IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

('The Rules')

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 1

Bifurcation

1. As a first stage of the proceedings the Tribunal will determine (in a partial award) liability issues and issues as to the principles on which damages (if any) should be awarded, leaving the calculation of the quantification of such damages, if any, to a second stage. Expert evidence on the calculation of any such quantification will not be required during the first stage.

2. Accordingly, the directions given in this Procedural Order relate only to the issues to be determined in the first stage of the proceedings. Directions relating to the second stage of the proceedings, if required, will be given by the Tribunal after its partial award has been made.

Initial Written Pleadings

3. On 30 October 1998 MYERS delivered its Statement of Claim under Article 18 of the Rules together with its Notice of Arbitration of the same date.

4. By 20 June 1999 CANADA shall submit its Statement of Defence under Article 19 of the Rules.

Evidence Gathering

Documentary evidence

5. By 28 May 1999 each party may submit to the other a 'first request' for the production of documents or categories of documents identified with adequate specificity.

6. By 15 July 1999 the 'requested party' shall either produce the 'requested documents' or give reasons in writing to the 'requesting party' why it proposes not to produce such documents.

7. By 5 July 1999 each party may submit to the other a 'second request' for the production of documents or categories of documents identified with adequate specificity.

8. By 31 August 1999 the 'requested party' shall either produce the 'requested documents' of give reasons in writing to the 'requesting party' why it proposes not to produce such documents.

9. By 1 October 1999 each party may submit to the other a 'third request' for the production of documents or categories of documents identified with adequate specificity.

10. By 16 October 1999 the 'requested party' shall either produce the 'requested documents' or give reasons in writing to the 'requesting party' why it proposes not to produce such documents.

11. The Tribunal will make procedural orders in relation to disputed requests for document production if and when necessary; and, if not agreed, in relation to the terms as to confidentiality upon which any such documents shall be produced.

12. At any stage of the proceedings either party may deliver to the other further requests for the production of additional documents or categories of documents identified with adequate specificity. However, the proceedings shall continue as set out in this order once the 'first requests' have been complied with or resolved.

Witness evidence

13. The parties shall submit signed statements of the witnesses of fact on whom they intend to rely with their Memorials.

14. By 1 October 1999 each party may deliver to the other and to the Tribunal a list of witnesses under the control of the other it wishes to examine orally at the witness hearings.

15. The Tribunal will give directions later as to the method by which (if at all) the testimony of such witnesses will be admitted into the record of the proceedings.

Experts

16. The Tribunal will give directions later, if necessary, for the submission of written reports of any expert witnesses upon whom the parties intend to rely during the first stage of the proceedings, and their examination at the witness hearings.

Memorials

17. By 20 July 1999 MYERS shall deliver its Memorial not exceeding 50 pages (excluding appendices and exhibits) to CANADA and to the Tribunal.

18. By 20 September 1999 CANADA shall deliver its Counter-memorial not exceeding 50 pages (excluding appendices and exhibits) to MYERS and to the Tribunal.

19. Either party may apply to the Tribunal for permission to extend the length of its Memorial, giving reasons in writing.

20. The memorials shall be accompanied by (a) the documentary evidence relied upon (b) the signed statements of witnesses relied upon and (c) copies of any passages from legal authorities relied upon.

Other Pre-hearing activity

21. On a date to be fixed during the week beginning 25 October 1999 a second case management meeting will be held, for the purpose of making any determinations necessary to finalise the evidence gathering exercise and to resolve any other outstanding procedural matters. This meeting will be held by telephone conference unless the Tribunal determines that it wishes to meet the parties' representatives in person.

22. Not less than 21 days before the start of the witness hearings the parties shall deliver to each other and to the Tribunal a pre-hearing memorandum of not more than 10 pages in length summarising its position on the 'live' issues in the case. The purpose of the pre-hearing memoranda will be to eliminate (or at least reduce the length of) oral opening statements at the witness hearings.

23. Not less than 14 days before the start of the witness hearings the parties shall deliver to the Tribunal a chronologically organised joint volume (or volumes) of the documents that are expected to be referred to at the hearings, and a volume (or volumes) of witness statements.

24. Not less than 14 days before the start of the witness hearings the parties shall endeavour to agree upon and deliver to the Tribunal a stipulation or statement of agreed facts together with a memorandum dealing with any issues as to the authenticity or admissibility of the documents to be referred to at the witness hearings.

25. A pre-hearing telephone conference shall be held as soon as practicable after the delivery to the Tribunal of the joint exhibits volumes and witness statements, for the purpose of discussing the order in which witnesses will be heard, time limits for their examination and other administrative aspects of the hearings.

Hearings

26. The witness hearings shall take place during the week beginning Monday 14 February 2000, provisionally estimated to occupy 3 days. The witness hearings shall take place in Toronto, Canada, at a venue to be arranged by the parties, the cost shall be borne by the parties equally shares pending the Tribunal's award in respect of costs.

27. The hearings shall be primarily for the cross-examination and re-examination of witnesses. However, the parties' representatives will be permitted to make brief opening statements. Closing statements will also be permitted, and the Tribunal will give directions as to their maximum duration later. Either party may apply to the Tribunal to exceed the time limits for opening and closing statements if it considers it necessary for the purpose of presenting its case to the Tribunal.

