prices, including an unexpected increase in the Appellant's mining costs and an

[649] Page 5 of the Shapiro-Sarin Surrebuttal of Barbera.
[650] The calculations are replaced by the Shapiro-Sarin Corrections, which Doctors Shapiro and Sarin state are based on more accurate data not available at the time the Shapiro-Sarin Surrebuttal of Barbera was prepared.
[651] Table 3 of the Shapiro-Sarin Corrections.
[652] Doctors Shapiro and Sarin summarize the data in support of their position in Table 9.1 on page 9 of the Shapiro-Sarin Surrebuttal of Barbera.

unexpected decline in the Canadian dollars earned due to changes in the Canada-US dollar exchange rate, contributed to the Appellant's losses.

[470] Doctors Shapiro and Sarin agree that the pricing arrangement between CEL and Cameco US effectively allocated price risk between these two entities. However, they opine that Doctor Barbera fails to distinguish between price risk and other risks. Doctors Shapiro and Sarin go on to state:

> . . . The pricing arrangement between CEL and CCO was effective in limiting CCO's price risk. By selling its production forward in long-term contracts at mostly base-escalated prices, CCO insulated itself from price risk and most inflation risk. Under its base-escalated contracts with CEL, CCO would get the same (or increasing, depending on the inflation rate) nominal revenue, and nearly the same inflation-adjusted revenue, from its sales to CEL regardless of the future market price of uranium.
>
> However, the contracts did not insulate CCO from other risks, such as foreign-exchange risk or mining cost risk. For example, if the Canadian dollar unexpectedly appreciated against the U.S. dollar, CCO's revenues would decline in Canadian-dollar terms. Similarly, if one of its mines flooded, its costs would increase. As it turned out these things did happen, and CCO's returns suffered.[653]

[471] Doctors Shapiro and Sarin state that they did not claim that the Appellant was a low-risk entity, only that the Appellant effectively protected itself against price risk. The Appellant remained exposed to foreign exchange risk, mining cost risk and other risks (e.g., the risk that its uranium deposits would be smaller, less accessible or of lower quality than originally anticipated).

[472] Doctor Wright summarizes her criticisms of the Shapiro-Sarin Report as follows:

> 33. While I generally agree with many of the points made by the Shapiro Report, I believe that the Report has not addressed the right questions. The first question that should have been addressed is whether CEL performed the functions related to managing the price risk inherent in the uranium purchase contracts it signed (both with CCO and with unrelated third parties). If the decision is that CEL did not perform the relevant functions, one must ask whether CEL would have been willing to take on the price risk associated with those contracts if it were operating as a free-standing company unrelated to the Cameco group (all other things unchanged). Both of these questions must be addressed before concluding that CEL should receive the benefit of the price risk inherent in its uranium purchase agreements. And, neither of these questions is addressed in the Shapiro Report.

[653] Page 10 of the Shapiro-Sarin Surrebuttal of Barbera.

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> 34. Second, the Shapiro Report has not evaluated whether CCO would have been willing to make the deal it made with CEL if CEL had been unrelated to the Cameco Group. The Shapiro Report ignores CCO's perspective, which must be addressed i.e., the pertinent question is whether CCO would have been willing to sell all but its committed volumes to an unrelated third party at prices that were effectively fixed at historically low rates when it expected market prices to rise over the contract period and it knew that its mining costs were rising over the same period.
>
> 35. Finally, the Shapiro Report takes the position that the HEU agreements could be signed by any legal entity whose goals were aligned with those of the Cameco Group. That may be true; however, the Report does not address whether CEL, at the time the HEU contracts were signed, was comparable to a substantial player in the uranium market such that, at arm's length, it would have been viewed as having aligned interests.

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[473] In their surrebuttal report,[654] Doctors Shapiro and Sarin state that while Doctor Wright raises potential issues she fails to provide any opinion on these issues. For example, Doctor Wright criticizes Doctor Shapiro's and Doctor Sarin's functional analysis. She correctly observes that a functional analysis is the starting point for a transfer pricing analysis. However, she offers no definitive opinion on which functions the Appellant performed that Doctors Shapiro and Sarin failed to take into account, or how these functions had any bearing on their conclusion that CEL bore price risk.

[474] Doctors Shapiro and Sarin disagree with Doctor Wright's suggestion that CEL's purchases of uranium from the Appellant were made because employees at the Appellant determined that they met the Appellant's "corporate-wide" goals. They state:

> This is just an assertion without economic support and is completely irrelevant to who should receive the profits from price risk bearing. The only relevant issue is who legally bore the price risk and here the answer is unambiguous: It was CEL.[655]

[475] Doctors Shapiro and Sarin state that, contrary to Doctor Wright's assertion to the opposite effect, they said that ownership and the management of risk can be and often are separated. Doctors Shapiro and Sarin then state:

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[654] Cameco Corporation Expert Report–Sur-rebuttal to Dr. Deloris Wright's Rebuttal Report, dated August 25, 2016 (the "Shapiro-Sarin Surrebuttal of Wright") (Exhibit EA000545).
[655] Page 4 of the Shapiro-Sarin Surrebuttal of Wright.

> . . . The profit/loss associated with bearing risk belongs to the party that owns the risky asset, regardless of who "controls" the risk. If an investment advisor recommends which investments an investor should buy, at what prices, and in what quantities, and what the overall asset mix should be, the profit/loss associated with the portfolio's performance is still borne by that investor. The advisor receives a fee that is typically a fixed-dollar amount or a percentage of the value of the assets managed; the advisor rarely, if ever, bears the risk of the portfolio declining in value and does not typically enjoy the gains if it increases in value.[656]

[476] With respect to whether an arm's length company would have entered into the BPCs, Doctors Shapiro and Sarin reference the analysis they did in their main report. They reiterate their opinion that, given the Appellant's and the industry's poor forecasting record, "it would be reasonable for a company to decide to lock in future prices, thereby stabilizing its future revenues, rather than rely on its potentially erroneous forecasts of rising prices in making pricing decisions."[657] They go on to state:

> From a strategic standpoint, it might well make sense to sell uranium production forward at base-escalated prices. This insight relies on the fact that uranium is a commodity product, selling for the same transaction-adjusted price worldwide. As a commodity business, subject to the law of one price, the key to success for a uranium miner is to be a low-cost producer. Uranium miners can build competitive cost advantage all along the mining value chain, including being a low-cost finder of uranium, developing cost-efficient mines, designing and implementing cost-effective safety standards, controlling mining risks – such as cave-ins and flooding – in a cost-effective manner, and extracting uranium from its mines at a relatively low cost. However, a uranium miner has no competitive advantage in bearing price risk. Anyone with an appetite for risk and sufficient capital can bear that risk at the same cost. Indeed, well-diversified investors would have a competitive advantage in bearing uranium price risk since their portfolios would be insulated from the full effects of a decline in the price of uranium by having other assets whose prices would likely be uncorrelated with the price of uranium. Hence, one could make a strong case for uranium miners sticking to what they do best – locating and producing uranium at a relatively low cost – and letting others bear the price risk.[658]

[477] With respect to whether an arm's length company would allow a third party to execute the HEU Feed Agreement, they assert that Doctor Wright provides no basis for her speculation that "[i]t may be that Tenex/Urenco signed the contracts because they viewed them to be between themselves and CCO" and "if CEL had

[656] Page 5 of the Shapiro-Sarin Surrebuttal of Wright.
[657] Page 7 of the Shapiro-Sarin Surrebuttal of Wright.
[658] Page 8 of the Shapiro-Sarin Surrebuttal of Wright.

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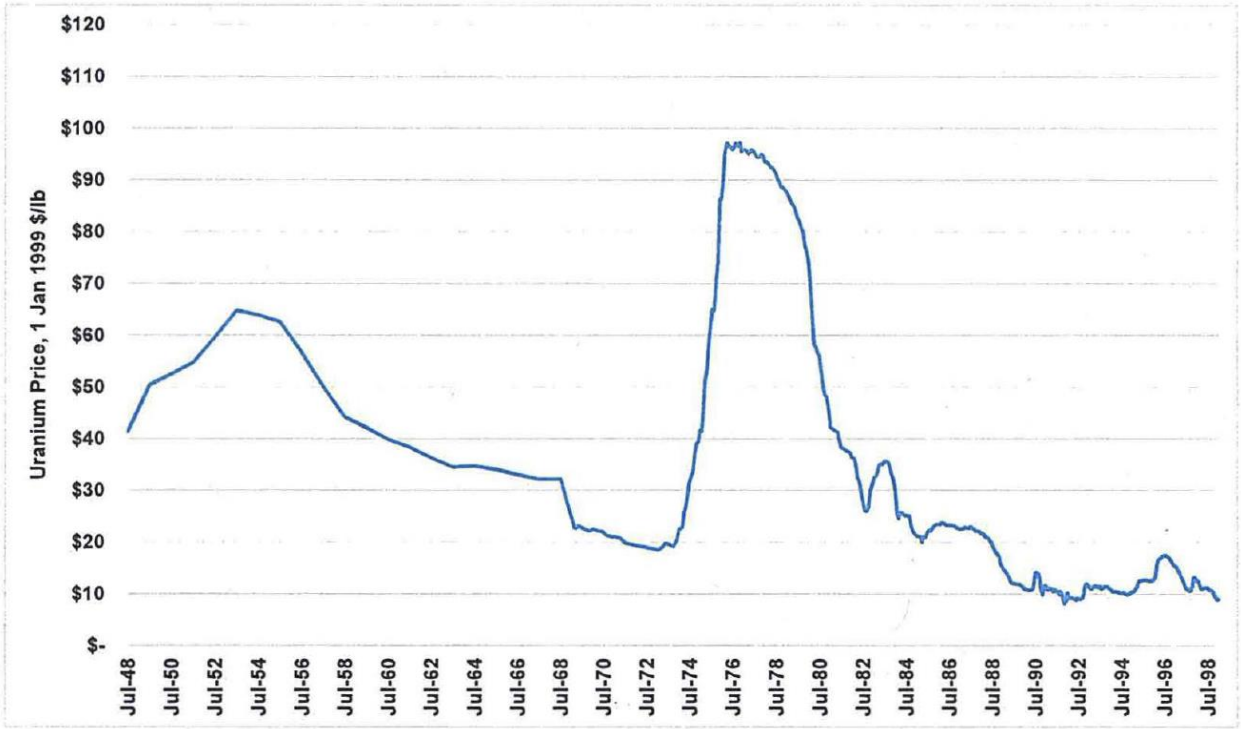
been unrelated to the Cameco Group it may that the HEU Agreement would never have become a CEL contract." They opine that no one knows whether these statements are true and that in fact Tenex did sign the HEU Feed Agreement with CESA. As well, Nukem participated in the agreements even though it was not as substantial a player in the industry as the Appellant.

[478] Mr. Kee opines that the CEL price risk identified by Doctors Shapiro and Sarin is premised on faulty assumptions regarding the price of uranium. He states that the analysis ignores past uranium prices, uses an unlikely probability distribution to represent possible future prices (i.e., $6 to $14), incorporates a flawed view of uranium price risk and does not reflect uranium industry fundamentals.

[479] Mr. Kee states that real and not nominal historical prices must be used to remove the impact of inflation over time. He provides the following graph of real prices between 1948 and the end of 1998:[659]

Figure 1 - Real Uranium Prices



[659] Page 4 of Edward Kee – Rebuttal of Shapiro/Sarin, dated July 22, 2016 (the "Kee Rebuttal of Shapiro-Sarin") (Exhibit ER000203).

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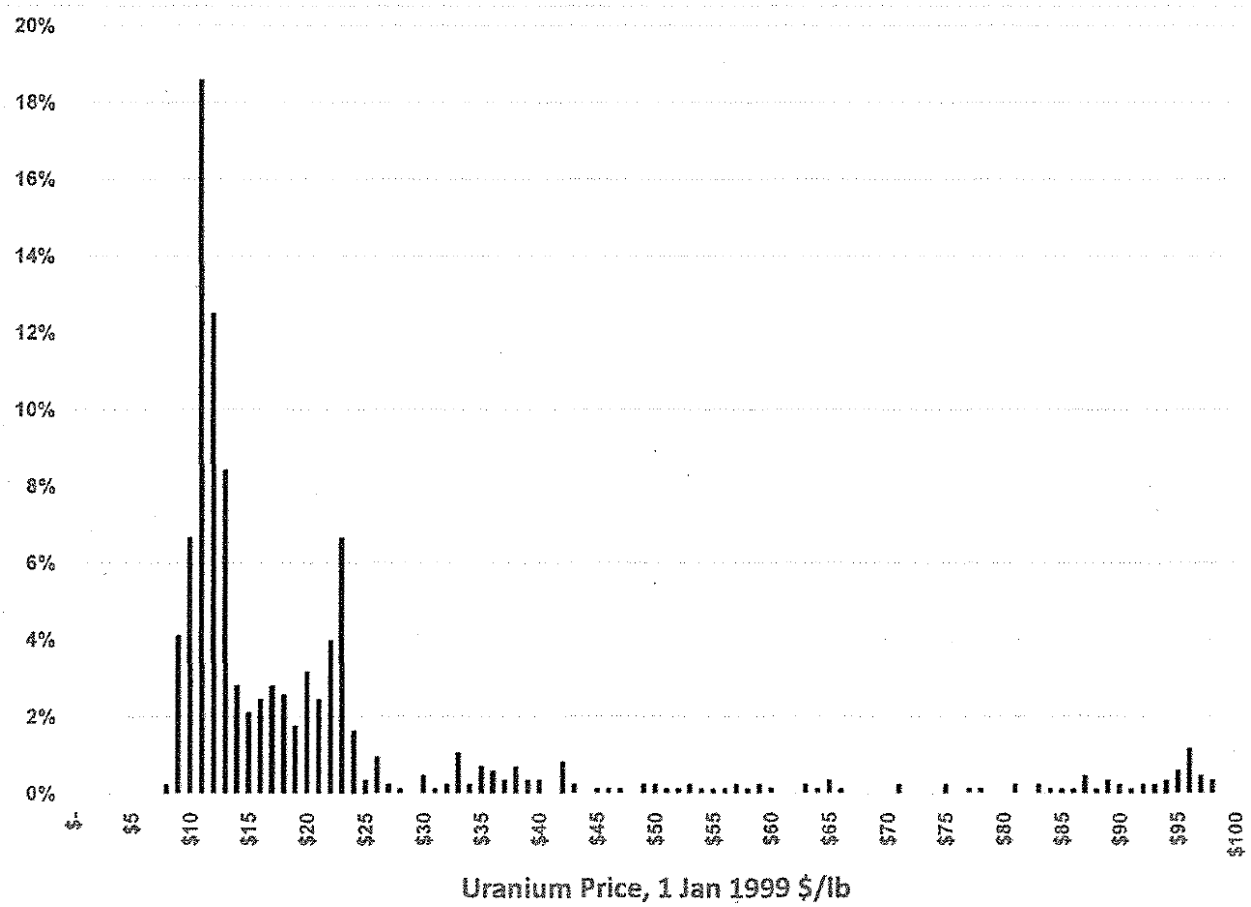
[480] On this chart he shows that the low point in the range of prices is approximately $10. He opines that Figure 5.7 and Table 7.7 of the Shapiro-Sarin Report are misleading because they use nominal prices, which make historical prices appear lower, and because they use 1986 as their starting point and omit previous price spikes.

[481] Mr. Kee states that Doctors Shapiro and Sarin used a uniform probability distribution to represent the likelihood of prices being above or below $10. He provides the following chart which is a histogram of the real prices shown in Figure 1 in his rebuttal report. He opines that the histogram provides a view of historical uranium process that is similar to a probability distribution:[660]

Figure 3 – Histogram of Actual Real (1 Jan 1999$) Uranium Prices



[660] Page 8 of the Kee Rebuttal of Shapiro-Sarin.

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[482] On the basis of this histogram, Mr. Kee concludes that CEL had little or no price risk because the probability of prices below $10 was quite low.

[483] Mr. Kee states that future uranium prices are uncertain but not unpredictable. He observes that none of the forecasts cited by Doctors Shapiro and Sarin predicted spot prices below $9.59.

[484] Mr. Kee states that Doctors Shapiro and Sarin failed to consider that the production gap (i.e., the gap that exists when uranium demand exceeds uranium production) and the decline in uranium inventories since about 1990 would place upward pressure on uranium prices.

[485] Mr. Kee opines that Doctor Shapiro and Doctor Sarin's suggestion that uranium prices could be lower than $10 ignores the fact that the "cash operating costs of the lowest cost uranium producers was close to $10/lb, so that it was unlikely that any uranium producers would have entered into spot contracts at prices much lower than this, which limited the possibility that spot market prices would be below about $10 for any sustained period."[661]

[486] Finally, Mr. Kee opines that the value at risk analysis of Doctors Shapiro and Sarin describes uranium inventory as "exposure," assumes that uranium inventory may be worthless and ignores the potential for CEL so sell this inventory; as a result Tables 7.3 and 7.4 of the Shapiro-Sarin Report are misleading.

[487] In their surrebuttal report,[662] Doctors Shapiro and Sarin state that Mr. Kee's rebuttal contains several mischaracterizations of their analysis. In particular, they explain that the premise in the Shapiro-Sarin Report that CEL faced financial risk due to uncertain uranium spot market prices was not based on specific expectations about future prices, but on the fact that CEL's returns depended on future prices, and future uranium prices were uncertain.

[488] Doctors Shapiro and Sarin opine that if, as Mr. Kee suggests, the market knew that future uranium prices would be higher, then the market would have behaved accordingly, which would have resulted in a significant rise in base escalated prices.

[661] Paragraph 41 on page 13 of the Kee Rebuttal of Shapiro-Sarin. Cost data is provided for 2010 only.
[662] Cameco Corporation Expert report–Sur-rebuttal to Dr. Edward Kee's Rebuttal Report, dated August 25, 2016 (the "Shapiro-Sarin Surrebuttal of Kee") (Exhibit EA000543).

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[489] Doctors Shapiro and Sarin opine that, whether prices are presented in real or nominal terms, the figures show significant fluctuations in the price of uranium. In addition, if earlier prices are factored into the analysis the fluctuation is even greater. In particular, between June 1978 and May 1992 the price fell 82 percent, from $43.40 to $7.73, in nominal terms, and it fell 91 percent from September 1976 to October 1991 in real terms. Doctors Shapiro and Sarin go on to state:

> The (real) market price of uranium was lower in 1986 than it was in 1948 (as shown in Dr. Kee's Figure 1), so by starting our graph in 1986 instead of 1948, we understate the true magnitude of prior declines in market uranium prices.
>
> In terms of assessing rational expectations as of the time CCO entered into its long-term sales contracts with CEL, it is Dr. Kee's graph that is misleading. Dr. Kee's Figure 1 shows market uranium prices from July 1948 to July 1998, and Dr. Kee states (paragraph 13) "that real uranium market prices have an all-time low level at about $10/lb." Market uranium prices may have hit a then-all-time low of about $10/lb. in the first half of 1998, but what Dr. Kee neglects to show or discuss is that market uranium prices continued to fall. By December 1998, the price (in constant January 1, 1999 dollars, as Dr. Kee prefers to use) was $8.79, having declined by 17 percent from the July 1998 price of $10.59.
>
> After rising in early 1999, the price resumed its decline and did not hit bottom until December 2000. At that point the price was $6.84 (in constant January 1, 1999 dollars). This was 35.4 percent below the price in July 1998; the last price shown in Dr. Kee's Figure 1. The price remained below the July 1998 price until May 2003. This clearly demonstrates that uranium prices, even after periods of steep decline, can fall even further, and that prices do not necessarily increase just because they have recently fallen or have been relatively low for a period of time.[663]

[490] With respect to the price probability distribution, Doctors Shapiro and Sarin state that the range they used was not a prediction of future prices but an illustration of the effect of price movements. They state:

> Dr. Kee ignores the fact that past prices are no guarantee of future prices, and that prices sometimes move below prior lows. Indeed, there is substantial empirical evidence in the financial economics literature that asset prices follow a random walk; that is, at any point in time, they are just as likely to go down as up. The reason for this phenomenon turns out to be simple: What moves prices is new information, which by definition is unpredictable; otherwise, it would not be new. It is only in hindsight that we perceive patterns in the data. We would also note

[663] Pages 4 and 5 of the Shapiro-Sarin Surrebuttal of Kee.

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> that Dr. Kee skews his results by stopping his analysis in July 1998, thereby missing the significant price decline from July 1998 to December 2000. In real terms, prices fell from $10.59 to $6.84 during this time, a decline of 35 percent. A company that relied on historical uranium price distributions as of July 1998 to make bets about future prices would have lost money; if it bet the company on these forecasts, it could have gone bankrupt.[664]

[491] With respect to Mr. Kee's contention that none of the forecasts predicted lower prices and that Tables 8.1 to 8.4 of the Shapiro –Sarin Report suggest that CEL was guaranteed profits, Doctors Shapiro and Sarin state:

> Dr. Kee adds (paragraph 32) that "None of the uranium spot market forecasts discussed by Shapiro/Sarin predicted spot market prices below the $9.59/lb breakeven price that Shapiro/Sarin calculated for CEL." Our point is that these predictions were all wrong, and that CCO's predictions were less accurate than most of the others. The forecasts could have just as easily been wrong on the downside as on the upside.
>
> Dr. Kee then states (paragraph 33) that the uranium price forecasts in our Tables 8.1 through 8.4 "all indicated that CEL profits were guaranteed as a result of its mix of base-escalated uranium purchase contracts and market-related sale contracts." (Emphasis added.) This failure to distinguish between predictions and guarantees permeates Dr. Kee's analysis and encapsulates the difference between our view of the issue at hand and his. Projected profits and guaranteed profits are two different things. If forecasted prices were always correct, there would be no risk, because nobody would enter into any business activity for which profits are not forecast. Dr. Kee's argument also ignores the way markets work. Guaranteed profits from trading strategies tend to be arbitraged away almost instantaneously, resulting in new prices from which profits can only be earned by bearing risk.[665]

[492] With respect to failure to consider industry fundamentals, Doctors Shapiro and Sarin state that, regardless how predictive the statistics cited by Mr. Kee are, in fact prices fell from 1998 to 2000 and then remained below their 1998 level until 2003.

[493] With respect to industry views, Doctors Shapiro and Sarin state:

> The Ux Weekly from August 21, 2000 does include a discussion about whether uranium prices have reached a bottom, but states that most industry participants thought prices had further to fall. The discussion is based on a survey that UxC conducted in July and August 2000 that involved 62 companies (including utilities and suppliers). The survey showed that more than two-thirds of supplier

[664] Pages 7 and 8 of the Shapiro-Sarin Surrebuttal of Kee.
[665] Page 9 of the Shapiro-Sarin Surrebuttal of Kee.

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> respondents, and more than half of all respondents, thought the uranium price had not yet hit bottom. Less than 40 percent of respondents thought that prices would turn higher during the next 12 months.
>
> > The main message in this survey is that price could still fall further, with about half of the respondents believing it would end the year below $8.00 (The survey was conducted during a period when price was in the $8.00-$8.50 range.)
>
> Contrary to Dr. Kee's implication, there was not a consensus (or even a preponderance of belief) among suppliers or utilities that prices were about to increase.[666]

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(3) Doctor Barbera

[494] In his expert report,[667] Doctor Barbera reviews the Cameco Group's uranium business, provides a functional analysis of the Appellant, Cameco US and CEL, provides a summary of the intercompany transactions that he reviewed and provides a description of the arm's length principle and the 1995 Guidelines. With respect to the arm's length principle, Doctor Barbera states:

> The standard applied in this analysis to test the transfer prices between CCO and CEL is the arm's-length principle as set forth in the OECD's 1995 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and Article 9 of the OECD Model Tax Convention, hereafter referred to as the "OECD Guidelines." Under the OECD Guidelines, a controlled transaction meets the arm's-length principle if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in comparable transactions under comparable circumstances. In order to be "comparable" to a controlled transaction, an uncontrolled transaction need not be identical to the controlled transaction, but must only be sufficiently similar that it provides a reliable measure of an arm's length result.[668]

[495] On the basis of his functional analysis, Doctor Barbera opines that CEL is a distributor and that the business of CEL relating to its purchases of uranium from the Appellant can be viewed as two separate types of buy-sell operations.[669] The first involves CEL purchasing U_3O_8 from the Appellant under base escalated and

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[666] Page 11 of the Shapiro-Sarin Surrebuttal of Kee.
[667] Economic Analysis Report of Anthony J. Barbera dated June 9, 2016 (the "Barbera Report") (Exhibit ER000001).
[668] Paragraph 84 on page 32 of the Barbera Report.
[669] Paragraphs 64 to 68 on pages 24 to 26 of the Barbera Report.

market-based contracts[670] and selling it to Cameco US under the same contract structure. Doctor Barbera opines that this segment of CEL's operations is essentially identical to what a routine distributor does. Doctor Barbera goes on to state:

> 66. . . . A routine distributor buys products, holds modest levels of inventory, and then resells those products. Such distributors typically buy and sell products with stable prices over time. Given an economic environment of stable prices, routine distributors do not have an incentive to speculate as to the timing of their purchases and resales or the level of inventory that may or may not optimize profits. Routine distributors neither own valuable and unique technology, nor are they in the process of developing such technology. Routine distributors neither own nor are in the process of developing unique and valuable trademarks or brands.[671]

[496] The second type of buy-sell operation involves CEL purchasing U_3O_8 from the Appellant under base escalated contracts and selling it to Cameco US under market-based contracts. Doctor Barbera states in this regard:

> 67. . . . This second entity is functionally similar to the first entity (i.e., routine distributor). This entity is, however, buying solely under BE and selling solely under MKT, when market prices are expected to increase this type of entity has an incentive to 1) take on greater levels of inventory, and 2) purchase well in advance of resale if it is believed prices will rise over the intervening period.
>
> 68. Even though this second type of buy sell operation is performing similar functions as a routine distributor, it cannot be classified as a routine distributor. The reason is it assumes additional risks than a typical distributor (i.e. inventory and market price speculation) in order to take advantage of the potential upside of price changes. This [is] speculation that buying under different pricing terms will result in above routine distribution profits if market prices do rise over a specified period. However, if market prices fall, this type of buy sell operation is liable to earn below routine distribution profits, or earn operating losses as well.[672]

[497] Doctor Barbera uses three methodologies to evaluate the arm's length nature of the prices that the Appellant charged on its sales of U_3O_8 to CEL over the 2003 through 2006 period: the RPM, the cost-plus method ("CPM") and a third method not identified in the 1995 Guidelines that he calls the valuation method ("VM").

[670] Doctor Barbera identified only two types of contracts: those using a base escalated pricing mechanism and those using a market pricing mechanism. Doctor Barbera viewed hybrid contracts as simply a combination of these two types of contracts rather than as a separate category of contract.
[671] Paragraph 66 on page 25 of the Barbera Report.
[672] Paragraphs 67 and 68 on page 26 of the Barbera Report.

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Doctor Barbera opines that of these three methods the CPM is most appropriate for those transactions.[673]

[498] Under the VM, Doctor Barbera computes a fixed price for the terms of the BPCs based on the discounted present value of the profit expected to be earned over the terms of the BPCs. The expected profit is in turn based on the Appellant's forecast of future realized prices[674] around the times the BPCs were entered into. To determine this profit, the expected revenues are discounted by 10% to reflect the risk of the hypothetical arrangement and are also reduced by the costs of CEL and Cameco US and by a routine profit (based on certain arm's length indicators) for their functions and capital investments. These costs and routine profit collectively required a further discount of 3.5%. The result is a fixed price of $14.96 for the two BPCs dated October 25, 1999 and May 3, 2000 and $12.43 for the balance of the BPCs. These prices are then increased each year by the rate of inflation. The revenues computed using these prices are then compared to the actual revenues from the BPCs to determine the adjustment. The total adjustment for the Taxation Years is an increase in the income of the Appellant of CAN $241.3 million.

[499] Under the RPM, Doctor Barbera compares the sales by the Appellant to CEL under the BPCs to the sales by CEL to Cameco US, which he views as arm's length because they mirror Cameco US sales to third-party customers. Doctor Barbera breaks CEL's sales down into three categories-CEL buys from the Appellant and sells to Cameco US under base escalated pricing terms ("CEL-BE"), CEL buys and sells under market pricing terms ("CEL-MKT") and CEL buys under base escalated pricing terms and sells under market terms ("CEL-MB")–and then computes for each year from 2003 through 2006 CEL's gross discount from CEL's sale price to Cameco US for each category. CEL-BE, CEL-MKT and CEL-MB account for 15%, 30% and 55% respectively of CEL's sales of the uranium purchased under the BPCs.

[500] Doctor Barbera describes the CEL-BE sales as a traditional buy-sell business similar to that of Cameco US and determines, on the basis of the margin paid to distributors in other industries, that 1.7% (plus 0.5% to 0.6% to cover CEL's expenses) of the sale price to Cameco US is appropriate compensation for CEL's services.

[673] Paragraph 95 on page 37 of the Barbera Report.
[674] The forecasts are taken from a September 1999 strategic plan and slides prepared by the Appellant in November 2000. The slides had forecasted spot prices which Doctor Barbera discounted by 5% to generate a proxy for forecast realized prices.

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[501] Doctor Barbera states that the same approach and result apply to the CEL-MKT sales. Doctor Barbera does not apply the RPM to the CEL-MB sales. The total proposed adjustment to the income of the Appellant for the Taxation Years is an increase of CAN $252.4 million.[675] Doctor Barbera subsequently revised his total RPM adjustment downward to $258.9 million for the years 2003 through 2006, but he does not indicate how this overall adjustment affects the adjustments for the Taxation Years.[676]

[502] Under the CPM, Doctor Barbera compares the Appellant's mark-up on sales of U_3O_8 to CEL under the BPCs with the Appellant's mark-up on sales of U_3O_8 to customers under 16 contracts entered into or amended between 1999 and 2001.[677] The details of the 16 contracts are set out in Appendix A to the Barbera Addendum. The results of the CPM analysis are set out in Table 1 of the Barbera Update as follows:

	2003	2005	2006
CCO's CP on Sales to Third Parties	-1.5%	10.5%	22.0%
CCO's CP on Sales to CEL	-10.1%	-20.2%	-27.9%

[503] Doctor Barbera uses the mark-up on the sales to third parties to calculate adjustments to the income of the Appellant of CAN$18.0 million, CAN$76.8 million and CAN$121.3 million for 2003, 2005 and 2006 respectively, or a total of CAN$216.1 million.

[504] In addition, Doctor Barbera performs a CPM calculation for 4.1 million pounds of U_3O_8 that CEL loaned to the Appellant in 2005 (3.4 million pounds) and 2006 (0.7 million pounds) and that the Appellant subsequently sold to CEL. This calculation yields a further upward adjustment to the Appellant's income of CAN$16.5 million in 2005 and CAN$5.4 million in 2006, for a total of

[675] The Barbera Report indicates an adjustment of CAN$271.2 million for the 2003 through 2006 years, which includes an adjustment of CAN$18.8 million for 2004.

[676] Page 3 of the Amended Surrebuttal to Dr. Horst's Rebuttal Report, dated September 6, 2016 (the "Amended Barbera Surrebuttal of Horst") (ER000017).

[677] This description incorporates the changes made by Doctor Barbera to the CPM in his Addendum to Dr. Horst's Cost Plus Critique, dated November 1, 2016 (the "Barbera Addendum") (Exhibit ER000207). The Barbera Addendum redoes the CPM computations in the Barbera Report using data from the Appellant not available to Doctor Barbera at the time of the Barbera Report but available to Doctor Horst at the time of his rebuttal to the Barbera Report. Doctor Barbera subsequently amended these calculations in his report titled Update of the November 1, 2016 Addendum to Dr. Horst's Cost Plus Critique, dated April 13, 2017 (the "Barbera Update") (Exhibit ER000210).

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CAN$22 million.[678] The total adjustments are summarized in Table 3 of the Barbera Update as follows:

All figures in Millions of CAD

	2003	2005	2006	Total
CP Adjustment	18.0	76.8	121.3	216.1
Loaned Amount Adjustment	0.0	16.5	5.4	22.0
Total Adjustment	**18.0**	**93.3**	**126.8**	**238.0**

[505] Doctor Barbera also performs an economic analysis of the arrangement between CEL and Tenex and the arrangement between CEL and Urenco to determine if the Appellant transferred value to CEL by allowing CEL (then CESA) to enter into these arrangements.[679]

[506] With respect to the CEL-Tenex arrangement, Doctor Barbera reviews the history leading up to the HEU Feed Agreement and poses the question: "Would [the Appellant] have entered into this Tenex related arrangement with an unrelated party under terms that provided [the Appellant] with no compensation beyond a routine distribution profit in return?" Doctor Barbera opines that the answer depends on the Appellant's expectation regarding the future profit generated by the HEU Feed Agreement.

[507] Doctor Barbera uses the Appellant's price forecasts *circa* 1998[680] less expected operating expenses to determine the profit the Appellant would expect from the contract with Tenex. The calculations yield an annual operating margin of 33.4% of the resale price. On the basis of these calculations, Doctor Barbera concludes that the Appellant would not have transferred the HEU Feed Agreement to an arm's length party without compensation equal to the expected profit less the compensation an arm's length distributor would require in the circumstances. Doctor Barbera determines that an arm's length distributor would have required a margin of 1.9% of the resale value of the Tenex source uranium, which equates to 5.7% of the total profit from the sale of Tenex source uranium.[681] The resulting adjustments proposed by Doctor Barbera are set out in Table VIII-5, as follows:[682]

[678] Paragraphs 178 to 180 of the Barbera Report and page 3 of the Barbera Update.
[679] Sections VIII and IX of the Barbera Report.
[680] The documents referenced by Doctor Barbera at footnotes 116 and 117 of the Barbera Report as the source of the forecasts are not in evidence.
[681] Paragraphs 239 and 240 on pages 85 and 86 of the Barbera Report.
[682] Page 88 of the Barbera Report.

