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CONFIDENTIAL

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

INVESTOR'S RESPONSE TO CANADA'S SUBMISSION ON STAY OF ARBITRATION

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

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The Investor submits that Canada's Application for a Stay of Arbitral Proceedings should not be granted by this Tribunal because:

(A) It would be generally inequitable to the Investor for this Tribunal to order a stay of the arbitration proceedings at this point;

(B) A stay is contrary and inconsistent with the public policy presumption in favour of arbitration over domestic courts:

(C) The scope of review by domestic courts is limited and Canada has not demonstrated that there is any reasonable likelihood of success for its judicial review application;

(D) Canada will not be prejudiced if the Stay Application is not granted and the Investor will be prejudiced; and

(E) A domestic court cannot provide guidance to this Tribunal on damages.

General Introduction

1. The granting of a stay by this Tribunal would be inequitable, and unfair to the Investor, for the following reasons:

   i) Canada consented to participate in the NAFTA Investor-State process based on the procedures set out in the NAFTA. This consent is clearly indicated by the express terms of NAFTA Article 1122(1). Having agreed to that process, it is simply not fair to permit one party to delay the proceedings simply because it is unhappy with a determination against it.

   ii) The NAFTA process is intended to be efficient and efficacious. This Tribunal has already concluded that the Investor is entitled to a speedy resolution of its claim. This goal is not served by ordering a stay in the proceedings at this point in time. It is reasonable for the Investor to maintain its expectation of a reasonably speedy determination of the issues in dispute by an independent tribunal.

   iii) Canada has not demonstrated that there is any likelihood that its judicial review application will be successful or has any merit whatsoever.

   iv) Canada has been found by this Tribunal to have acted inconsistently with its NAFTA obligations. There can be no prejudice to Canada by continuing the damages phase of this claim. Canada can be compensated for any costs incurred in the damage phase if it is successful in its domestic application.

v) There can be serious prejudice to the Investor caused by a lengthy delay in the hearing of this claim.

2. Ordering a stay of this arbitration process would not be consistent with the objectives of the NAFTA. NAFTA Article 102(1) states:

> **Article 102: Objectives**
>
> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (e) **Create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolutions of disputes;**
> (Emphasis added)

The Preamble to the NAFTA provides additional guidance for this Tribunal. It proclaims that the NAFTA Parties were resolved to "Ensure a predictable commercial framework for business planning and investment".

3. An Investor relying on the NAFTA Investor-State arbitration process can expect that disputes will be resolved in a prompt and efficient arbitration way, in accordance with the objectives of the NAFTA. NAFTA Chapter 11 assures investors that their foreign investments would receive fair and non-discriminatory treatment. Canada's efforts now to delay the conclusion of this arbitration in light of a clear finding that its conduct was inconsistent with the NAFTA flies in the face of the objectives of the NAFTA and the provisions of NAFTA Chapter 11.

B. *There is a Presumption in Favour of Arbitration Over Domestic Proceedings*

4. The integrity of the arbitral process requires that the application for a stay be dismissed. The dispute between the parties should be resolved in accordance with the rules they have chosen.

> The purpose of the United Nations conventions and legislation adopting them is to ensure that the method of resolving disputes, in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and

encourages free trade on an international scale: *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 at p. 139. 85 Alta. L.R. (2d) 287 (C.A.).[1]

5. The NAFTA established a consensual Investor-State arbitration process. The NAFTA Parties provided their consent to the Investor-State process to adjudicate disputes arising out of Section A of Chapter 11 in accordance with the relevant arbitration rules under NAFTA Article 1122(1). The Investor provided Canada with its consent to arbitration with the issuance of its Claim as required by NAFTA Article 1121. At the same time, the Investor agreed to waive its recourse to domestic courts other than injunctive, declaratory or other extraordinary relief, as required by NAFTA Article 1121(1)(b).

6. There are strong public policy grounds to hold disputing parties to their agreement to arbitrate and maintain the importance of courts to defer to the arbitral process.[2]

7. There is nothing to prevent an arbitration from proceeding, even if the matter is simultaneously being pursued through the Courts. Indeed, that is expressly contemplated by Article 8 of Canada's own *Code*, which provides that:

> Article 8: Arbitration Agreement and Substantive Claim before Court
>
> (1) **A court before which an action is brought in a matter which is the subject of an arbitration agreement shall**, if a party so requests not later than when submitting his first statement on the substance of the dispute, **refer the parties to arbitration** unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, **arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.**
>
> [Emphasis in bold]

8. The presumption in favour of arbitration over domestic litigation applies particularly where determination is sought over the same substantive claim before both an arbitration tribunal and the local courts. This presumption should equally apply when a party seeks a stay of arbitral proceedings as a general policy reflection of the intent of drafters of the UNCITRAL model law.

