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INTERNATIONAL LAWYERS

*Washington DC*

*Toronto*

**CONFIDENTIAL**

**UNDER THE UNCITRAL ARBITRATION RULES AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**INVESTOR'S  
SUBMISSION ON COSTS**

BETWEEN:

**S.D. MYERS, INC.**

Claimant / Investor

- and -

**GOVERNMENT OF CANADA**

Respondent / Party

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## INVESTOR'S SUBMISSION ON COSTS

### PART ONE: INTRODUCTION

1. The Investor files its Submission on Costs pursuant to the direction of this Tribunal of October 21, 2002.<sup>1</sup> The Investor submits that, in light of the circumstances of this claim, this Tribunal should award the entire costs of this arbitration to the Investor under Article 40 of the UNCITRAL Arbitration Rules and NAFTA Article 1135(1). Such an award should include the arbitration costs (costs of the Tribunal and its hearing) and representation costs (legal fees, expert costs and other assistance). The Investor seeks costs for representation, assistance and arbitration costs of CDN \$4,268,516.09 plus interest.<sup>2</sup>
2. The UNCITRAL Arbitration Rules provide that arbitration costs are to be borne in principle by the unsuccessful party and representation costs are to be determined at the discretion of the Tribunal, taking into account the circumstances. The Tribunal should use its authority to award full costs pursuant to Article 40 of the UNCITRAL Arbitration rules for the following reasons:
  - a) S.D. Myers, Inc. was successful in this claim;
  - b) the conduct of Canada merits an award of costs to the Investor

#### *S.D. Myers Inc.'s Success in this Arbitration*

3. A review of the course of this arbitration, the motions, the Merits Phase and the Damages Phase, demonstrates that the Investor has been the successful party, being awarded damages in the amount of \$6.05 million. As the unsuccessful party, Canada should bear the arbitration and representation costs of this arbitration.

#### *The Conduct of Canada*

4. Canada is a signatory to the North American Free Trade Agreement. It has a special obligation under international law to take all necessary measures in good faith to ensure that the treaty is given full effect. The fact that Canada has knowingly violated its

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<sup>1</sup> Letter from Tribunal to Parties dated October 21, 2002. (Schedule of Documents, Tab 1).

<sup>2</sup> All figures involving US funds in this submission have been converted at the Canadian dollar - US dollar rate of exchange fixed at the close of business on the date of the Tribunal's award, October 21, 2002 of 1.5682 \$ Canadian to the US dollar.

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international treaty obligations in this matter is cause for serious concern and should be properly addressed as a factor in the awarding of costs.

5. When considering the circumstances for awarding costs, this Tribunal should give particular attention to the evidence of Canada's intention to harm the Investor and its Investment. Intent was relevant to the consideration of merits and is highly relevant to the consideration of costs. Before the Investor raised this NAFTA claim, Canada was on notice from its own lawyers from the Department of Foreign Affairs and International Trade that the illegal *PCB Waste Export Ban* would violate the NAFTA and that S.D. Myers, Inc. would almost certainly seek redress through arbitration.<sup>3</sup> Canada chose to ignore what turned out to be the accurate advice of its own Trade Law Division and pursued the illegal measure with premeditation, foresight and discriminatory intent. The appropriate sanction in such a situation is a full award of costs against Canada.
6. In addition, Canada took steps during the arbitration designed to prolong these proceedings. These actions include delaying the provision of the Valuation Matrix to the Tribunal and failing to comply with requests and directions from the Tribunal regarding document production. Apportioning costs would be tantamount to having the Tribunal condone this behaviour.

***Reasons why this Tribunal should award all costs to the Investor***

7. The Tribunal should award all costs to the Investor due to Canada's inappropriate conduct and the Investor's success, as set out in this submission.
8. The Tribunal should also take into account the impact of this arbitration claim upon each disputing party. There is a large difference in the capacity to endure litigation between the disputing parties. Canada is a sovereign nation and it controls the largest legal service entity in Canada, the lawyers at the Canadian Department of Justice. Its legal costs are covered by the public purse. S.D. Myers, Inc. is a family owned business employing some 300 employees in Tallmadge, Ohio and other locations. At the time of the *PCB Waste Export Ban*, it had no in-house legal counsel. It has been far more difficult for S.D. Myers, Inc. to carry the burden and cost of this litigation than for the Government of Canada. Delay and extra cost caused by inappropriate behaviour has had, and continues to this day to have, a detrimental impact on the Investor. This factor should be taken into account by the Tribunal when awarding costs.

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<sup>3</sup> See Cornwall note of October 30, 1995 outlined the 'cons' of the Minister's option of closing the border. (Schedule of Documents, Tab 4). See Partial Award at para. 179.

9. NAFTA Article 1118 states that “the disputing parties should first attempt to settle a claim through consultation or negotiation”. The Investor has, from the very start of this arbitration, attempted to consult and negotiate with Canada with very little substantive response from Canada. The Investor retained government relations advice and also designated settlement counsel to be available to negotiate a settlement with Canada. Canada, at every step of the process, has refused to consult or negotiate a settlement of this arbitration in any meaningful manner whatsoever. In fact, Canada has done the complete opposite by prematurely filing a judicial review before domestic Canadian courts of the interim award issued by this Tribunal.<sup>4</sup> Because Canada has not fulfilled its NAFTA Article 1118 obligations and S.D. Myers, Inc. has, it is reasonable that all costs associated with consultation, negotiation and settlement of this arbitration be awarded to S.D. Myers, Inc.<sup>5</sup>

***Costs to S.D. Myers, Inc.***

10. To conduct this NAFTA claim, the Investor obtained representation from a variety of professionals. Documents supporting these costs are set out in Schedules of Documents annexed to this cost submission<sup>6</sup>. The costs can be summarized in Canadian dollars as follows:

Arbitration Costs

Tribunal costs	\$ 647,666.60
Hearing Transcription costs	\$ 21,748.29
Tallmadge Experts visit additional expenses	\$ 12,490.26
Hotel Costs	\$ 36,749.70

Representation Costs

Appleton & Associates	\$2,068,250.00
Appleton & Associates disbursements	\$ 421,585.27
Dr. Alan Alexandroff (Strategic Policy Initiatives)	\$ 49,797.00
Davis & Company	\$ 217,530.02

<sup>4</sup> Canada notified the Tribunal by letter dated February 8, 2001 that it had filed an application to the Federal Court of Canada seeking to set aside the *Partial Award* based on public policy and other grounds. Canada argued that the Tribunal exceeded its jurisdiction by resolving disputes not properly before it, by improperly having invoked an equitable jurisdiction that had “overextended the benefits of Chapter Eleven to S.D. Myers”. In the same letter Canada stated that it had intended to ask the Tribunal to delay the assessment of damages until the courts completed judicial review of the Tribunal’s *Partial Award* on liability. Canada’s purpose was to impose a stay of the proceedings to further delay the deliberations of the Tribunal in reaching a final damages award. (See Schedule of Documents, Tab 5).

<sup>5</sup> See Consultation Correspondence. (Schedule of Documents, Tab 3).