28. The signed statements of the witnesses shall be treated as their direct evidence. However, the Tribunal may permit (or require) any witness to give additional direct evidence.

29. No new testimony or new documents may be introduced at the hearings without permission of the Tribunal. Such permission will usually be given where the purpose of the material is for the purposes of rebuttal, but not where a document has been withheld merely for the purpose of taking a witness by surprise in cross-examination

30. The parties shall arrange for a reporter to make a verbatim record of the witness hearings (testimony and argument), the cost to be borne equally by the parties pending the Tribunal's award in respect of costs. However, transcripts will be produced only at the request of either party or the Tribunal, not automatically. Each party shall pay the cost of transcripts it orders for its own use. The parties shall bear the cost of transcripts provided to the Tribunal equally pending the Tribunal's award in respect of costs.

Other Matters

31. Documents of up to 10 pages shall be sent by fax, the date of the fax transmission to be the date of service.

32. Documents of more than 10 pages shall be sent by courier, the date of receipt to be the date of service.

33. The initial deposit for the purposes of Article 41.1 shall be US$30,000, to be paid by the parties in equal shares to an account at a first class bank in the United Kingdom to be notified to the parties by the presiding arbitrator. The Tribunal will review the sufficiency of the deposit from time to time during the proceedings and may request supplementary deposits in accordance with Article 41.1 of the Rules.

34. Either party may apply to the Tribunal at any time for the terms of this Order to be varied in the interest of ensuring an orderly proceeding and of providing a fair opportunity for each party to present the merits its case. Any 'emergency' applications to the Tribunal for procedural directions shall be made in writing and sent to each member of the Tribunal by fax. The Tribunal will give directions as soon as possible thereafter for the submission of a reply and (if necessary) rejoinders. Such applications shall normally be decided in writing or (at the discretion of the Tribunal) following a telephone conference.

Signed: Martin Hunter

(on behalf of the Tribunal)

Dated: 28 May 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 2

Confidentiality of material prepared for the purpose of the proceedings

1. As a temporary measure the parties shall not release into the public domain the following documents:

   The Notice of Intent
   The Notice of Arbitration
   The Statement of Claim
   The Statement of Defence

   before 30 June 1999 or the date on which the parties enter into an agreement as to the confidentiality of materials prepared in connection with the proceedings, whichever is the earlier.

2. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or renewed.

Martin Hunter

Signed: .....
(on behalf of the Tribunal)

Dated: 28 May 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 3

Confidentiality of material prepared for the purpose of the proceedings

1. MYERS having confirmed by Mr Appleton's letter dated 26 May1999 that it had no objection to publication of its Statement of Claim submitted under Article 18 of the UNCITRAL Rules, the following documents may be released into the public domain immediately:

   The Notice of Intent
   The Notice of Arbitration
   The Statement of Claim
   The Statement of Defence

2. As a further temporary measure the parties shall not release into the public domain any other documents prepared in connection with the proceedings before 30 June 1999 or the date on which the parties enter into a confidentiality agreement, whichever is the earlier.

3. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or renewed.

4. This Order supersedes Procedural Order No. 2.

Signed: Martin Hunter
(on behalf of the Tribunal)

Dated: 10 June 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 4

Confidentiality of material prepared for the purpose of the proceedings

1. As a temporary measure the parties shall not release into the public domain any documents prepared in connection with the proceedings before 29 October 1999 or the date on which the parties enter into a confidentiality agreement, whichever is the earlier.

2. Paragraph 1 of this Order shall not apply to the documents identified in paragraph 1 of Procedural Order No. 1, as the Tribunal has already given leave (by consent) for the release of these documents into the public domain.

3. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or renewed.

Signed: Martin Hunter
(on behalf of the ~~Tribunal~~)

Dated: 6 July 1999

ESSEX COURT CHAMBERS Barristers

24 LINCOLN'S INN FIELDS LONDON WC2A 3ED

6 July1999 BY FAX

Appleton & Associates +1 416 815 8801
For: Mr Barry Appleton

Trade Law Division, Dept of Foreign Affairs etc, Canada +1 613 944 3213
For: Mr Joseph de Pencier

cc: Faculty of Law, University of Manitoba +1 204 474 7580
For: Dr Bryan Schwartz

Ladner Downs +1 604 687 6744
For: Mr Edward Chiasson QC

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I thank Mr DePencier for his letter of 23 June, and Mr Appleton for his letter of 5 July.

As Myers has consented to Canada's proposal to extend the present time limit for preserving confidentiality in documents prepared for the purposes of the arbitration, the Tribunal consents to continue the effect of Procedural Order No. 3 as agreed.

Accordingly, I attach Procedural Order No. 4.

The issues involved in the confidentiality question appear to be quite intricate. It therefore seems likely that, if no agreement is reached, the Tribunal would wish to meet the parties in person rather than hear the their counsel in a telephone conference.