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[1] *Automatic Systems Inc.* v. *Bracknell Corp.* (1994) 18 O.R. (3d) 257 at 264 (Ont. C. A.). *See also Automatic Systems Inc.* v. *Bracknell Corp.* where the Ontario Appeal Court relied upon the decision of the Alberta Court of Appeal in *Kaverit Steel* v. *Kone* .(1992), 87 D.L.R. (4th) 129 (Alberta Court of Appeal).

[2] *Boart Sweden AB* v. *NYA Strommes AB* (1988). 41 B.L.R. 295 at 303 (Ont. H.C.J.). This case was cited with approval by the Ontario Court of Appeal case *Automatic Systems Inc.* v. *Bracknell Corp.* (1994) 18 O.R. (3d) 257 (C.A.).

C. *The Scope of Review by Domestic Court is Limited*

9. Under Canadian law, the grounds upon which a domestic court may successfully review the determinations of an international commercial arbitration are narrow. In its Application, Canada argued that the grounds for the Judicial Review Application are sections 5 and 6 of *Act*, and Articles 1, 6, 34(2)(a)(iii) and 34(2)(b)(ii) of the *Code*. *Code* Article 34(2)(a)(iii) provides:

> 2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that: ...
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

10. *Code* Article 34(2)(b)(ii) further provides that an award can be challenged if it is found that it is contrary to the public policy of Canada, as follows:

> 2) An arbitral award may be set aside by the court specified in article 6 only if: ...
>
> (b) the court finds that: ...
>
> (ii) the award is in conflict with the public policy of *Canada*.

11. One of Canada's leading cases on the role of judicial deference in reviewing an international arbitration decision is the decision of the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.*[3] The petitioner applied under s. 34(2) of the *British Columbia International Commercial Arbitration Act* to set aside the arbitral award on the ground that the arbitration board only had jurisdiction to fix a base price as at April 1, 1987, and that in fixing a series of base prices for the fifteen quarters after that date, the board acted beyond its mandate. The petitioner relied on the Court's jurisdiction under s. 34(2)(a)(iv) that the award "contain decisions on matters beyond the scope of the submission to arbitration". The Court upheld the arbitral award giving considerable deference to the arbitral tribunal, concluding:

> ...courts should exercise restraint in reviewing arbitration awards in the international arena. The views expressed by those courts, in my view, are substantially the same as the 'consensus' referred to in the preamble to our International Act, and thus reflect the purpose of this Act. ...

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[3] (1990), 50 B.C.L.R. (2d) 207. Leave to appeal denied by the Supreme Court of Canada on December 13, 1990.

> It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. This is the standard to be followed in this case.[4]

12. The Ontario Court of Appeal case in *Boardwalk Regency Corp.* v. *Maalouf* confirmed the narrow grounds of a challenge to an international arbitration award based on public policy. The court held:

> The Policy Issue
>
> In my opinion, the respondent has not satisfied the burden of showing that the enforcement of the contract or of the New Jersey judgment would be contrary to public policy. **I agree that the foreign judgment should not be declared unenforceable on grounds of public policy unless its enforcement would violate conceptions of essential justice and morality.** I am here referring to domestic public policy as well as national public policy at the international level. Where the foreign law is applicable, Canadian courts will generally apply that law even though the result may be contrary to domestic law. Professor Castel's discussion of public policy regarding the application of foreign law or the enforcement of a foreign judgment is helpful in this respect (Castel, *Conflict of Laws*, para. 91 (pp. 153-55)):
>
>> Canadian courts will not recognize or enforce a foreign law or judgment or a right, power, capacity, status or disability created by a foreign law that is contrary to the forum's stringent public policy or "essential public or moral interest" or "our conception of essential justice and morality....
>>
>> **If foreign law is to be refused any effect on public policy grounds, it must at least violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum.**[5]

13. There is no appeal from a decision of an international commercial arbitration Tribunal. For example, the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric* Co. stated:

> 'The New York Convention does not permit any review on the merits of an award to which the Convention applies and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the

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[4] (1990), 50 B.C.L.R. (2d) 207 at 216 - 217.