<sup>6</sup> No fees have been claimed for management time or for fixed employees of the Investor as this would not be considered to be a cost under the UNCITRAL Arbitration Rules, see Redfern & Hunter: *The Law and Practice of International Commercial Arbitration* (1999) at 406. (Book of Authorities, Tab 1).

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Todd Weiler	\$ 32,820.00
James Hopkins	\$ 622.94
Low Rosen Taylor Soriano (LRTS)	\$ 836,235.39
BDO Dunwoody	\$ 52,055.93
Peter Wallace Associates	\$ 10,474.63
Professor Roger Ware	\$ 39,150.75
Palto Communications	\$ 1,365.86
Summa Strategies	\$ 11,081.41

#### Appleton & Associates International Lawyers

11. Appleton & Associates were responsible for all legal aspects related to the NAFTA arbitration in its entirety, as well as the co-ordination of all experts. Work was done on this file from the firm's New York, Toronto and Washington, D.C. offices. Over a four year period, the firm's cost to S.D. Myers, Inc. totalled CDN \$2,068,250 in fees and CDN \$421,585.27 in disbursements.<sup>7</sup>

#### Dr. Alan Alexandroff (Strategic Policy Initiatives)

12. Dr. Alan Alexandroff acted as counsel throughout the NAFTA arbitration including advising on pleadings, motions and attending hearings during all phases. Over a four year period Dr. Alexandroff has billed S.D. Myers, Inc. \$49,797 in fees and costs.<sup>8</sup>

#### Davis & Company

13. The law firm of Davis & Co. assisted in the litigation aspects of the Damages Phase. Keith Mitchell appeared at one of the hearings of this arbitration as counsel. In addition, lawyers from this firm assisted S.D. Myers, Inc. with its consultation and negotiation obligation pursuant to NAFTA Article 1118. Over a two year period, Davis & Co. has billed S.D. Myers, Inc. a total of \$217,530.02 in fees and costs related to the conduct of this NAFTA claim.<sup>9</sup>

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<sup>7</sup> See materials set out at Schedule of Invoices, Tabs 1-18. A schedule of hours worked by time keeper including hourly rates is set out at Schedule of Invoices, Tab 17.

<sup>8</sup> See materials set out at Schedule of Invoices, Tabs 23-28.

<sup>9</sup> See materials set out at Schedule of Invoices, Tabs 19-22.

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Other Legal Providers

14. Todd Weiler was a full-time employee of Appleton & Associates who later became an external consultant when he entered a graduate program in international law. He provided consulting services throughout the arbitration related to international law and other aspects of the arbitration. Over a two year period, Mr. Weiler has billed S.D. Myers, Inc. \$32,820 in fees and costs for this claim.<sup>10</sup>
15. James Hopkins provided contract legal assistance on Federal Court of Canada files relevant to this arbitration. Over a two year period Mr. Hopkins has billed S.D. Myers, Inc. \$622.94.<sup>11</sup>

Low Rosen Taylor Soriano (LRTS)

16. LRTS provided services with respect to all aspects of valuation and damages quantification throughout the arbitration. The firm provided valuation reports and attended before this Tribunal, at a site visit with Canada's expert valuator in Tallmadge Ohio and at other joint meetings of disputing party experts. Howard Rosen appeared before the Tribunal as a witness and was examined upon his firm's report. Over a four year period the firm has billed S.D. Myers, Inc. \$836,235.39 in fees and costs for its work done on this claim.<sup>12</sup>

BDO Dunwoody

17. BDO Dunwoody provided a report on valuation and quantification in the Damages Phase. Jeffrey Harder appeared as a witness at the Damages Hearing. Over a one year period, BDO Dunwoody has billed S.D. Myers, Inc. \$52,055.93 in fees and costs for this claim.<sup>13</sup>

Peter Wallace Associates

18. Peter Wallace provided industry expert assistance with respect to the PCB waste market in Canada for the Damages Phase and he testified at the Damages Hearing. Over a one year period, Peter Wallace Associates has billed S.D. Myers, Inc. \$10,474.63.<sup>14</sup>

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<sup>10</sup> See materials set out at Schedule of Invoices, Tabs 29 - 43.

<sup>11</sup> See materials set out at Schedule of Invoices, Tabs 44 - 47.

<sup>12</sup> See materials set out at Schedule of Invoices, Tabs 56 - 103.

<sup>13</sup> See materials set out at Schedule of Invoices, Tabs 104 - 106.

<sup>14</sup> See materials set out at Schedule of Invoices, Tabs 107 - 108.



Professor Roger Ware

19. Professor Roger Ware provided expert assistance as an economist dealing primarily on the issue of S.D. Myers, Inc.'s 'first mover advantage' in the Canadian marketplace. Over the period of a year, Professor Ware's firm has billed S.D. Myers, Inc. \$39,150.75 in fees and costs for this claim.<sup>15</sup>

Palto Communications

20. Palto Communications provided editorial and proof reading services to the Investor through Tim Paleczny and Nancy Marto. Total fees and costs over a two year basis totalled \$1,365.86.<sup>16</sup>

Summa Strategies

21. Summa Strategies provided representation for the Investor in NAFTA Article 1118 consultations and negotiations with the Government of Canada. Over a one year period, the firm billed \$11,081.41 to S.D. Myers, Inc.<sup>17</sup>

Tribunal Fees

22. S.D. Myers, Inc. has paid out fees and costs to the Tribunal of CDN \$647,666.60 (US\$413,250). These payments were made as follows:

i)	April 22, 1999	\$ 15,000
ii)	September 23, 1999	\$ 15,000
iii)	December 31, 1999	\$138,500
iv)	June 27, 2000	\$ 71,000
v)	December 18, 2000	\$ 20,000
vi)	February 14, 2001	\$ 15,000
vii)	June 10, 2001	\$ 30,000
viii)	July 18, 2001	\$122,250

23. The Investor paid for costs for transcription of Tribunal hearings of \$21,748.29.<sup>18</sup>

<sup>15</sup> See materials set out at Schedule of Invoices, Tabs 109 - 110.

<sup>16</sup> See materials set out at Schedule of Invoices, Tabs 49 - 54.

<sup>17</sup> See materials set out at Schedule of Invoices, Tab 48.

<sup>18</sup> See materials set out at Schedule of Invoices, Tab 111.

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24. On November 6, 2001 the Investor wrote to Canada to seek it to pay one half of the cancellation fee imposed by the Metropolitan Hotel or to advise whether it would be paying its share directly.<sup>19</sup> Canada has refused to pay its share or reply to the content of this letter. Each disputing party's share comes to \$12,396.23 for a total of \$24,792.45.

In addition, according to the hotel, the Investor is liable for an additional \$11,957.25 for rooms booked for the hearing. Thus the Investor seeks an award of \$36,749.70.

25. In total, the Investor seeks \$718,654.85 for arbitration expenses.

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<sup>19</sup> See materials set out at Schedule of Invoices, Tabs 111 - 112..

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**PART TWO: THE APPLICABLE TEST FOR AWARDING ARBITRAL COSTS*****Governing Provisions of the UNCITRAL Rules***

26. Article 1135(1) of the NAFTA provides that "A tribunal may also award costs in accordance with the applicable arbitration rules. Articles 38 and 40 of the UNCITRAL Arbitration Rules govern the awarding of costs. Article 38 gives the Tribunal authority to fix the costs of an arbitration while Article 40 sets out the presumptions and tests to be applied by the Tribunal in awarding costs.