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P&L Data in Millions USD. Adjustment Figures in Millions CAD

CEL P&L - Tenex Sales	2003	2004	2005	2006	Total
Revenues	40.7	118.3	131.7	210.7	501.5
COGS	35.4	74.8	59.3	104.3	274.0
Gross Profit	5.2	43.5	72.4	106.4	227.5
Operating Expenses	0.2	0.7	0.8	1.0	2.7
Operating Profit	5.0	42.8	71.6	105.4	224.8
Operating Margin	*12.4%*	*36.1%*	*54.4%*	*50.0%*	*44.8%*
CCO Profit % (Tenex)	*94.3%*	*94.3%*	*94.3%*	*94.3%*	*94.3%*
CCO Share of Profit	4.7	40.3	67.5	99.4	212.0
Exchange Rate	1.40	1.30	1.21	1.13	
CEL Tenex Adjustment (CAD)	**6.6**	**52.5**	**81.8**	**112.7**	**CAD 253.7**

[508] Doctor Barbera conducts essentially the same analysis for the CEL-Urenco arrangement. In that case, the 1.9% margin attributed to CEL equates to 7.2% of the total profit from the sale of Urenco source uranium.[683] The resulting adjustments proposed by Doctor Barbera are set out in Table IX-2, as follows:[684]

P&L Data in Millions USD. Adjustment Figures in Millions CAD

CEL P&L - Urenco Sales	2003	2004	2005	2006	Total
Revenues	55.6	65.0	35.9	12.7	169.2
COGS	46.7	44.1	30.0	10.9	131.7
Gross Profit	8.9	20.9	5.9	1.7	37.5
Operating Expenses	0.3	0.4	0.2	0.1	0.9
Operating Profit	8.6	20.5	5.7	1.7	36.5
Operating Margin	*15.6%*	*31.5%*	*15.8%*	*13.3%*	*21.6%*
CCO Profit % (Urenco)	*92.8%*	*92.8%*	*92.8%*	*92.8%*	*92.8%*
CCO Share of Profit	8.0	19.0	5.3	1.6	33.9
Exchange Rate	1.40	1.30	1.21	1.13	
CEL Urenco Adjustment (CAD)	**11.2**	**24.8**	**6.4**	**1.8**	**CAD 44.2**

[509] Doctor Horst and Doctors Shapiro and Sarin each wrote rebuttal reports in response to the Barbera Report and Doctor Barbera wrote surrebuttal reports in response to these rebuttal reports.[685] Doctor Horst wrote a separate rebuttal

[683] Paragraph 253 on page 91 of the Barbera Report.
[684] Page 93 of the Barbera Report.
[685] Doctor Horst's rebuttal report is titled Horst Rebuttal of Economic Analysis Report Prepared by Anthony J. Barbera, Ph.D. and dated July 22, 2016 (the "Horst Rebuttal of Barbera") (Exhibit EA000540). The rebuttal report

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regarding the revised CPM method described in the Barbera Addendum and the Barbera Update.

[510] Doctor Horst opines that the three methods used by Doctor Barbera to value the transactions under the BPCs overstate that value.

[511] With respect to the VM, Doctor Horst states that it does not yield reliable results for two reasons. First, the initial base escalated price suggested by the valuation analysis exceeds the contemporaneous TradeTech long-term indicator by 34%. Doctor Horst suggests that a wholesale purchaser would not have paid such a premium. Second, the valuation method is a form of transactional profit method, which is not as reliable as the traditional transaction methods.

[512] With respect to the RPM used by Doctor Barbera, Doctor Horst states that this method uses the actual prices under the 2003 to 2006 transactions between the Appellant and CEL and between CEL and Cameco US. He criticizes the fact that Doctor Barbera makes no adjustment for the change in market circumstances between the dates the BPCs were entered into and the dates of the actual transactions.

[513] Doctor Horst's rebuttal of the CPM consists of a modification of Doctor Barbera's approach-which, Doctor Horst says, streamlines the analysis by eliminating any reference to the Appellant's cost of sales, gross profits and margin and shows that Doctor Barbera's approach is akin to a CUP method–and a critique of that approach. Doctor Horst raises issues regarding the comparability of the 16 contracts as follows:

1. The three base escalated agreements in the sample used by Doctor Barbera include a legacy premium[686] and therefore overstate the arm's length price;

2. Five of the thirteen market agreements in the sample are capped market price agreements with a pricing formula broadly similar to the market pricing formula used in some of the BPCs. Doctor Horst opines that the actual price paid under those agreements is not a reliable comparable

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of Doctors Shapiro and Sarin is titled Cameco Corporation Expert Report – Rebuttal of Report of Dr. Anthony Barbera and dated July 22, 2016 (the "Shapiro-Sarin Rebuttal of Barbera") (Exhibit EA000538). Doctor Horst's Rebuttal of Doctor Barbera's CPM is titled Rebuttal of Dr. Barbera's Revised Cost Plus Method and dated May 5, 2017 (the "Horst CPM Rebuttal")(Exhibit EA000562).

[686] According to Doctor Horst, a legacy premium is a premium secured for additional volumes under an amended agreement obtained for agreement to lower the price of the volumes under the original agreement: page 2 of the Horst CPM Rebuttal.

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because of the trade-off, in any capped market price agreement, between the level of the discount allowed from current spot prices and the level of the ceiling price.

3. The remaining eight market contracts in the sample use pricing methods that are fundamentally different from the market-based formulas used in the relevant BPCs. Doctor Barbera does not make any adjustment for these differences.

4. With respect to all the market-based contracts in the sample, because buyers and sellers cannot predict what actual contract prices will be in any year, comparing the prices under the BPCs with the prices under the third-party contracts assumes that the parties knew what the prices would be and amounts to the use of hindsight.

[514] In addition, Doctor Horst raises two further issues regarding Doctor Barbera's CPM:

1. Doctor Barbera does not account for the differences in the pricing mechanisms used in the sample contracts and the BPCs. The majority of the sample contracts use predominantly market-based price mechanisms while the majority of the BPCs use base escalated price mechanisms. The failure to make any adjustment for this ignores the contractual terms and restructures the base escalated pricing formulas of the BPCs to mirror the pricing mechanisms in the 13 market price agreements in the sample.

2. Doctor Horst opines that for various reasons the RPM analysis he uses in the Horst Report provides a more reliable basis for comparing the Appellant's transfer pricing formulas with the comparable formulas in the relevant third-party agreements than does Doctor Barbera's CPM.

[515] Doctor Horst's criticism of Doctor Barbera's analysis of the arrangements with Tenex and Urenco is summarized in the Horst Rebuttal of Barbera as follows:

> The principal points on which I disagree with the Barbera Tenex Analysis are as follows. The decisions made by all three of the Western Consortium – CEL, Cogema and Nukem – before and after the Tenex Agreement was signed in March 1999 – are contrary to what the Barbera Valuation Method concludes a "profit-maximizing" company would do. To be specific, if the three Western Consortium companies – CEL, Cogema and Nukem – had in fact viewed the rights to purchase UF_6 as a high-value intangible asset, it is hard to understand:

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- In negotiating the terms of the 1999 Tenex Agreement, why were the Western Consortium companies unwilling to commit themselves in advance to purchasing 100% of the UF_6 that Tenex was offering?

- Once the 1999 Tenex Agreement was signed, why did they not issue multi-year First Option Exercise Notices ("FOENs") to purchase 100% of the UF_6 that Tenex was offering?

- In May 2001, when Tenex was threatening to terminate the 1999 Agreement, why did the Western Consortium companies not then issue multi-year FOENs to purchase 100% of the UF_6 that Tenex was offering?

- What was Tenex thinking when it agreed in November 2001 to make substantial (but temporary) reductions in the escalated base prices available to the Western Consortium companies?

In my view, the most plausible explanation of the actual decisions made by the three Western Consortium companies and by Tenex is that, given the more or less continuous decline in uranium spot prices between 1996 and early 2001, the Western Consortium companies and Tenex were understandably skeptical of forecasts predicting that spot prices would increase sharply in the near future. I think it is more reasonable to assume that the Western Consortium companies would have evaluated the escalated base prices that they would pay under the Base Price Mechanism of the 1999 Tenex Agreement by reference not to forecasts of future spot prices, but rather to the escalated base prices at which they could resell the Tenex-supplied UF_6 to their retail customers. That is to say, they reasonably relied on simpler apples-to-apples comparisons of one Escalated Base Price ("EBP") formula to another EBP formula, rather than on an apples-to-bananas comparison of an EBP formula to a forecasted spot price. Because the EBP prices payable to Tenex were 92% of the most recent TradeTech Long-Term Indicator, the valuation issue is simple – was the 8% discount that Tenex allowed from the TradeTech Long-Term Indicator greater than an arm's length gross margin for CEL and CCI's distribution functions?

As noted, the Barbera Tenex Analysis applies a TNMM to conclude that an arm's length gross margin for CEL and CCI's distribution functions is 3.6% of net sales. In my view, the resale price method, which is one of the three traditional transaction methods, provides a more reliable estimate of the arm's length gross margin for CEL and CCI's combined activities than the Barbera Report TNMM does. In particular, I believe that the gross margin should be based on the projected results of Nukem's back-to-back agreements relating to resales of U_3O_8 supplied by Kazatomprom (Stepnoye) and Sepva-Navoi, respectively. In my Expert Report, I determined that these projected gross margins ranged from a low of 7.4% to a high of 18.0%. The 8% discount from the TradeTech Long-Term

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Indicator allowed under the 1999 Tenex Agreement is near the lower end of the range based on Nukem's back-to-back agreements.

My conclusion is that CEL's right to purchase UF_6 under the 1999 Tenex Agreement under an EBP formula with an initial base price that reflected an 8% discount from the most recent TradeTech ("TT") Long Term Indicator was not a valuable intangible asset. An important corollary of that conclusion is that the prices that CEL paid to Tenex, with whom it was dealing at arm's length, can and should be used in applying the Comparable Uncontrolled Price ("CUP") method to determine whether the transfer prices that CEL paid to CCO had arm's length values.

. . .

As noted, Section III of my Rebuttal Report addresses the Barbera Urenco Analysis. In summary, the Barbera Report uses the same general method to evaluate the 1999 Urenco Agreement as it applies to the 1999 Tenex Agreement. Accordingly, I have the same basic objections to the Barbera Urenco Analysis as I just described regarding the 1999 Tenex Agreement.

Also, as I explain in Section III(B) below, the Barbera Urenco Analysis focuses on the 1999 Urenco Agreement and does not consider any of its significant substantive amendments or the series of carve-out agreements that fixed the price that CEL would pay for UF_6 that CCI then resold under designated back-to-back agreements with its nuclear power plant operator ("NPPO") customers. The omission is significant because the formula provided by the 1999 Urenco Agreement actually applied only to CEL's 1999 purchases. CEL's purchases during the years at issue were all at prices determined under amendments or carve-out agreements made in later years, none of which are considered in the Barbera Report. Given the renegotiation of the Urenco pricing formulas in 2000 and again in 2001 that resulted from declining uranium prices, I am dubious of the Barbera Report's conclusion that CCO is entitled, by virtue of its role in securing the original 1999 Urenco Agreement, to a share of CEL and CCI's combined gross margin on sales made in 2003, 2005 and 2006. Given the history of the 1999 Urenco Agreement described above, I would think it would be more reasonable to attribute any excess profits to CEL's and CCI's marketing efforts, rather than to CCO's role in negotiating the terms of the original 1999 Urenco Agreement.

Finally, the Barbera Urenco Analysis makes no mention of, and thus no adjustment for two factors that may have depressed the wholesale prices that CEL paid and the retail prices that CCI received for the Urenco UF_6. The first is the fact that the Urenco UF_6 was Russian-source and could generally not be sold to U.S. nuclear power plant operators. The second and more significant is the fact that Tenex had no firm contractual obligation to supply the re-enriched UF_6 to Urenco, which resulted in Urenco's having a contractual obligation to supply CEL

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> only if Tenex supplied by [*sic*] Urenco. Given the history of the 1999 Urenco Agreement described above, I would think it would be more reasonable to attribute any excess profits to CEL's and CCI's marketing efforts, rather than to CCO's role in negotiating the terms of the original 1999 Urenco Agreement.[687]

[516] In his surrebuttal report addressing Doctor Horst's rebuttal report,[688] Doctor Barbera summarizes his criticism of Doctor Horst's rebuttal of his use of the CPM analysis as follows:[689]

> Dr. Horst's CUP analysis concluded that the actual contracts CCO signed with CEL produced results that diverged from the arm's length standard by 1.5% of total sales revenue. It follows that Dr. Horst has concluded that CCO's CP on sales to CEL over the years 2003, 2005 and 2006 should be negative. The implication of his CUP analysis along with his critique of my CP analysis is that CCO would be willing to sign contracts that generate gross losses over the entire contract term.
>
> Dr. Horst's critique lacks economic merit. He offers no evidence to support his assertion, either explicit or implicit, that CCO, under arm's-length conditions, would have accepted continuous operating losses. Such conduct is contrary to the arm's-length principle and CCO's objectives and interests. Therefore, I stand by my CP analysis.[690]

[517] Doctor Barbera submitted two further surrebuttal reports one of which addresses the rebuttal reports of Doctor Horst and of Doctors Shapiro and Sarin and one of which addresses only the rebuttal report of Doctors Shapiro and Sarin. I will summarize these two surrebuttal reports after summarizing the rebuttal report of Doctors Shapiro and Sarin.

[518] In the Shapiro-Sarin Rebuttal of Barbera, Doctors Shapiro and Sarin opine that the 2.2% to 2.4% discount used by Doctor Barbera to determine the profitability of CEL is based on returns earned by distributors that are not remotely comparable to CEL in terms of risk borne. They state, for example, that one of the distributors on Doctor Barbera's list of comparable distributors hedged its price risk, which CEL was not able to do because of the absence of a futures market in uranium. They also state that Doctor Barbera contradicts his own conclusion when he finds that CEL was not a routine distributor when it bought and sold under different contract structures, because it took on additional risk, but applies the

[687] Pages 3 to 7 of the Horst Rebuttal of Barbera.
[688] Amended Barbera Surrebuttal of Horst.
[689] As noted above, Doctor Barbera revised his CPM analysis in the Barbera Addendum and the Barbera Update. There is no surrebuttal report addressing Doctor Horst's rebuttal of the revised CPM analysis.
[690] Page 2 of the Barbera Surrebuttal of Horst.

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routine distributor margin to all the transactions. Doctors Shapiro and Sarin opine that CEL was not a routine distributor because it took on significant price risk.

[519] Doctors Shapiro and Sarin criticize Doctor Barbera's VM on the grounds that in 1999 to 2001 the Appellant had no reason to believe that its forecast prices were accurate, that an economically rational actor would realize that there was tremendous uncertainty regarding forecast uranium prices and would accept a lower contract price in exchange for the elimination of this uncertainty, and that the discount on the forecast price stream of revenues would be higher than on the fixed price stream because the forecast stream is uncertain.

[520] Doctors Shapiro and Sarin opine that Doctor Barbera fails to understand how an arm's length party would actually behave in the face of an optimistic forecast. They state:

> By failing to account for the expectations of other market participants, Dr. Barbera fails to understand how an arm's length party would actually behave in the face of an optimistic forecast. Specifically, if a company believes the price of a product it seeks to acquire and sell is going to rise, it does not necessarily mean the company will try to purchase the product on a fixed-price (base-escalated) basis and sell it on a market basis. If the company's price expectations are shared by the market, these expectations will be priced into the market. That is, the base-escalated and market prices available in the market will reflect these expectations. The base price in base-escalated contracts would likely be higher in these circumstances than in an environment in which expectations were for prices to decline. CEL's contracting preferences would depend on several factors, including its price expectations relative to the price expectations of other market participants, its risk tolerance, and the risk tolerances and other preferences of its counterparties.
>
> . . .
>
> Dr. Barbera's assertion that a company would not be willing to sell at long-term fixed prices if the value of the resulting revenue were less than the revenue that could be obtained by selling at forecast uranium prices, and indeed his entire analysis, completely ignores the value companies place on avoiding uncertainty. A tenet of finance (and behavioral psychology) is that people prefer certainty and are . . . willing to pay a premium for it. Failure to account for the risk inherent in accepting an uncertain set of cash flows plagues Dr. Barbera's entire analysis.
>
> Dr. Barbera also does not take into account that, without the benefit of hindsight, no contracting option is unequivocally better than another. Whether CCO would have been better off selling under a base-escalated or market contract depends on

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> the future price of uranium, the price of avoiding risk, counter-party preferences, and other market circumstances.
>
> Indeed, despite CCO's repeated forecasts of rising prices, in some instances, CEL was indifferent between entering into market or base-escalated price contracts and offered (indirectly, through CCI) potential clients both options. As we note in our affirmative report, we identified 18 situations in 2003 in which customers were offered the choice of fixed, market, and/or hybrid terms.[691]

[521] Doctors Shapiro and Sarin opine that Doctor Barbera's VM results for 2003 are unreasonably high given the market prices suggested by his own analysis, and they illustrate the point in Table 6.6 as follows:[692]

Table 6.6: Dr. Barbera's Valuation Model Results Are Unreasonable

Price or Price Calculation Component	Amount	Source
CCO to CEL Revenues	C$187.2m	Barbera Table VII-25
Barbera Valuation Analysis Adjustment	C$78.6m	Barbera Table VII-23
Barbera Implied CCO Revenue	C$265.8m	
CCO to CEL Volume	14.3m lbs.	Barbera Appendix C
Implied CCO to CEL Sales Price	C$18.55/lb.	
This is higher than:		
CEL to CCI base-escalated price	C$14.14/lb.	Barbera Table VII-27*
CEL to CCI market-based price	C$15.15/lb.	Barbera Table VII-27*
CEL Adjusted Arm's Length Price	C$14.43/lb.	Barbera Table VII-28*

*Converted to C$using 2003 exchange rate of C$1.40/US$ (Barbera, Table VII-18).

[522] Doctors Shapiro and Sarin criticize Doctor Barbera's use of the CPM as follows:

> Dr. Barbera uses the cost plus method to analyze CCO's sales to CEL even though this method is usually applied to transactions involving the provision of services or the sale of semi-finished goods. Further, arm's length uranium transactions are rarely if ever priced on a cost-plus basis. This is not surprising, as uranium is a commodity. It follows the Law of One Price. That is, irrespective of the cost of production, uranium can only be sold at the prevailing market price. If uranium were priced on a cost-plus basis, uranium that was extracted more

[691] Pages 20 and 21 of the Shapiro-Sarin Rebuttal of Barbera.
[692] Page 22 of the Shapiro-Sarin Rebuttal of Barbera.

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> efficiently would be sold at lower prices than uranium that was more expensive to mine, and uranium sellers with lower costs of goods sold ("COGS") would have lower revenues than sellers with higher COGS. This would be contrary to the Law of One Price, and common sense. There is no reason for uranium to be priced, or for uranium transactions to be evaluated, on a cost-plus basis. Rather than being a pricing mechanism, the markup over cost is simply an *ex-post* calculation that determines what the miner's profit margin is.
>
> Further, miners frequently lose money, in part because they are price takers. Because they are price takers, they cannot charge on a cost-plus basis. If they could, they would not experience the volatile returns, and frequent losses, which they do.[693]

[523] Doctors Shapiro and Sarin criticize Doctor Barbera's Tenex analysis for vastly overstating the expected profits from the HEU Feed Agreement and underestimating the compensation required in order for CEL to enter into the agreement. They also state that Doctor Barbera's conclusion is contrary to the actual behaviour of parties acting at arm's length and to contemporaneous statements by Cameco and the business press.

[524] Doctors Shapiro and Sarin state that Doctor Barbera does not explain the distinctions among the forecasts he uses to value the HEU Feed Agreement, does not explain his basis for selecting among the four forecasts that he identifies, appears to misstate which forecast he uses in his analysis, and does not examine whether his selected forecast data are applicable to forecasting an estimated sales price for Tenex source uranium. Doctors Shapiro and Sarin also state that Doctor Barbera does not appear to have taken into account the potential implications of the fact that there was a restricted and an unrestricted market for uranium and that a discount applied to uranium sold in the unrestricted market.

[525] Doctors Shapiro and Sarin state that, contrary to Doctor Barbera's assumption that CESA adopted the base escalated pricing option and paid US$29, CESA could not purchase uranium under the HEU Feed Agreement for US$29. Rather, the formula required payment of the greater of US$29 and 92% of the then long-term price, which would have yielded a price higher than US$29. In any event, CESA did not exercise its option to purchase uranium under the base escalated price option. Accordingly, Doctor Barbera's fundamental assumption as to which option would be selected is simply wrong, rendering his subsequent conclusions moot. In addition, Doctor Barbera fails to account for the price risk that CESA would have taken on if it had exercised the option. After analyzing the

[693] Page 23 of the Shapiro-Sarin Rebuttal of Barbera.

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approach taken by Doctor Barbera, Doctors Shapiro and Sarin summarize their position on Doctor Barbera's Tenex analysis as follows:

> Dr. Barbera's analysis of expected returns from the Tenex transactions is deeply flawed. Under the Tenex contract, CEL could maintain option flexibility by purchasing HEU for 92 percent of the market price or could lock in prices using the BE mechanism. Under the first alternative it would have reasonably expected gross margins of 8 percent (6 percent after paying CCI its 2 percent fee). Under the second alternative, which it did not exercise, it would pay more than the $29 assumed by Dr. Barbera, and, moreover, it would be exposed to price risk. Its risk-adjusted return would likely have been negative. Under no mechanism could CEL have paid just $29 and received risk-free returns, as asserted by Dr. Barbera.
>
> Further, Dr. Barbera's conclusion of expected gross margins of 35 percent is contradicted by actual behavior (CEL did not exercise the BE pricing mechanism option) as well as by contemporaneous statements by the Cameco Group (expected gross margins of 4 to 6 percent) and of the business press and analysts (which focused on the supply control aspects of the transaction, rather than any expected direct contract value). Lastly, Dr. Barbera's conclusion is completely inconsistent with economic logic. If the terms of the Tenex transactions were such that CEL were expected to receive risk-free gross profits of 35 percent (and operating profits of 33 percent), Tenex, negotiating at arm's length, would not agree to such terms, and CCO, acting in its interests, would not have sought to partner with unrelated parties.[694]

[526] Doctors Shapiro and Sarin opine that, under Doctor Barbera's own analysis, the Appellant would not require any consideration from CESA/CEL with respect to the HEU Fed Agreement:

> Dr. Barbera outlines the conditions under which no compensation would be due to CCO as a result of CEL signing the agreement with Tenex. He states (paragraph 219)
>
> > CCO would agree to enter into an arrangement with a third party without further consideration or compensation if the only profits expected from the deal were expected to be equivalent to routine distribution profits. Such an arrangement would indeed shift routine profit from CCO to the third party. But the arrangement also shifts the burden of performing the necessary functions and raising capital from CCO to the third party. In this case, CCO loses the associated routine distributor profit, but is also freed of the burden of necessary incremental functional and financial investment.

[694] Page 35 of the Shapiro-Sarin Rebuttal of Barbera.

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> As demonstrated above, this is exactly the situation here. That is, the profits expected from the deal were expected to be equivalent to routine distribution profits. In fact, they may have been less. The expected profits from the deal were at most 6 percent, and the "routine" distribution profits required by CEL were 6 percent as estimated by Dr. Wright, and would be even higher if one accounted for the additional risk CEL bore as a result of the unique circumstances of the Tenex transaction. Given these expectations and risks, CCO would be happy to forego expected profits of, at most, 6 percent, to free itself "of the burden of necessary incremental function and financial investment."[695]

[527] Doctors Shapiro and Sarin criticize Doctor Barbera's analysis of the Urenco agreement on the ground that he makes no effort to identify who performed the activities that led to the trading profits.

[528] As noted above, Doctor Barbera wrote two surrebuttal reports[696] that addressed the rebuttal report of Doctors Shapiro and Sarin. In the Barbera Surrebuttal of Shapiro/Sarin, Doctor Barbera states that Doctors Shapiro and Sarin were wrong when they opined that in his VM analysis Doctor Barbera should have used a higher discount rate for the forecast revenue stream. He further states:

> . . . Fixed price revenues lead to more certain cash-flow streams only in the case where both the fixed revenues and the costs are denominated in the same currency. When the fixed price revenue stream is denominated in US dollars, and the costs associated with that revenue stream are denominated in Canadian dollars, however, the resulting Canadian dollar cash-flow stream becomes highly uncertain, thus rendering Shapiro's / Sarin's claim to be untrue. A fixed price US dollar stream does not produce a relatively certain Canadian dollar profit/cash flow stream for CCO, as Shapiro / Sarin assert in their rebuttal. Therefore, my use of the same discount rate is justified, and my resulting Valuation Analysis adjustment is correct.[697]

[529] With respect to the discount rates suggested by Doctors Shapiro and Sarin, Doctor Barbera opines that a rate in excess of 10% is wildly inappropriate given that in 1997 the Appellant used of rates of 8.5% or 10% to evaluate the Tenex transaction.

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[695] Page 37 of the Shapiro-Sarin Rebuttal of Barbera.
[696] Surrebuttal to Dr. Horst's & Shapiro / Sarin's Rebuttal to the Urenco Analysis, dated August 29, 2016 (the "Barbera Urenco Surrebuttal") (ER000018) and Surrebuttal to Shapiro / Sarin Rebuttal Report, dated August 26, 2016 (the "Barbera Surrebuttal of Shapiro/Sarin") (ER000016).
[697] Page 1 of the Barbera Surrebuttal of Shapiro/Sarin.

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[530] With respect to his RPM analysis, Doctor Barbera rejects the assertion that he used incomplete data. Doctor Barbera states:

> The authors are correct in that I did not use in my RPM analysis all of the volumes CEL sold to CCO over the 2003 through 2006 period. The authors also correctly point out that the volumes I excluded were from UF6 supply contracts (see top of page 10 of Shapiro / Sarin's rebuttal report). There is a good reason for this. I clearly state that my RPM analysis is only evaluating the arm's-length nature of CCO's sales of U308 to CEL. The volume and sales I use in my RPM analysis relate only to CEL's resales to CCI of U308 purchased from CCO. These resales equaled 59.6% of CEL's total sales to CCI over the 2003 through 2006 period. Since I'm using consistent data throughout, which comprises over 50% of CEL's total volumes of sales to CCI, it is correct to use only CEL's volumes and resales of U308 acquired from CCO in my RPM analysis. My RPM analysis, therefore, is wholly reliable as a result, contrary to the authors' assertion.
>
> Based on actual CEL to CCI invoice data provided to me, CEL's average sales price for non-CCO sourced uranium is lower than the average CEL sales price for CCO sourced material in 2003, but higher in 2004, 2005 and 2006. Therefore, the net impact of including the non-CCO sourced transactions in the RPM analysis would lead to a higher adjustment than that shown in my expert report: not lower as the authors claim.[698]

[531] In the Barbera Urenco Surrebuttal, Doctor Barbera states:

> Dr. Horst asserts that any excess profits should be attributed to CEL's and CCI's efforts, given that the prices from the original agreement had nothing to do with the actual purchases under the agreement. I disagree with this claim. Any incremental "excess profits" as a result of the amendments was possible only because CCO's 1999 negotiation of the original agreement included a termination clause. Dr. Horst and Shapiro / Sarin overlook the most important feature of the original 1999 agreement which allowed CEL to amend or terminate the agreement, solely at CEL's option, when the "spot price… remains below a stipulated floor price for six consecutive months" (Horst, page 30). The amendments and carve-outs that CEL negotiated were possible only because of CEL's right to terminate. This right gave CEL the leverage to renegotiate much improved pricing terms. Of course, it is possible that neither CCO nor CEL actually anticipated spot prices to fall below the stipulated floor price for six consecutive months. Yet, this fact could have no bearing on the arrangements that CCO would require of a third party distributor in 1999 to execute the contract.
>
> I view the profit split analysis as a sensible vehicle for CCO to protect its stockholders. There was nothing wrong (from an economic perspective) with CCO selecting a third party distributor to execute the Urenco agreement as long

[698] Page 2 of the Barbera Surrebuttal of Shapiro/Sarin.

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> as that distributor earned an arm's length profit. The fact that CCO negotiated terms under which CCO (or a third party distributor) could amend the Urenco agreement to its benefit is just one aspect of protecting CCO's stockholders. This term makes sense because it provided CCO (or a third party distributor) with the flexibility to amend the contract to make it more likely to generate profits.
>
> Dr. Horst refers to the fact that the market value of the Urenco agreement "vanished" (Horst, 30) soon after the parties entered into the agreement because CEL could have exercised its right as buyer to terminate the agreement but instead ultimately amended it to lower CEL's purchase price as market spot prices declined. As previously remarked, the amendment was possible only because of the right to terminate. A contract without the termination clause may or may not have been valuable. If not, then CCO would have seen little if any profit from my analysis. The profit split model does not require high margins to produce the correct answer. That is, if system profits (i.e., overall profit derived from the deal) are very low, then CCO receives very little profit from the profit split along with CEL. When there are losses, CCO bears the largest burden of those losses.[699]

[532] With respect to the risks assumed by CESA/CEL, Doctor Barbera opines:

> I do not agree with Shapiro / Sarin, or Dr. Horst's conclusions that CEL was required to perform additional activities and bear more risk beyond that of a normal trader because there was uncertainty in the available volume CEL could purchase year over year under the Urenco Agreement. On page 38 of their rebuttal, Shapiro / Sarin even quote the terms of the Urenco Agreement that in October, Urenco was to provide CEL with a non-binding notice of the best estimate of the delivery quantity for the following year, and suggests [*sic*] that CEL faced all this risk of supply uncertainty. Importantly, Shapiro / Sarin omitted to mention another clause in the agreement that a binding notice was to be provided to CEL on or before January 1 for each year. Shapiro / Sarin's characterization of the risk associated with volume uncertainty is inaccurate. As a function of the binding notice, CEL can manage these risks by scheduling and committing to sales based on the binding notice amounts. These activities performed by CEL do not appear to be substantially different than those performed by typical traders.
>
> CCO's forecasts and the original Urenco contract terms were such that CCO clearly had expectations that the Urenco contract, over the full term, could be quite valuable. The potential profit returns resulting from CCO's projections were more than sufficient to entice CCO to assume the associated pricing and market risks; otherwise the contract would not have been consummated. Given CCO's expectations, under arm's-length conditions CCO would have accepted the original pricing terms and the associated market risks, and would not have

[699] Pages 2 and 3 of the Barbera Urenco Surrebuttal.

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> allowed a third-party distributor to earn all of the non-routine profits that Dr. Horst and Shapiro / Sarin claim were the result of those risks.[700]

[533] With respect to the assertion that the CPM is not appropriate in the circumstances, Doctor Barbera states that there is nothing in the 1995 Guidelines that says the CPM cannot be used for manufacturers of finished goods and that the 1995 Guidelines note that the CPM "probably is most useful" when one is evaluating "long-term buy-and-supply arrangements", which perfectly describes the Appellant's sale of U_3O_8 to CEL.

[534] With respect to the assertion that he did not explain the source of the data used, Doctor Barbera states that he discussed the sources of the data used in his CPM analysis at paragraphs 165 and 166 of his report and that he did not show invoice-by-invoice data because the data provided to him did not include that level of detail.

[535] Doctor Barbera rejects the assertion that the gross margin he used was above the Cameco Group average of 29.5% and asserts that in fact the cost-plus mark-up used was 14.9%, which translates into a gross margin of 13%.

[536] With respect to the assertion that the results of the CPM analysis are unreasonable, Doctor Barbera states that Doctors Shapiro and Sarin omitted in their calculations the uranium sold by the Appellant to CEL and then loaned by CEL to the Appellant.

(4) Doctor Wright

[537] In her report,[701] Doctor Wright states that she was asked by the Department of Justice to prepare an economic analysis that addresses the transactions between the Appellant and CESA/CEL and the transactions between CESA/CEL and third parties (most notably, Tenex and Urenco) and to opine on whether the prices in the transactions between the Appellant and CEL were arm's length prices. For both sets of transactions, Doctor Wright was asked by the Department of Justice to assume three different factual scenarios:

> a. CEL performed no functions relevant to its purchase and sale of uranium;
>
> b. CEL performed some functions relevant to its purchase and sale of uranium; and,

[700] Page 4 of the Barbera Urenco Surrebuttal.
[701] Expert Report of Deloris R. Wright, PhD dated June 9, 2016 (the "Wright Report") (Exhibit ER000023).

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c. CEL performed all functions relevant to its purchase and sale of uranium.[702]

[538] Doctor Wright provides the following description of how to obtain a reliable transfer price:

> . . . reliable transfer prices depend on much more than just finding a price for a particular product. The circumstances surrounding the proposed comparable, including market conditions in which the transaction takes place, may require an analysis quite different from pricing products in markets without those circumstances. In other words, the whole picture must be known and taken into consideration. What may, superficially, appear to be a reliable comparable transaction may turn out to be completely unreliable when all aspects of the transaction and its market are known.[703]

[539] Doctor Wright identifies the following two steps in a transfer price analysis:

1. Identify the aspects of the industry (or the industry characteristics) that are relevant to properly determine arm's length transfer prices. The important industry characteristics are those that explain prices or margins and/or fluctuations in prices or margins.