[5] (1992) 6 O.R. (3d) 737 (Ont.C.A.) (emphasis added).

courts on points of law may be permitted.' (Redfern and Hunter, Law and Practice of International Commercial Arbitration, 2nd ed., p. 461).

> In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Sect. 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.[6]

14. Canada has made the bold assertion that the Tribunal erred in its determinations of facts and its determinations upon questions of international and NAFTA law. Under domestic legal regimes in Canada, the United States and the United Kingdom, in order to obtain an interlocutory stay of proceedings it is common to demonstrate that there would be a likelihood of success in the review proceeding. At no time has Canada ever provided this Tribunal with any argument or material dealing with the sufficiency or likely success of its domestic court application other than Canada's simple assertions that the Tribunal acted in error.

The Canadian Domestic Test for Stay of Arbitration

15. The United Kingdom case law cited by Canada in its Stay Application, at paragraph 29, sets out the test that Canadian courts apply with respect to stays of arbitration. This test is strict and the onus is on the applicant to meet both elements of the test. The Court held that:

> ... the court has jurisdiction to grant, in its discretion, an injunction to restrain a claimant from proceeding with an arbitration. **The power is to be used sparingly and is not to be exercised simply by reference to the balance of convenience. The court may grant the injunction in circumstances where, firstly, such a stay would not cause injustice to the claimant in the arbitration, and, secondly, the continuance of the arbitration would also be oppressive or vexatious to the applicant for the stay, or would constitute and abuse of the process of the court.**[7]

16. The appropriate test to be applied by this NAFTA Tribunal might be higher than this domestic standard, but it certainly should not be lower than the standard that would be applied by the domestic court if the stay was sought there. Since Canada's application does not apply the standard applied by a Canadian domestic court, this NAFTA Tribunal should not grant Canada's application for a stay.

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[6] *Renusagar Power Co. Ltd. v. General Electric Co.*, Supreme Court of India, *Yearbook Commercial Arbitration* Volume XX –1995, at 690-691.

[7] *Wilson v. Larchwood Construction Ltd.* [1994] ADRLJ 67 at 70 (County Court).

17. For example, at paragraph 28 of its Stay Application before this Tribunal, Canada suggests that the appropriate test for this Tribunal should be one of "irreparable harm" to the Claimant. This is not the test under Canadian law. In the *Deluce Holdings* case before the Ontario Court (General Division), the court explicitly stated that the irreparable harm test was not the appropriate test:

> These principles, it seems to me, are another way of approaching the same kind of balancing exercise that finds its expression in interlocutory injunction jargon through the concepts of 'irreparable harm' and 'the balance of convenience'. I do not think it is necessary to apply these latter concepts in themselves – particularly the concept of irreparable harm to the process of determining whether a stay of an arbitration should be granted. The competing factors which must be weighed are similar in nature, however, and the process boils down in the end to a determination, in the court's discretion, of what is most fair – or, to put it another way, what is least unfair – to the parties, in the circumstances.[8]

An example of the appropriate Canadian standard for the making of a stay in an arbitration is given in the *Deluce Holdings* case. The court held that:

> ... the competing stay motions before me must be resolved through resort to the traditional principles which have been applied to stays in arbitration situations. Courts have long exercised an equitable jurisdiction to restrain the continuation of an arbitration proceeding in circumstances where the foundation of the arbitration agreement is under attack. There must be some prima facie evidence -- I would say, a strong prima facie case -- that resort to the arbitration mechanism by the party seeking to rely upon it may be impeached. The stay must not cause an injustice to that party. **The applicant for the stay must persuade the court that the continuance of the arbitration would be oppressive or vexatious or an abuse of the process of the court:** *see Kitts v. Moore*, [1985] 1 Q.B. 253 (C.A.); *The "Oranie" and The "Tunisie"*, [1966] 1 Lloyd's L. Rep. 477 (C.A.), per Sellers L.J., at pp. 486-88.[9] [emphasis added in bold]

and:

> For a stay to be imposed it must not cause an injustice to the claimant seeking the arbitration and the continuance of the arbitration must work an injustice of the party seeking the stay.[10]

18. Canada has produced no evidence that the continuance of the arbitration would be oppressive, vexatious or an abuse of the arbitration process. The Ontario Court in *Deluce Holdings* made the following conclusions on the general principle that arbitration is paramount to domestic proceedings. Justice Blair concluded:

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[8] See *Deluce Holdings Inc. v. Air Canada* (1992) 12 O.R. (3d) 131 at 152.