27. Article 38 states:

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

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

28. The main provisions of Article 40 state:

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

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***Two Tests: One for Arbitration Costs and One for Representation Costs***

29. Article 40 establishes one test for the awarding of arbitration costs (Articles 38(a) - (d) and (f)) and another for representation costs (legal representation and other assistance) (Article 38(e)).
30. For arbitration costs, Article 40(1) creates a rebuttable presumption that arbitration costs will be paid by the unsuccessful party. It states that "the costs of arbitration shall in principle be borne by the unsuccessful party".
31. For the representation costs, Article 40(2) gives the arbitral Tribunal discretion to apportion costs "taking into account the circumstances of the case".

***Circumstances to be Considered in Apportioning Costs***

32. The primary "circumstance" to be taken into account by the Tribunal is the degree of success a party has achieved in the arbitration.
33. A second important "circumstance" is the conduct of the parties. In particular, the Tribunal should take into account obstructionist tactics of one party that have caused substantial delay and costs.<sup>20</sup>
34. The Iran-US Claims Tribunal case of *Sylvania Technical Systems v. Iran* is often cited for its detailed analysis regarding the award of costs in an UNCITRAL Arbitration Rules arbitration,<sup>21</sup> as is the Separate Opinion of Judge Howard Holtzmann.<sup>22</sup> Judge Holtzmann applies a four-part test to determine the appropriate amount of costs for legal representation and assistance and which party should bear those costs. The test is as follows:
  1. Were costs claimed in the arbitration?
  2. Was it necessary to employ lawyers in the case in question?
  3. Is the amount of costs reasonable?
  4. Who should bear the costs? Are there circumstances in this case that make it reasonable to apportion costs?

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<sup>20</sup> See Berger, *International Economic Arbitration* (1993), p. 617. (Book of Authorities 23).

<sup>21</sup> See *Sylvania Technical Systems, Inc. and Iran* (1985) 8 Iran-US C.T.R. 298 at 322-324. (Book of Authorities, Tab 13) See: Redfern and Hunter, *The Law and Practice of International Commercial Arbitration* (1999) at 405-409; and Van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-US Claims Tribunal* (1991) at 302-303. (Book of Authorities, Tab 14).

<sup>22</sup> *Sylvania* at 329-336.

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35. As Redfern and Hunter have suggested, this test provides a useful guide to the practice international arbitral tribunals should adopt when they are required to exercise their discretion in relation to an award of costs.<sup>23</sup> Judge Holtzmann's test is also more useful than the limited jurisprudence of NAFTA Tribunals respecting costs, which has generally been fact-specific.
36. In *Robert Azinian et al and Mexico*,<sup>24</sup> the NAFTA Tribunal ordered that each losing party cover its own costs. The Tribunal noted at para. 125 that it is common in international arbitral proceedings that a losing party bear the costs of the arbitration as well as contribute to the prevailing party's costs of representation. The Tribunal noted that this practice "serves the dual function of reparation and dissuasion". The Tribunal decided in that case that each party should bear its own costs because of unique factors, including the fact that the former spouse of the controlling mind of the claimant had carriage of the NAFTA Claim at the time of judgment while the controlling mind was no longer legally responsible for any costs in the proceeding. The Tribunal also stated that another reason why it did not award costs to the Respondent was because the Respondent did not have clean hands and had virtually "invited litigation".<sup>25</sup>

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<sup>23</sup> Redfern and Hunter, *The Law and Practice of International Commercial Arbitration* (1999) at 409.

<sup>24</sup> See *Robert Azinian et al and Mexico*, Award, November 1, 1999. (Book of Authorities, Tab 8).

<sup>25</sup> *Azinian* at para 126.

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**PART THREE: THE APPLICATION OF THE TEST*****Application of Tests One and Two - Costs been claimed? The use of lawyers was necessary?***

37. Application of the first two tests in this arbitration are simple matters. At all stages of this arbitration, as shown by the record, both disputing parties have claimed costs.<sup>26</sup> With respect to the second test, due to the novel nature of NAFTA Chapter 11 arbitrations at the time this claim was made, the complex issues of international arbitral procedure, fact and international law, it would seem to be beyond dispute that it was necessary in the circumstances of this arbitration for the disputing parties to employ legal counsel and assistance.

***Application of Test Three - Costs are Reasonable?***

38. The question of whether the amount of costs claimed for professional fees and assistance are reasonable relates typically, as Judge Holtzmann suggests, to the time spent and the complexity of the case. Moreover, "just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation."<sup>27</sup>

***The Proceedings were Lengthy and Complicated***

39. In this arbitration, there have been two partial awards made in the two phases of the arbitration: The *First Partial Award* on liability issued on November 13, 2001 and the *Second Partial Award* issued on October 21, 2002. The Tribunal has issued eight procedural orders (*Procedural Orders No. 5* through to *Procedural Order No. 12*). The time spent by counsel for both disputing parties was accordingly significant.
40. The Investor has presented detailing invoices, including for its counsel - time spent, hourly billing rates and dockets describing the services rendered and disbursements incurred. The hourly billing rates charged by counsel for the Investor are within the standard range for American corporate law firms and the total fee was reasonable in light of the extensive amount of work required to do this claim. Lawyers at Appleton & Associates worked over seven thousand five hundred (7,500) hours on the S.D. Myers, Inc. NAFTA claim. Based on the firm's standard hourly billing rates, the firm's hourly

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<sup>26</sup> Canada has sought its costs in all of its submissions. For example, see Canada's Statement of Defence at paragraph 65 which reads "Canada respectfully requests that this honourable Tribunal dismiss this claim and order Myers to pay all costs, disbursements and expenses incurred by Canada in the defence of this claim including but not restricted to, legal, consulting, and witness fees and expenses, and travel and administrative expenses, as well as the costs of the Tribunal".

<sup>27</sup> *Sylvania* at 333.

dockets for work done on the S.D. Myers, Inc. NAFTA Claim came to over USD\$1,790,000 (CDN\$2,792,400) plus disbursements which have totalled CDN\$421,585.27.<sup>28</sup>

41. As a result of the terms of a written fee agreement entered into between S.D. Myers, Inc. and Appleton & Associates on June 19, 1997, governed by the law of the state of New York, the total legal fee payable (excluding disbursements) by S.D. Myers, Inc. as of October 21, 2002 will be reduced to CDN\$ 2,053,250 plus disbursements and applicable taxes.
42. In addition to the lead counsel from Appleton & Associates, other lawyers assisted the Investor. The costs for this assistance were:

Dr. Alan Alexandroff	\$ 49,797.00
Davis & Company	\$ 217,530.02
Todd Weiler	\$ 32,820.00
James Hopkins	\$ 622.94

These costs have been paid with the exception of the most recent billings sent to Mr. Myers.<sup>29</sup>

43. Experts were retained by the Investor for this claim. Each of the experts produced a report for the Tribunal and presented evidence before it. The costs for these experts have all been paid by S.D. Myers, Inc.<sup>30</sup> and are as follows:

Low Rosen Taylor Soriano (LRTS)	\$ 836,235.39 <sup>31</sup>
BDO Dunwoody	\$ 52,055.93
Peter Wallace Associates	\$ 10,474.63
Professor Roger Ware	\$ 39,150.75

44. The Investor also retained Summa Strategies, an Ottawa-based government relations firm, to assist it to obtain a consultation meeting pursuant to NAFTA Article 1118. The cost for this work billed and paid by S.D. Myers, Inc. was \$11,081.41.<sup>32</sup>

<sup>28</sup> These amounts have been converted from US dollars to Canadian based on the US dollar exchange rate at the close of business on October 21, 2002.