2. Identify the business activities (functions) that each party to the transaction performs, the risks that are assumed by each party and the assets (especially intangible assets) that each owns. This allows the analyst to determine the value added by each legal entity involved in the transaction. The value added by a party in turn determines that party's bargaining power (i.e., ability to secure profit from the transaction).

[540] Doctor Wright reviews the transfer pricing methodologies described in the 1995 Guidelines and then states:

> Once intercompany prices are determined, it is imperative to ask whether the result is reasonable under the circumstances. This is ordinarily accomplished by evaluating the income statements that result from application of the recommended pricing (i.e., income statements for the transaction in question for each related party that participates in the subject intercompany transaction). The goal is to ensure that the margins shown on those income statements (for all parties to the transaction) are consistent with both the industry and functional analyses.[704]

[702] Paragraph 7 on pages 2 and 3 of the Wright Report.
[703] Paragraph 31 on page 10 of the Wright Report.
[704] Paragraph 77 on page 24 of the Wright Report.

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[541] Doctor Wright describes the functions and risks of CEL and her mandate as follows:

> CEL functioned as a uranium intermediary. It purchased uranium from CCO, Tenex, Urenco, and other third parties. It sold uranium to CCO and CCI. The Department of Justice has provided me with a list of functions that the Cameco Group has advised that CEL performed in 2003 through 2006 (See Appendix 3). As stated, I have been asked to opine on different scenarios that vary depending on which functions CEL performed. Some of the scenarios are based on the assumption that CEL did not perform all the functions in the list. The specific functions relevant to each scenario are further discussed in the analysis section.[705]

Doctor Wright then performs a transfer pricing analysis of each scenario, which yields the results stated in the executive summary of her report.

[542] With respect to the choice of transfer pricing methodology for the scenario in which CEL does not perform all of the functions related to a uranium trading business, Doctor Wright states:

> As is the case in all transfer pricing analyses, the CUP method is the best method if it can be applied. In this case, no comparable transactions are publicly available to allow application of the method; hence, it cannot be used to determine an arm's length return to CEL under this scenario. Comparable transactions to allow application of the resale price method do exist, and for this reason, the resale price method is the best method. The cost plus method is not typically used to compensate traders; therefore, this method is not used. And, because comparable transactions can be used to apply the resale price method, I do not consider using TNMM because public information does not exist to allow me to determine operating margins for the limited risk portion of a trader's portfolio.[706]

[543] With respect to the choice of transfer pricing methodology for the scenario in which CEL performs all the functions associated with a uranium trading business, Doctor Wright states:

> 160. Under this scenario, it is determined that CEL performed all functions needed to obtain and manage contracts relating to the purchase and sale of uranium from/to both related and unrelated parties, including all functions related to the management of the risks associated with the contracts.
>
> 161. This scenario differs from the previous scenarios because it assumes that CEL independently performed all of the functions necessary to act as a trader, including negotiating prices with CCO and CCI, developing and maintain [*sic*]

[705] Paragraph 88 on page 28 of the Wright Report.
[706] Paragraph 143 on pages 53 and 54 of the Wright Report.

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> relationships with third parties, including Tenex and Urenco, negotiating all prices with these entities, and maintaining control and management of inventory levels and decision-making relating to whether or not to enter deals as well as determining what volumes to purchase and sell. In particular, this scenario assumes that CEL, with little, if any, assistance from either CCO or CCI, controls and manages price risk through the functions described in Appendix 3. In fact, this scenario assumes that CEL's functions exceed those listed in Appendix 3 especially as it pertains to the Tenex, Urenco, and other third-party contracts. In essence, this scenario assumes that CEL takes on all the functions and risks of an independent trading company, and developed and managed all of the agreements it signed.
>
> 162. To value this scenario, I use two separate approaches. The first uses two of the largest uranium traders and the second uses broader-based trading companies.
>
> . . .
>
> 163. Because no contracts between unrelated parties are available that could be used to apply a transaction-based method, I use comparable trading companies to benchmark the margins that CEL would have received had it been operating at arm's length with its related parties. The pricing method is the TNMM with gross margin as well as operating margin as the profit level indicators. The transaction-based method (CUP, resale price, and cost plus) could not be used because comparable transactions are not publicly available.

[544] For the first approach, Doctor Wright reviews the information that was in the public domain and concludes that one company, Nufcor, is available for the TNMM analysis.

[545] For the second approach, Doctor Wright concludes that the TNMM is the preferred methodology in view of the information available regarding "comparable Asian trading companies". Doctor Wright explains her reasons for this as follows:

> Because this analysis relies on comparables that are companies rather than transactions, the CUP method cannot be used. Either the resale price method or the TNMM could be selected as the best method, however, I use TNMM because (a) I use comparable companies (not comparable transactions) and (b) the use of operating marge [*sic*] as the profit level indicator does not require me to address the accounting issues associated with use of the gross margin, which would be required under a resale price method. I do not use the cost plus method because traders are typically not compensated based on a markup on their costs.

[546] Finally, Doctor Wright performed a "sanity check" in which she compared the operating margins of CEL with the operating margins of the Cameco Group's

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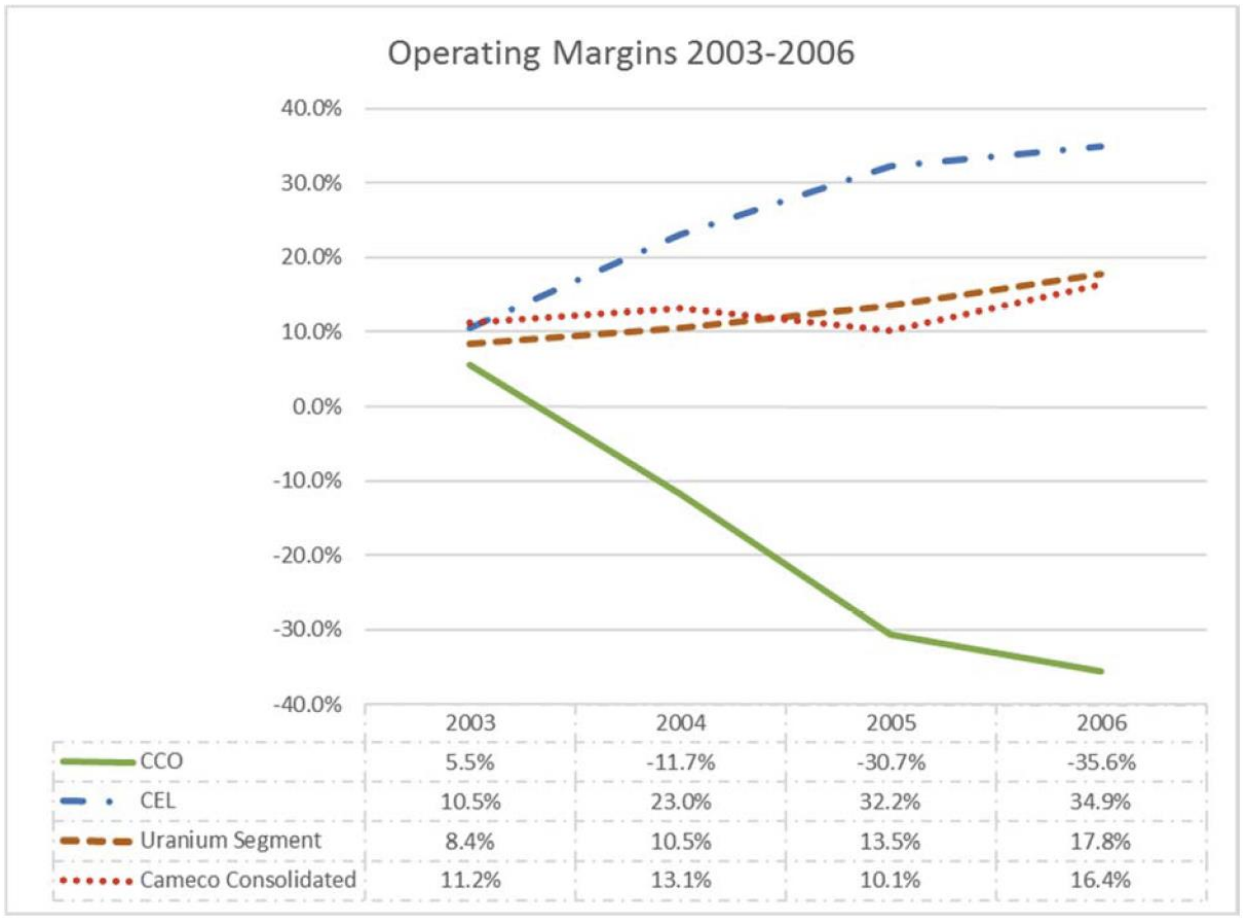
uranium business computed using data from the Cameco Group Annual Reports. Doctor Wright reported the results of this analysis in Chart 3:[707]

Chart 3. Operating Margins of Cameco Entities 2002-2006



	2003	2004	2005	2006
CCO	5.5%	-11.7%	-30.7%	-35.6%
CEL	10.5%	23.0%	32.2%	34.9%
Uranium Segment	8.4%	10.5%	13.5%	17.8%
Cameco Consolidated	11.2%	13.1%	10.1%	16.4%

[547] Doctor Wright summarizes her conclusions from her transfer pricing analyses as follows:

> The factual scenarios upon which the valuations are based and the results of my valuations are as follows.
>
> a. For the situation where CEL performed no functions, no compensation is due if CEL performs no functions.
>
> b. For the situation where CEL performed some functions, the compensation due is related to the nature of the value created. For example,

[707] Page 76 of the Wright Report.

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- If CEL performs functions unrelated to the uranium contracts that it owns, but does perform functions that provide a benefit to the Cameco Group, then CEL should receive compensation equal to a markup on the total cost of rendering the beneficial services. The operating margin resulting from the application of the arm's length markup is between 0.0 percent and 0.1 percent of revenue. In fact, CEL's operating margins were 10.5 percent in 2003, 32.2 percent in 2005, and 34.9 percent in 2006, which exceed the arm's length margins in all three years.

- If CEL performs functions related to one of [*sic*] more of the transaction flows, but the functions performed are limited to negotiating and signing agreements and are not related to management of the contracts after signing, then CEL should receive compensation relating to the investment that it made in connection with the contracts. That compensation is an operating margin between 1.0 percent and 2.8 percent of revenue. In fact, CEL's operating margins exceed the arm's length margins in all three years.

- If CEL performs the functions outlined in the previous bullet and, in addition, performs some, but not all, of the functions needed to manage its uranium purchase and sale agreements, then its compensation should be similar to that of a limited-risk trader and its gross margin should be 6.0 percent of revenue, which converts to an operating margin of between 5.4 percent and 5.5 percent of revenue depending on the year in question. In fact, CEL's operating margins exceed the arm's length margins in all three years.

c. For the situation where CEL performed all functions relevant to its purchase and sale of uranium, its gross margin should be consistent with the benchmark rate of 6.2 percent in 2003, 25 percent in 2005, and 15.8 percent in 2006. This converts to operating margins consistent with 5.7 percent for 2003, 24.4 percent for 2005, and 15.3 percent for 2006. These margins are higher than the Asian company margins, therefore I do not use the results of the Asian comparables analysis in these conclusions. In fact, CEL's operating margins were 10.5 percent in 2003, 32.2 percent in 2005, and 34.9 percent in 2006. CEL's operating margins exceeded the arm's length benchmark in 2003, 2005 and 2006.[708]

[708] Paragraph 206 on pages 78 to 80 of the Wright Report.

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[548] Doctors Shapiro and Sarin wrote a rebuttal report in response to Doctor Wright's report.[709] Doctor Wright did not write a surrebuttal report.

[549] Doctors Shapiro and Sarin summarize their criticisms of the Wright Report as follows:

> Dr. Wright estimates a benchmark rate of compensation for CEL under different assumptions regarding CEL's functions and risks. She concludes that CEL's reported operating margins exceed the arm's length benchmarks for all three years for all scenarios.
>
> Much of Dr. Wright's report is not relevant to the assessment of pricing between CEL and CCO because it is based on assumed scenarios that are not similar to the facts. In her first four scenarios, Dr. Wright assumes CEL bore no risk or, at most, acted as a limited-risk trader. Dr. Wright makes no attempt to independently reach these conclusions regarding CEL's functions and risks. She does not conduct a functional analysis of CEL and instead simply presents analysis under function and risk assumptions that are incorrect. As we show in our affirmative report, CEL did not simply broker transactions between other parties, but took significant price risk. Its returns were very sensitive to changes in the market price of uranium, and it could have suffered losses if the market price had declined.
>
> The only scenario analyzed by Dr. Wright that is of relevance to the matter at hand is her fifth, in which she assumes CEL took on all of the functions and risks of an independent trading company. Dr. Wright's findings with respect to this scenario are flawed. As we demonstrate below, Dr. Wright does not adequately explain her selection of the transfer pricing method she applies to analyze this scenario. Moreover, her computation of CEL's arm's length return through the large-uranium-trader analysis contains several errors, including failing to identify a set of comparable companies, using incorrect data for the one potential comparable identified, failing to account for the effect of related-party transactions on the results of the identified comparable company's returns, and failing to account for significant differences in the risks borne by CEL and the identified comparable company.
>
> Dr. Wright also analyzes the full-risk scenario using a broader trading company approach, but this method suffers from significant flaws and cannot be used to meaningfully assess CEL's returns. It uses data from conglomerates engaged in a wide variety of intertwined businesses. The data used in the broader-trading-company analysis are not specific to trading activities, but are from segments that engage in many non-comparable activities, including mining, manufacturing, and energy production. The analysis does not account for these non-comparable

[709] Cameco Corporation Rebuttal of Export Report of Dr. Deloris Wright, dated July 22, 2016 ("Shapiro-Sarin Rebuttal of Wright") (Exhibit EA000539).

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> activities, and the data it relies on are not reflective of returns for the activities performed or risks borne by CEL.[710]

[550] With respect to Doctor Wright's rejection of the CUP method, Doctors Shapiro and Sarin state that Doctor Wright does not explain why the transactions involving the same or similar services would have to be from public sources when some of the contracts used for her RPM analysis were not publicly available, nor does Doctor Wright explain why none of the Cameco Group's contracts with third parties were comparable for the purposes of a CUP analysis. Doctors Shapiro and Sarin opine that there is no requirement that the comparable transactions be publicly available.

[551] Doctors Shapiro and Sarin reiterate their position that CEL bore significant price risk and opine that in light of this risk Doctor Wright's no function and some functions scenarios are irrelevant. With respect to Doctor Wright's all functions scenario, Doctors Shapiro and Sarin state that Doctor Wright "mischaracterizes CEL's functions and risks and chooses wholly non-comparable companies in trying to assess CEL's arm's length returns".[711]

[552] With respect to the first of the two approaches to the all functions scenario, Doctors Shapiro and Sarin opine that no meaningful conclusions can be drawn from a TNMM analysis that uses a sample of one company (Nufcor) and that:

> . . . Comparing the returns of two uranium traders says nothing about whether one of them was purchasing uranium at arm's length prices. Companies in the same industry would not be expected to have the same returns due to the myriad factors that determine returns and that differ from one company to another.[712]

[553] Doctors Shapiro and Sarin also state that Doctor Wright misinterpreted Nufcor's results for 2006, failed to account for the fact that in 2005 and 2006 Nufcor sold the majority of its uranium to related parties, and also failed to account for the possibility that CEL and Nufcor were exposed to different levels of risk.

[554] Doctors Shapiro and Sarin state that Nufcor's 2006 financial statements include a charge for future losses on forward contracts. This charge related to anticipated losses by Nufcor in future years. If the charge is excluded, Nufcor's gross margin for 2006 is 32.5% compared to 35.3% for CEL.

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[710] Page 2 of the Shapiro-Sarin Rebuttal of Wright.
[711] Page 6 of the Shapiro-Sarin Rebuttal of Wright.
[712] Page 8 of the Shapiro-Sarin Rebuttal of Wright.

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[555] Doctors Shapiro and Sarin opine that Nufcor's related-party transactions make Nufcor unsuitable as a benchmark company.

[556] With respect to the comparison of CEL to a broader range of trading companies, Doctors Shapiro and Sarin identify three concerns:

> There are several significant problems with Dr. Wright's analysis. First, she does not explain how or why she selected these six companies for inclusion in her broad trading company sample. Second, it is not clear that these companies were comparable to CEL in terms of functions performed or risks borne. Lastly, the companies were engaged in so many non-comparable activities that their returns are not useful in assessing trading returns.[713]

[557] Doctors Shapiro and Sarin then provide a more detailed review of these issues and conclude:

> It is not clear why Dr. Wright includes these companies given these differences. They are not comparable to CEL in terms of functions performed or risks borne, and their returns tell us nothing about whether CEL's returns were arm's length.[714]
>
> . . .
>
> Dr. Wright does not appear to have tried to isolate these companies' trading returns from their profits and losses from these significant other activities. Given their extensive transactions with entities in which they held interests or with which they participated in other ventures, obtaining financial data for their arm's length trading transactions may well have been impossible. This explains why Dr. Wright excluded these companies from her initial sample of trading companies. These companies should not have been included in a sample of general trading companies because they are too dissimilar from [*sic*] CEL in terms of functions performed and risks borne, and because their financial data, even their segmented financial data, are largely related to non-trading activities and/or transactions with parties with which it has other relationships.[715]

[558] While agreeing, that the principal benefit of the HEU Feed Agreement was control of the uranium supply, Doctors Shapiro and Sarin disagree with Doctor Wright's analysis of that agreement on the basis that CEL took on the price risk and other risks associated with owning the agreement. The uranium supplied under the agreement was not inexpensive and CEL bore the risk of "1) being

[713] Page 16 of the Shapiro-Sarin Rebuttal of Wright.
[714] Page 20 of the Shapiro-Sarin Rebuttal of Wright.
[715] Page 23 of the Shapiro-Sarin Rebuttal of Wright.

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compelled to exercise options under sub-optimal conditions so as to keep the deal alive, 2) being required to buy uranium at above-market prices (after the options were converted to purchase obligations), and 3) counter-party risk (i.e., Tenex may not have honored the deal).”[716] Doctors Shapiro and Sarin opine that it is the bearing of the price risk that entitles CEL to the returns from the HEU Feed Agreement:

> Dr. Wright is correct that as contract owner, CEL is entitled to income attributable to owning the contracts. As owner, CEL was bearing the price risk associated with the contracts. If market prices fell such that money would be lost by purchasing uranium at pre-determined prices that were now above market, CEL would bear those losses. And if market prices rose such that money would be made by buying uranium at pre-determined prices that were now below market, CEL would enjoy those profits.
>
> Doctor Wright acknowledges that CEL was owner of these contracts, but then awards it only risk-free returns. Dr. Wright seems to misunderstand what ownership entails. Specifically, she distorts the meaning of ownership by taking away the most important element of ownership of an asset – namely, receiving the gains and losses associated with that asset.
>
> Doctor Wright’s confusion seems to stem from failing to account for the fact that risk is borne by the contract owner, not the party providing contract administration, forecasting, and other services. CCO performed certain administrative functions for CEL. For example, it kept financial records about uranium transactions, issued uranium market forecasts (which, as we demonstrate in our affirmative report, were no more accurate than commercially available analyses), and prepared payrolls, and is entitled to arm’s length returns for performing these functions.
>
> However, these functions are unrelated to the prices at which CEL bought or sold uranium ore and do not affect which party realizes the gains or losses associated with these prices. Administering the contracts did not entail bearing the risk associated with the contracts. To repeat an analogy from our affirmative report, an investor may employ a wealth manager to provide services related to his or her investment portfolio. The wealth manager may monitor the risk of the investment portfolio, administer the portfolio, keep records associated with the portfolio, broker the transactions, and provide the investor with market research including buy and sell recommendations. However, it is the owner of the investments (the investor) who bears the risk associated with the portfolio. If the portfolio shrinks by 50 percent, the investor suffers the loss and, at most, the wealth manager sees a cut in his or her fee revenue. Correspondingly, if the portfolio doubles, the investor enjoys the gain.

[716] Page 25 of the Shapiro-Sarin Rebuttal of Wright.

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> Similarly, even though CCO provided services related to CEL's contracts, CEL, as owner, bore the risks associated with those contracts and is entitled to the returns for bearing those risks.[717]

[559] Doctors Shapiro and Sarin disagree with Doctor Wright's assertion that at arm's length a company would not agree to take on manageable risks that it does not control. In this regard, Doctors Shapiro and Sarin point to the routine transfer of manageable risks demonstrated by the use of forward contracts, options, swaps and other derivatives.

(5) Carol Hansell

[560] Ms. Hansell begins her report by stating that she has conducted a benchmarking study of comparator organizations (the "Benchmarking Study")[718] and a review of publications by the Government of Canada, academics and other commentators (the "Literature Review").[719] She follows this with a statement of the assumed facts on which her opinions are based.[720]

[561] Ms. Hansell then offers the following opinions regarding MNEs:

> [1.] MNEs carry on business in more than one country. The parent company typically has subsidiaries formed in foreign jurisdictions (i.e. countries other than the country in which the parent company was formed or has its head office). 85% of the comparators in the Benchmarking Study disclosed that they had foreign subsidiaries in 2006, as did Cameco.[721]
>
> [2.] The decision to carry on aspects of a business through a subsidiary (whether domestic or foreign) as well as the jurisdiction of incorporation of the subsidiary can be driven by a variety of considerations, including tax, accounting, legal, regulatory, liability and compensation as well as proximity to customers, suppliers, financial markets and the necessary work force.[722]

[717] Pages 25 and 26 of the Shapiro-Sarin Rebuttal of Wright.
[718] The methodology for the Benchmarking Study is in Part IV of Cameco Corporation Expert Report of Carol Hansell dated June 8, 2016 (the "Hansell Report") (Exhibit EA000530), starting on page 20. The results of the study are in Schedule D to the Hansell Report.
[719] The findings under the Literature Review are in Schedule E to the Hansell Report.
[720] Pages 5 to 11 of the Hansell Report.
[721] Paragraph 9.1 on page 12 of the Hansell Report.
[722] Paragraph 9.2 on page 12 of the Hansell Report.

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[3.] It is not unusual for a parent to incorporate subsidiaries in [favourable tax jurisdictions] where that choice is available.[723]

[4.] The fact that CEL's business was confined to one stage in the process that ultimately culminated in the sale of uranium to a customer is consistent with the commercial integration referred to [by the Organisation for Economic Co-operation and Development and Export Development Canada ("EDC")].[724]

[5.] It is common in an MNE for administrative functions to be centralized and shared across the enterprise.[725]

[6.] It is common for entities in an MNE to document the basis on which they share services.[726]

[7.] It is common for entities within an MNE to provide financing for other members of the MNE or for one to guarantee the obligations of another.[727]

[8.] The fact that Cameco Ireland made certain financial arrangements available to [CESA] and CEL, including by way of a revolving credit facility, and that Cameco provided guarantees for its subsidiaries' obligations (including the obligations of [CESA] and CEL to suppliers) is consistent with the financial interdependence across an MNE reflected in the Benchmarking Study.[728]

[9.] The composition of the board of directors and management team of a subsidiary can be driven by a number of factors, including local requirements, the significance of where the directing mind of the organization is located, and the availability of management and oversight functions in other parts of the global family. It is common for boards of directors of subsidiaries to include individuals who have been board members or members of management in other parts of the MNE. Those individuals are conversant with the business, values and culture of the organization and have the confidence of other decision makers across the MNE.[729]

[10.] There are not always clear lines of responsibility between a board of directors and the CEO. In the absence of detailed mandates and position descriptions, it is generally accepted that the CEO operates the business in

[723] Paragraph 9.5 on pages 12 and 13 of the Hansell Report.
[724] Paragraph 10.1 on pages 13 and 14 of the Hansell Report.
[725] Paragraph 10.3 on page 15 of the Hansell Report.
[726] Paragraph 10.4 on page 15 of the Hansell Report.
[727] Paragraph 10.5 on page 15 of the Hansell Report.
[728] Paragraph 10.6 on page 16 of the Hansell Report.
[729] Paragraph 11.1 on page 16 of the Hansell Report.

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the ordinary course and the board oversees the CEO's discharge of his responsibilities. In addition, the board takes any other action that is required of it by law, such as the approval of the financial statements.[730]

[11.] It is not unusual to appoint an individual as an officer of a corporation for the purposes of facilitating the execution of documents.[731]

[12.] It is not unusual for a board of directors that was aware of an agreement that the corporation was planning to sign, to ratify the execution and delivery of that agreement, after the date of execution.[732]

[13.] The integration and interdependence of entities within a MNE is reflected in both financial reporting and disclosure requirements under Canadian securities laws.[733]

[14.] A parent company and its subsidiaries are viewed as a single economic entity for financial reporting purposes. A parent company is required to issue consolidated financial statements, combining its own financial statements and the financial statements of its subsidiaries. The parent exercises its control and influence over the subsidiary in order to be confident about the quality of financial information presented in the consolidated financial statements.[734]

[15.] A parent company elects the subsidiary's board of directors. The board of directors (and the management team) then manage the business. While this is the legal structure, commercial integration across the MNE . . . and the accountability of the parent company to investors and regulators . . . requires cooperation and coordination across the entities forming the MNE. This cooperation and coordination is not inconsistent with the legal structure.[735]

[16.] A commercially normal relationship between a parent corporation and a subsidiary corporation within a large, complex MNE during the Relevant Period would have involved common goals, coordinated efforts, commercial interdependence and governance integration.[736]

[562] Ms. Hansell concludes as follows:

[730] Paragraph 11.4 on pages 16 and 17 of the Hansell Report.
[731] Paragraph 11.5(a) on page 17 of the Hansell Report.
[732] Paragraph 11.5(b) on page 17 of the Hansell Report.
[733] Paragraph 12.1 on page 17 of the Hansell Report.
[734] Paragraph 12.2 on page 17 of the Hansell Report.
[735] Paragraph 13.1 on page 18 of the Hansell Report.
[736] Paragraph 14.1 on page 19 of the Hansell Report.

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> The Assumed Facts discussed in Part II of this report, above, and the information contained in the documents set out in Schedule A, were consistent with a commercially normal relationship between a parent corporation and a subsidiary corporation in a large, complex MNE during the Relevant Period. On this basis, it is my view that the relationship between Cameco and CEL would be considered commercially normal.[737]

(6) Thomas Hayslett

[563] Mr. Hayslett's expert report addresses two questions regarding the BPCs:

> 1) Are the types of commercial terms in the contracts similar to the types of terms that would normally be present in uranium sales contracts concluded by industry participants?
>
> 2) With respect to the specific values for the commercial terms in the contracts, are such values generally consistent with the range of values seen in uranium sales contracts offered and/or concluded by industry participants around the time the nine contracts were concluded?

[564] Mr. Hayslett first provides an overview of the nuclear fuel cycle and uranium contracting. Mr. Hayslett identifies the following terms as typically being included in contracts for the purchase and sale of U_3O_8 or UF_6:

- Contract term
- Quantity flexibility
- Delivery schedule, notices, flexibility
- Delivery location(s), method
- Material origin
- Material specifications
- Pricing
- Payment terms[738]

[565] Mr. Hayslett goes on to state:

> The specific manner in which these items are addressed in any single contract will be determined based on the objectives (e.g., long term vs. short term commitment, large vs. small quantity commitment, predictable pricing vs. market exposure) and agreements of the contracting parties. Utility buyers have consistently indicated

[737] Paragraph 14.2 on page 19 of the Hansell Report.
[738] Page 3 of the Hayslett Report.

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> that in evaluating offers price and reliability of supply are the two dominant factors. While other terms, such as quantity flexibility and delivery notice requirements, may have value, they are typically viewed as "tie-breakers" between offers that are considered essentially equivalent as to supply reliability and price.[739]

[566] Mr. Hayslett then reviews the terms in each of the BPCs in detail and concludes as follows:

> Based upon the review which I have conducted of the nine contracts I would conclude that the contracts contain commercial terms similar to the types of terms that would normally be present in uranium sales contracts concluded by industry participants. While in some instances the specific value or treatment of a commercial term might seem to be more favorable to one party than the predominant treatment at that time, in my opinion they are generally consistent with the range of values commercially attainable during the time period late 1999 through early 2001.[740]

[567] With respect to specific contract terms, Mr. Hayslett opines that the contract durations were within the range of durations of long-term contracts identified by Ux for the years 1999 to 2001, that it is not unusual for sellers to offer a right to extend a contract duration or for a buyer to negotiate such a right, that the annual quantities in all but two of the BPCs were larger than the amounts most utilities would contract for under a single contract, that the flex ranges were generally consistent with the ranges in the market at the time the BPCs were executed, that the notice requirements are "fairly common", that the delivery flexibility provided is not typical but rather is more favourable to the buyer than was typical at the time the BPCs were executed, that the delivery terms, the material origin terms and the material specifications terms are consistent with general industry practice, that the pricing terms are consistent with industry practice and that the payment terms are typical of such terms *circa* 1999 to 2001.

(7) Doctor Chambers

[568] Doctor Chambers' expert report[741] addressed the creditworthiness of CEL from 2002 through 2006. He concluded that in 2002, on a stand-alone basis, CEL would most likely have had a credit rating of BB+ or BB on the Standard & Poor's ("S&P") scale, or a similar Ba1 or Ba2 rating on the Moody's scale. As a result of

[739] Pages 3 and 4 of Hayslett Report.
[740] Page 13 of the Hayslett Report.
[741] Analysis of the Creditworthiness of Cameco Europe Ltd. 2002 – 2006 dated June 8, 2016 (the "Chambers Report") (Exhibit EA000533).

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profits and the resulting repayment of debt, these ratings would likely have improved to investment grade ratings by 2004.

[569] Doctor Chambers opined that CEL, as a core subsidiary of the Appellant, could have expected to see its credit rating raised either to match the Appellant's credit rating or to one level below the Appellant's credit rating. In 2002, the Appellant's publicly available credit rating was A- on the S&P rating scale and A3 on the Moody's rating scale. In 2003, the Appellant's S&P and Moody's credit ratings were reduced one level to BBB+ and Baa1 respectively, and remained at that level through 2006.

[570] Doctor Chambers opined that if in 2002 CEL's "raised" credit rating was one level below that of the Appellant, it is very likely it would have been equal to the Appellant's credit rating by 2004.

F. Position of the Appellant

[571] The Appellant submits that the Reassessments have no basis in fact or in law. With respect to the three alternative assessing positions adopted by the Minister in these appeals, the Appellant submits as follows.

(1) Sham

[572] The reorganization that took place in 1999 and the uranium purchase and sale contracts to which CEL was a party are what they appear on their face to be. There is no deception and no sham. CEL's trading profits did not result from any functions performed by the Appellant but from CEL's bona fide trading activity pursuant to which it entered into legally effective and commercially normal contracts to purchase uranium from the Appellant and third parties and to resell that uranium at market prices.

(2) Transfer Pricing

[573] The Appellant submits that the Court should respect the clearly stated limitations in the statutory language and should reject any interpretation of subsection 247(2) that fails to respect the need for certainty, predictability, and fairness. The Appellant submits that the Minister is applying subsection 247(2) in an unprincipled and arbitrary manner and in so doing is taxing the Appellant on the basis of an artificial reconstruction of its corporate structure and its transactions that is not justified on the facts. Moreover, subsection 247(2) is being applied to

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arm's length transactions and to transactions to which no Canadian taxpayer is a party. Finally, subsection 247(2) is being applied in a manner that is at odds with the regime in the ITA applicable to foreign affiliates.

[574] The transfer pricing recharacterization rule in paragraphs 247(2)(b) and (d) (the "TPRR") does not apply to the transactions in issue in these appeals. The TPRR is intended to be applied sparingly and only in those exceptional circumstances where the transactions in issue are commercially irrational and cannot be priced under the arm's length principle. CEL's profits are the result of commercially normal transactions for the purchase and sale of a commodity that can be priced by reference to market analogs. As a result, the exceptional circumstances contemplated by the TPRR are absent and the TPRR does not apply. Moreover, there is nothing in the text, context or purpose of the TPRR that permits the corporate structure of the Cameco Group to be ignored, or that moves all of the profits of CEL to the Appellant.

[575] The Minister made no effort to determine the arm's length terms and conditions of the intercompany contracts in issue, or to avoid applying the TPRR to arm's length transactions that are plainly beyond its reach. The transfer pricing adjustments included in the schedules to the Minister's Replies (the "Schedules") are not supported by the evidence of the Respondent's expert witnesses. The evidence presented by the Appellant demonstrates that the terms and conditions of all of the intercompany agreements in issue satisfy the arm's length principle, subject to minor adjustments. Consequently, there is no basis in fact or in law for making any further transfer pricing adjustments.

(3) Resource Allowance

[576] The Appellant submits that the losses incurred by the Appellant on the sale of uranium purchased from CESA/CEL are properly excluded from the computation of resource profit and requests that $98,012,595 be added back to the Appellant's resource profit for 2005 and that $183,935,259 be added back to the Appellant's resource profit for 2006. By way of clarification in this regard, it should be mentioned that the Appellant is claiming the lesser of the amount the Minister deducted in computing the Appellant's resource profits for the year and the amount of the Appellant's loss for the year from the sale of purchased uranium.

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For 2005, the former is the lesser amount and for 2006 the latter is the lesser amount.