At present my schedule has me in Los Angeles on 25 and 26 October. It would therefore be convenient for me if I could arrange to pass through Toronto towards the end of the week in question – but things may change, and of course a physical meeting may turn out not to be necessary.

Yours truly

Martin Hunter

J Martin Hunter

TELEPHONE 0171 813 8000 FAX 0171 813 8080 DX No 320
e-mail: clerksroom@essexcourt-chambers.co.uk http://www.essexcourt-chambers.co.uk

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 5

Document Production Issues

Pursuant to a telephone conference between the Tribunal and the parties' representatives on 28 July 1999, the Tribunal makes the following directions:

1. By Friday 30 July 1999 MYERS shall deliver to CANADA and to the Tribunal a brief memorandum containing its suggestions as to the procedure the Tribunal should follow in making its determination as to whether any particular documents ought to be produced; for example, should the Tribunal review such documents? Should the Chairman alone review them? Should a 'special master' be appointed? Or should the Tribunal make its determination based on a description of the contents of the documents? Or is there another more appropriate method?

2. By Tuesday 10 August CANADA shall deliver to MYERS and the Tribunal a memorandum in support of the grounds on which it claims that requested documents should not be produced, dealing with different categories of documents with adequate specificity and the principles to be applied by the Tribunal in making its determination.

3. By Tuesday 10 August CANADA shall also deliver to MYERS and the Tribunal a memorandum containing its response to the suggestions made by MYERS under paragraph 1 above.

4. By Thursday 19 August MYERS may, if it wishes, deliver to CANADA and the Tribunal a memorandum containing its response to CANADA's memorandum delivered under paragraph 2 above.

5. On Thursday 2 September (with Wednesday 1 September as an alternative) the Tribunal will hear the parties' representatives orally on the outstanding document production issues. The Tribunal will notify the parties later as to whether this event will take place by telephone conference or at a meeting in Toronto.

Signed: Martin Hunter
(on behalf of the Tribunal)

Dated: 28 July 1999

ESSEX COURT CHAMBERS

24 LINCOLN'S INN FIELDS LONDON WC2A 3ED

28 July 1999

BY FAX

Appleton & Associates
For: Mr Barry Appleton
+1 416 815 8801

Trade Law Division, Dept of Foreign Affairs etc, Canada
For: Mr Joseph de Pencier
+1 613 944 3213

cc: Faculty of Law, University of Manitoba
For: Dr Bryan Schwartz
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Ladner Downs
For Mr Edward Chiasson QC
+1 604 622 5807

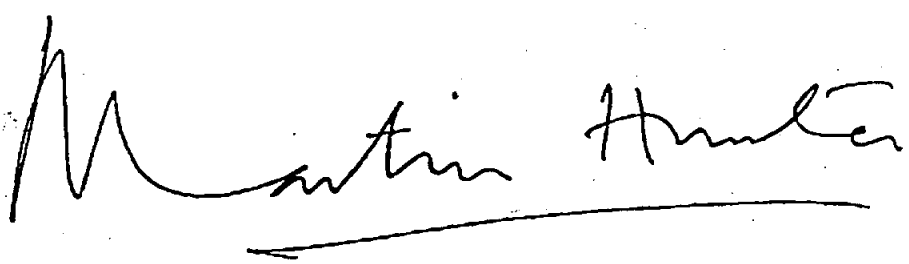
Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

Following our telephone conference today I attach Procedural Order No. 5, which I have signed on behalf of the Tribunal.

The parties (and my fellow arbitrators) should feel free to say so if I have recorded the Tribunal's directions inaccurately.

Yours truly



J Martin Hunter

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 6

After considering the parties' most recent written submissions and hearing their Counsel orally on 2 September 1999 the Tribunal makes the following procedural directions:

Amendments to Procedural Order No. 1

1. Paragraph 18 shall be amended so that CANADA's Counter-memorial shall be delivered by 5 October 1999.

2. Paragraph 9 shall be amended so that any 'Third Requests' for document production shall be delivered by 8 October 1999.

3. Paragraph 10 shall be amended so that responses to any 'Third Requests' shall be delivered by 21 October 1999.

4. Paragraph 21 shall be amended to provide that a third case management will be held (if necessary) on 28 October 1999.

Document Production

5. By 10 September 1999 CANADA shall make written request(s) to the Minister(s) concerned as to the existence of documents requested by MYERS under heads B12, B17, B31, C1 and C2; of its First Request; and, if any such documents do exist, request the consent of the Minister(s) concerned to their production in this arbitration, and shall report the position to the Tribunal and MYERS as soon as possible thereafter.

6. By 17 September 1999 CANADA shall provide further justification as to why the documents requested by MYERS under heads A4, B5, C5 and C6 of its First Request

should be protected by any form of state privilege, giving adequate particulars in relation to each category of documents under each head.

7. By consent, CANADA shall produce Document A1.

8. Without deciding whether Document B18 is protected by legal professional privilege, the Tribunal determines that this document is not necessary for its determination of the issues in the arbitration; and that, accordingly, CANADA shall not be required to produce it.

9. By 17 September 1999 CANADA shall produce such documents as it has in its possession or control in relation to the documents requested by MYERS under head B48 of its First Request.