<sup>29</sup> See statement of Dana Myers, November 4, 2002. (See Schedule of Documents, Tab 2).

<sup>30</sup> See statement of Dana Myers, November 4, 2002.

<sup>31</sup> Converted at the US-Canada dollar exchange rate on October 21, 2002.

<sup>32</sup> See statement of Dana Myers, November 4, 2002.

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***Application of Test Four - It is reasonable to award all costs to the Investor***

45. Although much of the jurisprudence on costs apportionment has resulted in both parties sharing professional and arbitration costs, this arbitration represents circumstances in which a number of factors support the conclusion that costs be awarded to the Investor. Misconduct of one of the disputing parties during an arbitration is an important factor in determining whether to apportion costs. The *Azinian* Tribunal referred to this as the dual functions in cost awards of “reparation and dissuasion”. In that case, the fact that the respondent in effect did not have clean hands by virtually inviting litigation supported the tribunal’s decision to deny it an award of costs as the successful party. In the context of an ICSID arbitration, Professor Schreuer cites non-cooperation with a tribunal and disregard of tribunal orders as examples of misconduct that would attract an award of costs<sup>33</sup>.
46. Judge Holtzmann points to limited circumstances under the UNCITRAL Arbitration Rules in which apportionment is appropriate, such as the case of the respondent being successful in a counter-claim.<sup>34</sup> In this case, there is no such basis on which to argue for apportionment.
47. The following factors support the Investor’s position that, because of its misconduct and a complete lack of success in this arbitration, Canada should bear the entire costs of this arbitration and the costs of professional fees and assistance.

***Success of the Investor***

48. The Investor has demonstrated a measure of success by repeatedly prevailing over Canada throughout this arbitration in every phase and in motions and jurisdictional challenges.
49. Canada made a number of jurisdictional challenges to the Investor’s claim, namely that:
- i. S.D. Myers was not an ‘investment’ under Article 1139;
  - ii. The *PCB Waste Export Ban* was not a measure “relating to” Investors and Investments;
  - iii. NAFTA Chapter Eleven must give way to Canada’s other international environmental obligations;

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<sup>33</sup> See Schreuer, *The ICSID Convention: A Commentary - A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* 2001 at 1129. (Book of Authorities, Tab 10).

<sup>34</sup> *Sylvania* at 333.



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- iv. No Chapter Eleven obligation was breached; and
  - v. S.D. Myers was a cross-border service provider and therefore not entitled to any damages under Chapter 11.

Canada was completely unsuccessful in all these matters. Despite losing these issues before the NAFTA Tribunal, Canada has attempted to circumvent this Tribunal's decision by seeking judicial review on many of these very same issues.

The Investor advanced three specific motions:

- i. Violating Tribunal orders on confidentiality to Sub-nationals;
- ii. Crown privilege; and
- iii. Document production.

The Investor was largely successful in each of these motions.

- 50. The Investor succeeded on the merits and Canada was found to have acted in violation of its obligations under Chapter 11 of the NAFTA.
- 51. The Investor succeeded at the Damages Hearing and obtained damages in excess of those proposed by Canada in its damages submissions.

**Procedural Order No. 18 (Re: Canada's motion to stay arbitration pending domestic set aside action)**

- 52. Canada notified the Tribunal on February 8, 2001 that it had filed (on that day) an application to the Federal Court of Canada to set aside this Tribunal's *Partial Award* dated November 13, 2000. In that same letter, Canada informed this Tribunal that it intended to ask this Tribunal to stay the arbitration proceedings pending the results of the domestic court. The Tribunal asked for and received written submissions from Canada and the Investor on this motion.
- 53. On February 21, 2001 this Tribunal heard oral arguments respecting this motion in Toronto. On February 26, 2001 this Tribunal rendered its decision as *Procedural Order No. 18* dismissing Canada's motion in its entirety. In dismissing Canada's motion, the Tribunal concluded as follows:

The Tribunal takes the view that on its own submissions CANADA has come nowhere near discharging the burden on it to show that the proper course for the Tribunal is to suspend the

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arbitration.<sup>35</sup>

54. The Investor has not sought any costs from the Tribunal with respect to its costs in the domestic judicial review action. The Investor will seek these extensive costs from Canada separately before Canadian courts. The Investor does seek its costs related to this motion heard by this NAFTA Tribunal, for which Canada should be held completely accountable. All costs related to this matter should be awarded against Canada given that they were completely unsuccessful in their motion.

### ***Success in the Claim***

55. The Tribunal must consider the totality of this claim when assessing costs. The Investor succeeded in establishing that Canada violated its NAFTA Treaty obligations and that these violations caused harm to S.D. Myers, Inc. The Tribunal should not give much, if any, weight to the fact that there was no finding of NAFTA inconsistently by a majority of this Tribunal with respect to two other NAFTA Chapter 11 obligations raised in this claim. The claims brought by the Investor with respect to all of the breaches alleged were brought in good faith. Also, they were all based upon on a common factual framework permeated by Canadian acts of discrimination and unfair treatment. The Investor is not required to be successful on all breaches claimed for it to be successful in the arbitration. The Investor was successful on the NAFTA Articles 1102 and 1105 claims, and this conduct was related to whether Canada violated its NAFTA Article 1106 and 1110 obligations as well as many other legal arguments, and was awarded substantial damages in the amount of \$6,050,000 plus applicable interest. This can be the only measure of success in this arbitration.
56. Based on the various Awards of the Tribunal, Canada has lost this NAFTA claim and should not be rewarded in any respect for conduct that was found to have violated its international treaty obligations. Anything less than a full award of costs to the Investor could be taken as a sign that Canada is being rewarded for such conduct.

### **Second Partial Award – October 21, 2002<sup>36</sup>**

57. The *Second Partial Award* confirms the gravity of Canada's violation of its NAFTA obligations and the detrimental impact on S.D. Myers, Inc. In addition to ordering a damage award against Canada, the Tribunal also confirmed the Investor's principal arguments responding to Canada's new and ill-timed jurisdictional concerns raised at the Damages Phase –namely, that S.D. Myers, Inc. was not an investment but rather a service

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<sup>35</sup> See *Procedural Order No. 18*, February 26, 2001 at para. 15. (Book of Authorities, Tab 21).

<sup>36</sup> See *S.D. Myers, Inc. and Canada*, Second Partial Award, October 21, 2002. (Book of Authorities, Tab 22).