G. Position of the Respondent

[577] The Respondent submits that when an MNE decides to set up a business abroad, it must respect two fundamental principles. First, the business activity must, in fact, be transferred. It is not enough to simply put all the contracts into the name of the foreign subsidiary and claim that the business is now that of the foreign subsidiary. The significant functions and activities relating to that business must also be transferred and performed by the foreign subsidiary-paper signing is not sufficient. Second, any transfer of goods and services to the foreign subsidiary must be done on an arm's length basis. The Respondent submits that the Appellant failed to respect both of these principles.

[578] The Respondent submits that the transactions undertaken by CESA/CEL were a sham. For the doctrine of sham to apply to a transaction, it is sufficient that the parties to the transaction present that transaction in a manner that is different from what they know it to be. The Appellant presented the transactions involving CESA/CEL in such a fashion. Following the reorganization in 1999, all of the important functions and all of the strategic decisions for the uranium-trading business continued to be performed and made by the Appellant in Saskatoon. Although on paper the uranium-trading business was transferred to CESA/CEL, CESA/CEL did little more than rubberstamp the paperwork. The Appellant created an illusion that its uranium-trading activities were moved to Switzerland when in reality the Appellant continued to control and carry on the uranium-trading business regardless of the corporate reorganization or of who held title to the uranium. Instead of engaging in any uranium-trading business, CESA/CEL's only employee was preoccupied with ensuring the illusion was sufficiently documented to deceive the CRA.

[579] The Respondent submits that the TPRR permits the Minister to make adjustments based on the existence of a transaction that differs from the taxpayer's actual transaction. The Respondent submits that a textual, contextual and purposive interpretation of the relevant provisions supports this application of the TPRR to transactions such as the Appellant's that are not commercially rational. The TPRR permits the Minister to base the assessment of the Appellant's tax on what would have been commercially rational transactions.

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[580] The Respondent submits that, if the TPRR does not apply, the transfer pricing adjustments in the Schedules should be applied. An arm's length party would not agree to terms or conditions that would result in any amounts being allocated to CEL.

[581] The Respondent submits that the losses incurred by the Appellant on the sale of uranium purchased from CESA/CEL must be deducted in computing resource profits under paragraph 1204(1.1)(a) of the *Income Tax Regulations* (the "ITR") and that the exclusion in subparagraph 1204(1.1)(a)(v) does not apply to these losses.

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Analysis

A. Is there a Sham?

[582] The origin of the modern concept of sham can be traced to the decision in *Snook v. London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 ("*Snook*"), in which Diplock L.J. states:

> As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, **it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create**. One thing I think, however, is clear in legal principle, morality and the authorities . . . that for acts or documents to be a "sham", with whatever legal consequences follow from this, **all the parties thereto must have a common intention** that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived. . . . [742]
>
> [Emphasis added.]

[742] At page 528. *Snook* is still cited in United Kingdom jurisprudence for the meaning of sham. See, for example, the recent decision of the United Kingdom Supreme Court in *UBS AG v Commissioners for Her Majesty's Revenue and Customs; OB Group Services (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs*, [2016] UKSC 13 at paragraph 38 ("*UBS*"). The comment in *UBS* is brief but highlights that an important element of sham is the intention to deceive.

[583] The Supreme Court of Canada adopted this description of sham in *M.N.R. v. Cameron*, [1974] S.C.R. 1062 at page 1068 ("*Cameron*"). Ten years later, in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 ("*Stubart*"), Estey J. stated:

> . . . A sham transaction: This expression comes to us from decisions in the United Kingdom, and it has been generally taken to mean (but not without ambiguity) **a transaction conducted with an element of deceit** so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, simple deception whereby the taxpayer creates a facade of reality quite different from the disguised reality. . . . [743]
>
> [Emphasis added.]

[584] In concurring reasons, Wilson J. states:

> As I understand it, a sham transaction as applied in Canadian tax cases is one **that does not have the legal consequences that it purports on its face to have**. . . . [744]
>
> [Emphasis added.]

[585] In *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 ("*Continental Bank*"), the Supreme Court of Canada interpreted Estey J.'s comments in *Stubart* to mean that the "sham doctrine will not be applied unless there is an element of deceit in the way a transaction was either constructed or conducted."[745]

[586] The Court in *Continental Bank* held that the determination of whether a sham exists precedes and is distinct from the correct legal characterization of a transaction. If the transaction is a sham, the true nature of the transaction must be determined from extrinsic evidence (i.e., evidence other than the document(s) papering the transaction). If the transaction is not a sham, the correct legal

[743] At page 545.
[744] At page 539.
[745] At paragraph 20. This paragraph is in the dissenting reasons of Bastarache J. However, at paragraph 103 of the reasons for judgment, McLachlin J., writing for the majority, agrees with all aspects of Bastarache J.'s dissenting judgment other than his conclusion that the partnership was void under the *Partnerships Act*, R.S.O. 1980, c. 370.

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characterization of the transaction can be determined with reference to the document(s) papering the transaction.[746]

[587] Canada is not the only commonwealth jurisdiction in which the highest court has adopted the concept of sham described in *Snook*. In *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, [2008] NZSC 115, the New Zealand Supreme Court cites *Snook* and two New Zealand Court of Appeal cases[747] and then provides the following description of a sham:

> . . . In essence, a sham is a pretence. It is possible to derive the following propositions from the leading authorities. **A document will be a sham when it does not evidence the true common intention of the parties**. They either intend to create different rights and obligations from those evidenced by the document or they do not intend to create any rights or obligations, whether of the kind evidenced by the document or at all. A document which originally records the true common intention of the parties may become a sham if the parties later agree to change their arrangement but leave the original document standing and continue to represent it as an accurate reflection of their arrangement. **A sham in the taxation context is designed to lead the taxation authorities to view the documentation as representing what the parties have agreed when it does not record their true agreement.** The purpose is to obtain a more favourable taxation outcome than that which would have eventuated if documents reflecting the true nature of the parties' transaction had been submitted to the Revenue authorities.
>
> It is important to keep firmly in mind the difference between sham and avoidance. A sham exists **when documents do not reflect the true nature of what the parties have agreed**. Avoidance occurs, even though the documents may accurately reflect the transaction which the parties intend to implement, when, for reasons to be discussed more fully below, the arrangement entered into gives a tax advantage which Parliament regards as unacceptable.[748]
>
> [Emphasis added.]

[588] In *Faraggi v. The Queen*, 2007 TCC 286 ("Faraggi"), the Tax Court judge stated:

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[746] *Ibid*., at paragraph 21, where Bastarache J. adopts an excerpt from the judgment of the English Court of Appeal in *Orion Finance Ltd. v. Crown Financial Management Ltd.*, [1996] 2 B.C.L.C. 78. The correct legal characterization of a transaction is sometimes referred to as the "legal substance" of the transaction as opposed to the "legal form" of the transaction (see, generally, Nik Diksic, "Some Reflections on the Roles of Legal and Economic Substance in Tax Law," Report of Proceedings of Sixty-Second Tax Conference, 2010 Conference Report (Toronto: Canadian Tax Foundation, 2011), 25:1-34).

[747] *Paintin and Nottingham Ltd v Miller Gale and Winter*, [1971] NZLR 164 (CA) and *NZI Bank Ltd v Euro-National Corporation Ltd*, [1992] 3 NZLR 528 (CA).

[748] At paragraphs 33 and 34. The description of sham in *Snook* has also been adopted in Australia.

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> For a sham to exist, the taxpayers must have acted in such a way as to **deceive the tax authority as to their real legal relationships**. The taxpayer creates an appearance that does not conform to the reality of the situation.[749]
>
> [Emphasis added.]

[589] On appeal to the Federal Court of Appeal, Noɹl J.A. (as he then was) stated:

> The concepts of "sham" and "abuse" are not the same. I do not believe that the few words of Iacobucci J. in *Antosko*, *supra*, cited by the TCC judge (Reasons, para. 87, note 34), were intended to alter this view. Nowhere in the extensive case law dealing with the concept of "sham" is it suggested that "sham" and "abuse" are analogous. Iacobucci J.'s brief comment, which was part of a discussion on the principles of statutory interpretation, cannot be read as bringing about such a radical change.
>
> Subject to the invocation of the GAAR in a particular case, taxpayers are entitled to arrange their affairs in such a way as to minimize their tax burden, even if in doing so, they resort to elaborate plans that give rise to results which Parliament did not anticipate. . . .
>
> However, courts have always felt authorized to intervene when confronted with what can properly be labelled as a sham. The classic definition of "sham" is that formulated by Lord Diplock in *Snook*, *supra*, and reiterated by the Supreme Court on a number of occasions since. In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, Estey J. said the following (page 545):
>
> > . . . This expression comes to us from decisions in the United Kingdom, and it has been generally taken to mean (but not without ambiguity) a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, simple deception whereby the taxpayer creates a facade of reality quite different from the disguised reality.
>
> This passage is also quoted with approval in *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at paragraph 20.
>
> In *Cameron*, *supra*, the Supreme Court adopted the following passage from *Snook*, *supra*, to define "sham" in Canadian law (page 1068):
>
> > . . . [I]t means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal

[749] Paragraph 86.

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> rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

The same excerpt was quoted by Estey J. in Stubart, supra, at page 572.

> **It follows from the above definitions that the existence of a sham under Canadian law requires an element of deceit which generally manifests itself by a misrepresentation by the parties of the actual transaction taking place between them**. When confronted with this situation, courts will consider the real transaction and disregard the one that was represented as being the real one.[750]

[Emphasis added.]

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[590] In *Antle v. The Queen*, 2010 FCA 280 ("Antle"), Noɹl J.A. (as he then was) again reviewed the concept of sham, this time in the context of a trust deed that on its face gave discretion to the trustee. After reviewing the findings of fact of the trial judge, Noɹl J.A. states:

> The Tax Court judge found as a fact that both the appellant and the trustee **knew with absolute certainty** that the latter had no discretion or control over the shares. Yet both signed a document saying the opposite. The Tax Court judge nevertheless held that they did not have the requisite intention to deceive.
>
> In so holding, the Tax Court judge misconstrued the notion of intentional deception in the context of a sham. The required intent or state of mind is not equivalent to *mens rea* and need not go so far as to give rise to what is known at common law as the tort of deceit (compare *MacKinnon v. Regent Trust Company Limited*, (2005), J.L. Rev. 198 (CA) at para. 20). **It suffices that parties to a transaction present it as being different from what they know it to be.** That is precisely what the Tax Court judge found.
>
> When regard is had to the reasons as a whole, it is apparent that the only reason why the Tax Court judge reached the conclusion that he did is his finding that the appellant and the trustee-as well as all participants in the plan-could say "with some legitimacy" that they believed that the trustee had discretion over the shares (Reasons, para. 71). While the claim to "some legitimacy" may show that there was no criminal intent to deceive (as would be required in a prosecution pursuant to subsection 239(1) of the Act) and perhaps no tortious deceit, it does not detract from the Tax Court judge's finding that **both the appellant and the trustee gave a false impression of the rights and obligations created between them**. Nothing more was required in order to hold that the Trust was a sham.

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[750] 2008 FCA 398 at paragraphs 55 to 59. Leave to appeal to the Supreme Court of Canada refused on April 24, 2009.

> I respectfully conclude that the Tax Court judge was bound to hold that the Trust was a sham based on the findings that he made.[751]
>
> [Emphasis added.]

[591] Noɹl J.A.'s finding of sham in *Antle* turns on the finding of fact by the trial judge that the parties "knew with absolute certainty that the trustee would not say no" and that "both the appellant and the trustee gave a false impression of the rights and obligations created between them". Absolute certainty that the trustee would act in a certain fashion was inconsistent with the representation in the trust deed that the trustee had discretion to act as he saw fit. This inconsistency led inexorably to the conclusion that the settlor and the trustee did not intend the trustee to have any discretion but nevertheless entered into a trust deed that stated that the trustee did have discretion. As the trial judge found, "both the appellant and the trustee gave a false impression of the rights and obligations created between them". The factual misrepresentation of the actual legal rights constituted the sham.[752]

[592] It can be seen from the foregoing authorities that a transaction is a sham when the parties to the transaction present the legal rights and obligations of the parties to the transaction in a manner that does not reflect the legal rights and obligations, if any, that the parties intend to create. To be a sham, the factual presentation of the legal rights and obligations of the parties to the sham must be different from what the parties know those legal rights and obligations, if any, to be. The deceit is the factual representation of the existence of legal rights when the parties know those legal rights either do not exist or are different from the representation thereof.

[593] In *Antle*, Noɹl J.A. distinguishes the level of deceit required for a sham from the level of deceit required for the "tort of deceit" (or "tort of civil fraud", as it is also known). Four years after *Antle*, the Supreme Court of Canada held in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 that the tort of civil fraud has four elements that must be satisfied:

> From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant

[751] At paragraphs 19 to 22.
[752] I note that other facts such as the apparent back-dating of the trust deed may have contributed to this conclusion.

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> (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.[753]

[594] The first element of civil fraud is indistinguishable from the requirement under the doctrine of sham that the parties to a transaction factually misrepresent the legal rights and obligations, if any, created by the parties. The second element of civil fraud arguably establishes a lower bar than the doctrine of sham in that the mental element in civil fraud requires only some level of knowledge of the falsehood of the representation whether through knowledge or recklessness. The reference to recklessness implies that the parties need only be subjectively aware of the possibility that there is a false representation but proceed in any event.

[595] The third and fourth elements of civil fraud are not elements of the doctrine of sham.

[596] The relevant standard of proof in both sham and civil fraud cases is the civil standard of proof.

[597] Since *Antle* was decided four years before *Bruno Appliance*, I do not read Justice Noël's comments regarding tortious deceit as suggesting that the mental element for sham is lower than the mental element for civil fraud described in *Bruno Appliance*. Justice Noël explicitly states that the mental element for a finding of sham requires that the parties know that their factual presentation is false. Accordingly, for a transaction to be a sham, the facts (assumed or proven) must establish that the parties to the transaction presented their legal rights and obligations differently from what they know those legal rights, if any, to be.

[598] As observed in *Continental Bank*, the factual presentation of the legal rights and obligations of parties to a transaction is not the same as the legal characterization of that transaction. Consequently, a sham does not exist if the parties present the legal rights and obligations to the outside world in a factually accurate manner (i.e., in a manner that reflects the true intentions of the parties) but identify the legal character of the transaction incorrectly. For example, calling a contract a lease when its actual legal effect is a sale is not evidence of a sham provided the terms and conditions of the contract accurately reflect the legal rights and obligations intended by the parties.

[753] Paragraph 21. The Court reviews the relevant jurisprudence in paragraphs 17 to 20.

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[599] Finally, in considering whether a transaction is a sham, it is helpful to keep in mind the comments of the Supreme Court of Canada in *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770 ("*Neuman*"):

> Finally, the requirement of a legitimate contribution is in some ways an attempt to invite a review of the transactions in issue in accordance with the doctrines of sham or artificiality. Implicit in the distinction between non-arm's length and arm's length transactions is the assumption that non-arm's length transactions lend themselves to the creation of corporate structures which exist for the sole purpose of avoiding tax and therefore should be caught by s. 56(2). However, as mentioned above, taxpayers are entitled to arrange their affairs for the sole purpose of achieving a favourable position regarding taxation and no distinction is to be made in the application of this principle between arm's length and non-arm's length transactions (see *Stubart*, *supra*). The *ITA* has many specific anti-avoidance provisions and rules governing the treatment of non-arm's length transactions. We should not be quick to embellish the provision at issue here when it is open for the legislator to be precise and specific with respect to any mischief to be avoided.[754]

[600] The Appellant submits that the burden of proof is on the Minister to prove that the contracts to which CESA/CEL was a party are false documents that conceal legal rights and relationships. In my view, the burden of proof where the Minister alleges sham in support of an assessment of tax is no different than in any other tax case. The Minister may rely on assumptions of fact in support of an assessment based on sham provided (1) the assumptions are made at the time of the assessment or confirmation of the assessment, and (2) the Minister accurately pleads these assumptions in the Minister's Reply.[755] Assuming these requirements are met then the principles regarding burden of proof stated in *House v. The Queen*, 2011 FCA 234 apply.[756]

[601] It is worth noting, however, that which party bears the burden of proof is ultimately only relevant, if on the evidentiary record as a whole (including the assumption of fact), the positions of the parties are evenly supported. The role of

[754] Paragraph 63. See, also, the recent comments of the majority at paragraph 41 of *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670 ("*Jean Coutu*").

[755] *The Queen v. Anchor Pointe Energy Ltd.*, 2007 FCA 188 at paragraphs 30 to 40. The Minister makes assumptions of fact in support of an assessment or confirmation. The Minister may amend the legal argument in support of the assessment after the assessment or confirmation and rely on the same assumptions of fact to support the revised legal argument: subsection 159(3).

[756] These principles are stated in paragraphs 30 and 31 of the reasons for judgment. In *Sarmadi v. The Queen*, 2017 FCA 131, because the issue had not been fully argued, the Majority declined to revisit the principles on burden of proof described in *House*.

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the burden of proof is described by the Privy Council in *Robins v. National Trust Co.*, [1927] A.C. 515 as follows (at page 520):

> . . . But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

[602] The Respondent submits that the Appellant created the illusion that the uranium-trading business of the Appellant was transferred to CESA/CEL when in fact the control and the essential functions of that business remained with the Appellant. According to the Respondent, the written agreements entered into by CESA/CEL were a façade and the functions that generated the profits in CESA/CEL remained with the Appellant.

[603] In my view, the Respondent's position reflects a fundamental misunderstanding of the concept of sham. I have heard no evidence to suggest that the written terms and conditions of the many contracts entered into by the Appellant, Cameco US and CESA/CEL between 1999 and the end of 2006 do not reflect the true intentions of the parties to those contracts, or that the contracts presented the resulting transactions in a manner different from what the parties knew the transactions to be.

[604] Quite the contrary, I find as a fact that the Appellant, Cameco US and CESA/CEL entered into numerous contracts to create the very legal relationships described by those contracts. The arrangements created by the contracts were not a façade but were the legal foundation of the implementation of the Appellant's tax plan.

[605] The Appellant's motivation for these arrangements may have been tax-related, but a tax motivation does not transform the arrangements among the Appellant, Cameco US and CESA/CEL into a sham. As stated by Noɹl J.A. (as he then was) in *Faraggi*:

> Subject to the invocation of the GAAR in a particular case, taxpayers are entitled to arrange their affairs in such a way as to minimize their tax burden, even if in doing so, they resort to elaborate plans that give rise to results which Parliament did not anticipate

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[606] Under its numerous purchase and sale contracts, CESA/CEL agreed either to buy uranium or to sell uranium on the terms specified in the contracts, and the evidence overwhelmingly supports my finding that CESA/CEL did in fact buy or sell uranium in accordance with the terms of the contracts.

[607] CESA and CEL were each a properly constituted corporate entity resident in Luxembourg and Switzerland respectively. CESA and CEL each had a properly constituted and functioning board of directors that met regularly to address board-level matters. The fact that the boards approved transactions that were clearly in the best interests of the Cameco Group as a whole does not detract from the legitimacy of their role in directing the affairs of CESA or CEL. No reasonable person would expect a wholly owned subsidiary to act in a manner that is at odds with the interests of the ultimate parent corporation or of the broader corporate group.

[608] BfE (the Swiss nuclear regulatory authority) and Euratom (the European nuclear regulatory authority) expressly authorized CESA/CEL to carry out the transactions under its numerous purchase and sale contracts. Initially, BfE required CESA/CEL to obtain authorization for each purchase or sale of UF_6 but, effective January 1, 2003, Mr. Glattes secured a global authorization from BfE. Trading in uranium is a serious business that is subject to worldwide regulation and scrutiny and it is beyond belief that this regulatory authority would authorize what the Respondent in substance alleges are fictitious transactions.

[609] CESA and CEL each had at least one senior employee with extensive experience in the uranium industry. CESA and CEL also had the assistance of a third-party service provider, which included the dedicated services of Mr. Bopp. Mr. Bopp eventually became an employee of CEL. Mr. Murphy testified that two persons were more than sufficient to address the number of contracts entered into by CEL.

[610] There is no evidence that the intentions of the parties to the contracts executed by CESA/CEL changed yet they left these contracts unamended to present for the future a false picture of the transactions under the contracts. In the case of eight of the BPCs, the Appellant and CESA/CEL agreed to amend the contracts in 2004 and 2007 to defer certain deliveries and then acted on the amended terms and conditions of those contracts. CESA/CEL's contracts with third parties were also amended on a number of occasions.

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[611] Under the Services Agreement, the Appellant agreed to provide a list of services to CESA/CEL.[757] Mr. Belosowsky testified that the Appellant and CESA/CEL did not sign the Services Agreement until March 2001 and that the fees under the Services Agreement were not "paid" until that same year. However, the initial request for services was set out in a letter from Mr. Glattes to the Appellant dated August 25, 1999 and the Appellant provided an initial proposal to CESA/CEL by letter dated September 22, 1999. Mr. Glattes explained that it took time to settle the terms of the Services Agreement and that the Appellant provided to CESA in 1999 and 2000 the services contemplated by the concluded agreement. I accept Mr. Glattes' explanation.

[612] CESA's annual accounts for the years ending December 31, 1999 and December 31, 2000 show the accrual of the cost of the services as being US$1,432,134 and US$1,214,633 respectively. There is no requirement in the ITA that an agreement to provide services be in writing, but in any event the Services Agreement was in place long before the first taxation year in issue in these appeals.

[613] Several contract administrators testified as to the services provided by the Appellant, and the services described in that testimony are consistent with the terms of the Services Agreement. There is no evidence to support the conclusion that the Appellant was performing the services for its own account rather than for the benefit of CESA/CEL. Canadian law has long recognized that a corporation may undertake activities through its own employees or through independent contractors acting on its behalf.[758]

[614] The evidence does indicate that on rare occasions a contract administrator overstepped the bounds of the authority given to the Appellant by the Services Agreement. However, that fact does not in any way support the conclusion that the Services Agreement, or the services provided under that agreement, constituted a sham. The evidence clearly establishes that no one in authority within the Cameco Group condoned or tolerated these transgressions. In fact, in his private notes to himself, Mr. Murphy expressed in very colourful terms his concern with a single suggestion that CESA/CEL destroy a contract. Mr. Murphy rejected the request and took steps to ensure that CESA/CEL implemented an appropriate alternative solution.

[757] The price paid for the services under the Services Agreement was not in issue in these appeals.
[758] *E.S.G. Holdings Ltd. v. The Queen*, 76 DTC 6158 (FCA) ("*ESG Holdings*") at page 6159 and *Weaver v. The Queen*, 2008 FCA 238 ("*Weaver*") at paragraph 23.

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[615] The Respondent submits that the Appellant concluded contracts on behalf of CESA/CEL and treated CESA/CEL's inventory as its own. There is evidence that Mr. Grandey had high-level discussions with Kazatomprom and Tenex and that individuals other than Mr. Glattes and Mr. Murphy very occasionally made spur-of-the-moment decisions, but this was almost invariably in exigent circumstances.

[616] The *de minimis* examples provided by the Respondent do not support a finding of sham, nor do they support the suggestion that the Appellant routinely concluded contracts on behalf of CESA/CEL and treated CESA/CEL's inventory as its own.[759] I am not aware of any principle that states that the chief executive officer of the parent of a multinational group of corporations is precluded from holding high-level discussions on behalf of members of the multinational group.

[617] Section 2.1 of the Services Agreement states that the services provided by the Appellant to CESA/CEL do not include the conclusion of contractual terms on behalf of CESA/CEL.

[618] Mr. Glattes testified that, although this was not explicitly stated, the services described in Appendix A of the Services Agreement included the making of routine decisions about which of CESA/CEL's inventory would be allocated to uranium sales contracts. However, more important issues would be reported to Bernie Del Frari, who would raise the issues in the twice-weekly sales meetings. Mr. Glattes testified that the role of allocating CESA/CEL's inventory to the sales contracts fell under the general language of item 2 of Appendix A to the Services Agreement.

[619] Mr. Murphy testified that the Appellant did not conclude contractual terms on behalf of CESA/CEL. Mr. Assie testified that neither the Appellant nor Cameco US made decisions regarding the purchase and sale of uranium by CESA/CEL.

[620] The Respondent submits that the failure of Mr. Assie, Mr. Glattes and Mr. Murphy to take or keep notes of the sales meetings requires that I draw an adverse inference as to the content of those meetings.

[621] The uncontradicted evidence of Mr. Assie, Mr. Glattes and Mr. Murphy is that the terms of all contracts relevant to the Appellant, Cameco US and CESA/CEL were discussed and agreed to during the sales meetings held

[759] The Respondent describes "examples" at paragraph 152 of the Respondent's Written Argument, but in fact the evidence does not disclose any other examples. Some of these examples are discussed in more detail below.

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twice-weekly, or more frequently if the circumstances warranted. Mr. Wilyman and Mr. Mayers testified that discussions regarding the uranium market and potential sales to third parties did take place during the sales meetings and that Mr. Glattes and Mr. Murphy participated in those discussions. The terms of the sales to third parties in turn determined the terms of the back-to-back contracts between Cameco US and CESA/CEL.

[622] Mr. Glattes and Mr. Murphy were both experienced participants in the uranium industry and in my view clearly had the knowledge and experience to understand and participate in the sales meetings, and to meaningfully contribute to those meetings. Mr. Newton, in cross-examination, spoke in glowing terms of Mr. Glattes' expertise and experience in the uranium industry, as did other witnesses. Even without such testimony, Mr. Glattes' résumé and years of experience speak for themselves. Mr. Murphy, for his part, had extensive relevant experience with the Cameco Group before he became the president of CEL. My clear impression of Mr. Glattes and Mr. Murphy is that they are both strong personalities and experts in the Uranium business carried on my the Cameco Group and that they would not and did not act as mere figureheads who simply followed the explicit directions of the Appellant.

[623] The evidence of several witnesses was that the marketing group prepared bimonthly activity reports that, in the words of Ms. Kerr, included "all of our RFQs, all of our pending business, everything that was going on in each of our market regions so that everybody was aware exactly where we were at", and that Mr. Glattes and Mr. Murphy received copies of these reports. Mr. Murphy began to prepare his own activity reports for CEL shortly after he became president of that corporation in 2004. There was clearly no need for notes or e-mails confirming the discussions at the sales meetings since everything of importance to the Cameco Group was already documented in the regular activity reports. In any event, some of Mr. Assie's notes did address the sales meetings.

[624] The Respondent also submits that I should draw an adverse inference from the fact that Cameco US did not seek CESA/CEL's express agreement to each of the back-to-back contracts. However, Mr. Assie, Mr. Glattes and Mr. Murphy each testified that the understanding was that, to the extent that Cameco US agreed to sell uranium to a customer on terms discussed during the sales meetings, CESA/CEL agreed to sell uranium to Cameco US on the same terms less 2% of the sale price to the customer. The terms and conditions of the contracts between CESA/CEL and Cameco US accurately reflected this understanding. It would have been cumbersome and redundant for Cameco US to seek CESA/CEL's agreement

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to each individual contract when the terms of the arrangement were so clear and practical.

[625] The Respondent submits that, because the Appellant continued to play an important role in the gathering of market intelligence and the administration of the various contracts entered into by CESA/CEL and because the decision making by CESA/CEL, the Appellant and Cameco US was collaborative rather than adversarial, the overall arrangement was a deliberate deception of the Minister because the Appellant was doing everything. However, there was nothing unusual about the way in which the Cameco Group operated. Carol Hansell opined that it is common in an MNE such as the Cameco Group for administrative functions to be centralized and shared across the enterprise and that commercial integration across the MNE and the accountability of the parent company to investors and regulators requires cooperation and coordination across the entities forming the MNE.

[626] The holding of the twice-weekly sales meetings strikes me as a reasonable way to ensure that all members of the Cameco Group were working together in the best interests of the Cameco Group as a whole. The Respondent's suggestion that CESA/CEL failed to act as if unrelated to the Cameco Group is neither relevant to the Respondent's allegation of sham nor reflective of how MNEs operate. It is worth noting that the same misunderstanding of how MNEs function fuelled many of Mr. Murphy's more colourful comments in his notes to himself.

[627] The Respondent alleges that the Appellant coached or told witnesses what to say. This allegation is based primarily on the extremely flimsy proposition that some witnesses used similar words, such as the word "collaborative" to describe the twice-weekly sales meetings. One has only to consult *Webster's New World Roget's A-Z Thesaurus* (on-line: http://thesaurus.yourdictionary.com/collaborate) to see that there are only a limited number of synonyms for "collaborate" those given being: "work together", "collude" and "team up". Collude is not an appropriate alternative and neither of the other two alternatives is an effective way to communicate collaboration. I find no evidence of coaching and, as stated at the outset, I found every witness to be credible.

[628] I agree with the Appellant that it is contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67 (HL) to raise an allegation of coaching in argument without providing the witnesses with the opportunity to address the allegation. While there is no fixed remedy, I am not required to provide a remedy in this instance because I reject the allegation out of hand.

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[629] The Respondent submits that little changed following the reorganization and that that supports a finding of sham. Even if I accepted the premise of that submission, which I do not, the fact that little changed does not support a finding of sham. In *Stubart* the taxpayer transferred its food production business to a related corporation that had losses (Grover). The taxpayer and Grover executed an agency agreement pursuant to which the taxpayer continued to carry on the transferred business for the benefit of Grover. In effect, nothing changed except the beneficial ownership of the transferred business, which, after the transactions, rested with Grover. The Supreme Court of Canada held that such an arrangement was not a sham because there was no false representation of the arrangements. Estey J. states:

> . . . The transaction and the form in which it was cast by the parties and their legal and accounting advisers cannot be said to have been so constructed as to create a false impression in the eyes of a third party, specifically the taxing authority. **The appearance created by the documentation is precisely the reality.** Obligations created in the documents were legal obligations in the sense that they were fully enforceable at law.
>
> . . .
>
> There is, in short, a total absence of the element of deceit, which is the heart and core of a sham. **The parties, by their agreement, accomplish their announced purpose. The transaction was presented by the taxpayer to the tax authority for a determination of the tax consequence according to the law.** I find no basis for the application in these circumstances of the doctrine of sham as it has developed in the case law of this country.[760]
>
> [Emphasis added.]

[630] In concurring reasons, Wilson J. states:

> . . . I cannot see how a sham can be said to result where parties intend to create certain legal relations (in this case the purchase and sale of a business and a nominee arrangement to operate it) and are successful in creating those legal relations.[761]

[631] As in *Stubart*, the parties to the transactions in issue in these appeals, by their various agreements, created precisely the legal relations that they wished to create and presented those relations to the Minister for a determination of the tax

[760] At pages 572 and 573.
[761] At page 539.

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consequence according to the law, including the transfer pricing provisions in the ITA.

[632] The evidence does indicate that on a few occasions the date on intercompany contracts signed by CESA/CEL did not clearly reflect the actual date the contract was signed. However, I have concluded that these occurrences cannot reasonably be viewed as a deliberate attempt by CESA/CEL or the Appellant to mislead the outside world as to the true intent or agreement of the parties to the contracts, or to present the legal rights and obligations created by those agreements as something different from what the parties knew those legal rights and obligations to be. I will nevertheless review the details of these occurrences.

[633] With respect to Exhibit A163425, Mr. Glattes agreed that the contract was signed after its effective date of January 1, 2004, and the evidence reviewed with Mr. Assie suggested that the contract was signed around January 28, 2004. The proposal summary for the contract was dated November 3, 2003, was prepared by Mr. Del Frari and was signed on behalf of the Appellant by Mr. Assie and Mr. Grandey. Mr. Assie could not recall when he signed the proposal summary and Mr. Grandey was not asked about the proposal summary.

[634] Mr. Glattes testified that his "vague recollection" was that the terms of the agreement were agreed to during twice-weekly sales meetings that were held in November 2003. Mr. Glattes also stated that the contract would only stand out in his mind if the usual procedure for such agreements had not been followed.

[635] The evidence of Mr. Assie, Mr. Glattes and Mr. Murphy establishes to my satisfaction that the protocol for such agreements was to discuss the terms during the sales meetings.[762] The existence and purpose of the sales meetings as described by these three witnesses is amply supported by the testimony of other witnesses.[763] Mr. Glattes testified that, although he only had a vague recollection of the discussions regarding this contract, which would have taken place some 13 years prior to his testimony, the agreement would only have stood out in his mind if such discussions had not occurred.

[636] I do not expect Mr. Glattes to have a clear recollection of events that took place in late 2003. There is no evidence to suggest that the terms of Exhibit A163425 were not discussed and agreed to at one or more sales meetings

[762] See, for example, the evidence cited at footnote 347.
[763] See, for example, the evidence of Marlene Kerr cited at footnote 243.

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in late 2003. The time frame between the proposal summary and the execution of the contract was approximately two months, and the delay between the effective date of the contract and the date of signing was less than one month. The language of the agreement is that it was signed "as at" the date on the first page of the contract, which states that the "agreement is made with effect as of" January 1, 2004. This language is ambiguous as to when the contract was in fact signed.

[637] In my view, the evidence taken as a whole does not support the conclusion that the effective date stated on Exhibit A163425 was intended to deceive. I find that the signing of this Long-term Contract approximately 28 days after its effective date was most likely the consequence of the preparation of the formal documentation evidencing the agreement reached in late 2003 stalling during the holiday season and that the minor delay between the effective date and the actual signature date is not evidence of deceit on the part of the parties to the contract.