[9] *Deluce Holdings Inc.* at 151.

[10] *Deluce Holdings Inc.* at 152.

> The *Arbitration Act, 1991* imposes what is tantamount to a mandatory stay of court proceedings, with certain limited exceptions, in circumstances where the parties have agreed to submit their dispute to arbitration. **This legislation represents a shift in policy towards the resolution of arbitrable disputes outside of court proceedings.** Whereas prior to the enactment of this legislation the courts in Ontario had a broad discretion whether or not to stay a court action, **the focus has now been reversed: the court must stay the court proceeding and allow the arbitration to go ahead** unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.
>
> The Act is based upon an international commercial arbitration model in widespread use around the world, including Ontario and other Canadian provinces, respecting international arbitrations. Its clear direction is to compel parties who have agreed to arbitrate disputes to do exactly that, and to discourage them from running to the courts after the agreement has been made if they think there is some particular tactical or strategical advantage in doing so.[11] [emphasis added]

19. In *NetSys Technology Group AB* v. *Open Text Corp.*, the Ontario court summarized the "strong public policy favouring international commercial arbitration" in the Model Law and concluded that domestic court intervention into arbitrations is strictly limited. The court stated:

> As is apparent from the foregoing summary, the underlining theme that can be found in both the ICA Act and the Model Law is that court intervention or involvement with matters that are already the subject of an arbitration agreement is strictly limited. **The legislature has chosen to grant extensive authority to the arbitrator selected by the parties and to restrict court intervention to specific instances.** These provisions signal a marked departure from historical judicial approaches to the scope of private dispute resolution mechanisms and a "clear shift in policy towards encouraging parties to submit their differences to consensual dispute resolution mechanisms outside of the regular court stream": *Onex Corp. v. Ball Corp.* (1994), 12 B.L.R. (2d) 151 (O.C.J. (G.D.)) at 158, per R.A. Blair J. (See also the cases cited there). These legislative changes and these cases reflect what has been described by the Ontario Court of Appeal as "the strong public policy favouring international commercial arbitration": *Automatic Systems Inc. v. Bracknell Corp.* (1994), 12 B.L.R. (2d) 132, at p. 144.[12]
>
> [emphasis added]

20. The focus of these authorities is on maintaining the integrity of the arbitral process and recognizing the very limited nature of judicial review of arbitral awards. That process is undermined if a stay is granted in the present circumstances. Indeed, the integrity of the process is further undermined given the complete absence of any material which would suggest that Canada has any reasonable prospect of success on judicial review. There is no material before the tribunal which gives any indication that there is a likelihood of success of its domestic application to set aside the decision of this NAFTA Tribunal. Simply by stating several grounds upon which Canada wishes to seek review does not

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[11] *Deluce Holdings* at 148.]

[12] [1999] O.J. No. 3134, July 29, 1999 (Ont. S.C.J.) At para. 33 of the Decision.

warrant this NAFTA Tribunal to order a stay of proceedings. The Investor submits that as the moving disputing party for this request, Canada has to meet a higher burden than that.

21. Since the governing law in this NAFTA arbitration is the NAFTA and international law, it simply stretches credulity to argue that the applicable law of this NAFTA arbitration violates a fundamental principle of justice in Canada.

22. In summary, the scope of this type of judicial review is limited and the likelihood of success of Canada's application is minimal. No argument has been advanced that would give any meaningful weight to the suggestion that the substantially unanimous award of distinguished international arbitrators would be interfered with by a domestic court exercising a narrowly constrained review jurisdiction.

D. Canada will not be prejudiced if the Stay Application is not granted and the Investor will be prejudiced.

23. Canada has to establish that the continuation of the arbitration will prejudice Canada and that the Investor will not be prejudiced by a delay of the present phase of the arbitration. Canada has not established that it will be prejudiced, and, accordingly, its request for a stay of this arbitration can be rejected on that basis alone.