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provider as contemplated under NAFTA Chapter 12. The Tribunal wholly disagreed with Canada's argument that S.D. Myers, Inc. could not resort to Chapter 11 and concluded as follows:

In summary, the fact that SDMI as a cross-border service provider may have recourse to the dispute provisions of Chapter 12, does not deprive it of the right to claim as an investor under Chapter 11. Extending to it rights as a cross-border service provider under Chapter 12 does not take away from SDMI rights conferred to it by Chapter 11.<sup>37</sup>

Chapter 11 is engaged because SDMI was an investor. It has a right to recover the economic losses to its investment initiative caused proximately by an interference with its investment contrary to the provisions of Chapter 11. The fact that some of the totality of SDMI's losses due to interference with its investment involved cross-border services does not prevent SDMI from recovering them.<sup>38</sup>

Canada should be responsible for all costs related to the damages of this arbitration.

### ***Conduct***

#### **The Need to Consider the Context of Canada's Unfair Actions**

58. The signatories to the NAFTA have a special responsibility to ensure that all necessary measures are taken to give effect to the Agreement. Article 26 of the *Vienna Convention* states that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is reflected in the words of NAFTA Articles 105 and 1105, as well as in the principle of *pacta sunt servanda* which is recognized in the *Vienna Convention on the Law of Treaties*. This general obligation of good faith suggests that a higher standard of treatment must be applied to NAFTA Parties to conduct themselves in an appropriate manner respecting their international treaty obligations.
59. The *Pope & Talbot* Tribunal referred to the use of this equality principle as being an "overriding principle" within its NAFTA Investor-State arbitration decision of September 6, 2000 at para. 1.5 attaching to Procedural Order No.11.

In the specific context of a NAFTA arbitration where the parties have agreed to operate by UNCITRAL Rules, it is an overriding principle (Article 15) that the parties be treated with equality. The other NAFTA Parties do not, so far as the Tribunal has been made aware, have domestic law that would permit or require them to withhold documents from Chapter 11 tribunals without any justification beyond a simple certification that they are some kind of state secret. In these circumstances, Canada if it could simply reply on s. 39 might be in an unfairly

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<sup>37</sup> Second Partial Award at para. 138

<sup>38</sup> Second Partial Award at para. 139

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advantaged position under Chapter 11 by comparison with the United States and Mexico.<sup>39</sup>

60. Furthermore, upon learning that the Government of Canada had urged domestic courts to ignore the decisions made by NAFTA Tribunals as being not worthy of judicial defence, the UPS NAFTA Tribunal stated that it was troubled by Canada's comments and held to hold its arbitration outside of Canada.<sup>40</sup>
61. Similar behaviour from the Government of Canada towards NAFTA investor-state Tribunals have been the subject of comment from other NAFTA Chapter 11 tribunals. These comments are relevant to give broader context to the nature of these actions. For example, in the *Pope & Talbot Damages Award*, the NAFTA Tribunal severely admonished Canada's actions respecting the refusal to provide the *travaux preparatoires* of the relevant NAFTA obligations at issue. The Tribunal stated:
- ...it is almost certain that the documents provided, which included nothing in explication of the various drafts, are not all that exists, yet no effort was made by Canada to let the Tribunal know what, if anything, has been withheld.
- This incident's injury to the Tribunal's work can now be remedied. But the injury to the Chapter 11 process will surely linger.<sup>41</sup>
62. The overwhelming evidence in this case demonstrated that Canadian officials intentionally set out to harm the Investor and its Investment as evidenced in the damning lineage of documents and internal government memoranda. Although punitive awards are not possible in NAFTA Chapter 11 arbitration, part of the dual functions of a cost award is "reparation and dissuasion". The kind of conduct that Canada directed at the Investor and its Investment are certainly worthy of a cost award to dissuade such future conduct by Canada, especially in cases when the officials responsible for a measure are unequivocally advised by their lawyers from the Trade Law branch and other government officials, that such actions would violate the NAFTA and the Investor would seek redress through arbitration.
63. Canada has failed to meet this standard in a number of instances and an award of costs is the appropriate remedy in such circumstances.

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<sup>39</sup> See *Pope & Talbot, Inc. and Canada*, Decision, September 6, 2000 amended to Procedural Order No. 11 at para 1.5. (Book of Authorities, Tab 24).

<sup>40</sup> See *United Parcel Service of America, Inc. and the Government of Canada*, Decision on the Place of Arbitration, (October 17, 2001) at para. 11. (Book of Authorities, Tab 25).

<sup>41</sup> See *Pope & Talbot Damages Award* at paras 41-42. (Book of Authorities, Tab 26).

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**Request for Documents by Canada***Production of Documents - Costly frustration and delays by Canada*

64. Canada undermined the authority of this Tribunal by creating delay and instilling a spirit of non-cooperation into the entire document production process. This conduct endured from the very beginning of this arbitration to the close of the Damages Phase.
65. Throughout the Merits and Damages Phases, Canada has failed to provide requested documents in a timely manner causing delay and undue expense to the Tribunal and the Investor. This failure has occurred both in response to requests submitted by the Investor or as a result of the Tribunal's specific requests for clarification.<sup>42</sup> On more than one occasion<sup>43</sup>, Canada not only failed to provide the requested documents in a timely manner but also failed to report on the status of these requests to the Tribunal or to the Investor.<sup>44</sup>
66. In addition, the persistent refusals made by Canada over confidentiality ignored the specific terms of *Procedural Order No. 6*. This conduct fundamentally undermined the authority of the Tribunal to manage the evidentiary process in the most efficient manner possible and has resulted in needless expense for which Canada should be held accountable.

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<sup>42</sup> See *Procedural Order No. 6* para. 5 to 9 (Book of Authorities, Tab 17). The Tribunal made orders with respect to Canada's response to the Investor's First Request for Documents to which Canada failed to respond in a timely manner prior to the Third Case Management meeting held on October 28, 1999. Canada was ordered to make written requests to the Ministers concerned about the existence of certain documents requested by S.D. Myers, Inc. under heads B12, B17, B31, C1 and C2 of its First Request, and if any such documents did not exist, to request the consent of the Minister concerned to their production in the arbitration and report the position to the Tribunal and S.D. Myers, Inc. as soon as possible. In Canada's letter to the Tribunal of September 10, 1999 (See Schedule of Documents, Tab 6), Canada stated that it had sent letters to the relevant Ministers as ordered under *Procedural Order No. 6*. The Investor requested on September 23 1999 (See Schedule of Documents, Tab 7) that Canada provide it with copies of letters sent out to the Ministers and advise the Investor as to the status of those requests as provided in paragraph 5 of *Procedural Order No. 6*. By October 25, 1999 the Investor had failed to receive any confirmation as to the status of the request to the Ministers nor any copies of those letters.

<sup>43</sup> See letter from the Investor to Canada attempting to provide clarification on document production issues. (Schedule of Documents, Tab 8 and Tab 9).