[638] With respect to Exhibit R-001399, Mr. Glattes agreed that the contract was signed by Mr. Murphy shortly after its effective date of August 20, 2004. The proposal summary setting out the terms of the contract was dated August 16, 2004.[764] Mr. Glattes and Mr. Murphy testified that the offer and contract were signed after the effective date only because Mr. Murphy was in the process of moving to Switzerland on the effective date and that Mr. Murphy signed the offer upon arriving in Zug on August 27 or 28, 2004 and signed the contract shortly after he formally took occupancy of the office in Zug on September 1, 2004. In a different context, Mr. Murphy stated that his understanding was that parties could agree to execute a contract after its effective date as long as the agreement was reached before that date.[765] The language used to describe the date of signature is the same as that in Exhibit A163425.

[639] For much the same reasons as for Exhibit A163425, I find that the signing of this contract a few days after its effective date was not done to deceive but was simply the result of Mr. Murphy not being available to sign the contract on the effective date stipulated in the contract because he was in the process of relocating to Switzerland. The terms of the contract were settled on August 16, 2004, which is several days before the effective date of the contract.

[764] Exhibit A155558.
[765] Lines 3 to 7 of page 3217 of the Transcript.

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[640] Mr. Glattes provided no explanation why Exhibits A225935, A165040, A016549 and A154147, all of which involve conversion services, had effective dates prior to the dates the contracts were signed. Exhibits A225935 and A016549 do not mention any date on the signature page but rather state "the Parties hereto have executed this Agreement under the hands of their proper officers duly authorized in that behalf."

[641] Mr. Glattes testified that the issue of how to optimize the use of CESA/CEL's conversion credits came up frequently but that it was "nothing of commercial -- really big commercial importance." The conversion services arrangements in these contracts were for the most part driven by the demands of customers of Cameco US and I accept that these demands would have been a topic of conversation at the twice-weekly sales meetings. In any event, the role of these contracts in the business of CESA/CEL was clearly not material and I find that the sloppiness surrounding the contracts reflects the lack of priority accorded such arrangements and not an attempt to deceive the outside world regarding the conversion credit transactions.

[642] With respect to Exhibit A154086, Mr. Glattes conceded that he was not aware of the loan of uranium described in that contract until after the effective date of the loan, which took place on April 14, 2003, and that he was sent signature copies of the contract on July 21, 2003. Mr. Assie testified that the Appellant's uranium account was overdrawn on April 14, 2003 and that the loan from CEL to the Appellant was put in place after that date to address the shortfall. The contract reflects a one-time fix for an unusual circumstance. It is not deceitful for parties to choose to characterize an overdrawn account as a loan–such a characterization is entirely consistent with such circumstances.

[643] I note with respect to each of the above contracts that there was no evidence to suggest that the Appellant, CESA/CEL or Cameco US garnered any economic or other benefit from the sloppiness surrounding the preparation and execution of these contracts. To place these contracts in perspective, the evidence is that CESA/CEL executed approximately 210 contracts from March 1999 to the end of 2006. These five contracts therefore represent less than 2.4% of the total number of contracts and a much smaller percentage in terms of the dollar value of all the contracts. It defies logic and common sense to suggest that the relatively minor issues with these few contracts, establishes the existence of a sham from 1999 to 2006.

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[644] The Respondent also raised with Mr. Murphy the timing of the signing of several contracts but, for all but one of the contracts, re-examination established that the agreement evidenced by the contract was reached by the parties before the effective date of the contract.[766]

[645] The one exception was an amended and restated UF_6 conversion agreement–Exhibit A217602-which amended Exhibit A021444. In that case, the evidence on cross-examination was that there was a proposal summary for the amended agreement dated one day before the July 20, 2005 effective date of the contract. Mr. Murphy agreed that an e-mail showed that Exhibit A217602 remained unsigned as of December 7, 2005. Nevertheless, the agreement was in place as of July 19, 2005, when the terms were settled.

[646] Mr. Murphy testified that he would look at the effective date of the contract only and that he relied on the Appellant's legal department to ensure that the terminology used in the contract was correct since the legal department drafted the contract. Parenthetically, I note that Mr. Murphy had made clear in his testimony that he viewed backdating as placing an effective date on a contract that was prior to the existence of the agreement that the contract documented.[767]

[647] Notwithstanding that I have concluded that the foregoing contracts do not support the conclusion that the Appellant, Cameco US and CESA/CEL were perpetrating a sham, it is nevertheless important to say that taxpayers must be extremely careful not to give the impression that an agreement exists before it does in fact exist. While I have found as a fact that such was not the case here, the senior officers of the Appellant, CESA and CEL can each be faulted for executing Exhibits A225935, A165040, A016549, A154147 and A154086 with effective dates that precede the date of execution without stating on the face of the contract that the execution date differs from the effective date. Such a practice must be avoided.

[648] In addition to the foregoing contracts, there is also evidence that, particularly during the tenure of Mr. Glattes, there was a somewhat cavalier attitude toward the administration of the contracts to which CESA/CEL was a party. This cavalier attitude is reflected in the fact that various notices required by the terms of the contracts were regularly backdated by the personnel administering CESA/CEL's

[766] See the evidence cited at footnotes 453 to 467 and 604.
[767] See, for example, lines 27 to 28 of page 2853, lines 1 to 21 of page 2854, lines 23 to 28 of page 3027, pages 3028 to 3030, lines 20 to 27 of page 3054 and lines 3 to 7 of page 3217 of the Transcript.

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contracts. Mr. Glattes admitted that various notices were backdated to give the appearance that everything was in order.

[649] The evidence, however, is that the intercompany binding and non-binding delivery notices and delivery schedules ("delivery notices") had no actual function or effect beyond redundantly papering events that were for the most part dictated by the customers of Cameco US.

[650] For example, the typical flow of delivery notices was from the third-party customer to Cameco US and then from Cameco US to CESA/CEL. The delivery notices from the third-party customer to Cameco US determined when CESA/CEL had to deliver uranium to Cameco US under the back-to-back agreement between CESA/CEL and Cameco US. The contract administrators acting for CESA/CEL under the Services Agreement already had all the information required to meet CESA/CEL's obligation to Cameco US because they received the delivery notices directly from the third-party customers of Cameco US. Consequently, a delivery notice from Cameco US to CESA/CEL performed no meaningful function and the delivery of such a notice to CESA/CEL was merely the perfunctory performance of a technical requirement in the intercompany contract. Certainly, there was no fiscal consequence if Cameco US submitted its intercompany delivery notices to CESA/CEL late, or not at all. I therefore reject the submission of the Respondent that the backdating of delivery notices was intended to deceive the CRA because nothing turned on the date of these notices.

[651] Both Mr. Glattes and Mr. Murphy testified that they fought a losing battle with the contract administrators on the issue of timely delivery notices, although it is clear that Mr. Murphy took the issue more seriously than Mr. Glattes and made considerably more headway in bringing about change.

[652] In addition to the delivery notices, there were also issues with flex notices. A flex notice was required when CESA/CEL exercised an upward or downward flex option under a BPC.

[653] Mr. Assie testified that the general understanding was that, if the price under a BPC was reasonably expected to be below the market price at the time of delivery, then the upward flex option would be exercised on behalf of CESA/CEL by the contract administrators.

[654] Mr. Glattes testified that the contract administrators had standing instructions to exercise the flex option under a BPC if it made commercial sense,

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which generally meant that the price under the BPC was lower than the market price. If it was a close call, the contract administrators were instructed to consult their supervisor and ask for guidance, and if it was a really close call the issue would be addressed during a sales meeting.

[655] Mr. Murphy testified that the contract administrators acting on behalf of CESA/CEL under the Services Contract understood that if the market price was above the price in the BPC then they were to issue to the Appellant a flex notice exercising CESA/CEL's upward flex option. However, if the prices were close then the matter had to be discussed and a decision had to be made.

[656] Mr. Assie and Mr. Glattes testified that flex notices had been issued late and were backdated. Mr. Assie testified that he believed the decisions to exercise the flex options were made in a timely manner, but the documentation was not always prepared in a timely manner. Mr. Assie testified that he did not know why the backdating of flex notices occurred but that the Cameco Group did not seek or obtain any commercial advantage because of flex notices being late or backdated.

[657] Mr. Glattes testified that the delivery of a flex notice was a formality required by the terms of the BPCs once the decision to exercise the flex option had been made and that the notice lacked relevance for the same reasons as the delivery notices, i.e., the contract administrators were notifying themselves. Mr. Glattes also testified that CESA/CEL did not receive any economic benefit from late flex notices and that CESA/CEL did not deliberately issue backdated flex notices to see how the market would play out.

[658] The evidence did not reveal any economic, fiscal or other benefit from late flex notices.

[659] With respect to notices in general, Mr. Assie testified that Cameco management did not give any instructions to backdate either flex notices or delivery notices and that people were instructed not to backdate documents. Mr. Glattes testified that senior personnel did not encourage or condone the backdating of notices but that it nevertheless persisted.

[660] Mr. Murphy was clearly disturbed about the backdating of notices and did his best to rectify the situation. Mr. Murphy's notes to himself, on which he was extensively cross-examined, clearly reveal the frustration he felt. I accept without reservation Mr. Murphy's explanation that some of his more inflammatory comments were fuelled by his frustration arising from the timeliness issues already

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described and his misunderstanding of the general concepts involved, and I find as a fact that these notes are not evidence of deception on the part of the Appellant, CESA/CEL or Cameco US. If anything, these notes reveal Mr. Murphy's desire to have every "i" dotted and every "t" crossed in conformity with the detailed terms and conditions of the intercompany contracts.

[661] In conclusion, I find as a fact that the backdating of some delivery notices and flex notices is not evidence of a false representation of the true intentions of the parties to the approximately 210 contracts executed by CESA/CEL between March 1999 and the end of 2006. Rather, the late delivery and flex notices resulted from the failure of the persons charged with the administration of the intercompany contracts to abide by two technical requirements in those contracts notwithstanding clear instructions to the contrary.

[662] The fact that Mr. Murphy, and to a lesser extent Mr. Glattes, attempted to rectify the situation reinforces the point that the intention of CESA/CEL was that the contracts be carried out according to their terms. While none of the notices should have been backdated, the backdating of some notices does not support the existence of a sham. The failure on occasion to meet the more technical terms of a contract is not evidence that the factual presentation of the terms and obligations of the agreement is different from what the parties know the agreement to be. Rather, it is evidence of carelessness or incompetence on the part of those charged with meeting those technical requirements.

[663] The correct approach to addressing a failure of a taxpayer to take formal steps is to tax in accordance with the legal result brought about by that failure,[768] not by alleging that the failure is evidence of a sham. Here, there is no evidence that the failure on occasion to take certain formal steps dictated by the intercompany contracts, such as the issuance of timely delivery notices, had any impact on the fiscal position of the Appellant. While none of the notices should have been backdated, the fact that some were backdated does not support a finding of sham.

[664] The intercompany contracts are not the only contracts entered into by CESA/CEL. CESA/CEL entered into contracts with arm's length third parties, including Tenex and Urenco. There has been no suggestion that the rights and

[768] *Friedberg v. Minister of National Revenue* (1991), 135 N.R. 61 (F.C.A.), at paragraph 4, appeal to the Supreme Court of Canada dismissed at [1993] 4 S.C.R. 285.

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obligations of the parties to those contracts were falsely described in the contracts, or that the rights and obligations described in those contracts do not in fact exist.

[665] Quite the contrary, the evidence discloses that the terms and conditions of those contracts were the result of hard bargaining and that where the parties no longer accepted the existing terms and conditions they negotiated amendments to the contracts to reflect the new agreement of the parties. The evidence does show that Mr. Grandey was the lead negotiator of the HEU Feed Agreement and the amendments to that agreement and that John Britt and Mr. Assie were the lead negotiators of the Urenco Agreement and the amendments to that agreement. However, those facts do not support a finding of sham. Sham is focused on the existence of deception in the description of the legal rights and obligations of parties to arrangements, not on who negotiated the agreements creating those arrangements.

[666] As a final remark on sham, I observe that the Respondent cites *Dominion Bridge Co. v. Canada*, [1975] F.C.J. No. 316 (QL)(FCTD) ("*Dominion Bridge*") in support of her position on sham. Notably, on the appeal of that decision to the Federal Court of Appeal, that Court refused to overturn what it characterized as a finding of fact of the trial judge. The Court did not mention sham, or any other anti-avoidance doctrines considered by the trial judge.[769] Instead, the Federal Court of Appeal stated (at paragraphs 4 and 5):

> In my view, arrived at after the best consideration that I have been able to give to the appellant's submissions, this finding was a finding of fact that was open to the learned Trial Judge on the evidence before him and there is no ground for interfering with it.
>
> It follows from that finding of fact, that **the appellant's costs of the steel in question must be computed by reference to the costs incurred by Span <u>on behalf of the appellant</u>** and not by reference to amounts shown by the companies' books and papers as having been paid by the appellant to Span for it. My understanding is that this was the basis of the re-assessments as far as the items in question are concerned. No question was raised as to the amounts of those items.

[Emphasis and double emphasis added.]

[667] The Federal Court of Appeal's description of the result of the trial judge's finding of fact is at odds with a finding that Span should be disregarded as being a

[769] The decision of the Federal Court of Appeal is found at [1977] F.C.J. No. 916 (QL).

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sham corporation. Rather, the description used by the Court of Appeal reflects an implicit understanding that Span acted as the agent of Dominion Bridge and therefore the costs incurred by Span should be treated as the costs of Dominion Bridge. This, as noted by the Court of Appeal, appears to have been the basis of the Minister's assessment of Dominion Bridge.[770]

[668] In addition, many of the factors considered by the trial judge in reaching his finding of fact in *Dominion Bridge* are of dubious relevance today considering the subsequent decisions of the Supreme Court of Canada in *Stubart*, *Neuman*, *Canada v. Antosko*, [1994] 2 S.C.R. 312 and *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, among others, addressing the roles of sham, business purpose, economic substance over form, and tax motive in taxation matters.

[669] Finally, even if *Dominion Bridge* is still good law in Canada, the factual circumstances found to exist in that case bear no resemblance to CESA/CEL's and the Appellant's factual circumstances. Span was literally an empty shell corporation, and its parent corporation, which was its only client, directed, controlled and carried out all its activities.[771] Even with those facts one might conclude that Span's legal relationships were as they purported to be but that Span was resident in Canada and was carrying on its activities in Canada through the actions of its parent's employee and therefore was itself subject to Canadian tax. Alternatively, one might conclude that the predecessor provision to subsection 69(2) addressed the pricing arrangements.[772]

[670] In summary, I find as a fact that the Appellant, Cameco US and CESA/CEL did not factually represent the numerous legal arrangements that they entered into in a manner different from what they knew those arrangements to be, nor did they factually represent the transactions created by those arrangements in a manner different from what they knew those arrangements to be, consequently, the element of deceit required to find sham is simply not present.

B. Transfer Pricing

[671] The Respondent's second and third position is that the transfer pricing rules in subsection 247(2) apply to either recharacterize the transactions or to reprice the transactions. In interpreting subsection 247(2), I must adhere to the principles of statutory interpretation enunciated by the Supreme Court of Canada in cases such

[770] Paragraph 13 of the Federal Court, Trial Division decision.
[771] See, in particular, paragraphs 3 to 5, 12 and 17 of the Federal Court, Trial Division decision.
[772] Subsection 17(3) of the *Income Tax Act*, R.S.C. 1952, c. 148.

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as *Stubart* and *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 ("Canada Trustco").[773]

[672] Subsection 247(2) states:

> Where a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership, or a member of the partnership, does not deal at arm's length (or a partnership of which the non-resident person is a member) are participants in a transaction or a series of transactions and
>
> (a) the terms or conditions made or imposed, in respect of the transaction or series, between any of the participants in the transaction or series differ from those that would have been made between persons dealing at arm's length, or
>
> (b) the transaction or series
>
> (i) would not have been entered into between persons dealing at arm's length, and
>
> (ii) can reasonably be considered not to have been entered into primarily for *bona fide* purposes other than to obtain a tax benefit,
>
> any amounts that, but for this section and section 245, would be determined for the purposes of this Act in respect of the taxpayer or the partnership for a taxation year or fiscal period shall be adjusted (in this section referred to as an "adjustment") to the quantum or nature of the amounts that would have been determined if,
>
> (c) where only paragraph (a) applies, the terms and conditions made or imposed, in respect of the transaction or series, between the participants in the transaction or series had been those that would have been made between persons dealing at arm's length, or
>
> (d) where paragraph (b) applies, the transaction or series entered into between the participants had been the transaction or series that would have been entered into between persons dealing at arm's length, under terms and conditions that would have been made between persons dealing at arm's length.

[673] Subsection 247(2) was added to the ITA by subsection 238(1) of the *Income Tax Amendments Act, 1997* effective for fiscal periods that begin after 1997.[774] The

[773] *Stubart* at page 578 and *Canada Trustco* at paragraphs 10 to 13.

[774] S.C. 1998, c. 19, s. 238 (formerly, Bill C-28). The *Income Tax Amendments Act, 1997* received royal assent on June 18, 1998.

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Department of Finance's December 1997 explanatory notes for proposed subsection 247(2) state:

> In general terms, proposed new subsection 247(2) requires that, for tax purposes, non-arm's length parties conduct their transactions under terms and conditions that would have prevailed if the parties had been dealing at arm's length with each other. Therefore, proposed new subsection 247(2) embodies the arm's length principle.
>
> More specifically, proposed new subsection 247(2) applies in situations where a taxpayer or a partnership and a non-resident person with whom the taxpayer, the partnership or a member of the partnership does not deal at arm's length (or a partnership of which the non-resident person is a member) are participants in a transaction or a series of transactions and
>
> - the terms or conditions of the transaction or series differ from those that would have been made between persons dealing at arm's length, or
>
> - the transaction or series would not have been entered into between persons dealing at arm's length and may reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit.
>
> Where these conditions are met, proposed new subsection 247(2) may adjust any amounts that, but for that subsection and the general anti-avoidance rule in section 245, would have been determined for the purposes of the Act in respect of the taxpayer or the partnership. Such amounts may be adjusted to reflect the quantum or nature of the amounts that would have been determined if the participants had been dealing at arm's length with each other.

[674] Several cases have applied the transfer pricing rules in paragraphs 247(2)(a) and (c).[775] However, this is the first case in which the application of the transfer pricing rules in paragraphs 247(2)(b) and (d) is in issue (I will refer to the rules in paragraphs 247(2)(a) through (d) collectively as the "transfer pricing rules"). Since one of the fundamental principles of statutory interpretation is to read the text of legislation in context and with a view to its purpose, I will first address the interpretation of subsection 247(2) in its entirety.

[675] The introductory words of subsection 247(2) (the "preamble") impose the condition that a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership, or a member of the partnership, does not deal at arm's

[775] For example, *Marzen Artistic Aluminum Ltd. v. The Queen*, 2016 FCA 34 ("*Marzen*") and *The Queen v. General Electric Capital Canada Inc.*, 2010 FCA 344 ("*GE Capital*").

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length (or a partnership of which the non-resident person is a member) be participants in a transaction or a series of transactions. No partnerships are in issue in these appeals, so the relevant portion of the preamble can be distilled to require that:

> a taxpayer . . . and a non-resident person with whom the taxpayer . . . does not deal at arm's length . . . [be] participants in a transaction or a series of transactions.

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[676] The preamble requires the identification of a transaction or series of transactions (hereinafter, the "transaction or series") and the identification of the participants in that transaction or series.

[677] "Taxpayer" includes "any person whether or not liable to pay tax",[776] a "transaction" includes "an arrangement or event"[777] and a "participant" is "one who takes part in, possesses, or experiences something in common with others".[778] An "arrangement" includes an informal agreement or a plan, whether legally enforceable or not,[779] and an "event" includes "anything that happens".[780]

[678] Under common law, a transaction is part of a series of transactions if each transaction in the series is preordained to produce a result.[781] Subsection 248(10) expands this meaning to include "any related transactions or events completed in contemplation of the series", which allows either prospective or retrospective connection of a related transaction to a common law series of transactions.[782]

[679] The participants in the transaction or series must include the taxpayer and at least one non-resident person with whom the taxpayer does not deal at arm's length (I will refer to any such person as a "non-arm's length non-resident").

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[776] See the definition of "taxpayer" in subsection 248(1). A non-resident person can be a taxpayer, for example, if the person has income from a source in Canada. However, consistent with the purpose of the transfer pricing rules, a person that has no actual or potential liability for tax in Canada is not a taxpayer: *Oceanspan Carriers Ltd. v. The Queen*, (1987) 73 N.R. 91 (FCA) ("Oceanspan Carriers").

[777] See the definition of "transaction" in subsection 247(1).

[778] *Oxford English Dictionary* (2nd ed.) (the "OED").

[779] *Davidson v. R.*, [1999] 3 C.T.C 2159 at paragraph 14 and the dissenting judgment of Spence J. in *Geophysical Engineering Ltd. v. M.N.R.*, [1977] 2 S.C.R. 1008 at pages 1023 and 1024, in both of which the decision of the Judicial Committee of the Privy Council in *Newton v. Commissioner of Taxation of the Commonwealth of Australia*, [1958] 2 All E.R. 759 (P.C.) at page 763 is cited.

[780] The OED defines the noun "event" as "[t]he (actual or contemplated) fact of anything happening" and "[a]nything that happens, or is contemplated as happening". However, the statutory context requires that this definition be limited to anything that in fact happens.

[781] *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R.721 ("Copthorne") at paragraph 43.

[782] *Copthorne* at paragraph 56.

[680] The preamble does not require that the taxpayer and a non-arm's length non-resident be the only participants in the transaction or series. However, when the preamble is read in the context of the balance of subsection 247(2), the clear focus of the transfer pricing rules is a transaction or a series between a taxpayer and a non-arm's length non-resident. The subsection does not apply to a transaction or a series between a taxpayer and one or more arm's length persons, or to a transaction or series between a non-resident and another non-resident where neither is a taxpayer. However, the existence of such a transaction or series and the terms and conditions of that transaction or series may be relevant facts when applying the transfer pricing rules to a transaction or series between a taxpayer and a non-arm's length non-resident.[783] The scope of the preamble is addressed in more detail under the heading "Preamble" below.

[681] The words between paragraphs 247(2)(b) and (c) (the "mid-amble") authorize the Minister to adjust the amounts determined for the purposes of the ITA to the quantum or nature of the amounts determined in accordance with paragraph 247(2)(c) or (d) (an "adjustment"). The use of the word "nature" allows the recharacterization of an amount, but only if paragraph 247(2)(c) or (d) permits such an adjustment.

[682] If the condition in the preamble that a taxpayer and a non-arm's length non-resident be participants in a transaction or series is met, paragraph 247(2)(c) states that it applies "where only paragraph (a) applies" while paragraph 247(2)(d) states that it applies "where paragraph (b) applies".

[683] It is a well-accepted rule of statutory interpretation that every word in an enactment serves a purpose and must be given a meaning.[784] The question therefore is why is the word "only" included in paragraph 247(2)(c) and not in paragraph 247(2)(d)?

[684] In my view, the inclusion of the word "only" in paragraph 247(2)(c) emphasizes Parliament's intention that paragraph 247(2)(c) apply only if the condition in paragraph 247(2)(a) alone is satisfied. This ensures that paragraph 247(2)(c) does not apply in the unlikely event that the conditions in both paragraph 247(2)(a) and paragraph 247(2)(b) are satisfied. In contrast, paragraph 247(2)(d) may apply where the conditions in paragraph 247(2)(b) are satisfied and where the

[783] As stated in *GE Capital* at paragraph 54, all the circumstances must be considered, whether they arise from the relationship between the taxpayer and the non-arm's length non-resident or otherwise.
[784] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at pages 136 to 138.

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conditions in both paragraph 247(2)(a) and paragraph 247(2)(b) are satisfied, but not where the condition in paragraph 247(2)(a) alone is satisfied.

[685] Paragraph 247(2)(a) applies where the terms or conditions made or imposed in respect of the transaction or series differ from those that would have been made by arm's length parties.

[686] The assumption underlying paragraph 247(2)(a) is that arm's length parties would enter into the transaction or series but on different terms or conditions. Paragraph 247(2)(c) reinforces this interpretation by requiring that the determination of any adjustment be based on the assumption that the terms and conditions of the transaction or series are the terms and conditions that would have been made between persons dealing at arm's length.

[687] In *GE Capital*, Noɹl J.A., as he then was, explains the concept underlying paragraphs 247(2)(a) and (c) and the limitations implicit in that concept:

> The concept underlying subsection 69(2) and paragraphs 247(2)(*a*) and (*c*) is simple. The task in any given case is to ascertain the price that would have been paid in the same circumstances if the parties had been dealing at arm's length. This involves taking into account all the circumstances which bear on the price whether they arise from the relationship or otherwise.
>
> This interpretation flows from the normal use of the words as well as the statutory objective which is to prevent the avoidance of tax resulting from price distortions which can arise in the context of non arm's length relationships by reason of the community of interest shared by related parties. The elimination of these distortions by reference to objective benchmarks is all that is required to achieve the statutory objective. Otherwise all the factors which an arm's length person in the same circumstances as the respondent would consider relevant should be taken into account.[785]

[Emphasis and double emphasis added.]

[688] Paragraph 247(2)(c) permits an adjustment to the quantum of an amount but does not permit an adjustment of the nature of an amount. This flows from the fact that a change to the nature of an amount would be an impermissible recharacterization of the transaction or series rather than an adjustment based on the terms and conditions of the transaction or series, amended solely to reflect an objective arm's length benchmark. Paragraph 247(2)(c) does not permit the

[785] Paragraphs 54 and 55.

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Minister to recharacterize the transaction or series by substituting terms and conditions that have that effect.[786]

[689] Paragraph 247(2)(b) applies where the transaction or series would not have been entered into by arm's length parties and the transaction or series can reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit.

[690] The assumption underlying paragraph 247(2)(b) is that arm's length parties would not enter into the transaction or series identified in the preamble on any terms or conditions but that in the circumstances there is an alternative transaction or series that arm's length parties would enter into on arm's length terms and conditions in place of the transaction or series. Paragraph 247(2)(d) reinforces this interpretation by requiring that the determination of any adjustment be based on the assumptions that (i) the transaction or series entered into is instead the transaction or series that would have been entered into between persons dealing at arm's length[787] and (ii) the terms and conditions of that assumed transaction or series are the terms and conditions that would have been made between persons dealing at arm's length. As with paragraph 247(2)(c), it is implicit in paragraph 247(2)(d) that the determination of whether an alternative transaction or series exists is made with due regard to the circumstances in which the actual transaction or series exists.

[691] Since the existence of such a transaction or series is a question of fact and the Minister is in no better position to know that fact than the taxpayer, the Minister can assume the existence of an alternative transaction or series and the taxpayer must then "demolish" the assumption.[788]

[692] The term "tax benefit" is defined in subsection 247(1) to have the same meaning as it does under the general anti-avoidance rule in section 245 (the "GAAR").[789] However, the words "the transaction or series . . . can reasonably be

[786] In addition to the above quotation, see *GE Capital* at paragraph 52, *Marzen* at paragraphs 15 to 18 and *McKesson Canada Corporation v. The Queen*, 2013 TCC 404 at paragraphs 125 and 127.

[787] As with paragraph 247(2)(c), it is implicit in paragraph 247(2)(d) that the determination of whether an alternative transaction or series exists is made in the context of the actual circumstances in which the transaction or series exists.

[788] *House* at paragraphs 31 and 32.

[789] Subsection 245(1) defines "tax benefit" as follows:

> "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty.

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considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit" impose a subtly different test than subsection 245(3) of the GAAR.[790] Specifically, the test in subparagraph 247(2)(b)(ii) asks about the purpose of the transaction or the series (as opposed to the purpose of a transaction in the series).

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[693] In addressing the similarly worded test in subsection 245(3), the Supreme Court of Canada stated in *Canada Trustco*:

> While the inquiry proceeds on the premise that both tax and non-tax purposes can be identified, these can be intertwined in the particular circumstances of the transaction at issue. It is not helpful to speak of the threshold imposed by s. 245(3) as high or low. **The words of the section simply contemplate an objective assessment of the relative importance of the driving forces of the transaction**.
>
> Again, this is a factual inquiry. The taxpayer cannot avoid the application of the GAAR by merely stating that the transaction was undertaken or arranged primarily for a non-tax purpose. **The Tax Court judge must weigh the evidence to determine whether it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a non-tax purpose**. The determination invokes reasonableness, suggesting that the possibility of different interpretations of the events must be objectively considered.[791]
>
> [Emphasis added.]

[694] In the case of subparagraph 247(2)(b)(ii), I must weigh the evidence and make an objective assessment of the relative importance of the driving forces behind the transaction or the series to determine whether it is reasonable to consider that the transaction or the series was not entered into primarily for bona fide purposes other than to obtain a tax benefit.

[695] The two-prong test in paragraph 247(2)(b) recognizes that non-arm's length parties may enter into a transaction or series that arm's length parties would not. Paragraph 247(2)(b) will not capture such a transaction or series provided the condition in subparagraph 247(2)(b)(ii) is not satisfied. This approach appears to reflect a general observation in paragraph 1.10 of the 1995 Guidelines:

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[790] The test under the GAAR is summarized in *Canada Trustco* at paragraph 22.
[791] Paragraphs 28 and 29.

> 1.10 A practical difficulty in applying the arm's length principle is that associated enterprises may engage in transactions that independent enterprises would not undertake. **Such transactions may not necessarily be motivated by tax avoidance** but may occur because in transacting business with each other, members of an MNE group face different commercial circumstances than would independent enterprises. . . . [792]
>
> [Emphasis added.]

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[696] Paragraph 247(2)(d) is sometimes referred to as a recharacterization rule.[793] However, strictly speaking, paragraph 247(2)(d) does not authorize the Minister to recharacterize the transaction or series identified in the preamble. Rather, paragraph 247(2)(d) authorizes the Minister to identify an alternative transaction or series that in the same circumstances would be entered into by arm's length parties in place of the transaction or series and then to make an adjustment that reflects arm's length terms and conditions for that alternative transaction or series.[794] Because the adjustment is based on the arm's length terms and conditions of an alternative transaction or series, the adjustment may alter the quantum or the nature of an amount.

[697] The 1995 Guidelines recognize and explain the difference between the recharacterization of a transaction and the use of an alternatively structured transaction as a comparable uncontrolled transaction.[795] Only the latter approach is taken in paragraph 247(2)(d).

[698] The 1995 Guidelines also state that the arm's length principle, as expressed in Article 9 of the OECD Model Tax Convention (the "Model Convention"), permits the recharacterization of a transaction in exceptional circumstances.[796] However, the text of Article 9 is quite different from the text of subsection 247(2). The 1995 Guidelines reproduce a condensed (but accurate) version of Article 9 as follows:

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[792] The September 11, 1997 press release announcing the introduction of the transfer pricing rules in section 247 emphasized the conformity of the new provisions with the 1995 Guidelines:

> The proposed rules are in conformity with the revised (1995) transfer pricing guidelines of the Organization for Economic Co-operation and Development (the "OECD"), and are generally in keeping with the transfer pricing rules of other OECD member states, such as the U.S.

See, also, paragraph 43 of Information Circular 87-2R, "International Transfer Pricing," September 27, 1999.

[793] A September 1997 draft of subsection 247(2) released by the Department of Finance did use the verb "recharacterize" in the "mid-amble" but not in paragraph 247(2)(b) or (d).

[794] This parallels the approach in paragraph 247(2)(c), which requires a determination of the terms and conditions that would exist in the same circumstances if the parties had dealt at arm's length: *GE Capital* at paragraph 54.

[795] Paragraph 1.41 of the 1995 Guidelines. See, also, paragraph 1.69 of the 2010 OECD Transfer Pricing Guidelines (the "2010 Guidelines").

[796] Paragraph 1.37. See, also, paragraph 1.65 of the 2010 Guidelines.

> [When] conditions are made or imposed between . . . two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.[797]

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[699] While it is true that the purpose of subsection 247(2) is to implement the arm's length principle in Canada's domestic tax law in order to protect Canada's tax base, Parliament has chosen text that is quite different from the text in Article 9 of the Model Convention. Consequently, although the general thrust of Canada's domestic transfer pricing rule is no doubt consistent with the arm's length principle described in the Model Convention, regardless of the meaning given to Article 9 by the 1995 Guidelines, the determination of the application and scope of the domestic transfer pricing rules must be based on the text chosen by Parliament, interpreted according to accepted principles of statutory interpretation. As stated by the Supreme Court of Canada in *Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52, [2012] 3 S.C.R. 3 ("GlaxoSmithKline") the objective is to interpret the domestic law, and in that regard the 1995 Guidelines are not controlling as if a Canadian statute.[798]

(1) The Preamble

[700] The preamble asks whether a taxpayer and a non-arm's length non-resident are participants in a transaction or series or transactions. The Appellant is a taxpayer and CESA/CEL and Cameco US are non-arm's length non-residents.

[701] The Respondent submits that all the transactions undertaken by the Appellant and/or CESA/CEL are part of a single series that started with the reorganization in 1999 and that this series must be tested against the transfer pricing rules. While the text of the preamble read in isolation might support such an interpretation, the rules of statutory interpretation require that the text of the preamble be read in context and with regard to the purpose of section 247:

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[797] Paragraph 1.6. With respect to this article, one author stated recently:

> The arm's length principle embedded in article 9(1) of the OECD Model is often subject to quite a broad interpretation that jeopardizes legal certainty, despite the clear purpose of this treaty article.