24. Canada has not argued that the continuance of the arbitration would prejudice Canada and cause it an injustice. Its main argument relates to the inconvenience and expense which would be equally felt by both disputing parties. It appears from both Canada's Judicial Review Application to the Federal Court, and this present Stay Application to this Tribunal, that Canada is merely displeased with losing the merits phase of this arbitration and wishes to relitigate the claim in a domestic forum.[13] This is not a sufficient ground to seek a challenge of an award nor to stay this arbitration.

25. Canada argues that a stay is required because it is confident that the Judicial Review proceedings will be successful, and accordingly, that a determination of compensation would unnecessarily waste the resources and the time of the disputing parties and Tribunal if the *Partial Award* was judicially review. The Investor believes that the chance of success of the Judicial Review application is minimal. The parties respective views about the prospects of success are hardly relevant to this application.

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[13] At paragraph 19 of its Stay Application, Canada suggests that the court may provide guidance on liability and the NAFTA obligations at issue. The Investor submits that this would be inappropriate for the court and outside of its jurisdiction to address the Judicial Review application. The role of a domestic court when it reviews the awards of arbitrations is not to sit as an appeal court in the domestic sense.

26. In addition, Canada has not questioned in its Application, or even in the Judicial Review Application to the Court, the sufficiency of the arbitration agreement. There is no question that Canada has consented to proceed with the present Investor-State dispute resolution process under Chapter 11 and the UNCITRAL Arbitration Rules. Accordingly, the Investor submits that Canada should be obliged to continue with its procedural obligations under Chapter 11 and with the arbitration process.

27. In this Tribunal's May 1999 Procedural hearing, Canada sought a single phase of arbitration encompassing jurisdiction, merits and damages[14]. It seems contradictory and inconsistent for Canada to now argue that it will prejudiced by the continuation of the damages phase when had its proposal been accepted, damages would already have been addressed. Accordingly, there would be no duplication of effort, no increase in inconvenience or expense that Canada was not previously willing to incur.

28. Canada notes at paragraph 22 of the Stay Application that saving expense is a fundamental advantage of bifurcating arbitral proceedings. Canada does not mention that the main advantages of bifurcation and the reason it provides savings of expense, is that the disputing parties are given an opportunity to address the quantum of compensation on a mutual and consensual basis. The parties have not been able to do so in the present circumstances.

The Investor Will Be Prejudiced if a Stay is Granted

29. A stay of this phase of the arbitration will prejudice the Investor in a manner that would far outweigh any prejudice that would be incurred by Canada if it were to proceed. In fact Canada has not argued that it would incur any specific prejudice at all. Clearly, Canada has not met the initial required test as set out in Canadian or British case law to establish that the continuation of the arbitration will be oppressive or an abuse of the arbitral process.

30. Nevertheless, a stay of the arbitration will create a potentially lengthy delay which would effectively deprive the Investor of its remedy under NAFTA Chapter 11. A stay would also create imbalance and inequality between the disputing parties in this arbitration thus defeating the fundamental principle of equality under the UNCITRAL arbitration process.

Delay

31. Canada has made the theme of its submissions the avoidance of needless cost and expense. This position is clearly contradictory to Canada's act of initiating a domestic court process, which could take many years to resolve.

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[14]Canada admits this at paragraph 13 of its Stay Application.

32. The Investor has been seeking a remedy from Canada for its illegal *PCB Waste Export Ban* since November 1995. The Investor has sought an amicable solution to this dispute but been rebuffed by Canada at each step of the way. Any further delay in seeking its remedy for Canada's illegal acts would compound the effect of Canada's actions and effectively deprive the Investor of its remedy in an efficient and timely manner.

33. The Federal Court process is one which could take many years to complete, particularly if Canada seeks to appeal any or every ruling against it. If this Tribunal grants the present Stay Application, this process will be lengthened significantly. If the damages phase were continued, any challenges Canada wanted to bring could more properly be heard together at a later more appropriate time.

Expense

34. Canada has argued that the disputing parties have not yet expended significant sums on presenting their cases on damages and that Canada does not know the case against it on quantum.[15] As supported by the statements in the Investor's letter to the Tribunal of January 24, 2001, Canada has received a substantial production of documents relating it has requested with respect to damages. In particular, documents relating to over 1,000 bids and orders were provided to Canada in response to its documentary requests between August and October, 1999. It is clear that Canada has already made a detailed assessment of these bids and orders (for example see Volume IX of the Joint Book of Documents) which is the basis of establishing the compensation owed to the Investor.