Intervention by other State parties to the NAFTA

10. By consent, the Tribunal will write to the appropriate officials of MEXICO and the UNITED STATES in connection with any possible interventions in this arbitration under NAFTA Article 1128.

Financial status of the file

11. By 28 October 1999 at the latest the parties shall fulfil the undertaking given at the first case management meeting to give consideration to, and agree upon, the basis of the remuneration of the members of the Tribunal.

12. The Tribunal will notify the parties shortly as to the First Supplementary Deposit required under Article 41.2 of the Rules.

Other matters

13. Either party may apply to the Tribunal at any time for the terms of this Order to be varied in the interest of ensuring an orderly proceeding and of providing a fair opportunity to present the merits of its case.

Signed: .....
(on behalf of the Tribunal)

Dated: 4 September 1999

Draft letter, Tribunal to MEXICO and the UNITED STATES: 4/9/99

Dear Sirs

NAFTA/UNCITRAL Arbitration
S. D. MYERS, Inc. - v – GOVERNMENT OF CANADA

I write this letter with the consent of the parties to this arbitration and on behalf of the arbitral tribunal composed of Professor Bryan Schwartz, Mr Edward Chiasson QC and myself.

You will aware that Article 1128 of the NAFTA provides as follows:

> *On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement*

My purpose in writing is to enquire whether your Government wishes to make any submissions to the Tribunal in this arbitration; and, if so, to establish an appropriate procedure that will ensure the orderly and expeditious future conduct of the proceedings.

The present position is that a third case management meeting between the Tribunal and the parties is due to take place on Thursday 28 October 1999. The procedural matters currently in issue mainly concern the scope of document production. MYERS has already delivered its Memorial, and CANADA will deliver its Counter-memorial in early October.

The substantive witness hearings are scheduled to take place in Toronto during the week beginning Monday 14 February, after which the Tribunal is expected to make a partial award on liability issues.

You are invited to notify the Tribunal and the parties by 8 October 1999 if you wish to have a representative present at the third case management meeting on 28 October, so that the necessary logistical arrangements may be made. If you wish to have a representative present at the witness hearings, or to make any written submissions, you are invited to notify the Tribunal and the parties no later than 21 December 1999, in order to give the Tribunal enough time to establish an appropriate procedural schedule for your Government's participation in the proceedings.

Should you wish to be provided with further information on any matters concerning the arbitration, you are invited to address questions directly to the parties. The relevant contact details are as follows: ....

Yours truly

Prof. J Martin Hunter
(on behalf of the Tribunal)

04-Sep-99 11:31 Martin Hunter

ESSEX COURT CHAMBERS

24 LINCOLN'S INN FIELDS LONDON WC2A 3ED

Barristers

4 September 1999

BY FAX

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cc: Faculty of Law, University of Manitoba
For: Professor Bryan Schwartz

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Ladner Downs
For: Mr Edward C Chiasson QC

+1 604 622 5807

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I refer to the second case management meeting between the Tribunal and the parties on 2 September, and now attach Procedural Order No.6.

I also attach the Tribunal's draft 'letter to governments' as discussed at the meeting. Please let the Tribunal have any comments and/or suggestions as soon as possible and in any event no later than Friday 10 September 1999.

After deliberation, the Tribunal fixes the amount of the First Supplementary Deposit required under Article 41.2 of the Rules at $30,000, to be paid by the parties in equal shares within the 30 day period referred to in Article 41.4 of the Rules. Payment details remain as for the Initial Deposit. As before, interest on the deposit account will continue to be accrued for the benefit of the parties; and particulars of all payments made to each arbitrator will be given with the award as required by the Article 38 of the Rules. The sufficiency of the deposit will be reviewed again by the Tribunal as and when appropriate.

Yours truly,

Martin Hunter

J Martin Hunter
(on behalf of the Tribunal)

E

CLERK OF THE PRIVY COUNCIL AND
SECRETARY TO THE CABINET

CANADA

GREFFIER DU CONSEIL PRIVÉ ET
SECRÉTAIRE DU CABINET

September 17, 1999

Mr. J. Martin Hunter
Essex Court Chambers
24 Lincoln's Inn Fields
London, WC2A 3ED
U.K.

Dear Sir:

S.D. MYERS, INC. AND GOVERNMENT OF CANADA

This letter is in response to the Panel's Procedural Order No. 6 dated September 4, 1999, and in particular to Paragraph 6, which states as follows:

> "By 17 September 1999 CANADA shall provide further justification as to why the documents requested by Myers under heads A4, B5, C5 and C6 of its First Request should be protected by any form of state privilege, giving adequate particulars in relation to each category of documents under each head."

I confirm that the Government of Canada claims privilege on information which constitutes confidences of the Queen's Privy Council for Canada, contained in documents or portions of documents as detailed in the attached schedule.

OTTAWA
K1A 0A3

As specified in Procedural Order No. 6, each document responsive to heads A4, B5, C5 and C6 is listed on the schedule with particulars as to the basis for the privilege, provided in accordance with Canadian statutory requirements for document production containing such privilege.