Marta Pankiv, *Contemporary Application of the Arm's Length Principle in Transfer Pricing*, Vol. 6, European and International Tax Law and Policy Series (Amsterdam: IBFD, 2017) at 5.2.1, page 134.

[798] At page 20.

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[799]

[702] Paragraph 247(2)(a) asks if the terms and conditions made or imposed in respect of the transaction or in respect of the series depart from arm's length terms and conditions. Paragraph 247(2)(b) asks about the purpose of the transaction or series and whether arm's length persons would enter into the transaction or the series. Paragraphs 247(2)(c) and (d) each require a substitution of the terms and conditions that arm's length persons would agree upon in the circumstances, determined either by reference to the actual transaction or series or by reference to an alternative transaction or series.

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[703] The focus of paragraphs 247(2)(a) through (d) on a comparative and substitutive analysis is the hallmark of the arm's length principle as explained in the 2010 Guidelines:

> By seeking to adjust profits by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances (*i.e.* in "comparable uncontrolled transactions"), the arm's length principle follows the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of a single unified business. Because the separate entity approach treats the members of an MNE group as if they were independent entities, attention is focused on the nature of the transactions between those members and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions. **Such an analysis of the controlled and uncontrolled transactions, which is referred to as a "comparability analysis", is at the heart of the application of the arm's length principle**.[800]

[Emphasis added.]

[704] To allow for a meaningful comparative or substitutive analysis, the transaction or the series identified in the preamble must be susceptible of such an analysis. An overly broad series renders the analysis required by the transfer pricing rules impractical or even impossible by unduly narrowing (possibly to zero) the set of comparable circumstances and substitutable terms and conditions.

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[799] *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at paragraph 50, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21, and *Stubart* at page 578.

[800] Paragraph 1.6. The 1995 Guidelines contain a similar but slightly less detailed explanation.

[705] The series identified by the Respondent includes a wide range of transactions, some of which are between a taxpayer and a non-arm's length non-resident (e.g., the Appellant and CESA/CEL), some of which are between non-resident persons dealing at arm's length (e.g., CESA/CEL and Tenex and CESA/CEL and Urenco) and some of which are between non-arm's length non-residents that are not taxpayers[801] (e.g., CESA/CEL and Cameco US and CESA/CEL and the US Subsidiaries). How does one apply the analysis required by the transfer pricing rules to such a series?

[706] The answer is not that one simply disregards all the transactions that did take place and taxes the Appellant as if nothing in fact occurred because arm's length persons would not have entered into the series. Such an approach uses the series to define the result and in so doing completely disregards the purpose and focus of the transfer pricing rules by circumventing the comparability analysis that is at the heart of the rules.

[707] An interpretation of the preamble that identifies transactions and/or series susceptible of the analysis dictated by paragraphs 247(2)(a) through (d) allows a meaningful, predictable and practical application of the arm's length principle embodied in subsection 247(2), which in turn promotes certainty, predictability and fairness.

[708] Importantly, the identification of a particular transaction or a particular series does not preclude consideration of the broader circumstances in applying the analysis required by paragraphs 247(2)(a) through (d) to that transaction or series. The jurisprudence of the Supreme Court of Canada and the Federal Court of Appeal makes clear the fact that all relevant circumstances must be considered in the application of the current and past versions of the transfer pricing rules in the ITA.[802]

[709] Consistent with my interpretation of subsection 247(2), I have identified the following transactions or series of transactions:

1. The series of transactions comprised of the incorporation of CESA, the decision by the Appellant to designate CESA as the Cameco Group

[801] I have heard no evidence to suggest that CESA/CEL, Cameco US or the US Subsidiaries are actually or potentially liable to tax in Canada: see *Oceanspan Carriers*. Nor can I think of any reason why the word "taxpayer" in the preamble should be interpreted to include such persons given the text, context and purpose of the transfer pricing rules.

[802] See *GlaxoSmithKline*, *GE Capital* and *Marzen*.

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signatory to the HEU Feed Agreement, CESA's execution of the HEU Feed Agreement and the Appellant's guarantee with respect to CESA's obligations under the HEU Feed Agreement (the "Tenex Series").

2. The series of transactions comprised of the incorporation of CESA, the decision by the Appellant to designate CESA as the Cameco Group signatory to the Urenco Agreement, CESA's execution of the Urenco Agreement and the Appellant's guarantee with respect to CESA's obligations under the Urenco Agreement (the "Urenco Series").

3. The transactions consisting of the Appellant and CESA/CEL entering into the BPCs and the Appellant delivering uranium to CESA/CEL under the BPCs (the "BPC Transactions"). In identifying each sale under the BPCs as a separate transaction, I am cognizant of the fact that I could classify the Appellant's deliveries of uranium under each BPC as a series of transactions. However, I have concluded that the most effective way to test these deliveries against the arm's length principle is to address each delivery separately.[803] In my view, identifying each delivery as a separate transaction does not preclude an analysis of the terms and conditions of the BPCs having regard to all deliveries contemplated by those contracts since, in conducting any transfer pricing analysis, all the relevant circumstances must be considered.

4. The transactions consisting of the Appellant and CESA/CEL entering into the CC Contracts and CESA/CEL delivering uranium to the Appellant under the CC Contracts (the "CC Transactions").

[710] I will refer to the Tenex Series and the Urenco Series, collectively, as the "Series" and to the BPC Transactions and the CC Transactions collectively as the "Transactions".

[711] With respect to the Tenex Series, the Appellant submits that the decision to allow CESA to become a signatory to the HEU Feed Agreement and CESA signing the HEU Feed Agreement are events without tax attributes and therefore cannot be subject to the transfer pricing rules.

[712] I disagree. I can appropriately apply the transfer pricing rules to the series of transactions by which the Appellant brought about CESA/CEL's participation in the transactions with Tenex and Urenco. The question raised by the transfer pricing

[803] See, generally, paragraphs 1.42 to 1.44 of the 1995 Guidelines and paragraphs 3.9 to 3.12 of the 2010 Guidelines.

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rules in this context is whether the Appellant's placement in CESA/CEL of the future transactions with Tenex and Urenco warrants an adjustment. The fact that that placement occurs through a series of transactions that does not involve a specific transaction that is susceptible of adjustment is not a bar to the application of the transfer pricing rules because in this case the rules are addressing the series of transactions by which that placement occurred and not the individual transactions comprising the series. Also, while the Series took place prior to the Taxation Years, an adjustment required under the transfer pricing rules could apply to the Taxation Years.

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(2) Paragraphs 247(2)(b) and (d)

a) Introduction

[713] The question asked by subparagraph 247(2)(b)(i) is whether the Transactions or the Series would have been entered into by persons dealing at arm's length.

[714] In my view, subparagraph 247(2)(b)(i) is not asking the Court to speculate as to what arm's length persons might or might not have done in the circumstances. Rather, the subparagraph is asking whether the transaction or series under scrutiny would have been entered into by arm's length persons acting in a commercially rational manner. The focus of the test is the commercial rationality (or irrationality) of the transaction or series, taking into consideration all relevant circumstances.[804] The determination of whether a transaction or a series is commercially rational requires an objective assessment of the transaction or series, and that assessment may be aided by expert opinion.

[715] If a transaction or series is commercially rational then it is reasonable to assume that arm's length persons would enter into the transaction or series. The fact that the transaction or series is uncommon or even unique does not alter this assumption. If a transaction or series is not commercially rational then it is reasonable to assume that arm's length persons would not enter into the transaction or series.

[716] If a taxpayer and a non-arm's length non-resident enter into a transaction or series that is not commercially rational, then subparagraph 247(2)(b)(ii) comes into play. As recognized in the 1995 Guidelines, non-arm's length persons may enter

[804] See, also, the 1995 Guidelines at paragraph 1.37 and the 2010 Guidelines at paragraph 1.65.

into transactions or series that arm's length persons would not.[805] Subparagraph 247(2)(b)(ii) ensures that that fact alone does not trigger the Minister's right to substitute an alternative arm's length transaction or series for the actual transaction or series.

b) The Application of Paragraphs 247(2)(b) and (d) to the Series and the Transactions

i. The Series

[717] With respect to the Series, one's initial reaction might be: why would any person pass up the business opportunity represented by the HEU Feed Agreement and the Urenco Agreement? The expert evidence of Doctors Shapiro and Sarin explains why that reaction is simply wrong.

[718] The analysis on this point in the Shapiro-Sarin Report is summarized earlier in these reasons.[806] In his examination in chief, Doctor Sarin succinctly summarizes the point as follows:

> Any entity would be willing to give up a business opportunity as long as they are fairly compensated for giving up that opportunity. So the only question really is: What's the appropriate arm's-length price for that opportunity?[807]

[719] I accept this opinion and conclude that it is commercially rational for a person to give up a business opportunity and that the correct focus in such a situation is the compensation received for doing so. The issue of arm's length compensation is addressed by paragraphs 247(2)(a) and (c).

[720] The Appellant originally sought to secure its own a deal with Tenex and commenced negotiations with Tenex in early 1993. At some point in 1996, the Appellant decided to team up with Cogema,[808] an arm's length competitor, and the Appellant and Cogema submitted a joint proposal to Tenex on January 27, 1997. A short time later, Nukem, an arm's length uranium trader and a smaller player in the uranium industry, was added to the proposal as a ten percent participant. This resulted in the first tentative agreement with Tenex in August 1997.

[805] Paragraph 1.10 of the 1995 Guidelines. See, also, paragraph 1.11 of the 2010 Guidelines.
[806] The analysis is in Section XI of the Shapiro-Sarin Report.
[807] Lines 18 to 22 of page 4965 of the Transcript.
[808] And Cogema obviously decided to do the same by teaming up with the Appellant.

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[721] The Appellant's reason for entering into the arrangement with Cogema and Nukem was to mitigate financial risk. The Appellant joined forces with Cogema and Nukem even though a joint proposal would result in a dilution of the Appellant's share of any agreement reached with Tenex. Cogema and Nukem had been negotiating with Tenex, so their decision to join forces with the Appellant also entailed a decision to accept a smaller percentage of any agreement reached with Tenex. In short, everyone involved gave up a business opportunity to achieve other objectives.

[722] The United States Tax Court has held that a U.S. parent of a corporate group is free to establish subsidiaries and to decide which among its subsidiaries will earn income, and that the mere power to do so cannot justify reallocating the income earned by that subsidiary.[809] Implicit in the United States Tax Court's view is that the behaviour of the parent corporation in establishing subsidiaries and placing business opportunities in those subsidiaries is not commercially irrational. I would go so far as to suggest that such behaviour is a core function of the parent of a multinational enterprise.

[723] The foreign affiliate regime in the ITA contemplates Canadian corporations establishing subsidiaries (foreign affiliates) in foreign jurisdictions to carry on active businesses in those jurisdictions. The general thrust of the regime is that a foreign affiliate resident in a jurisdiction with which Canada has an income tax convention (a "treaty jurisdiction") may earn income from an active business carried on in that treaty jurisdiction or in another treaty jurisdiction without attracting Canadian income tax either at the time the income is earned or at the time the income is returned to its Canadian resident parent corporation as dividends.

[724] Canada's foreign affiliate regime has complex rules that ensure that only income from an active business is exempt from Canadian tax. Income from other sources is foreign accrual property income (FAPI) that is taxed in Canada in the hands of the Canadian parent corporation. CESA/CEL's sales of UF_6 to the Appellant are an example of an activity that is deemed by the foreign affiliate regime to give rise to FAPI.

[725] The purpose of the foreign affiliate regime is to allow Canadian multinationals to compete in international markets through foreign subsidiaries

[809] *Merck & Co. v. U.S.*, 24 Cl Ct 73 ("*Merck*") at page 88, recently cited in *Amazon.Com Inc. & Subsidiaries v. Commissioner of Internal Revenue*, 148 T.C. No. 8 ("*Amazon.Com*") at pages 152 and 153.

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without attracting Canadian income tax. The tax plan conceived and implemented by the Appellant sought to take advantage of the foreign affiliate regime by having a contract with an arm's length non-resident person (Tenex) executed by a controlled foreign affiliate of the Appellant.

[726] There is nothing exceptional, unusual or inappropriate about the Appellant's decision to incorporate CESA and have CESA execute the HEU Feed Agreement. To the extent that the Appellant's implementation of the decision raises transfer pricing concerns, paragraphs 247(2)(a) and (c) address those concerns. The application of the extraordinary remedy in paragraphs 247(2)(b) and (d) is neither warranted nor appropriate in the circumstances.

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[727] Doctor Wright provides the following criticism of the Shapiro-Sarin Report's analysis of the arrangements with Tenex:

> 30. The Shapiro Report states that the primary value of the HEU Agreement was control over the market. I agree. Then, the Shapiro Report states that because the benefit was socialized (i.e., the contract benefited the entire industry), it did not matter which company signed the contract as long as it was someone with "aligned interests." I agree to the extent that the signer could be any company that had substantial uranium business and was recognized as such in the industry. However, the Shapiro Report does not address whether CEL, at the time the Tenex and Urenco deals were signed, was a substantial player in the uranium industry, whether CEL was viewed as such by the industry, and, more important, by Tenex/Urenco.
>
> 31. In fact, at the time that the HEU Agreement was signed, neither Tenex nor Urenco was willing to sign a contract with CEL without a CCO performance guarantee. It may be that Tenex/Urenco signed the contracts because they viewed them to be between themselves and CCO (through the guarantee); however, if CEL had been unrelated to the Cameco Group it may be that the HEU Agreement would never have become a CEL contract. This is a judgment, based on the facts, that is necessary before the benefits attributable to the HEU Agreement can be placed in CEL.
>
> 32. Once again, the Shapiro Report discusses this issue in the context of third-party arrangements without addressing whether CEL was similar to the hypothetical third-party participant in the transactions discussed.[810]

[728] Doctor Wright does not challenge the commercial rationality of allowing another person to enter into the HEU Feed Agreement. In fact, Doctor Wright

[810] Response to "Cameco Corporation Expert Report" by Alan C. Shapiro and Atulya Sarin, Exhibit ER000091.

suggests that an appropriate arm's length entity could have signed the HEU Feed Agreement instead of the Appellant.

[729] Doctor Barbera does not question the commercial rationality of having CESA/CEL enter into the HEU Feed Agreement but rather focuses on the appropriate compensation to the Appellant.[811]

[730] In light of the foregoing, I conclude that the Tenex Series is not described in subparagraph 247(2)(b)(i). The same analysis and conclusion applies to the Urenco Series.

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ii. The Transactions

[731] The Transactions involve the making of contracts providing for the purchase and sale of uranium and the subsequent delivery of uranium under those contracts.

[732] The BPCs are long-term contracts providing for the delivery of volumes of uranium ranging from 300,000 lb to 5,000,000 lb per year. Mr. Hayslett states in the Hayslett Report that the duration of the BPCs is within the range reported by Ux for long-term contracts made in 1999 through 2001 but that the volumes of uranium sold under some of the BPCs exceeded the typical demands of even large uranium consumers, which only occasionally exceeded 1,000,000 lb per year under a single contract.[812]

[733] Mr. Assie testified that the Appellant deliberately chose to enter into thirteen Long-term Contracts because it did not want to enter into 15 to 20 contracts per year to sell its uncommitted uranium to CESA/CEL. While this decision may have resulted in the volumes under some of the BPCs being outside the volume range of typical retail contracts, the volumes under those BPCs are not excessive when compared to arm's length wholesale contracts made during the same period. For example, the transaction summary[813] for the Urenco Agreement sets out the following annual volumes:

[811] Doctor Barbera confirms this in his testimony: lines 25 to 28 of page 6537, page 6538, line 1 of page 6539 and lines 10 to 14 of page 6554 of the Transcript. See, also, paragraph 219 of the Barbera Report.
[812] Pages 7 and 8 of the Hayslett Report.
[813] Exhibit A002797.

Year	Quantity (tonnes U as UF_6)	Quantity (million lbs U_3O_8)
1999	500	1.3
2000	1750	4.5
2001	1750	4.5
2002	1750	4.5
2003	1550	4.1
2004	1200	3.1
Total	**8500**	**22.0**

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[734] With one relatively minor exception, the other terms and conditions of the Appellant's sales of uranium to CESA/CEL under the BPCs are generally consistent with practices in the uranium industry.[814] Mr. Hayslett states:

> Based upon the review which I have conducted of the nine contracts I would conclude that the contracts contain commercial terms similar to the types of terms that would normally be present in uranium sales contracts concluded by industry participants. While in some instances the specific value or treatment of a commercial term might seem to be more favorable to one party than the predominant treatment at that time, in my opinion they are generally consistent with the range of values commercially attainable during the time period late 1999 through early 2001.[815]

[735] The Long-term Contracts of which the BPCs are a subset sold all of the Appellant's uncommitted uranium production to CESA/CEL. Doctors Shapiro and Sarin opine that a commodity producer may sell production under a base escalated contract to secure a guaranteed revenue stream for that production even if the expectation is that prices will move higher.[816] Doctors Shapiro and Sarin describe the finance concept that explains such behaviour:

> There is a well-established concept in finance, known as the "Certainty Equivalent," which clearly suggests that rational actors will accept a lower guaranteed amount in lieu of a higher expected, but riskier, cash flow. For example, in a textbook, I explain that

[814] The one exception is delivery schedule flexibility, which, Mr. Hayslett opines, favours CESA/CEL. Delivery schedule flexibility is not in and of itself sufficient to characterize the Long-term Contracts as commercially irrational. Doctor Horst factored the delivery flexibility into his corrected RPM analysis confirming that in this case this factor goes to price not to commercial rationality.
[815] Page 13 of the Hayslett Report.
[816] Pages 24 to 27 of the Shapiro-Sarin Report.

> The certainty equivalent of a risky cash flow is defined as that certain amount of money that the decision maker would just be willing to accept in lieu of the risky amount. For example, suppose a person would be willing to trade for $15,000 a lottery ticket having a 25 percent chance of winning $100,000 and a 75 percent chance of winning nothing (an expected value of $25,000). We would say that the certain equivalent of this lottery ticket is $15,000.[817]

[736] Doctor Barbera and Doctor Wright do not suggest that the Appellant's decision to sell its uncommitted uranium production to CESA/CEL was commercially irrational. Doctor Barbera considered the appropriate level of compensation to the Appellant for the sales and Doctor Wright considered hypothetical scenarios based on various assumptions regarding the functions performed by CESA/CEL.

[737] On the basis of the foregoing, I conclude that the BPC Transactions are not described in subparagraph 247(2)(b)(i).

[738] The CC Transactions involved for the most part the entering into of contracts for the sale by CESA/CEL to the Appellant of uranium at fixed or market-based prices and the delivery by CESA/CEL to the Appellant of uranium under those contracts. The contracts are either for single deliveries or for deliveries over a relatively short period of time. I can discern nothing commercially irrational about the CC Transactions. Accordingly, I have concluded that the CC Transactions are not described in subparagraph 247(2)(b)(i).

[739] Although the foregoing dispenses with the application of paragraphs 247(2)(b) and (d), to be complete, I will also address subparagraph 247(2)(b)(ii). The question asked by subparagraph 247(2)(b)(ii) is whether the purpose of the transaction or the series of transactions was primarily to save tax. This determination must be made having regard to all the relevant circumstances.

[740] Mr. Assie and Mr. Goheen freely admitted that the impetus behind, and the object of, the reorganization undertaken in 1999 was to increase the after-tax profit of the Cameco Group by reducing the incidence of tax on profits from the sale of uranium. No doubt the Appellant considered other factors, such as the best jurisdiction for CESA/CEL, in determining how best to implement the reorganization. However, such considerations do not alter the purpose of the

[817] Pages 16 and 17of the Shapiro-Sarin Rebuttal of Barbera.

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reorganization, which was to save tax and thereby increase after-tax profit. To state it another way, it is clear that the Appellant would not have implemented the reorganization were it not for the expectation of tax savings. I do not believe the Appellant suggests otherwise.

[741] Considering this context, I find as a fact that the primary purpose of the Series was to save the tax that would have been payable in Canada if the Appellant had entered into the contracts with Tenex and Urenco directly. In fact, the only reason for the Tenex Series, as evidenced by the initial focus of the tax plan conceived by Mr. Goheen, was to save Canadian tax. Although the tax would only be saved if a profit was earned from the agreements with Tenex and Urenco, this does not detract from the fact that the purpose of the Series was to save Canadian tax.

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[742] My finding that the principal purpose of the Tenex Series and the Urenco Series was to save tax must not to be taken as a condemnation of the Appellant's behaviour. For the reasons described above, any tax savings realized by the Appellant resulted from the application of the foreign affiliate regime in the ITA. In taking advantage of the foreign affiliate regime, the Appellant was simply utilizing a tax planning tool provided by Parliament. The foreign affiliate regime has clearly defined boundaries, as evidenced by the fact that CESA/CEL's income from selling uranium to the Appellant was subject to current taxation in Canada.

[743] Unlike the Series, the primary purpose of each of the Transactions does not simply follow the purpose of the reorganization. The Appellant implemented the reorganization to increase the after-tax profit of the Cameco Group by placing the profit from an active business carried on outside Canada in a jurisdiction that imposed lower taxes than Canada. CESA/CEL and the Appellant entered into the Transactions for the bona fide purpose of earning a profit. To the extent a profit was earned by CESA/CEL, it was subject to a lower rate of tax because of the reorganization. However, the tax savings resulting from the reorganization do not alter the bona fide profit-earning purpose of the Transactions.

(3) Paragraphs 247(2)(a) and (c)

a) Introduction

[744] In the balance of these reasons, I will refer to the rules in paragraphs 247(2)(a) and (c) as the "traditional transfer pricing rules".

[745] In *Marzen*, the Federal Court of Appeal summarized the general approach dictated by paragraphs 247(2)(a) and (c) as follows:

> A multinational enterprise is free to set a price for a transaction between two corporations it controls under different tax jurisdictions. Transfer pricing is the setting of the price between related corporations. Identifying the fair market value of a transaction between related corporations is the underlying principle in transfer pricing. It entails a comparative exercise with what parties dealing at arm's length would have considered.
>
> The language in section 247 does not contain criteria nor does it specify a methodology to determine the reasonable amount parties dealing at arm's length would have paid in any given transaction where transfer pricing principles apply. Consequently, Canadian courts have relied on the *OECD Guidelines 1995* (the Guidelines) as being of assistance in that respect.
>
> The Supreme Court stated in *Canada v. GlaxoSmithKline Inc*., 2012 SCC 52, [2012] 3 S.C.R. 3 [*Glaxo*], at paragraphs 20 and 21 that the Guidelines are not controlling as if they were a Canadian statute but they are useful in determining the amount a reasonable business person, who was party to the transaction, would have paid if it had been dealing at arm's length. The Court also affirmed that a transfer pricing analysis is inherently fact driven.[818]

[746] As stated by the Supreme Court of Canada in *GlaxoSmithKline*, the application of the traditional transfer pricing rules is an inherently fact-driven exercise. The questions of fact raised by the traditional transfer pricing rules are typically resolved with the assistance of expert opinion.

[747] In these appeals I have a cornucopia of expert opinion to parse and consider. The evidence of each expert relies in part on hearsay. In considering the expert evidence, I have been careful not to rely on any hearsay in the expert evidence as independent proof of that hearsay.

[748] An expert may rely on hearsay as a basis for expert opinion provided the expert did not obtain the hearsay from a suspect source.[819] An expert's reliance on non-suspect hearsay goes to the weight given to his or her expert evidence.[820] If an expert relies on unproven facts of the type reasonably relied upon by experts in the

[818] Paragraphs 16 to 18.
[819] *R. v. Lavallee*, [1990] 1 S.C.R. 852 ("*Lavallee*") at pages 898 to 900. Suspect hearsay evidence includes hearsay evidence provided by the party retaining the expert. For an expert to rely on suspect hearsay, the truth of that hearsay must be independently established: *R. v. Giesbrecht*, [1994] 2 S.C.R. 482 and *Lavallee* at page 900.
[820] *City of Saint John v. Irving Oil Co. Ltd.*, [1966] S.C.R. 581 at pages 591 to 592.

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same field, such reliance does not in and of itself diminish the weight to be given to the evidence of the expert.[821]

[749] The first step under the traditional transfer pricing rules is to determine whether the terms or conditions made or imposed, in respect of the transaction or series, between any of the participants in the transaction or series of transactions differ from those that would have been made between persons dealing at arm's length. If the answer is yes, then the second step is to determine the terms and conditions that would have been made between persons dealing at arm's length in the same circumstances.

[750] It is apparent that the traditional transfer pricing rules are circular because the terms and conditions described by paragraph 247(2)(c) dictate whether the condition in paragraph 247(2)(a) is satisfied. Accordingly, in practice, the two-step approach described by the traditional transfer pricing rules is one step since to answer the question posed by paragraph 247(2)(a) it is necessary to consider the terms and conditions that would have been made between persons dealing at arm's length in the same circumstances.

[751] As stated in *GE Capital*, the task under the traditional transfer pricing rules is to ascertain the price that would have been paid in the same circumstances if the parties had been dealing at arm's length. The traditional transfer pricing rules must not be used to recast the arrangements actually made among the participants in the transaction or series, except to the limited extent necessary to properly price the transaction or series by reference to objective benchmarks.

[752] This approach is highlighted by the decisions of the Tax Court of Canada and the Federal Court of Appeal in *GE Capital*, in which one important question raised was whether the implicit support resulting from the parent-subsidiary relationship should be ignored in determining an appropriate price for the explicit guarantee provided by the taxpayer's U.S. parent. Hogan J. concluded that the implicit support should not be ignored and Noɹl J.A. (as he then was) agreed:

> [52] It is important to note that the respondent does not contend that the method adopted by the Tax Court Judge has the effect of re-casting the transaction in an impermissible way. The method identifies the transaction as it took place between the respondent and GECUS and seeks to ascertain the benefit to the respondent by comparing, based on recognized rating criteria, the credit rating associated with the implicit support with that associated with the explicit support. The only

[821] *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678 at paragraphs 62 and 63.

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> question is whether implicit support is a factor that can be considered when applying subsection 69(2) and paragraphs 247(2)(*a*) and (*c*), given that it arises by reason of the non arm's length relationship.
>
> [53] The Tax Court Judge answered this question in the affirmative. I can detect no error in this regard.

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[753] With respect to the Series, the question to be addressed is whether arm's length persons in the same circumstances would have attributed value to the business opportunities. With respect to the Transactions, the question to be addressed is whether the pricing of the Transactions reflected arm's length pricing, having regard to all the circumstances and to objective benchmarks.

b) The Application of Paragraphs 247(2)(a) and (c) to the Series and the Transactions

i. General Comments Regarding the Expert Evidence

[754] I find that Doctor Horst undertook a transfer pricing analysis under the traditional transfer pricing rules that accords with the approach endorsed in *GlaxoSmithKline*, *GE Capital* and *Marzen*. Doctor Horst considered the various methodologies endorsed in the 1995 Guidelines and determined that the CUP method provided the most reliable results in the circumstances.

[755] Doctor Horst identified the comparable uncontrolled transactions utilized in his analysis and explained the adjustments he made to eliminate the effect of the differences between the Transactions and the comparable uncontrolled transactions.

[756] Although this is by no means determinative, I note that even the proposed amendments following the completion of the OECD/G20 Base Erosion and Profit Shifting Project recognize the general appropriateness of using the CUP methodology to price commodities:

> Subject to the guidance in paragraph 2.2 for selecting the most appropriate transfer pricing method in the circumstances of a particular case, the CUP method would generally be an appropriate transfer pricing method for establishing the

> arm's length price for the transfer of commodities between associated enterprises. . . .[822]

[757] In his testimony in chief, Doctor Sarin makes the following general observation regarding the Respondent's approach to the transfer pricing issues in these appeals:

> The CRA is falling in a classic economic trap. It is looking at not the transaction as it was designed at the point in time that it was arranged. It is looking at what was the outcome of the transaction.
>
> And the outcome of the transaction was that a large Canadian taxpayer with mines and thousands of employees lost money. And it is also the outcome of the transaction whereby, as a relatively small shop -- one, two, three-people shop -- in Europe landed up making large amounts of money. And the CRA views that as a problem, and there is a problem, and the problem really is that they're looking at the outcome of the transaction in hindsight. The right way to think of it is looking at the transaction at the time it actually was entered into.[823]

[758] I find that Doctor Barbera and Doctor Wright did not undertake the transfer pricing analysis required by the traditional transfer pricing rules and that their expert evidence is to a significant degree based on hindsight and on assumptions regarding the subjective views of the Appellant and Tenex at the time the relevant transactions occurred rather than on objective benchmarks as required by the traditional transfer pricing rules.[824]

[759] Doctor Barbera describes his approach to the Series and the Transactions as replacing the prices actually paid under the intercompany contracts with "the prices that would have been charged between unrelated parties conducting the same transactions under the same or similar circumstances."[825] However, the result of his analysis is not to reprice the Series or the Transactions with reference to objective benchmarks but to replace the legal substance of the Series and the Transactions with notional relationships in which the Appellant had essentially all the price risk associated with the purchase and sale of the uranium legally and factually purchased and sold by CESA/CEL.

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[822] OECD/G20 Base Erosion and Profit Shifting Project, *Aligning Transfer Pricing Outcomes with Value Creation*, Actions 8-10: 2015 Final Reports at page 53, paragraph 2.16A. The report dedicates two pages to commodity transactions and 74 pages to intangibles (excluding the summaries).
[823] Lines 9 to 22 of page 4983 of the Transcript.
[824] *GE Capital* at paragraph 55.
[825] Paragraph 2 on page 1 of the Barbera Report.

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[760] Doctor Barbera opines that the activities of CESA/CEL can be divided into two separate buy-sell operations but that each such operation is essentially equivalent to that of a routine distributor. Doctor Barbera, ironically, observes that "[s]uch distributors typically buy and sell products with stable prices over time." In my view, these conflicting statements highlight Doctor Barbera's failure to address the legal substance of the Series and the Transactions and his attempt to fit the Series and the Transactions into a paradigm that ignores the economic reality of the actual legal arrangements.

[761] Doctor Barbera proceeds from the view that the Appellant's price forecasts and production cost forecasts are relevant to the price the Appellant would accept for its uranium and to the price the Appellant would accept for the HEU Feed Agreement.[826] For example, Doctor Barbera opines that in light of the Appellant's own price forecasts and cost expectations it would want to retain the "upside" of the HEU Feed Agreement and would not allow CESA/CEL to achieve more than a routine distributor's return from the HEU Agreement.

[762] In my view, the subjective views of the Appellant are not relevant to the transfer price of the Series or the Transactions, which involve dealings in a commodity with a market-determined value. The Appellant had no control over the market price of uranium and the Appellant's price and production cost forecasts had no bearing on the market price of uranium. Nor do these factors have any bearing on what terms and conditions arm's length persons would agree to in the same circumstances. A person's subjective view of a market is not an objective benchmark and reliance on such views introduces intolerable uncertainty into the transfer pricing rules.

[763] Doctor Barbera opines that the HEU Feed Agreement was not a comparable because Tenex was likely motivated by different considerations than a typical uranium producer. Doctor Barbera's assumptions regarding the forces driving Tenex are pure speculation and, unless there is clear evidence of an inequality of bargaining power, such considerations are not relevant to the validity of the HEU Feed Agreement as an arm's length comparable.

[826] Doctor Barbera's VM is based almost entirely on the Appellant's price forecasts: see pages 50 to 61 of the Barbera Report. Doctor Barbera's assessment of the arm's length price for the deal with Tenex starts with a discussion of the Appellant's profit expectations: paragraphs 216 to 233 of the Barbera Report.

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[764] In addition to the foregoing concerns, I am unable to reconcile the calculations in the expert reports of Doctor Barbera[827] with the adjustments set out in schedules to the Respondent's pleadings. I have therefore concluded that Doctor Barbera's opinions are in substance addressing the Respondent's position under paragraphs 247(2)(b) and (d) and not the factual issues raised by paragraphs 247(2)(a) and (c).

[765] Doctor Wright performed an analysis of various hypothetical scenarios involving the performance of various functions, but did not provide any transfer prices as such. Again, the hypothetical scenarios appear to be in support of the Respondent's position under paragraphs 247(2)(b) and (d).

[766] The 1995 Guidelines state the following regarding a functional analysis:

> The functions that taxpayers and tax administrations might need to identify and compare include, e.g., design, manufacturing, assembling, research and development, servicing, purchasing, distribution, marketing, advertising, transportation, financing, and management. . . . While one party may provide a large number of functions relative to that of the other party to the transaction, it is the economic significance of those functions in terms of their frequency, nature, and value to the respective parties to the transactions that is important.[828]

[767] My main concern with the functional analysis of Doctor Wright is that she fails to recognize the economic significance of the core functions performed by CESA/CEL and Cameco US, i.e., purchasing, marketing and selling a commodity the value of which is market-driven. While transportation, financing and management may have played a role, I do not accept that these functions were economically significant in relation to the core functions. With respect to financing, Doctor Chambers opined:

> Arms-length counterparties would have incorporated CEL's relationship with and support by its parent in assessing whether or not to enter into substantial contracts with CEL. That parental support, along with CEL's stand-alone position, would have made CEL a credible counterparty, able to fulfill its obligations under purchase and sales contracts, financing and other business dealings from 2002 onwards.[829]

[827] Doctor Wright did not provide any opinions regarding the arm's length price of the uranium purchased and sold by CESA/CEL.
[828] Paragraph 1.21. See, also, paragraphs 1.42 and 1.43 of the 2010 Guidelines.
[829] Paragraph 9 on page 6 of the Chambers Report.