35. Canada has also received a detailed Summary of Damages from the Investor and has accordingly been made aware of the main elements of the Investor's calculation of the quantum of compensation. The Investor has also expended considerable time and expense preparing for this damages phase, and is in a position to provide its Memorial and expert valuation report when ordered by the Tribunal. The Investor would have expected that Canada would also have been making productive use of its time leading to this phase of the arbitration and is surprised to learn that Canada is squandering its available time by not preparing since it has had the vast majority of the evidence relating to damages in its possession for over one year.

36. Nevertheless, it is clear that both disputing parties have previously expended considerable time and expense addressing evidential and legal issues related to damages (as addressed by the disputing parties in the Memorials in the Initial Phase of the arbitration). The Investor submits that proceeding with the damages phase would not create the degree of

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[15] At paragraph 23 of the Stay Application.

additional expense that Canada argues, and, regardless, this is an expense that both parties would incur.

An Award of Interest and Costs Will Not Sufficiently Indemnify the Investor

37. This Tribunal has recognized with approval the compensation principles established by the Permanent Court of Justice in the *Chorzow Factory case*[16]. In articulating the applicable principle, the Permanent Court found that:

> The essential principle contained in the actual notion of an illegal act ... is that **reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.** Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.[17] [emphasis added]

38. This is the principle that will be applied to the quantification phase of this arbitration. The goal is put a claimant back into the same position that it would have been "but for" the happening of the illegal act. In the words of this NAFTA Tribunal:

> compensation should undo the material harm inflicted by a breach of an international obligation.[18]

39. Rarely do awards of costs and interest sufficiently compensate the successful claimant. In this light, it is appropriate to make every effort to avoid situations which would contribute to increasing interest and costs. This Tribunal has an opportunity to avoid an unnecessary award of interest and opportunity costs by dismissing Canada's Stay Application and allowing the arbitration to proceed with the damages phase.

40. In addition, there are practical elements of the arbitration process that will be compromised as a result of granting a stay. For example, any practical momentum and knowledge of the evidence and issues of the Tribunal members will diminish if a further two year delay in incurred. Further, additional witnesses and evidence will also become more difficult to attain the longer the compensation phase is delayed.

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[16] At paragraphs 313 - 315 of the *Partial Award*.

[17] *Chorzow Factory*, at 47.

[18] *Partial Award* at para 315.

F. A domestic court cannot provide guidance to this Tribunal on damages

41. A domestic court cannot provide any guidance to this NAFTA Tribunal on its findings of damage and it is doubtful it would presume to do so. While Canada has argued that a domestic court can provide such guidance, the powers of a domestic court in Canada's application are to set aside the award. Only an appeal of the NAFTA Tribunal's decision could provide guidance on the determination of damages. Canada's application to the domestic court is not an appeal of the findings of the NAFTA Tribunal. Accordingly, there is no guidance that this Tribunal can obtain from a domestic court on the determination of damages under international law.

42. Canada's challenge to the Canadian domestic courts, if successful, would not result in any substantial narrowing of the issues that this Tribunal need consider. This NAFTA Tribunal must consider the issue of quantification of damages. This consideration will entail a consideration of two grounds of NAFTA inconsistency already determined by the Tribunal.

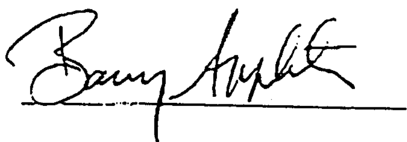
43. In the event that the domestic court were to determine that one of these determinations was to be successfully reviewed, then it would be possible for this NAFTA Tribunal to break down its award on damages in such a manner as to specify which damages were properly attributable to the breach of national treatment and that damage attributable to the violation of international law standards. Similarly, it would be possible for this Tribunal to be able to break down its damage award between damages attributable to the Investor and damages awardable to the Investment. Accordingly, in no way would the determinations of the domestic court be inconsistent with the determinations that were made by the NAFTA Tribunal, except in the circumstance where the entire award of the NAFTA Tribunal were to be successfully set aside.

PART THREE: RELIEF SOUGHT

44. The Investor requests that this Tribunal dismiss Canada's application for a stay and that this Tribunal award the costs for this motion to the Investor.

All of which is respectfully submitted.

Submitted this 19th day of February, 2001



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