<sup>44</sup> At para. 6 of *Procedural Order No. 6* Canada was ordered by the Tribunal to provide by September 17, 1999 further justification as to why documents requested by Myers under the heads A4, B5, C5 and C6 of its First Request for documents should be protected by any form of state privilege, giving adequate particulars in relation to each category of documents under each head. Canada failed to comply with the order and instead provided a "certificate" from Mel Cappe, Clerk of the Privy Council regarding Canada's claim of state privilege under Canada's municipal evidence law. Some of these document refusals involved situations involving Mr. Cappe himself in his previous job as Deputy Minister of the Environment at the time that the *PCB Waste Export Ban* was discussed and implemented.

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**Procedural Order No. 10 (concerning crown privilege)**

67. Canada disregarded the Tribunal's Procedural Orders regarding document production and confidentiality. The acts undermined the authority of the Tribunal and the NAFTA process itself. These actions also added considerable delay and expense to the arbitration for which Canada should be held responsible.
68. The Investor brought a motion addressing Canada's refusal to provide documents, or even identify documents, requested by the Investor on the grounds of cabinet confidence. Responding to Canada's use of Section 39 certificates to refuse production based on Crown privilege, the Tribunal issued a separate explanatory note outlining that any questions relating to the application for production of documents in this category would require separate written submissions or oral statements from the disputing parties. In its *Explanatory Note to the Procedural Order No. 10* the Tribunal ruled that the Investor's requests did not to seek documents in search of actual cabinet deliberations (which would have been properly refused) but rather briefings papers to the ministers directly involved.<sup>45</sup> These requests were thus proper and Canada was ordered to produce these documents.

**Merits Phase Document Production**

69. During the Merits Phase, the document production process was impeded by the need for two additional case management meetings. These meetings were essentially forced by Canada and were held on September 2, 1999 and October 28, 1999. Both hearings required oral hearings and written submissions by the disputing parties regarding production of documents.
70. On August 16, 1999 Canada submitted a request for an extension of time to file its Counter-memorial by November 1, 1999. Canada justified this request on the basis that it required more time to respond to the unforeseen motion filed by the Investor for the production of documents. According to Canada this request significantly affected its ability to prepare its Counter-Memorial necessitating additional time to obtain further documents from the Investor.
71. Canada argued that S.D. Myers, Inc. had years to prepare its case and had access to the Federal Court of Canada (Trial Division) file in *Centre Patronal de l'Environnement du Quebec and General Waste Transport Inc. v. The Minister of the Environment and the Attorney General of Canada* ("Centre Patronal"). Canada used this reasoning to allege that S.D. Myers, Inc. should have resorted to other avenues to obtain documents rather

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<sup>45</sup> See para. 4 of the *Explanatory Note to Procedural Order 10*. (Book of Authorities, Tab 19).

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- than impose documentary production burdens on the government directly.<sup>46</sup> In addition, Canada argued that the Investor effectively had more time to prepare its case because it had access to documents from the domestic *Centre Patronal* case.
72. Canada argued that the Investor was advantaged by having access to the relevant *Centre Patronal* case documents but at the same time Canada contended that it would not produce documents from the *Centre Patronal* case because they were not relevant. Based on this seemingly confused argument, Canada sought more time to prepare its claim. Canada's argument that it needed more time is questionable, considering the fact that Canada itself was a party in the *Centre Patronal* case and that its then-lead counsel in the S.D. Myers, Inc. NAFTA arbitration had also been counsel in the *Centre Patronal* case. This incident is indicative of Canada's 'smoke and mirrors' attempts to delay document production and forestall the inevitable result of a finding against Canada on liability and damages from the evidence uncovered.
73. Canada also attempted to justify its document refusals by arguing that the Investor could and should have obtained such documents by way of the *Canadian Access to Information Act*. For example, at the September 2, 1999 Tribunal meeting, Canada justified its motion for extension of time to file its Counter-Memorial by arguing that the Investor had an unfair advantage because of its access to documents obtained through access to information requests. In fact, the Investor had availed itself of the *Access to Information Act* process and had also filed numerous complaints to the Information Commissioner complaining about the inordinate delay and non-responsiveness of the government department concerned.<sup>47</sup>
74. To address Canada's attempts at delay of the document production the Investor was forced to incur costs and bring a Motion by August 18, 1999. As a courtesy and in the interest of efficiency, the Investor has, on numerous occasions during the course of this arbitration, offered to clarify and explain any document production requests with which Canada had difficulty.<sup>48</sup> In this instance and in others it was completely within Canada's control to cooperate and avoid the necessity of motions and case management meetings. Canada however chose to proceed down the road of continuous delay during the document production process resulting in significant costs for which Canada should be accountable.
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<sup>46</sup> See Canada's Motion Re Extension of time to File Counter-memorial August 16, 1999 para. 20. (Schedule of Documents, Tab 10).

<sup>47</sup> See attached correspondence from Todd Weiler, dated August 26, 1999, to the Hon. John M. Reid, Information Commission of Canada. (Schedule of Documents, Tab 11).

<sup>48</sup> See the Investor's letter of clarification dated May 9, 2001 in response to Canada's letter for clarification dated April 27, 2001. (Schedule of Documents, Tab12).

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75. *Procedural Order No. 6* is the result of Canada's attempts at frustrating the document production process and what has contributed to the costs of this proceeding. These costs ought to be borne by Canada being the party most directly responsible for the additional case management meetings and the Tribunal's intervention in the document production process.
76. As a result of the Tribunal's *Procedural Orders 6 and 9*, Canada was required to make direct written requests to the Ministers concerned as to the existence of documents as well as to obtain consent from the Ministers concerned to their production. The Tribunal ordered Canada to specifically report on the status of this information as soon as possible.<sup>49</sup> Canada was also instructed to provide further justifications as to why it continued to refuse documents requested by the Investor with adequate particulars in relation to the form of state privilege accorded to each category of document.<sup>50</sup> As an aid to the Tribunal, the Investor had summarized the refusals of documents by Canada with a chart with specific category headings. The Tribunal asked Canada to accept this document as beneficial to working out the document production issues and by consent, the Tribunal was able to provide specific determinations for each document refusal.
77. At the Third Case Management meeting on October 28, 1999, Canada was specifically required to deal with document production issues. According to *Procedural Order No. 8*, the Tribunal directly asked questions of certain government officials to help speed up the document production process. The Investor was ordered to propose the format of interrogatories for certain key government officials. The final form of these interrogatories was left to the Tribunal. After further written submissions and another oral hearing the Tribunal was nevertheless forced to specifically order Canada to produce documents held in its possession or control in relation to the Investor's requests.<sup>51</sup>
78. At the commencement of the Tribunal's Third Case Management Meeting, the Chairman strongly recommended that the disputing Parties display a spirit of co-operation as the costs for Tribunal deliberations for production issues were "adding up". Only after two prolonged case management meetings did Canada consent to produce relevant documents relating to e-mails and cellular phone records of Ms. Sheila Copps, her staff and Mr. Mel Cappe in connection to the Investor's second document requests.<sup>52</sup>
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<sup>49</sup> See *Procedural Order No. 6* at para. 5 dated September 4, 1999.

<sup>50</sup> See *Procedural Order No. 6* at para. 6 dated September 4, 1999.

<sup>51</sup> See *Procedural Order No. 9* at para. 1 dated November 4, 1999. (Book of Authorities, Tab 18).