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[768] In short, the implicit support provided to CESA/CEL by the Appellant would be factored into any financial assessment of CESA/CEL just as such parental support was factored into the determination of an arm's length guarantee fee in *General Electric*.

ii. The Series

[769] With these general comments in mind, I will address the Tenex Series and the Urenco Series first. The Respondent submits that, with respect to the HEU Feed Agreement and the Urenco Agreement, the Appellant knew it had negotiated valuable business opportunities, and that it placed these opportunities in CESA/CEL by allowing CESA/CEL to enter into the HEU Feed Agreement and the Urenco Agreement.

[770] With respect to the Tenex Series, Doctor Barbera relies on the Appellant's price forecasts, cost estimates and price of acquiring UF_6 from Tenex to justify the conclusion that the Appellant would not allow CESA/CEL to earn anything more than a routine distributor's return from entering into the HEU Feed Agreement. On the basis of the arm's length agreements between Nukem and Kazatomprom and between Nukem and Sepva-Navoi, Doctor Horst estimates the gross margin for a routine distribution function to be between 8% and 11.9%.[830]

[771] In the Horst Rebuttal of Barbera, Doctor Horst reviews Doctor Barbera's analysis of CESA/CEL's execution of the HEU Feed Agreement and opines:

> But whether the appropriate gross margin for CEL and CCO was 8% or 11.9%, Tenex's offer to sell UF_6 under an EBP method that allowed an 8% discount from the Escalated TradeTech Base Price provided no unearned windfall for CEL and CCI taken together. If there is no unearned windfall for CEL and CCI, there is no economic basis for the Barbera Report's conclusion that CCO was entitled to a share of that gross margin. . . .[831]

[772] In rebutting Doctor Barbera's analysis, Doctor Horst assumes that the maximum value of the HEU Feed Agreement at the time it was executed by CESA/CEL was equal to the discount on market price provided for in the default pricing mechanism. Of course, the discounted price also had to exceed the floor price initially set at US$29 per kgU. In my view, Doctor Horst's assumption regarding the value of the HEU Feed Agreement is conservative and more than

[830] Pages 25 to 27 of the Horst Rebuttal of Barbera.
[831] Page 27 of the Horst Rebuttal of Barbera.

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justifies the conclusion that no adjustment is required under the traditional transfer pricing rules because of the Tenex Series.

[773] In the case of an arm's length bilateral agreement to purchase and sell a commodity with a market-determined value, absent evidence to the contrary, it is reasonable to assume that at the inception of the agreement the consideration agreed to be given by one of the parties to the agreement is equal to the consideration agreed to be given by the other party to the agreement. Otherwise, one party would be transferring value to the other party for no consideration, which is inconsistent with the behaviour of persons dealing at arm's length.

[774] Doctors Shapiro and Sarin explain this point in their rebuttal of Doctor Barbera's analysis of the HEU Feed Agreement:

> In establishing the *ex-ante* value of the contracts between CEL and Tenex, it is critical to understand that these were arm's length contracts. The Tenex agreement was intensely negotiated over a period of years by four parties dealing at arm's length, with each party clearly looking to its own interests. The resulting arm's length transactions reflected market conditions at the time.
>
> Tenex was acting in its own interest, and would not grant Cameco access to their HEU material at prices that were expected to yield risk-free gross margins of 35 percent. As noted by Dr. Barbera (paragraph 220), no profit-maximizing company would give away potentially significant value. Instead, **the price at which Tenex agreed to sell HEU would be commensurate with expected market prices and the risks being borne by the Cameco Group**.
>
> Similarly, CCO would not have sought partners in Cogema and Nukem if the Tenex transaction was expected to yield risk-free gross margins of 35 percent. Instead, the coparticipation reflects the desire to spread the risks of participation, as demonstrated in our affirmative report.
>
> While the Tenex transaction turned out to be highly profitable, this is because the price of uranium unexpectedly rose sharply. At the time the deal was reached, this was not known, and to conclude that parties negotiating at arm's length left so much money on the table is contrary to economic logic.[832]
>
> [Emphasis added.]

[775] The evidence shows that the driving force behind the Appellant's negotiation with Tenex was the desire to control the sale of the HEU feed to avoid

[832] Section VIII.A.7 of the Shapiro-Sarin Rebuttal of Barbera.

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it being dumped on the market thereby depressing the market price of uranium. The Appellant also did not want Nukem alone to secure an agreement with Tenex for fear that Nukem would sell the HEU feed on the spot market with the same effect.[833]

[776] The evidence does not support the Respondent's position that the Appellant viewed the HEU Feed Agreement as giving rise to an economic windfall for the Appellant. Rather, the evidence supports the conclusion that, as of the date on which the HEU Feed Agreement was executed by CESA/CEL and Tenex, the agreement had no intrinsic economic value because the obligations on each side were balanced.

[777] The Appellant started negotiating an agreement with Tenex in early 1993. In 1996, the Appellant agreed with Cogema to jointly negotiate an agreement for the HEU feed with Tenex and shortly thereafter Nukem joined this joint effort. The Appellant did not require compensation from Cogema or Nukem for this new arrangement even though the Appellant had been negotiating an agreement with Tenex since early 1993. Conversely, Cogema and Nukem did not require compensation from the Appellant for its taking on a percentage of any agreement reached with Tenex. The lack of consideration flowing in either direction reflects the rational expectation of all three arm's length parties that any agreement reached with Tenex would have no intrinsic economic value at the time it was made.

[778] On April 13, 1999, shortly after the HEU Feed Agreement was executed, Mr. Goheen reported to the Executive Committee of the Appellant that the expected gross profit from the HEU Feed Agreement was 4% through 2002 and 6% thereafter. Mr. Assie explained that the projected gross profit assumed that 92% of the spot price for restricted UF_6 reported by TradeTech and Ux for the previous month would exceed the US$29 per kgU floor price so that CESA/CEL could exercise the FOENs and realize an 8% gross profit less its expenses. In fact, the discounted market price for UF_6 did not exceed the floor price until 2002, which suggests that, at least initially, Mr. Assie's prediction regarding profitability was optimistic.

[779] With respect to the spot price benchmarks used in the HEU Feed Agreement, Doctors Shapiro and Sarin observe that in the first quarter of 1999 the TradeTech spot price indices for uranium sourced from Russia and other areas within the

[833] The evidence regarding the Appellant's motivations *vis-à-vis* an agreement with Tenex is summarized in Section D.(5) above under the heading "The Agreement Between Tenex and the Western Consortium".

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former Soviet Union were 10% to 20% lower than for uranium from other geographic sources.[834] Since the benchmark for "restricted" uranium (i.e., uranium that can be sold into restricted countries such as the United States) used in the HEU Feed Agreement did not reflect this 10% to 20% discount, one might reasonably conclude that the benchmark used in the HEU Feed Agreement overstated the market value of the HEU feed even after application of the 8% discount.

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[780] The Respondent submits that Tenex did not have the resources to sell the HEU feed itself and that this leads to the conclusion that Tenex agreed to terms and conditions that resulted in a valuable business opportunity for the Appellant, which it passed on to CESA/CEL.

[781] However, in a confidential memorandum dated January 4, 1999, Mr. Grandey explained that the western consortium was in fact focused on various options that would allow the Appellant, Cogema and Nukem to purchase the HEU feed at market prices notwithstanding the Russian state requirement that the price of the HEU feed be no lower than a minimum of US$29 per kgU. There is no discussion in the memorandum of a windfall to the western consortium and the clear focus of Mr. Grandey, the lead negotiator for the western consortium, is the reduction of the financial risk associated with an agreement with Tenex for the HEU feed that included a "high" floor price. The approach ultimately settled on by the western consortium and Tenex was to use options (FOENs) so that the Appellant, Cogema and Nukem would not be required to purchase the HEU feed at above market prices.

[782] The market price of uranium declined in the second half of 1999 and in 2000 so there was no economic reason for the western consortium to exercise the options in the HEU Feed Agreement. Nevertheless, in 2000, the western consortium committed to purchasing the *quota* amount of UF_6 to show good faith to Tenex and the U.S. government.[835] On June 7, 2000 CESA's management committee discussed the anticipated losses from exercising the options:

> The income statement for the year 2000 as reforecasted provides for a loss of approximately $2.5 million. This is, in essence, due to the fact that the remaining sales in the year 2000 are composed largely of HEU feed material. This is being purchased from Tenex at a minimum price as provided for in the HEU Agreement which is, as a result of the recent negative uranium market development,

[834] Page 30 of the Shapiro-Sarin Rebuttal of Barbera.

[835] The quota amount is the amount of Russian source UF_6 that the United States would allow the western consortium to sell into the United States.

> exceeding the present spot market price. The latter is, however, the basis for the contemplated sale of the HEU feed to Cameco Corporation later this year thereby resulting in a loss. It is expected, as G. Glattes explained, that this recent price trend will turn around with the predicted upswing of the uranium market. The continuation of purchases by CSA under the HEU Agreement is, as G. Glattes went on, important from a broader corporate perspective in light of the medium and long-term benefits which are connected with the HEU Agreement for the company and the stability of the uranium market.
>
> The Management Committee expressed its concern regarding the extent of losses to be expected and will continue to closely monitor the further developments.[836]

[783] Tenex was not happy with the volumes of HEU feed being purchased by the western consortium and, following further negotiations, the HEU Feed Agreement was amended on November 8, 2001 to reduce the floor price from US$29 per kgU to US$26.30 per kgU in exchange for the exercise by the western consortium of options for delivery of HEU feed in 2002 through 2013.

[784] The Respondent submits that the Appellant negotiated the HEU Feed Agreement and the amendments to that agreement and passed the value of the negotiations on to CESA/CEL. Doctors Shapiro and Sarin opine that the cost of negotiation was a sunk cost that was not relevant to whether the HEU Feed Agreement had intrinsic economic value at the time the parties executed the agreement. I agree with Doctors Shapiro and Sarin that negotiation in and of itself does not determine the value of an agreement reached as a result of the negotiation. The proper focus is on the terms and conditions that result from the negotiation, not on the negotiation itself.

[785] According to Doctors Shapiro and Sarin, the only factors that a rational economic actor would consider in determining the value of an agreement at its inception are the future benefits and costs of the agreement. Since the principal benefit of the HEU Feed Agreement–controlling the supply of the HEU feed–benefited everyone in the market at the time, it did not matter who executed the agreement to achieve that benefit.[837]

[786] The evidence recited above leads to the conclusion that the economic benefit of participating in the HEU Feed Agreement was negligible at the time the parties executed the agreement in March 1999. While there is no doubt that CESA/CEL was afforded an opportunity, whether that opportunity had a positive or negative

[836] Exhibit A008070, Items 2 and 3.
[837] Section XI.A on page 76 of the Shapiro-Sarin Report.

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value depended on uncertain future events. A reasonable view of the circumstances, however, is that the HEU Feed Agreement would have had a negative value to CESA/CEL in March 1999 but for the optionality of the agreement, which was negotiated to address that concern. The optionality in the HEU Feed Agreement was eliminated in 2001 with the execution of the fourth amendment.

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[787] There is no doubt that after 2002 the HEU Feed Agreement became very valuable to CESA/CEL. However, that value resulted from a significant rise in the market price of uranium after 2002, which, at the time they executed the HEU Feed Agreement and the fourth amendment, the parties did not know would occur.

[788] On the basis of the foregoing, I conclude that there is no evidence warranting an adjustment with regard to the Appellant because of the Tenex Series.

[789] The analysis of the Urenco Series is similar but not identical to the analysis of the Tenex Series.

[790] Mr. Assie testified that the possibility of an agreement with Urenco was first identified in the spring or early summer of 1999. The Urenco Agreement was executed by CESA/CEL on September 9, 1999. Mr. Assie stated that the objective of the Urenco Agreement was twofold. The first objective was to avoid Urenco dumping UF_6 onto the market and depressing the market price of uranium. The second objective was to provide a trading opportunity for CESA/CEL. Mr. Assie and Mr. Britt took the lead in negotiating the Urenco Agreement on behalf of CESA/CEL.

[791] Mr. Glattes testified that Mr. Britt led the negotiation but that he himself had a close relationship with senior personnel at Urenco and that every step of the negotiation with Urenco was discussed at the sales meetings. As I have stated before, Mr. Glattes has a wealth of experience in the uranium industry and clearly garnered the respect of others in the Cameco Group. I accept Mr. Glattes' testimony that he had input into the negotiations even if he did not lead the negotiations or recall attending specific meetings with Urenco.

[792] Mr. Assie testified that he and Mr. Britt worked closely with Mr. Glattes, that they kept Mr. Glattes fully informed regarding the negotiations with Urenco and that Mr. Glattes dealt with the European regulatory issues that had to be resolved for CESA/CEL to purchase UF_6 from Urenco. The regulatory issues

associated with the purchase and sale of uranium are no doubt of significant importance.

[793] The Urenco Agreement fixed the price of the UF_6 at a base escalated price starting at US$25.05 plus 50% of the amount by which the spot price exceeded US$30.10 (this spot price being based on specified spot price indices). No UF_6 was delivered under the original Urenco Agreement.

[794] The Urenco Agreement included a clause that allowed CESA/CEL to renegotiate the agreement if the price of uranium remained below a stipulated threshold for six months. If the renegotiation failed then CESA/CEL could cancel the agreement. The price of uranium did remain below the threshold and the agreement was renegotiated, resulting in Amendment No. 1 dated August 8, 2000.

[795] Amendment No. 1 reduced the price for UF_6 delivered in 2000 to US$22.50 per kgU and amended the base escalated price for 2001 onward to US$22.50 plus 50% of the amount by which the spot price exceeded US$27.55 (this spot price being based on specified spot price indices).

[796] Amendment No. 1 also had a renegotiation clause and once again the price of uranium remained below the threshold price, resulting in renegotiation and in Amendment No. 2 dated April 11, 2001. Amendment No. 2 further reduced the price for the UF_6.

[797] The UF_6 to be delivered by Urenco under the Urenco Agreement was acquired by Urenco under an agreement with Tenex whereby Urenco delivered its uranium tails to Tenex and Tenex delivered UF_6 to Urenco.[838] Urenco had no guarantee that Tenex would deliver UF_6 in exchange for its tails so Urenco's supply of UF_6 was uncertain. The UF_6 delivered by Urenco was considered to be of Russian origin.

[798] Doctor Barbera opined that the Appellant would not have allowed an arm's length party to enter into the Urenco Agreement and applied the same analysis he applied to the HEU Feed Agreement. In doing so, Doctor Barbera assumed that Cameco US would sell the UF_6 purchased from Urenco at the spot prices forecast by the Appellant.[839]Doctor Barbera's analysis does not distinguish between an agreement, such as the HEU Feed Agreement, negotiated prior to the existence of

[838] The uranium tails were depleted uranium waste resulting from Urenco's enrichment activities.
[839] Pages 91 and 92 of the Barbera Report.

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the subsidiary that signs the agreement and an agreement negotiated on behalf of the subsidiary that signs the agreement.

[799] In this case, Cameco Group identified a possible business opportunity to purchase UF_6 from Urenco and that opportunity was pursued by Mr. Britt and Mr. Assie on behalf of CESA/CEL. Since the negotiation with Urenco was on behalf of CESA/CEL, the actual business opportunity represented by the Urenco Agreement was CESA/CEL's from the start. Even if it was the Appellant's decision to have CESA/CEL pursue the opportunity, that decision alone does not warrant a transfer pricing adjustment.[840]

[800] The fact that Mr. Britt and Mr. Assie led the negotiation for the Urenco Agreement does not mean that CESA/CEL received a windfall when it executed the Urenco Agreement or the amendments to that agreement. If there is a transfer pricing issue because of Mr. Britt's and Mr. Assie's involvement in the negotiations, that issue is whether Cameco US should have been compensated for the time of its employees. However, since Cameco US also benefited from an agreement with Urenco because of its 2% commission on sales of Urenco UF_6, it is unlikely such a transfer pricing issue exists.

[801] As with the HEU Feed Agreement, the mere possibility that CESA/CEL could earn a profit by purchasing Urenco's UF_6 and selling it in the market is not evidence that the Urenco Agreement had value that accrued to CESA/CEL at the time the agreement was executed. Nor do the Appellant's price forecasts determine the value of the agreement. The Urenco Agreement was negotiated by persons dealing at arm's length, which means that each party took on contractual obligations and that at the time the agreement was executed the respective values of these obligations cancelled each other out. There is no evidence to support a different view regarding the value of the Urenco Agreement.

[802] The Urenco Agreement (as amended) may have become valuable to CESA/CEL but, as with the HEU Feed Agreement, that occurred because the market price of uranium increased significantly after 2002. Since CESA/CEL took on the price risk when it entered into the Urenco Agreement, CESA/CEL was entitled to the upside.

[840] As stated earlier, this was the conclusion of the United States Tax Court in *Amazon.Com*, following the earlier decision in *Merck*.

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[803] On the basis of the foregoing, I conclude that there is no evidence warranting an adjustment with regard to the Appellant because of the Urenco Series.

iii. The Transactions

[804] Doctor Barbera describes his cost plus analysis as the most reliable means of determining the arm's length price for sales of uranium by the Appellant to CESA/CEL under the BPCs. The final version of Doctor Barbera's cost plus analysis is found in the Barbera Addendum and the Barbera Update. Doctor Barbera opined that his cost plus analysis required an aggregate upward adjustment to the Appellant's income of $238 million, which includes an upward adjustment of $22 million for loan transactions. The adjustments are set out in Table 3 of the Barbera Update as follows:

All figures in Millions of CAD

	2003	**2005**	**2006**	**Total**
CP Adjustment	18.0	76.8	121.3	216.1
Loaned Amount Adjustment	0.0	16.5	5.4	22.0
Total Adjustment	**18.0**	**93.3**	**126.8**	**238.0**

[805] The 1995 Guidelines state that, in order for the cost plus method to apply, it is necessary that either "*1.*) none of the differences (if any) between the transactions being compared or between the enterprises undertaking those transactions materially affect the cost plus mark up in the open market; or, *2.*) reasonably accurate adjustments can be made to eliminate the material effects of such differences."[841]

[806] The cost plus method implicitly assumes a product or service with a non-volatile price. The 1995 Guidelines state that the cost plus method "is most useful where semi-finished goods are sold between related parties, where related parties have concluded joint facility agreements or long-term buy-and-supply arrangements, or where the controlled transaction is the provision of services."[842]

[841] Paragraph 2.34 of the 1995 Guidelines. See, also, paragraph 2.41 of the 2010 Guidelines.
[842] Paragraph 2.32 of the 1995 Guidelines. See, also, paragraph 2.39 of the 2010 Guidelines. And see, more generally, the discussion at paragraphs 2.32 to 2.45 of the 1995 Guidelines and at paragraphs 2.39 to 2.55 of the 2010 Guidelines.

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The cost plus method is valid in that context because it compares the margin earned in comparable arm's length transactions with the margin earned in the non-arm's length transactions. The objective of the cost plus analysis is to reliably identify the magnitude of the price differences, not differences in cost.[843]

[807] If the cost plus method is applied to a commodity with a potentially volatile price then the issue becomes one of how to identify and remove the price volatility component of the arm's length margin. If the price volatility component cannot be removed from the arm's length comparable then the requirement that there be no difference that materially affects the cost plus mark up in the open market is not satisfied.

[808] Doctor Barbera relies on a selection of sixteen arm's length contracts for his benchmark. Three of the contracts are base escalated price contracts and thirteen are market-based price contracts. Of those thirteen, five use a capped market price formula.

[809] Doctor Barbera uses the Appellant's actual results on sales of uranium to third parties under these contracts in 2003, 2005 and 2006 to determine the margin that an arm's length person would earn on sales of uranium under the BPCs. Doctor Barbera opines that the comparison is valid because the Appellant entered into or renegotiated the third-party contracts during the same 1999 to 2001 time period as that during which the BPCs were concluded.

[810] Doctor Horst opines that it is not possible to reliably use contracts with market-based price mechanisms as arm's length comparables because the future price under such contracts depends on the future price of uranium, which is uncertain at the time the contracts are made.[844] Accordingly, if market-based contracts are used to determine the arm's length margin in a future year, the analysis is in essence using hindsight to determine the margin because the future price is the result of the choice made at the inception of the contract.

[811] To understand this point, it is helpful to first recite an opinion of Doctors Shapiro and Sarin:

> Without the benefit of hindsight, no contracting option is unequivocally better than another, and none is *prima facie* irrational. Whether a supplier or consumer ends up better off under a base-escalated contract, a pure market-price contract, or

[843] Barbera Update at page 2.
[844] Section E of the Horst CPM Rebuttal.

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> a market-price contract with a ceiling, depends on the future price of uranium. Only in hindsight can one know whether a particular type of contract was the right one for a buyer or seller to enter into, and on an *ex-ante* basis, any choice could be reasonable depending on counterparty preferences and other market circumstances.[845]

[812] The actual price of uranium in a future year under a market-price-based contract reflects the result of the originally neutral choice made when the arm's length persons agreed to the price mechanism in the contract. In the case of a commodity with a potentially volatile price, the future result will almost invariably favour one pricing choice over another, different pricing choice even if the initial choices each reflected arm's length terms and conditions.[846] Accordingly, to measure the price under a non-arm's length contract against the result under a market-based contract is in effect to use hindsight— i.e., the result of the original choice–since the result could not be known at the time the contract was executed. This skews the calculation of the margin by the "result" component of the choice of price mechanism, contrary to the 1995 Guidelines.

[813] Doctor Horst illustrates the lack of comparability in the sixteen contracts used by Doctor Barbera and the resulting concern with the use of hindsight by stripping down Doctor Barbera's cost plus analysis to reveal that the analysis is in substance a CUP analysis.[847]

[814] Doctor Horst opines that the three base escalated contracts included legacy premiums that inflated the prices in those contracts.[848] Accordingly, the three base escalated contracts are not suitable for a CUP analysis.

[815] Doctor Horst opines that there is no way to make reliable comparisons of the actual prices paid under intercompany capped market price contracts and the actual prices paid under third-party capped market price contracts. Doctor Horst provides the following explanation:

> . . . Suppose that a uranium supplier received requests for quotations from two unrelated buyers (Buyer A and Buyer B), both of whom requested a CMP formula. Suppose that the seller gave both buyers a choice between (1) paying 100% of the spot price at the time of delivery, but subject to a ceiling price of $12.00 per pound, and (2) paying 95% of the spot price at the time of delivery, but subject to a ceiling price of $14.00 per pound. Buyer A was concerned that

[845] Page 29 of the Shapiro-Sarin Report.
[846] Doctor Horst provides a simple example at pages 15 to 17 of the Horst CPM Rebuttal.
[847] Sections C and E of the Horst CPM Rebuttal.
[848] Section E. 1 of the Horst CPM Rebuttal.

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> uranium spot prices would appreciate strongly during the term of the agreement and elected the first option. Buyer B was less concerned than Buyer A about appreciation of spot prices and elected the second option.
>
> Which buyer will pay a lower price at the later date when a delivery is made under their respective agreements? Using algebra, it is easy to determine that:

If the actual spot price at the time of delivery equals $12.63 per pound, the contract prices under both CMP agreements would be $12.00 per pound.
If the actual spot price at the time of a delivery is less than $12.63 per pound, Buyer A's contract price will be higher than Buyer B's contract price. For example, if the spot price at the time of delivery is $10.00 per pound, Buyer A's contract price would be $10.00 per pound (100% of the $10.00 spot price), and Buyer B's contract price is $9.50 per pound (95% of the $10.00 spot price).
Conversely, If the actual spot price at the time of a delivery is higher than $12.63 per pound, Buyer A's contract price will be lower than Buyer B's contract price. For example, if the spot price at the time of delivery is $14.00 per pound, Buyer A's contract price is $12.00 per pound (the price ceiling under its CMP contract), and Buyer B's contract price is $13.30 per pound (95% of the $14.00 spot price).

> Because future spot prices are very uncertain, there is no reliable way of determining at the time the agreement is negotiated whether Buyer A or Buyer B will in fact pay the lower price in some future year. So even though both CMP formulas were negotiated at arm's length at exactly the same time, they yield different prices when actual deliveries are made in later years.
>
> To explain why I conclude that transfer pricing adjustments should not be made based on actual prices paid under CMP agreements, suppose that (1) Buyer A was a related party, whereas Buyer B was an unrelated party, and (2) the actual spot price at the time of delivery was $14.00 per pound. In that case, Buyer A, the related party, would pay a transfer price of $12.00 per pound, and Buyer B, the third party, would pay a price of $14.00 per pound. Assuming the CMP formula that applies to Buyer A would have been agreed to at arm's length at the time that CMP formula was negotiated, it would not be appropriate in my view to make a transfer pricing adjustment based on the differential between the actual prices ($12.00 per pound and $14.00 per pound) at the later time of delivery. Whether the CMP formula in an intercompany agreement is consistent with the arm's length principle must be based on an analysis of the parties' expectations at the time the long-term agreement was made, not the actual prices that prevailed in later years. Only if buyers and sellers could predict future spot prices and, thus, future contract prices with complete certainty could the actual prices paid under a third-party MKT agreement be used to evaluate the actual transfer prices under a related-party MKT agreement. Since buyers and sellers are not prescient, transfer

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> pricing analyses of MKT agreements based on the prices actually paid are, in effect, applying the "wisdom of hindsight."[849]

[816] With respect to the remaining eight market price agreements, Doctor Horst opines:

> I know of no reliable way for comparing contract prices when two contracts use fundamentally different uranium price indices (e.g., spot prices versus the average export price calculated by NRCAN), so I did not include in my CUP or Resale Price Method analyses in my June 2016 Expert Report those third-party agreements that applied uranium price indices that were fundamentally different from the spot prices used in CCO's MKT agreements with CEL. Only with hindsight would the parties know whether or not two MKT agreements that relied on different uranium price indices would or would not yield the same prices for deliveries made several years after the agreements were negotiated. Because Dr. Barbera's Revised Cost Plus Method does not consider, much less adjust for, the effect of differences between uranium price indices, I conclude that his transfer pricing comparisons for MKT agreements are in effect relying on the wisdom of hindsight.[850]

[817] Finally, Doctor Horst opines that Doctor Barbera failed to make required adjustments to address the differences in composition of the sixteen contracts used as arm's length comparables.[851]

[818] Doctor Barbera also performed an RPM analysis and an analysis he called a valuation analysis. Doctor Barbera's valuation methodology is not specifically included in the 1995 Guidelines.

[819] Doctor Barbera's RPM analysis appears to assume that the contracts between CESA/CEL and Cameco US are in effect back-to-back with the purchases from the Appellant under the BPCs and thus place CESA/CEL in the same position vis-à-vis risk as a routine distributor.[852] While it is true that the contracts between CESA/CEL and Cameco US are back-to-back, thereby ensuring that Cameco US does not bear price risk, other than the carve-out agreements under the Urenco Agreement there is no evidence to suggest that CESA/CEL's purchases of uranium were back-to-back with its sales to Cameco US.

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[849] Section E. 2 of the Horst CPM Rebuttal at pages 15 to 17.
[850] Section E. 3 of the Horst CPM Rebuttal at pages 17 and 18.
[851] Section F of the Horst CPM Rebuttal.
[852] See paragraphs 112, 117, 126, 66 and 67 of the Barbera Report. See, however, paragraph 102 in which Doctor Barbera states that the BPCs have no back-to-back relationship with a third-party contract.

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[820] Doctors Shapiro and Sarin opine that Doctor Barbera's RPM analysis is flawed:

> [B]ecause it 1) ignores the price risk borne by CEL (essentially re-characterizing CEL as a risk-free distributor), 2) ignores the fact that CEL's long-term purchase contracts were entered into years before, and under vastly different market conditions than, many of its sales contracts, and 3) uses incomplete data.[853]

[821] Doctor Horst opines that Doctor Barbera's RPM analysis materially overstates the transfer price because it fails to make an appropriate adjustment for changes in market conditions between the time the BPCs were entered into in 1999 through 2001 and the time the long-term agreements between CESA/CEL and Cameco US used for comparison were made.[854] Doctor Horst uses the TradeTech long-term price indicator to make an adjustment yielding the following results:

ADJUSTMENT FOR CHANGE IN MARKET CONDITIONS BASED ON TRADETECH LONG-TERM INDICATOR

		<a>	<b>	<c>
		Year of Delivery		
		2003	2005	2006
	Base Escalated Results Reported in Barbera Report			
1	Average BE Prices for CEL Sales to CCI	$10.10	$12.71	$21.82
2	Average Price for CEL Purchases from CCO	$8.82	$9.15	$9.42
3	CEL's Gross Discount from Resale	12.7%	28.0%	56.8%
	Base Escalated Reults Adjusted for Changed Conditions			
4	Average BE Prices for CEL Sales to CCI	$10.10	$12.71	$21.82
5	Average Price for CEL Purchases from CCO - Adjusted	$9.02	$11.63	$34.49
6	CEL's Gross Discount from Resale - Adjusted	10.7%	8.5%	-58.1%

Note that Lines 1 – 3 calculate CEL's gross margin before making an adjustment

[822] Doctor Barbera's valuation analysis relies on the Appellant's price forecasts in 1999 and 2000 to determine an arm's length price under the BPCs. As already stated, subjective speculation as to the future price of uranium is not a valid objective benchmark on which to base a transfer pricing analysis.

[823] Doctors Shapiro and Sarin opine:

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[853] Page 3 of the Shapiro-Sarin Rebuttal of Barbera. Doctor Shapiro's and Doctor Sarin's detailed analysis of these issues is set out in Section V of the report.

[854] See analysis in Section V. A. on pages 44 through 47 of the Horst Rebuttal of Barbera. Doctor Barbera treated the contracts between CESA/CEL and Cameco US as arm's length because these contracts mirrored the contracts of Cameco US with third parties, except for the 2% discount.

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> . . . Dr. Barbera completely ignores the uncertainty surrounding price forecasts and fundamentally misrepresents the risk inherent in CCO's expected returns. Correcting for his error shows that no adjustment is warranted.[855]

[824] Doctor Horst states his concern with Doctor Barbera's valuation analysis as follows:

> In my view, the Barbera Valuation Method does not yield reliable results for two reasons. First, as I explained above in my critique of the Barbera Tenex Analysis, the prices that wholesale buyers like CEL, Cogema and Nukem were actually willing to pay in EBP agreements with a third-party (Tenex) were substantially lower than the prices that those buyers, according to the Barbera Report analysis of Cameco's spot price forecasts, should have been willing to pay. The Barbera Valuation Analysis concludes that CEL, if it had been dealing at arm's length with CCO, would have been willing to purchase very substantial volumes under an EBP formula with an initial base price of $12.43 per pound (in 2000 U.S. dollars), which represents a 34% premium over the TradeTech Long-Term Indicator for U_3O_8 ($9.25 per pound) as of November 30, 2000.[856]

[825] The Respondent relies on Doctor Wright's analysis to support the position that the profit earned by CESA/CEL from the HEU Feed Agreement and from the BPCs should be attributed to the Appellant because the Appellant performed all the critical functions that earned the profit. The principal functions identified are the services provided by the Appellant under the Services Agreement and market forecasting and research "services" ostensibly obtained by CESA/CEL through Mr. Glattes' and Mr. Murphy's participation in the sales meetings.

[826] With respect to the market forecasting and research services, I am unclear as to how these "services" constituted more than the sharing of available information within a multinational group. The information is not proprietary but is information gathered as a result of the operations of the Cameco Group. No doubt the information flowed from all quarters in the Cameco Group to all quarters in the Cameco Group through the vehicle of the sales meetings. I do not accept that members of a multinational group cannot share such information without triggering a transfer pricing issue. Nevertheless, to demonstrate that the provision of such information is not material to the transfer pricing issues, I will address the sharing of that information as if it were provision of a service by the Appellant to CESA/CEL.

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[855] Page 11 of the Shapiro-Sarin Rebuttal of Barbera. Doctor Shapiro's and Doctor Sarin's detailed analysis of these issues is set out in Section VI of the report.
[856] Pages 35 to 36 of the Horst Rebuttal of Barbera.

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[827] The evidence establishes that CESA/CEL and Cameco US worked in a coordinated fashion to purchase, market and sell uranium. CESA/CEL purchased uranium from the Appellant and third parties and held that uranium in its inventory. Cameco US marketed and sold uranium to third parties. CESA/CEL and Cameco US operated on the understanding that, if Cameco US sold uranium, CESA/CEL would sell the uranium required to meet that obligation to Cameco US at the sale price agreed to by Cameco US less 2%. The employees of CESA/CEL, Cameco US and the Appellant discussed the purchasing, marketing and sales activities of CESA/CEL and Cameco US at the sales meetings and everyone was kept apprised of developments through the circulation of activity reports.

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[828] With the limited exception of carve-out agreements under the Urenco Agreement, the purchases of uranium by CESA/CEL were not contingent upon, matched to or connected with specific sales by Cameco US and therefore CESA/CEL took the price risk of acquiring and holding the uranium it purchased.[857] Doctors Shapiro and Sarin describe CESA/CEL's price risk exposure as follows:

> In this section we demonstrate that CEL bore significant price risk. Price risk stems from volatility and fluctuations in the prices of a company's products and services. As with all commodities, uranium prices are subject to volatility stemming from numerous factors, including but not limited to demand for nuclear power, political and economic conditions in uranium-producing and consuming countries, reprocessing of used reactor fuel, re-enrichment of depleted uranium tails, sales of excess civilian and military inventories, and production levels and costs.
>
> This volatility exposed CEL to price risk in two senses. First, CEL was often committed to purchasing more uranium than it had commitments in place to sell. As a result, if the price of uranium were to fall, CEL would bear the loss in value of its unsold uranium. Second, CEL often had a relatively high percentage of its purchase contracts at fixed or base-escalated prices while having a large share of its sales contracts at market-linked prices. In these situations, if the spot price of uranium were to fall, CEL could suffer losses on uranium it had contracts to sell.[858]

[829] The evidence establishes that the services provided by the Appellant to CESA/CEL in support of its purchase and sale activities were routine commercially available services. Ms. Klingbiel testified regarding the market

[857] Doctor Barbera acknowledges this fact at paragraph 102 of the Barbera Report.