Sincerely,

Mel Cappe

Attachment

c.c,: Dr. Barry Schwartz
Mr. Edward Chaisson
Mr. Barry Appleton, Counsel, S.D. Myers, Inc.

SCHEDULE
(TO LETTER TO J. MARTIN HUNTER, DATED SEPTEMBER 17, 1999)

1. Document #1 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

2. Document #2 contains information used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. (C-5; C-6)

   Document #2 also contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

3. Document #3 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

4. Document #4 contains portions of information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

   Document #4 also contains portions of information concerning an agendum of Council or a record recording deliberations or decisions of Council. (C-5; C-6)

5. Document #5 contains portions of information concerning an agendum of Council or a record recording deliberations or decisions of Council. (A-4)

6. Document #6 contains information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

7. Document #7 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

8. Document #8 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

9. Document #9 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

10. Document #10 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

11. Document #11 contains portions of information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

12. Document #12 contains portions of information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

13. Document #13 contains information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

14. Document #14 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

15. Document #15 contains information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

16. Document #16 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

17. Document #17 contains information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

Document #17 also contains information concerning an agendum of Council or a record recording deliberations or decisions of Council. (C-5; C-6)

18. Document #18 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

19. Document #19 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. **(C-5; C-6)**

20. Document #20 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. **(C-5; C-6)**

21. Document #21 contains information used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. **(C-5; C-6)**

22. Document #22 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. **(C-5; C-6)**

23. Document #23 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. **(C-5; C-6)**

24. Document #24 contains information concerning an agendum of Council or a record recording deliberations or decisions of Council. **(C-5; C-6)**

Document #24 also contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. **(C-5; C-6)**

25. Document #25 contains information concerning an agendum of Council or a record recording deliberations or decisions of Council. **(C-5; C-6)**

Document #25 also contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. **(C-5; C-6)**

26. Document #26 contains information used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. **(C-5; C-6)**

7. Document #27 contains information used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. (C-5; C-6)

28. Document #28 contains information used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. (C-5; C-6)

29. Document #29 contains information used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. (C-5; C-6)

30. Document #30 contains information concerning an agendum of Council or a record recording deliberations or decisions of Council. (C-5; C-6)

Document #30 also contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

31. Document #31 contains information the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions between Ministers. (C-5; C-6)

32. Document #32 contains information from a memorandum the purpose of which is to present proposals or recommendations to Council. (C-5; C-6)

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 7

After considering MYERS' submissions dated 20 & 23 September and 1 October and CANADA's submissions dated 23 & 26(x2) September and 1 October the Tribunal directs as follows:

1. CANADA shall deliver its Counter-Memorial by 5 October 1999, as provided in Procedural Order No. 6.

2. All the remaining document production issues will be addressed at the third case management meeting, which is scheduled for 28 October 1999.

3. When document production is completed, or at such earlier time as may be appropriate, the Tribunal will consider any requests by the parties for leave to deliver a supplemental Memorial or Counter-Memorial, as the case may be.

Signed: Martin Hunter
(on behalf of the Tribunal)

Dated: 4 October 1999

5575-613

ESSEX COURT CHAMBERS
24 LINCOLN'S INN FIELDS LONDON WC2A 3ED

BY FAX

4 October 1999

Appleton & Associates +1 416 815 8801
For: Mr Barry Appleton

Trade Law Division, Dept of Foreign Affairs etc, Canada +1 613 944 3213
For: Mr Joseph de Pencier

cc: Faculty of Law, University of Manitoba +1 204 474 7580
For: Professor Bryan Schwartz

Ladner Downs +1 604 622 5807
For Mr Edward Chiasson QC

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I refer to my letter dated 1 October.

The Tribunal has deliberated on the parties' various outstanding procedural applications and its decisions are given in the attached Procedural Order No. 7.

It is now clear that the case management meeting provisionally scheduled for 28 October will be required, and Mr Appleton is kindly invited to make the usual arrangements.

Yours truly

Martin Hunter

J Martin Hunter

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 8

This Order confirms certain directions given orally by the Tribunal during the Third Case Management Meeting held in Toronto on 28 October 1999, concerning written questions to be put by the Tribunal to Mr Reg Plummer, Mr Richard Fosbrooke and Mr Aharon Mayne:

1. By 8 November 1999 MYERS shall propose to the Tribunal, with a copy to CANADA, a list of questions to be put to the above named persons together with draft introductory instructions concerning the preparation of their written answers.

2. By 11 November 1999 CANADA shall deliver to the Tribunal its comments, if any, on the proposed questions and draft introductory instructions

3. The Tribunal shall as soon as possible thereafter settle the form of the questions and deliver them to the parties.

4. CANADA shall make arrangements to deliver the written answers to the Tribunal and to MYERS by 30 November 1999.

5. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or reviewed.

Signed: Martin Hunter
(on behalf of the Tribunal)

Dated: 31 October 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
('MYERS')

-and-

Government of Canada
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 9

After considering the parties' most recent written submissions and hearing their Counsel orally at the Third Case Management Meeting on 28 October 1999 the Tribunal makes the following procedural directions:

Document Production

1. CANADA shall produce such documents as it has in its possession or control in relation to items 10, 11 and 16 of MYERS' Second Request, except that no documents that came into existence after 31 December 1997 need be produced.