<sup>52</sup> See *Procedural Order No. 9* at para. 2 and 3 dated November 4, 1999.



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**Motion on Sub-Nationals and Confidentiality**

79. On March 10, 2000 Canada admitted sharing confidential information with provincial and territorial officials provided by the Investor to the Tribunal. The Investor objected to this practice as it was directly in breach of the Tribunal's *Procedural Order No. 3*. Canada asserted that this was a long-standing practice. The Investor took issue with Canada's breach of the clear order of the NAFTA Tribunal and the governing UNCITRAL rules. The Tribunal determined that confidentiality principles applicable to the arbitration were those of international commercial arbitrations and the treaty itself. As such Article 25(4) of UNCITRAL Arbitration Rules applied.

80. In dismissing Canada's argument, the Tribunal supported the Investor's position and held as follows:

The same level of confidentiality that is conferred on the transcripts of the opening and closing submissions and witness testimony must logically be applied to equivalent written materials. It would 'drive a coach and horses' through Article 25.4 of the Rules if any other conclusion were to be reached.<sup>53</sup>

In further admonishing Canada's practice of distributing confidential documents, the Tribunal concluded as follows:

...CANADA's distribution of Protected Documents and information to provincial and territorial governments was a departure from the express provisions of *Procedural Order No. 11*...<sup>54</sup>

This behaviour from Canada was disrespectful of the authority of this Tribunal and the very clear terms of the NAFTA. Costs are appropriate in such a situation.

**Damages Phase- Tallmadge Visit**

81. *Procedural Order No. 17* on February 26, 2001 set the process for document production in the Damages Phase. This process outlined specific dates for the disputing parties to exchange requests for production of documents and interrogatories. There was a two week period granted for refusals. In paragraph 11 of the *Procedural Order*, the Tribunal provided that in the event of any disputes concerning evidence gathering after March 26, 2001, the Tribunal would intervene to give procedural directions "designed to resolve the disputes as soon as practicable." Similar to previous phases of this arbitration, Canada's

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<sup>53</sup> See *Procedural Order No. 16* (concerning confidentiality in materials produced in the arbitration), May 13, 2000 at para.12. (Book of Authorities, Tab 16).

<sup>54</sup> *Procedural Order No. 16* (concerning confidentiality in materials produced in the arbitration) May 13 2000 at para.18.

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repeated refusals created delay and expense that needed the direct intervention of the Tribunal.

82. The Tribunal was required once again to convene a case management meeting on June 21, 2001. Prior to the meeting, the Tribunal suggested that despite the *cost and convenience implications* it would be useful if the valuation experts would be able attend as : *“Many of the document production questions and requests for further information have the underlying purpose of assisting CANADA’s experts in evaluating MYERS”*.<sup>55</sup> In addition, the Tribunal suggested that it would be useful to have a listing of outstanding document production issues that could be narrowed. As the Tribunal noted prior to the meeting, most of the time was spent on trying to get Canada to clarify or narrow its document production requests.
83. As a result of the Tribunal’s directions many of the issues in question were resolved by consensus.<sup>56</sup> Other issues were narrowed and mediated. However, Canada still demanded to review further financial documents and to interview S.D. Myers, Inc. personnel directly. The Investor facing a new and large administrative burden proposed that each disputing party’s respective valuation expert, Mr. Rosen and Mr. Rostant, make a joint visit to the Investor’s facility in Tallmadge, Ohio to review the remaining documents that Canada had requested.<sup>57</sup> This onsite visit was essentially an audit requiring S.D. Myers, Inc. to prepare a voluminous full print out of its general ledger which numbered in the thousands of pages.<sup>58</sup> At the case management meeting, Mr. Rostant made important reference to the need to review the entire general ledger of S.D. Myers, Inc. The company complied with this request, which took days of continuous printing activity to complete. Mr. Rosen notes in his valuation report that this voluminous report was never consulted by Mr. Rostant or his staff despite the fact that its existence was made known

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<sup>55</sup> See Tribunal’s letter to the Disputing parties dated June 14, 2001. (Schedule of Documents, Tab 14).

<sup>56</sup> After careful review of the issues in dispute the Tribunal managed to narrow or eliminate many of Canada’s refusals. Many of Canada’s requests for documents and interrogatories were outside of the period relevant to the dispute in question or not relevant in order to assess damages. Many of the financial document production requests Canada made were burdensome on the Investor. As a result the Investor agreed to an onsite visit by Canada’s valuation expert, Mr. Rostant and his assistant to satisfy Canada’s production request. See Investor’s Chart Summary Response to Canada’s Motion for Production of Documents and Response to Interrogatories provided on April 19, 2001.

<sup>57</sup> See Canada’s listing of outstanding production issues specifically Document Production Request No. 196 (c) where Canada demanded copies of the general ledgers of SDMI for the fiscal periods of 1995, 1996 and 1997. The burden of producing the general ledger for review by Canada’s valuers took over three days to prepare and print out. As a result of 6 boxes of materials produced Canada ended up reviewing a small part of the actual printed out general ledger.

<sup>58</sup> See Canada’s letter dated June 1, 2001 and attached letter dated May 31, 2001 listing outstanding production issues. (Schedule of Documents, Tab 15).

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to Canada's team by the Investor's representatives.<sup>59</sup> Despite the full cooperation of the Investor to produce all available and relevant documents, additional costs were forced upon the Investor that were completely unnecessary. Canada should be responsible for these accommodating measures and the entire cost associated with such amounting to \$12,490.26.<sup>60</sup>

**Partial Award – November 13, 2000<sup>61</sup>**

84. On November 13, 2000, this Tribunal issued its *Partial Award* and found Canada to have violated its NAFTA obligations under Articles 1102 and 1105. With respect to Canada's intent, which in the Investor's submission ought to be a crucial factor in awarding costs in this arbitration, the Tribunal made the following conclusions in its *Partial Award* (emphasis added):

The evidence establishes that CANADA's policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals. Other factors were considered at the bureaucratic level, but **the protectionist intent of the lead minister in this matter was reflected in decision-making at every stage that led to the ban.** Had that intent been absent, policy makers might have reached a conclusion in November 1995 that would have been consistent with the conclusion reached by CANADA when the ban was lifted in February 1997.<sup>62</sup>

85. Moreover, the Tribunal in its *Partial Award* cited internal government memoranda that not only confirmed the premeditated protectionist intent of the government, but also the fact that Canada was on notice of the effects of the measure and the NAFTA actions likely to be taken by S.D. Myers, Inc. as a result. A note from Mr. Cornwall stated:

**S.D. Myers will certainly seek redress through NAFTA intervention** since they have invested/lobbied heavily to get the border opened. The company can be expected to object formally to any action taken under CEPA to close the border...**Industry Canada and Foreign Affairs are likely to object to the closing of the Canadian border because it will appear to be an unjustifiable restriction on international trade.**<sup>63</sup>

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<sup>59</sup> See Revised Rosen Report at Page 3 Footnote 3 submitted with the Investor's Reply Counter-Memorial on August 9, 2001. (Schedule of Documents, Tab 19).

<sup>60</sup> See Schedule of Invoices, Tab 55.