[858] Section VII.B on page 38 of the Shapiro-Sarin Report. Doctors Shapiro and Sarin go on to do an extensive analysis of this price risk in Sections VII.B.1 through VII.B.5 of the Shapiro-Sarin Report.

forecasting and research services provided by TradeTech to the uranium industry, and those services paralleled the market forecasting and research "services" provided by the Appellant to CESA/CEL. Ms. Klingbiel estimated that TradeTech would charge no more than US$500,000 per year for the provision of market forecasting and research services.

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[830] The general administration and contract administration services provided by the Appellant to CESA/CEL are manifestly administrative in nature. For example, Mr. Wilyman described contract administration as follows:

> Once the contract was in place, the contract administration group was charged with administering those agreements and would have interactions with the third-party utilities. If there was anything that came up that was at all contentious, for example, a notice being missed, then typically you would advise the sales group and discuss the path forward to resolving that.[859]

[831] The Respondent points to decisions such as where to draw down inventory as being more than administrative. I disagree. A decision to draw down CESA/CEL's inventory at one converter rather than another in order to save shipping costs is perfunctory. The value of the inventory results from the sale of the inventory, not from the decision as to which pile to use to deliver the inventory to the customer.

[832] Doctors Shapiro and Sarin conducted a transfer pricing analysis of all the services that were ostensibly provided by the Appellant to CESA/CEL and concluded that the aggregate mark-up for the general administrative and contract administration services would be in the range of $26,000 to $36,000 per year and that, according to information from Ms. Klingbiel, the value of the market forecasting and research "services" was no greater than US$500,000 per year.[860] Doctors Shapiro and Sarin also opined that the Appellant did not incur risk in providing any of these services.[861] I accept these opinions.

[833] In addition to the foregoing, the evidence establishes that CESA/CEL contracted with the Appellant for the services provided under the Services Agreement. As stated earlier, the law in Canada has long been that there is no distinction between a corporation carrying on an activity by using its own employees and a corporation carrying on an activity by using independent

[859] Lines 15 to 21 of page 5972 of the Transcript.
[860] See Sections IX.C, IX.D and IX.E of the Shapiro-Sarin Report.
[861] Section IX.F of the Shapiro-Sarin Report.

contractors.[862] This general view further reinforces the conclusion that the general and contract administration services provided by the Appellant to CESA/CEL under the Services Agreement cannot be viewed as functions performed by the Appellant for its own account, that the proper focus of a transfer pricing analysis of such services under the traditional transfer pricing rules is the arm's length value of those services and that the existence of these services does not justify shifting the price risk inherent in the core purchase and sale function of CESA/CEL, which the services support, from CESA/CEL to the Appellant.

[834] The Respondent does not challenge the amount paid by CESA/CEL for the Appellant's services (actual or implicit) but instead asserts in effect that the value of these services is equal to the profit earned by CESA/CEL from its purchase and sale of uranium. I reject that assertion as being wrong in fact–the value of the services was in the range stated in the Shapiro-Sarin Report–and in law-paragraph 247(2)(c) does not permit the price risk associated with the purchase and sale of uranium to be shifted to the Appellant simply because the Appellant provided support services to CESA/CEL under a contract for services or otherwise.

[835] I also reject the Respondent's submission that the services (functions) performed by the Appellant cannot be separated from the price risk associated with CESA/CEL's purchase and sale of uranium. It is manifestly self-evident that price risk is inherent in uranium as a fungible commodity with a market-driven price and that a purchaser of uranium takes on this price risk. The price risk does not attach to the information or judgment used to determine when to purchase or sell uranium and how much to pay or accept for each purchase or sale. In that regard, I accept the following opinion of Doctors Shapiro and Sarin:

> . . . because risk depends on the volatility of an asset's future cash flows, the recipient of those cash flows (the owner of the asset), must bear the risk of the asset. This feature of an asset is reflected in the fact that the price of an asset is based on the risk of that asset, with riskier assets selling at a discount to less risky assets. In other words, potential owners of an asset will discount the price of an asset to reflect the risk they must bear if they buy the asset. The key point is that it is the owners of the asset who bear the asset's risk, not the managers of that risk.
>
> To emphasize this point, we note that there is an entire branch of financial economics called asset pricing that attempts to relate the value of an asset to the riskiness of that asset. In other words, it is a basic precept in finance that the value of an asset is based on the risk of that asset, which again points out that risk is an

[862] *ESG Holdings* and *Weaver*.

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> inherent characteristic of an asset and not of the owner or manager of that asset, or the control exerted over that asset.[863]

[836] I also reject the contention–implicit in the Respondent's position–that the Appellant unilaterally made all decisions regarding the purchase and sale of CESA/CEL's uranium. Mr. Glattes and Mr. Murphy each had more than sufficient expertise and experience in the uranium industry to make judgment calls regarding the purchase and sale of uranium and to contribute to discussions at the sales meetings regarding the purchase and sale of uranium. The evidence establishes that Mr. Glattes and Mr. Murphy each participated in and contributed to the twice-weekly sales meetings when the Cameco Group made key decisions regarding these matters.

[837] The fact that decisions may have been collaborative rather than adversarial does not support the shift of substantive contractual price risk from CESA/CEL to the Appellant. Carol Hansell opined that MNEs act in a highly integrated and interdependent manner driven in part by the financial reporting and disclosure requirements imposed by securities laws on the parent corporation and that a commercially normal relationship between a parent corporation and a subsidiary corporation within a large, complex MNE during the Relevant Period would have involved common goals, coordinated efforts, commercial interdependence and governance integration.[864]

[838] Of course, contractual terms may not always reflect the economic substance of an arrangement, which may in turn warrant a transfer pricing adjustment. In this case, CESA/CEL entered into a number of contracts for the purchase of uranium. In doing so, CESA/CEL took on the price risk associated with its ownership of the uranium acquired under those contracts. CESA/CEL mitigated its price risk by marketing and selling its uranium to arm's length third parties through Cameco US, which performed this function in exchange for a 2% return on gross sales. The return to Cameco US for its marketing efforts has not been challenged in these appeals and there is no evidence to suggest that the return to Cameco US was not an arm's length return (i.e., Cameco US was adequately compensated for its marketing efforts).

[839] The profit ultimately earned by CESA/CEL resulted from the price risk assumed by CESA/CEL under the various contracts that it made with the Appellant and third parties, from the meeting by CESA/CEL of the regulatory requirements

[863] Section X, page 72, of the Shapiro-Sarin Report.
[864] Paragraphs 12.1 and 14.1 of the Hansell Report.

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that permitted its purchase and sale of uranium and from the marketing efforts of Cameco US in selling the uranium purchased by CESA/CEL. When the activities (functions) of CESA/CEL and Cameco US are viewed together, it is apparent that the economic result is entirely consistent with the functions performed by CESA/CEL and Cameco US. The fact that decisions regarding the purchase and sale of uranium by CESA/CEL were made on a collaborative basis during the sales calls does not alter that conclusion.

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[840] In addition to providing services under the Services Agreement, the Appellant guaranteed CESA/CEL's performance under the contracts with Tenex and Urenco and indirectly provided financing to CESA/CEL. However, the Respondent has not attributed a specific value to these particular services and Doctor Barbera did not address the value of these services, other than on the global profit-shifting basis already noted. Accordingly, there is no evidence on which to base an adjustment for these services even if one were warranted.

[841] As stated at the outset, Doctor Horst undertook a rigorous transfer pricing analysis that sought to determine if the prices agreed to under the BPCs and the relevant CC Contracts[865] were arm's length prices. Doctor Horst used three iterations of a CUP analysis as his main approach and then performed an RPM analysis to check the reasonableness of his conclusions under the CUP analyses.

[842] Doctor Horst described the third iteration of his CUP analysis as the most accurate but also the most complicated because it involved adjustments to account for variations in future spot market prices as well as differences in the forecasted base escalated prices.

[843] In the Horst Report, Doctor Horst summarizes the overall results of his CUP analyses as follows:

> . . . As shown in Table 1, under any of my three CUP applications, no discount factor for any intercompany agreement falls below the comparable arm's length range. In fact, all three applications of the CUP method result in discount factors for each intercompany agreement that are either above or in the upper half of the comparable arm's length range. This means that, according to the CUP method, the transfer prices paid under the twelve long-term agreements between CEL and CCO were in some cases greater than, and never less than, prices paid in

[865] Only six of the CC Contracts resulted in deliveries of uranium in the Taxation Years.

> comparable transactions that occurred at arm's length (after adjusting for the inherent differences between those transactions).[866]

[844] Doctor Horst undertakes a separate CUP analysis of the relevant CC Contracts. On the basis of this analysis, he concludes that the Appellant's income for 2003 should be adjusted upward by $671,547.

[845] Doctor Horst recommends aggregate transfer pricing adjustments that would increase the Appellant's income for 2003 by $665,000 and decrease the Appellant's income for 2005 and 2006 by $5,173,000 and $3,959,000 respectively.

[846] Doctor Horst relies on Mr. Hayslett's assessment of the terms and conditions of the BPCs to determine whether he must adjust his transfer pricing analysis to account for off-market terms. After the release of the Horst Report, Doctor Horst made an adjustment to his RPM analysis to account for Mr. Hayslett's conclusion that the BPCs provided CESA/CEL with favourable delivery schedule flexibility.[867] Doctor Horst concluded that this factor had no material impact on his third CUP analysis.

[847] I accept Mr. Hayslett's opinions regarding the terms and conditions of the BPCs and I conclude that Doctor Horst's reliance on these opinions in conducting his analysis of the pricing under the BPCs was reasonable and appropriate in the circumstances.

[848] I do not propose to review in detail Doctor Horst's transfer pricing analysis. I have summarized his analysis earlier in these reasons and I have considered carefully the merits of his analysis. In my view, the third CUP methodology used by Doctor Horst to analyze the prices charged under the BPCs and the CUP methodology used by Doctor Horst to analyze the prices charged under the relevant CC Contracts provide the most reliable and objectively reasonable assessment of those prices.

[849] I reject the Respondent's submissions that the comparables chosen by Doctor Horst are not in fact comparable. In my view, the position of the Respondent's experts on this point is based on speculation as to the motivations of Tenex and other arm's length third parties which purportedly support the conclusion that the economic circumstances in which the comparables arose are different.

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[866] Page 15 of the Horst Report, Volume 1, Exhibit EA000534.
[867] The adjustments are described in Exhibit EA000559 (the "Horst Corrections").

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[850] The 1995 Guidelines describe the focus of "economic circumstances" as follows:

> Arm's length prices may vary across different markets even for transactions involving the same property or services; therefore, to achieve comparability requires that the markets in which the independent and associated enterprises operate are comparable, and that differences do not have a material effect on price or that appropriate adjustments can be made.[868]

[851] There is no evidence to suggest that the price for uranium varied from region to region or that the Transactions involved a different market from that for the comparable arm's length transactions chosen by Doctor Horst. The Cameco Group sold uranium in a global market. The prices commanded in the different regions of the world varied only to the extent that the uranium was restricted uranium or unrestricted uranium, which was a function of the geographic source of the uranium. The price indices published by TradeTech and Ux show the global price differentiation between restricted and unrestricted uranium.

[852] Notably, in *Jean Coutu*, the seven-member majority of the Supreme Court of Canada stated:

> . . . Equally, if taxpayers agree to and execute an agreement that produce [*sic*] unintended tax consequences, they must still be taxed on the basis of that agreement and not on the basis of what they "could have done" to achieve their intended tax consequences, had they been better informed. **Tax consequences do not flow from contracting parties' motivations or tax objectives.**[869]
>
> [Emphasis added.]

[853] Similarly, I see no reason to incorporate the purported motivations of the contracting parties into the objective benchmark-driven analysis required by the traditional transfer pricing rules. I also see no evidence to suggest that there was an inequality of bargaining power between the western consortium and Tenex or between CESA/CEL and Urenco, or between any of the other parties to the agreements used by Doctor Horst as arm's length comparables.

[854] I also reject the Respondent's submission that the results of the transfer price under the BPCs (i.e., losses to the Appellant) support the conclusion that the price was not an arm's length price. While I agree that losses may be an indicator that a

[868] Paragraph 1.30.
[869] At paragraph 41.

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transfer price is suspect, losses are not in and of themselves evidence of a transfer price resulting from non-arm's length terms and conditions. This is particularly true when the property sold is a commodity with a market-driven price that is independent of the cost of its production. The idea that no arm's length party would accept significant and prolonged losses assumes that the losses are known or predictable with certainty at the time the terms and conditions come into existence. I have not been convinced that the Appellant knew or could have predicted with any degree of certainty that it would incur losses because of the BPCs.

[855] Finally, I reject the Respondent's submission that the timing of the Long-term Contracts is somehow suspect and indicative of the fact that the Appellant knew prices would rise. The Appellant's and CESA/CEL's strategic decision to enter into the BPCs when they did may have been based on the subjective views of those parties as to the price of uranium, but that fact has no bearing on whether the terms and conditions agreed to in the Long-term Contracts are arm's length terms and conditions. The serendipity of such a choice is not a basis for a transfer pricing adjustment.

[856] In conclusion, I accept the results of Doctor Horst's third CUP analysis as reflecting a reasonable assessment of the terms and conditions that arm's length parties would have reached in the same circumstances. The result of Doctor Horst's transfer pricing analysis is that the prices charged by the Appellant to CESA/CEL for uranium delivered in the Taxation Years were well within an arm's length range of prices and that consequently no transfer pricing adjustment was warranted for the Taxation Years.

(4) The Resource Allowance

[857] The final issue in these appeals is whether the Appellant is required to include losses on the sale of uranium purchased from CESA/CEL in computing its entitlement to the resource allowance provided under former paragraph 20(1)(v.1) of the ITA and Part XII of the ITR.

[858] For taxation years ending before 2007, the ITA generally permitted taxpayers to claim a resource allowance in respect of income generated from certain natural resource production and processing activities. Specifically, former paragraph 20(1)(v.1) provided that, in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such amount as is allowed by regulation in respect of, among other things, mineral resources in Canada. At the same time, paragraph 18(1)(m) denied the deduction of royalties,

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taxes and other amounts paid to a Canadian federal or provincial government, agent or entity in relation to the acquisition, development or ownership of a Canadian resource property, or the production in Canada of, among other things, metals, minerals or coal from a mineral resource located in Canada (to any stage that is not beyond the prime metal stage or its equivalent).

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[859] The regulations referred to in paragraph 20(1)(v.1) are found in Part XII of the ITR. The resource allowance is computed using a multi-step process as follows: first, compute "gross resource profits" under subsection 1204(1) of the ITR; second, compute "resource profits" under subsection 1204(1.1) of the ITR; third, compute "adjusted resource profits" under subsection 1210(2) of the ITR; and finally, compute the resource allowance by multiplying the taxpayer's adjusted resource profits by 25% under subsection 1210(1) of the ITR.

[860] For years after 2002 and before 2007, paragraph 20(1)(v.1) allowed a deduction equal to a percentage of the resource allowance calculated under subsection 1210(1) of the ITR.[870] The resource allowance deduction was eliminated for years after 2006.

[861] The phrase "gross resource profits" is defined in subsection 1204(1) of the ITR. The sources of income relevant to these appeals are as follows:[871]

> 1204 (1) For the purposes of this Part, "gross resource profits" of a taxpayer for a taxation year means the amount, if any, by which the total of
>
> . . .
>
> (b) the amount, if any, of the aggregate of his incomes for the year from
>
> . . .
>
> (ii) the production and processing in Canada of
>
> (A) ore, other than iron ore or tar sands ore, from mineral resources in Canada operated by him to any stage that is not beyond the prime metal stage or its equivalent,
>
> . . .

[870] The percentages allowed for 2003, 2004, 2005 and 2006 were 90%, 75%, 65% and 35% respectively.

[871] Subparagraph 1204(1)(b)(iv) includes income from processing non-Canadian ore. However, such income is backed out by subsection 1210(2) in the computation of adjusted resource profits (see paragraph (b) in A of the formula).

> (iii) the processing in Canada of
>
> > (A) ore, other than iron ore or tar sands ore, from mineral resources in Canada not operated by him to any stage that is not beyond the prime metal stage or its equivalent . . .

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[862] Subsection 1204(1) goes on to provide that the taxpayer's incomes and losses from these sources are to be computed in accordance with the ITA on the assumption that the taxpayer had no incomes or losses except from those sources and was allowed no deductions except:

> (d) amounts deductible under section 66 of the Act (other than amounts in respect of foreign exploration and development expenses) or subsection 17(2) or (6) or section 29 of the *Income Tax Application Rules*, for the year;
>
> (e) the amounts deductible or deducted, as the case may be, under section 66.1, 66.2 (other than an amount that is in respect of a property described in clause 66(15)(c)(ii)(A) of the Act), 66.4, 66.5 or 66.7 (other than subsection (2) thereof) of the Act for the year; and
>
> (f) any other deductions for the year that can reasonably be regarded as applicable to the sources of income described in paragraph (b) or (b.1), other than a deduction under paragraph 20(1)(ss) or (tt) of the Act or section 1201 or subsection 1202(2), 1203(1), 1207(1) or 1212(1).

[863] Subsection 1204(3) of the ITR provides that a taxpayer's income or loss from a source described in paragraph 1204(1)(b) does not include any income or loss from certain specified activities, i.e., transporting, transmitting or processing activities, and (with exceptions) the provision of services.

[864] Subsection 1206(2) of the ITR states that "production" from a Canadian resource property has the meaning assigned by subsection 66(15) of the ITR. Subsection 66(15) states, as regards ore, that "production" from a Canadian resource property means ore produced from such a property processed to any stage that is not beyond the prime metal stage or its equivalent.

[865] The technical notes accompanying the introduction of the definition in 1987[872] state that it is relevant for the purposes of the successor corporation rules,

[872] Introduced by S.C. 1987, c. 46, subsection 18(9), applicable to taxation years ending after February 17, 1987.

which explicitly refer to "production from a Canadian resource property".[873] The incorporation of the definition in Part XII of the ITR reflects the fact that the various depletion allowance rules that existed in Part XII had their own set of successor rules.[874]

[866] The word "production" does not appear to be used in its defined sense in paragraph 1204(1)(b) of the ITR or in the definition of "resource activity" in paragraph 1206(1) (other than paragraph (e) of that definition) since the word production in those provisions refers to the act of production rather than the product of production (i.e., to the production of ore, not to ore produced from a Canadian resource property processed to any stage that is not beyond the prime metal stage or its equivalent).[875] The word is however used in its defined sense in subsection 1204(1)(b.1) of the ITR. Regardless, the definition has no bearing on the issue in these appeals.

[867] Subsection 1204(1.1) of the ITR provides that a taxpayer's "resource profits" for a taxation year are the amount, if any, by which the taxpayer's "gross resource profits" exceeds the total of the following: (a) all amounts deducted in computing the taxpayer's income under Part I of the ITA for the year, other than the amounts described in subparagraphs 1204(1.1)(a)(i) through (v); (b) where a non-arm's length party charges an amount for the use of property or the provision of services, the amount by which the amount an arm's length party would have charged the taxpayer for the use of property or for the services exceeds the amount actually charged; and (c) any amount included in income by virtue of the debt forgiveness rule in subsection 80(13) of the ITA.

[868] Subparagraphs 1204(1.1)(a)(i) through (v) of the ITR describe the amounts excluded from the general deduction rule in paragraph 1204(1.1)(a). Subparagraphs 1204(1.1)(a)(iv) and (v) state:

> (iv) an amount deducted in computing the taxpayer's income for the year from a business, or other source, that does not include any resource activity of the taxpayer, and
>
> (v) an amount deducted in computing the taxpayer's income for the year, to the extent that the amount

[873] See subsections 66.7(2) and (2.3).
[874] See, generally, Brian R. Carr, "The Successor Corporation Rules After Bill C-18" (1992) 40:6 Can. Tax J. 1261-1314.
[875] The word "production" is used in paragraph (e) of the definition of "resource activity" to refer to production from specific resource properties.

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(A) relates to an activity

(I) that is not a resource activity of the taxpayer, and

(II) that is

1. the production, processing, manufacturing, distribution, marketing, transportation or sale of any property,

2. carried out for the purpose of earning income from property, or

3. the rendering of a service by the taxpayer to another person for the purpose of earning income of the taxpayer, and

(B) does not relate to a resource activity of the taxpayer.

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[869] Subparagraph 1204(1.1)(a)(v) applies if both of two conditions are satisfied. First, the amount deducted relates to an activity that is not a resource activity of the taxpayer but is an activity described in sub-subclauses 1204(1.1)(a)(v)(A)(II)1 to 3. Second, the amount deducted does not relate to a resource activity of the taxpayer.

[870] The phrase "resource activity" is defined in subsection 1206(1). The relevant portions of the definition state:

"resource activity" of a taxpayer means

. . .

(b) the production and processing in Canada by the taxpayer or the processing in Canada by the taxpayer of

(i) ore (other than iron ore or tar sands ore) from a mineral resource in Canada to any stage that is not beyond the prime metal stage or its equivalent,

. . .

and, for the purposes of this definition,

. . .

(g) the production or the processing, or the production and processing, of a substance by a taxpayer includes activities performed by the taxpayer that are ancillary to, or in support of, the production or the processing, or the production and processing, of that substance by the taxpayer,

. . .

[871] Paragraph (b) of the definition of "resource activity" describes the activities that comprise the sources of income referred to in subparagraphs 1204(1)(b)(ii) and (iii),[876] and paragraph (g) of the definition includes within the scope of those activities the activities performed by the taxpayer that are ancillary to, or in support of, those activities. The words "ancillary" and "support" each connote an activity that is subordinate to the main activity. For example, the *Oxford English Dictionary* (2nd ed.) defines "ancillary" in part as follows:

> Designating activities and services that provide essential support to the functioning of a central service or industry.[877]

[872] The description of the activities (the "specific activities") in subparagraph (b)(i) of the definition of "resource activity" is precise and detailed. A natural reading of the text of paragraph (g) of the definition of "resource activity" in this context suggests that the additional activities must be ancillary to or in support of the specific activities, that is, ancillary to or in support of the production or the processing, or the production and processing, of ore by the taxpayer.[878] It is not sufficient that the activities be ancillary to or in support of a business that includes the specific activities as well as other activities–the additional activities must be ancillary to or in support of the specific activities.

[873] Although the descriptions of the sources of income in clauses 1204(1)(b)(ii)(A) and (iii)(A) of the ITR also refer to the activities described in subparagraph (b)(i) of the definition of resource activity, it is apparent that those provisions are referring to sources of income that involve the specific activities and not to the specific activities themselves. This is simply because the specific activities do not in and of themselves result in income.

[874] In *The Queen v. 3850625 Canada Inc.*, 2011 FCA 117 ("*3850625 Canada*"), the Federal Court of Appeal explained this point as follows:

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[876] The omission in paragraph (b) of the words "operated by him" and "not operated by him" is explained by the fact that paragraph (b) is describing the activities comprising both sources of income. If the taxpayer owns the mineral resource then the source and activity are the production and processing in Canada of the ore from that resource to any stage that is not beyond the prime metal stage or its equivalent, and if the taxpayer does not own the mineral resource then the source and activity are the processing in Canada of the ore from that mineral resource to any stage that is not beyond the prime metal stage or its equivalent.

[877] See, also, *Alberta (Minister of Justice) v. Paa*sche, 2013 ABCA 301 at paragraph 23.

[878] The additional activities described in paragraphs (f), (h) and (i) of the definition of "resource activity" are similarly precise.

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> . . . The reasoning is that in order to qualify for inclusion in the computation of "taxable production profits", the income (or the deductions) must be related to production in the narrow sense of extraction from the ground as a source of income. This does not restrict the qualifying activity to extraction *per se*. As was made clear on appeal, extraction *per se* is not a source of income; only the "business of production" can give rise to income (see the decision of the Appeal Division at p. 6127). In my respectful view, the *Gulf* test is consistent with the one set out in *Echo Bay Mines* and which the Tax Court Judge applied in this case, *i.e.* whether the refund interest was sufficiently connected to the production and processing activities to constitute income from that source. . . .[879]

[875] In *Echo Bay Mines Ltd. v. Canada*, [1992] 3 F.C. 707 (FCTD), the Court stated:

> If one turns to Regulation 1204(1), I note that a fuller excerpt of the words used in defining "resource profits" than that offered by the defendant more fully represents the provision. Thus, these profits are defined, in part in paragraph (*b*), as "the amount . . . of the aggregate of . . . incomes . . . from the production in Canada of . . . metals or minerals" [to the primary metal stage]. The use of the words "aggregate" and "incomes", and the implicit inclusion of "income . . . derived from transporting, transmitting or pro cessing" [to the primary metal stage] in the case of metals or minerals under Regulation 1204(1)(*b*) which arises from Regulation 1204(3), both signify that income from "production" may be generated by various activities provided those are found to be included in production activities. Production activities yield no income without sales. **Activities reasonably interconnected with marketing the product, undertaken to assure its sale at a satisfactory price, to yield income, and hopefully a profit, are, in my view, activities that form an integral part of production which is to yield income, and resource profits, within Regulation 1204(1)**.[880]
>
> [Emphasis added.]

[876] The decision in *3850625 Canada* was addressing the computation of gross resource profits and the decision in *Echo Bay* was addressing the computation of resource profits prior to the amendments in 1996 that introduced subsection 1204(1.1) of the ITR.[881] The clear rationale of these decisions is that the sources of income/loss described in paragraph 1204(1)(b) are comprised of the activities described in that paragraph (the "core activities") and the activities that are integral to or sufficiently connected with the earning of income from the core activities (collectively, the "source activities").

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[879] Paragraph 21.
[880] Page 732.
[881] The amendments renamed the amount determined under subsection 1204(1) as gross resource profits and introduced new subsection 1204(1.1) to determine resource profits.

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[877] In *Echo Bay*, the Court held that the hedging activities of the taxpayer were integral to the earning of income from the production of ore from the taxpayer's silver mine. In *3850625 Canada*, the Tax Court of Canada found that the activity consisting in the payment of income tax on income from the production and sale of coal was sufficiently connected with the taxpayer's core activities to warrant the inclusion of interest on a tax refund in income from the sources of income described in paragraph 1204(1)(b). The Federal Court of Appeal found no palpable and overriding error in this finding of fact.[882]

[878] The Respondent does not suggest that the Appellant should include in its computation of gross resources profits for its 2005 and 2006 taxation years the losses from selling uranium purchased from CESA/CEL. I agree that the purchases and sales of this uranium are not integral to or connected with the specific activities of the Appellant. The purchases and sales do not fall anywhere along the continuum of activities integral to or connected with the earning of income from the specific activities.

[879] The Respondent submits, however, that the losses ought to be deducted under paragraph 1204(1.1)(a) in computing the Appellant's resource profit. The Respondent summarizes the basis for this position in the following terms:

> The Losses relate to CCO's resource activity and the full amount of the Losses ought to be deducted in computing CCO's resource profits. CCO's only business which is carried on in Canada consists of producing, processing, and selling uranium. CCO has no business other than this resource activity. CCO was always a miner and producer of uranium both pre- and post-restructuring. CCO purchased uranium to advance its over-contracting strategy. It was envisioned that CCO would keep whatever production was needed to meet its legacy and Canadian contracts and the rest would be sold to CE. Cameco admitted to reviewing production forecasts in estimating how much CCO could sell to CE. Those forecasts showed that, in 1999, CCO anticipated that by 2005, it would only have 22.7 million pounds of Canadian production available to sell to CE, including 9 million pounds from Rabbit Lake and Cigar Lake. The nine bulk sales . . . agreements gave CE the right to purchase just under 24 million pounds from CCO if all the flexes were exercised upward. CCO purchased the uranium in order to meet these existing long-term supply contracts; CCO had a policy to not sell on the spot market, and no evidence was adduced that the purchased uranium were [*sic*] for spot sales. Accordingly, the Losses are an indirect expense of CCO in producing uranium and deductible in computing the corporation's resource profits.

[882] See, also, the recent decision of the Tax Court of Canada in *Barrick Gold Corp. v. The Queen*, 2017 TCC 18.

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> Further, CCO was not engaged in activities other than a resource activity, ergo there is no non-resource activity to which to allocate the Losses. The exception in subparagraph 1204(1.1)(a)(v) contemplates that there be a reasonable allocation to a taxpayer's resource activities on the one hand and to a taxpayer's defined activities that do not relate to a resource activity on the other hand. The double-barreled nature of the test (i.e., the amount that is required, both to relate to a non-resource activity, and not relate to a resource activity) ensures that taxpayers cannot avoid an allocation of a deduction to a resource activity by arguing that there is more than one purpose associated with a particular deducted amount.[883]

[880] There is no question that the losses from the purchase and sale activity relate to an activity described in subclause 1204(1.1)(a)(v)(A)(II): the sale of any property.

[881] The first question raised by the Respondent's position is whether the purchase by the Appellant of uranium from CESA/CEL and the sale of that uranium (the "ps activity") is ancillary to or in support of the specific activities.[884] If it is then the ps activity constitutes a resource activity and the losses from this activity fail to meet the condition in subclause 1204(1.1)(a)(v)(A)(I) because they relate to a resource activity of the Appellant.

[882] If the answer to the first question is no, then the second question is whether the losses resulting from the ps activity are related to a resource activity of the taxpayer. If they are then the condition in clause 1204(1.1)(a)(v)(B) is not satisfied. If they are not then the losses satisfy both conditions in subparagraph 1204(1.1)(a)(v) and are excluded from the rule in paragraph 1204(1.1)(a).

[883] The ps activity is not ancillary to or in support of the specific activities. In particular, the ps activity does not support, assist in or contribute to the Appellant's performance of the specific activities. The fact that the ps activities may allow the Appellant to satisfy contractual obligations to sell uranium does not connect the ps activity with the specific activities. The ps activity exists apart from the specific activities. Accordingly, the ps activity is not a resource activity.

[884] The question that remains is whether the loss from the ps activity is related to a resource activity of the Appellant. The Respondent submits that the phrase "related to" is to be given a broad interpretation.

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[883] Paragraphs 364 and 365 of the Respondent's Written Argument.
[884] It is clear that the ps activity is not one of the specific activities.

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[885] In my view, the phrase "related to" read in context simply requires a connection between the loss from the ps activity and a resource activity of the Appellant. This is no different than the approach taken in *3850625 Canada*, where the Federal Court of Appeal observed that "[t]he Tax Court Judge went on to consider whether there was a sufficient connection between the refund and the production and processing activities."[885] In this case, the question is whether there is a sufficient connection between the losses from the ps activity and a resource activity of the Appellant to conclude that the losses are related to a resource activity of the Appellant.

[886] I am not able to discern a connection between the losses from the ps activity and a resource activity of the Appellant. The losses result from the ps activity and the ps activity itself has no connection with the resource activity of the Appellant. While it is true that the ps activity was an aspect of the Appellant's business and that that business involved significant resource activity, the losses from the ps activity were separate from and unconnected with that resource activity. Contrary to the implication of the Respondent's position, the test is not whether the losses were related to a business of the Appellant that includes of resource activity; the test is whether the losses were related to the resource activity of the Appellant.

[887] In my view, this result is consistent with the purpose of the resource allowance which the federal government introduced in 1976 to provide a deduction in computing income in recognition of the fact that provinces impose taxes or royalties in respect of provincial resources.[886] The ps activity and the loss from that activity have no connection with the production and/or processing of ore from a mineral resource in Canada, and losses from the ps activity should not reduce the relief provided by the resource allowance in respect of the resource-related tax imposed by Saskatchewan.

Conclusion

[885] Paragraph 11.

[886] Budget Speech dated June 23, 1975 at pages 33 and 34 and Budget Plan dated March 6, 1996 at page 162. The regime prior to the resource allowance allowed an unlimited deduction from income for such taxes and royalties. The regime that replaced the resource allowance reinstated the deductibility of Crown royalties and resource taxes that are not taxes on income (by repealing paragraph 18(1)(m) of the ITA) and also allows a deduction for eligible taxes paid in respect of income from mining operations (by introducing paragraph 20(1)(v) of the ITA and section 3900 of the ITR). The Department of Finance explains the history and the changes in "Improving the Income Taxation of the Resource Sector in Canada" released by the Department of Finance in March 2003.

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[888] The Appellant's appeals of the Reassessments are allowed and the Reassessments are referred back to the Minister for reconsideration and reassessment on the basis that:

1. none of the transactions, arrangements or events in issue in the appeals was a sham;

2. the Minister's transfer pricing adjustments for each of the Taxation Years shall be reversed;

3. the amount of $98,012,595 shall be added back in computing the resource profit of the Appellant for its 2005 taxation year; and

4. the amount of $183,935,259 shall be added back in computing the resource profit of the Appellant for its 2006 taxation year.

[889] The parties have 60 days from the date of this judgment to provide submissions regarding costs. Such submissions are not to exceed 15 pages for each party.

Signed at Ottawa, Canada, this 26th day of September 2018.

"J.R. Owen"

Owen J.

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