2. By consent, CANADA shall produce hard copies of any e-mail messages that may be found pursuant to a further search in connection with item 32 of MYERS' Second Request.

3. By consent, CANADA shall produce any relevant accounts relating to the use of cellular phones by Ms Sheila Copps, her staff and Mr Mel Cappe pursuant to a further search in connection with item 38 of MYERS' Second Request.

4. The Parties shall consult with each other in connection with documents mentioned item II-2 of MYERS' Third Request, and shall revert to the Tribunal if necessary.

5. Save as directed in paragraphs 1 to 4 above, and subject to matters concerning Crown Privilege which are the subject of a separate procedural order, the Tribunal makes no further orders concerning the production of documents. All document production by both parties shall be completed at the latest by 30 November 1999. Subject to any applications under paragraph 6 below, from that date the production of documents phase shall be closed. The failure or refusal of either party to produce Requested Documents by that date may thereafter be the subject of comment and/or submission.

Witness Testimony

6. Rev. Michael Valentine, Mr Victor Shantora, Mr John Myslicki, Mr Roy Hickman and Mr George Cornwall shall be offered for oral examination at the witness hearings scheduled to start on 14 February 2000. As provided by paragraph 28 of Procedural Order No.1 their signed statements shall be treated as their direct testimony. However, the Tribunal may permit (or require) any witness to give additional direct testimony.

7. The Tribunal makes no orders or requests for the attendance of any other witnesses for oral examination.

8. The Tribunal makes no orders relating to the taking of pre-hearing testimony on deposition.

9. Either party may, if it wishes, apply to the Tribunal for leave to present additional witnesses for oral examination at the witness hearings.

10. Paragraphs 26 to 29 of Procedural Order No.1 remain in effect concerning the witness hearings.

11. Paragraph 29 of Procedural Order No.1 shall be varied to provide that the Tribunal shall be provided with full transcript of the witness hearings and any oral closing statements.

Further Written Pleadings

12. By 15 December 1999 each party may, if it wishes, deliver to the Tribunal and to the other party a Supplemental Memorial.

13. The 'pre-hearing memoranda' to be delivered by each party pursuant to paragraph 22 of Procedural Order No.1 may be accompanied by an annexed brief 'Reply to Supplemental Memorial' which shall be limited to reference to any *new material* contained in the Supplemental Memorials.

14. By 28 January 2000 each party may, if it wishes, deliver to the Tribunal, the other party and the other NAFTA Parties a short response to any submissions made under Article 1128 of the NAFTA pursuant to the Tribunal's invitation.

Other matters

15. Either party may apply to the Tribunal at any time for the terms of this Order to be supplemented, varied or reviewed.

Signed: .....
(on behalf of the Tribunal)

Dated: 4 November 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. MYERS, Inc.
(Claimant)
('MYERS')

-and-

GOVERNMENT OF CANADA
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 10

(concerning crown privilege)

After considering the parties' most recent written submissions, and their oral submissions made at the Third Case Management Meeting held on 28 October 1999, the Tribunal gives the following procedural directions:

Crown Privilege

1. CANADA shall not at this stage be required to produce any documents in respect of which a 'certificate' of the appropriate authority has been provided pursuant to section 39 of the Canada Evidence Act 1985.

2. It shall be a matter for each party to determine the manner in which it will proceed in the light of the Tribunal's decision not to make any order concerning documents in

respect of which a Canada Evidence Act 'certificate' has been produced, bearing in mind that the closing date for the production of documents is 30 November 1999.

3. If MYERS elects to renew its application for an order for production of documents in respect of which a 'certificate' of the appropriate authority has been provided, the Tribunal will give directions for the parties to submit memoranda dealing with the issues mentioned in the Tribunal's 'Explanatory Note' that accompanies this Procedural Order.

4. Any questions relating to the drawing of 'adverse inferences' and/or the discharge of any burden of proof by either party will be determined by the Tribunal after consideration of written or oral statements when the evidentiary record is closed.

Other Matters

5. Either party may apply to the Tribunal at any time for the terms of this Order to be supplemented, varied or reviewed.

Signed: .....

(on behalf of the Tribunal)

Dated: 16 November 1999

Explanatory Note to Procedural Order No. 10

1. The purpose of this explanatory note is to summarize the Tribunal's reasoning underlying Procedural Order No. 10 and to give some guidance to the parties if production of documents for which cabinet privilege is claimed were pursued.

2. CANADA resists production of certain requested documents relying on a certificate issued pursuant to Section 39 of the *Canada Evidence Act* R.S.C. 1970, c. E-10 as amended, that is, that the documents contain information that is ". . . a confidence of the Queen's Privy Council for Canada . . ." MYERS contends that this "privilege" is inapplicable in a NAFTA Chapter 11 proceeding and calls in aid the principles of public international law.

3. The submissions advanced to date by the parties are not sufficient to brief the Tribunal on this highly complex matter.

4. In the Tribunal's view, MYERS correctly does not seek production of documents containing information of actual cabinet deliberations. The documents in issue are "peripheral" to such discussions and include briefing papers for individual ministers.