<sup>61</sup> See *S.D. Myers, Inc. and Canada*, Partial Award, November 13, 2000. (Book of Authorities, Tab 20).

<sup>62</sup> Partial Award, November 13, 2000 at para. 162.

<sup>63</sup> See Cornwall note of October 30, 1995 outlined the 'cons' of the Minister's option of closing the border. (Schedule of Documents, Tab 4). See Partial Award at para. 179.

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86. In another briefing note from Mr. Hilborn to the Minister's office, dated November 1, 1995, the following conclusions were reached confirming that government officials were completely aware that the measure would be a violation of Canada's NAFTA obligations and international law. In fact many parts of the Canadian government, including the Trade Law Division, opposed it. The memorandum states:

A legal opinion (DRAFT October 23, 1995) indicates that closing the Canadian border would likely be found by a NAFTA panel to be a restriction on trade.

PCO, DFAIT and Industry Canada view the question as a trade issue and will vehemently oppose closing the Canadian border.<sup>64</sup>

87. After reviewing all of the evidence and arguments put forward in the Merits Phase of this arbitration, this Tribunal concluded:

...the Tribunal is satisfied that the Interim Order and the Final Order favoured Canadian nationals over non-nationals...Insofar as intent is concerned, the documentary record as a whole clearly indicates that the Interim Order and the Final Order were intended primarily to protect the Canadian PCB disposal industry from U.S. competition. CANADA produced no convincing witness testimony to rebut the thrust of the documentary evidence.<sup>65</sup>

88. The evidence provides overwhelming support for the proposition that Canada undertook a measure inconsistent with its international treaty obligations with complete intent and full knowledge of its potential repercussions. In the face of contrary advice from its own Trade Law Division and other government officials, Canada chose to pursue this discriminatory and unfair policy solely to punish S.D. Myers, Inc. for being an American company that was successful in the Canadian marketplace. This unconscionable behaviour must now be remedied by this Tribunal and an award of costs would be an appropriate manner in which to do so. An award of costs would dissuade Canada from knowingly violating its NAFTA obligations and would be in keeping the test for awarding costs established in *Azinian* namely, reparation and dissuasion.

#### **Delay by Canada and its experts to provide Tribunal with the Valuation Matrix**

89. The Investor's expert business valuator, Mr. Rosen and his firm, Low Rosen Taylor Soriano ("LRTS") pursued Canada's valuator, Mr. Rostant and his firm for a resolution

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<sup>64</sup> See Hilborn briefing note to Minister, November 1, 1995. Joint Book of Documents Tab 10. (Schedule of Documents, Tab 16).

<sup>65</sup> Partial Award, November 13, 2000 at paras. 193 & 194.

- of the commonly agreed upon matrix for the Tribunal after the Damages Hearing.<sup>66</sup> Mr. Rostant's office continually delayed Mr. Rosen's efforts to obtain agreement. It was not in the interest of the Investor nor of the Tribunal to delay this process.
90. On December 24, 2001 Chris Milburn from LRTS wrote to Mr. Rostant's assistant, Peter Armstrong regarding an agreement on the much anticipated Valuation Matrix. Originally, the Tribunal was expecting this joint expert model within 14 days from the conclusion of the Damages Phase hearing, Mr. Milburn confirms in the letter that the delay was caused by Mr. Armstrong's unavailability and his unwillingness to agree. Only one issue prevented the submission of a joint Matrix. This was the Sierra Club litigation factor. Mr. Armstrong demanded that the matrix contain an exceptionally large discount to account for the fact that the Sierra Club litigation could have occurred earlier. Only after the Tribunal's letter of December 23, 2001 ordering that the Matrix be submitted within the next few days, did Canada finally agree to permit the percentage amount on this issue be addressable by the Tribunal in the matrix. Finally, he agreed to submit the joint expert report. Had the Tribunal permitted each disputing party's advisor to submit a matrix, the Investor would have been in a position to submit its matrix in under one week from the conclusion of the Damages Phase hearing.
91. At paragraph 175 of its *Second Partial Award*, the Tribunal has alluded to the impact of the delay in receiving the matrix, which was provided months after the initial deliberations of the Tribunal had started. This delay is attributable to Canada and the costs to the Investor and the Tribunal as a result of this delay should be borne by Canada in their entirety.

### Settlement Negotiations

92. NAFTA Article 1118 states that "the disputing parties should first attempt to settle a claim through consultation or negotiation". The Investor wishes to advise the Tribunal that unsuccessful settlement discussions have taken place between the disputing parties. The Investor has, from the very start of this arbitration, attempted to consult and negotiate with Canada with very little substantive response from Canada. The Investor undertook costs for government relations counsel and even appointed designated Settlement Counsel, who made their existence known to Canada. Because Canada has not fulfilled its NAFTA Article 1118 obligations and S.D. Myers, Inc. has, it is reasonable that all costs associated with consultation, negotiation and settlement of this arbitration be awarded to S.D. Myers, Inc.<sup>67</sup>

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<sup>66</sup> See letter from C. Milburn dated December 24, 2001 (Schedule of Documents, Tab 17) and the Investor's letter to Canada dated December 28, 2001. (Schedule of Documents, Tab 18).

<sup>67</sup> See Consultation Correspondence (Schedule of Documents, Tab 3).

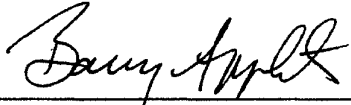
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**PART FOUR: SUMMARY**

93. The Investor was successful during this entire arbitration. Canada was found by this Tribunal to have acted in a discriminatory manner which violated its international obligations under NAFTA Articles 1102 and 1105. The Tribunal has now ordered Canada to pay the Investor damages in the amount of \$6,050,000. Based on this success, the Investor should be awarded its full costs of this arbitration.
94. Apportionment of costs in this case is not appropriate in light of the misconduct of Canada. This misconduct is especially relevant in light of the warnings that were issued by Canada's own officials and trade lawyers informing their colleagues at the Department of the Environment that this would violate Canada's NAFTA obligations and that there was no good environmental reason for the ban.
95. This pattern of persistent misconduct can only be considered to be a direct attack of the NAFTA and its status in Canadian and international law. Because NAFTA Chapter 11 arbitrations involve, by definition, a state Party and an investor, there is an immediate imbalance in the relationship between the two disputing parties in favour of the NAFTA Party. As noted in the *Azinian Case*, part of the function of the payment of costs is "reparation and dissuasion". Because of the intentional manner in which the Government of Canada acted with respect to the Investor and the Investment before, during and after the illegal *PCB Waste Export Ban*, and the contempt showed to the arbitration process by Canada, it is appropriate that Canada bear the full costs of the professional and arbitration fees in this matter to meet the functions of "reparation and dissuasion" as noted in *Azinian*.
96. It is reasonable to conclude that the circumstances of this case support an award of full representation and arbitration costs against Canada.
97. In summary, the Investor submits that Canada bear the total arbitration costs and costs for legal representation and assistance in an amount not less than **CDN\$4,268,516.09** including interest.

All of which is respectfully submitted.

Submitted this 4<sup>th</sup> day of November, 2002



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for Appleton & Associates International Lawyers  
Counsel for the Investor, S.D. Myers, Inc.