5. In the absence of the certificate, the issuance of which appears to be at CANADA's discretion, the Tribunal likely would follow the approach taken by the WTO panel in the Brazil-Canada airplane dispute and, on a "document-by-document" basis, require CANADA to give sufficient information and justification to sustain privilege for each document.

6. The circumstances of the present case involve a number of complicating factors: first, CANADA has invoked a domestic law that applies to it and other NAFTA Chapter 11 panels have taken into account the "personal" legal rights and obligations of parties; secondly, the seat of the arbitration is Toronto, Canada; thirdly, the arbitration is being conducted under the UNCITRAL Arbitration Rules which are designed for

international commercial arbitrations (private sector disputes); other Chapter 11 proceedings are conducted under the ICSID Special Facility which is designed for mixed international commercial arbitrations (private sector or state agencies); fourthly, the claim is an alleged breach of the NAFTA, a treaty, that includes, *inter alia*, CANADA's obligation ". . . to accord to [MYERS and its investments] treatment in accordance with international law, including fair and equitable treatment . . ."; fifthly, the substantive governing law is public international law, a source of law that concerns the relationship between states.

7. There is some precedent in Canadian law, in contexts where section 39 is not applicable or not dispositive, for the consideration of documents on a document-by-document basis. The Brazil-Canada decision at least contemplates that executive privilege might be accepted in some circumstances by a tribunal deciding issues of international law.

8. Insofar as Canadian law is relevant, in addition to the *Canada Evidence Act*, several enactments may need to be considered. These include: the *Commercial Arbitration Act* and the *NAFTA Implementation Act*.

9. Each NAFTA Chapter 11 tribunal must grapple with the essentials of the individual case before it.

10. The Tribunal recognizes that this issue must be decided in the context of this NAFTA Chapter 11 dispute which is being conducted under the UNCITRAL Rules (which afford to the Tribunal considerable discretion in the management of the dispute) and which potentially embraces consideration of international and domestic law.

11. If MYERS were to pursue the matter it would be essential for the parties to provide to the arbitrators briefing on the full range of complex issues that are brought into play by it.

17 November 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. MYERS, Inc.
(Claimant)
('MYERS')

-and-

GOVERNMENT OF CANADA
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 11

(concerning confidentiality in materials produced in the arbitration)

With reference to Procedural Orders Nos. 2, 3 and 4 and the parties' submissions during the Third Case Management Meeting in Toronto on 28 October 1999 the Tribunal orders as follows:

Hearings, Transcripts of Hearings and Submissions

1. In accordance with Article 24.4 of the UNCITRAL Rules all hearings shall be held in camera unless the parties agree otherwise.

2. All transcripts and other records taken of hearings (except those documents mentioned in Procedural Order No.3, paragraph 1, namely the Notice of Intention, Notice of Arbitration, Statement of Claim and Statement of Defence) shall be kept confidential and may only be disclosed according to the conditions established below for 'Protected Documents'.

The Tribunal

3. The Tribunal confirms that by letter of 24 March 1999 it consented to the publication of the identity of its members.

Decisions of the Tribunal

4. According to NAFTA Article 1137 and its Annexe 1137.4, awards may be published by either party. This includes not only the final award, but also interim, interlocutory, partial and preliminary awards.

5. Other decisions of the Tribunal may also be disclosed or published. This includes Procedural Orders of the Tribunal unless they contain information that is to be treated as confidential according to paragraphs 2 and/or 7 of this Order.

Confidential Business Information

6. Subject to NAFTA Article 1129, no document over which business confidentiality has been claimed in these proceedings between MYERS and CANADA or copy thereof ('Protected Documents), or information recorded in those documents, shall be disclosed except in accordance with the terms of this Order or with prior written consent of the party that claimed business confidentiality over the document.

7. If any person in possession of a Protected Document receives a request pursuant to law to disclose a Protected Document or information contained therein, that person shall give prompt written notice to the party that claimed confidentiality over the document so that party may take such steps as it considers appropriate not less than thirty (30) days before disclosure unless the law requires disclosure in a shorter period of time.

8. The party claiming privilege shall identify each Protected Document with the notation:

> 'CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO CONFIDENTIALITY ORDER. UNAUTHORISED DISCLOSURE PROHIBITED'.

9. Protected Documents identified by the parties and information recorded in those Protected Documents may be used only in these proceedings between MYERS and CANADA and may be disclosed only for such purposes to and among:

   (a) counsel whose involvement in the preparation or conduct of these proceedings is reasonably necessary;

   (b) officials or employees of the parties whose involvement in the preparation or conduct of these proceedings is reasonably necessary;

   (c) independent experts or consultants retained or consulted by the parties in connection with these proceedings; and

   (d) witnesses who in good faith are reasonably expected to offer evidence in these proceedings and only to the extent material to their expected testimony.

10. All persons receiving Protected Documents shall be governed by this Order. Each party shall have the obligation of notifying all independent experts, consultants and witnesses retained by such parties of the obligations under this Order. The obligations created by this Order shall survive the termination of these proceedings.

11. This Order is binding on all persons receiving Protected Documents pursuant to paragraphs 9(a) and (b) of this Order. The party making disclosure pursuant to paragraph 9(a) and (b) of this Order shall take reasonable steps to inform all recipients of Protected Documents of their obligations under this Order.

12. It shall be the responsibility of the party who is to disclose Protected Documents to any person in accordance with paragraphs 9(c) and (d) of this Order, to ensure that such person who is to receive Protected Documents, or the information contained therein, executes a Confidentiality Agreement in the form attached as Appendix "A" before gaining access to any Protected Document. Each such Confidentiality Agreement shall be immediately filed with the President of the Tribunal, who shall keep such Agreement confidential. Where Protected Documents are to be disclosed to a firm, organization, company or group, all employees and consultants of the firm, organization, company or group with access to the Protected Documents, must execute and agree to be bound by the terms of the Confidentiality Agreement attached as Appendix 'A'.

13. At the conclusion of these proceedings, all Protected Documents and copies thereof are to be returned to the party who supplied the Protected Documents, and all documents containing information from a Protected Document shall be destroyed, subject to the requirements of the *National Archives of Canada Act*.

14. This Order is without prejudice to any assertion of privilege. In the event the Tribunal orders production of a document for which privilege is claimed, the party asserting privilege may claim the protection available under this Order.

15. Notice pursuant to this Order shall be provided to the Claimant by sending notice by fax to the counsel of record for MYERS, while these proceedings are pending (or after the completion of these proceedings, to MYERS direct) and to CANADA by sending notice by fax to the General Counsel of the Trade Law Division of the Department of Foreign Affairs and International Trade (or his or her successor or designate).

Specific Applications by Parties

16. If a party considers that certain documents and information should be treated in a different way from that ordered above, it may submit an application to the Tribunal to that effect, explaining the reasons why it considers such different treatment necessary.

Other matters

17. Each party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or reviewed.

18. The above directions having been made, it still appears to the Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of the working relations between the parties if during the proceedings they both were to limit public discussion of the case to a minimum.

Signed: .....

(on behalf of the Tribunal)

Dated: 11 November 1999

[Appendix 'A': Confidentiality Agreement in the form already agreed by the parties]

APPENDIX "A"

S.D. MYERS, Inc v CANADA

CONFIDENTIALITY AGREEMENT

TO: The Government of Canada (and its legal counsel); and S.D. Myers, Inc. (and its legal counsel).

FROM: [*Name*]
[*Address*]
[*Affiliation*]
[*Position*]

1. IN CONSIDERATION of being provided with information and documentation ("Protected Documents") in connection with this proceeding over which claims for confidentiality have been advanced, I hereby agree to maintain the confidentiality of such information or documentation. It shall not be copied or disclosed to any other person nor shall the information or documentation so obtained be used by me for any purposes other than in connection with this proceeding.

2. I acknowledge that I am aware of the order of the Arbitration Tribunal regarding confidentiality, a copy of which is attached as Schedule "A" to this Agreement, and agree to be bound by the same.

3. In the event that I am required by law to disclose any of the information or documentation, I will provide the General Counsel of S.D. Myers, Inc. and the Government of Canada with advance written notice in conformity with the attached Order so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the information or documentation which is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to the information or documentation.

4. I will promptly return any Protected Documents received by me to the party that provided me with such Protected Documents, or the information recorded in those Protected Documents, at the conclusion of my involvement in these proceedings. All documents containing information from a Protected Document will be destroyed.

5. I acknowledge an agree that in the event that any of the provisions of this Confidentiality Agreement are not performed by me in accordance with their specific terms or are otherwise breached, that irreparable harm may be caused to either of the parties to this arbitration. I acknowledge and agree that either of the parties to this arbitration is entitled to injunctive relief to prevent breaches of this Confidentiality Agreement and to specifically enforce the terms and provision hereof in addition to any other remedy to which any party to this arbitration may be entitled at law or in equity. The prevailing party in any such litigation will be entitled to payment of its legal fees and disbursements, court costs and other expenses of enforcing, defending or otherwise protecting its interests hereunder.

6. I agree to submit to the jurisdiction of the courts of the Province of Ontario (in the case of the residents of Canada) or State of Ohio (in the case of residents of the United States of America) to resolve any disputes arising under this Agreement.

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____, _____

.....

(Print name)

.....

(Witness)

.....

(Signature)

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
(Claimant)
('MYERS')

- and -

GOVERNMENT OF CANADA
(Respondent)
('CANADA')

PROCEDURAL ORDER No. 12

(concerning written questions to be addressed to certain witnesses)

Introduction

1. By Procedural Order No. 8 the parties were given certain directions as to the preparation and submission of written questions to certain named witnesses in the employment of CANADA.

2. It subsequently emerged that the parties held widely differing views concerning the process as contemplated by the Tribunal at the third case management meeting held in Toronto on 28 October 1999.

3. After deliberation, the Tribunal considers that the questions as formulated by MYERS amount to a request for further 'discovery', rather than a request for the personal testimony of certain named witnesses in relation to meetings held at the Privy Council Office on 21 and/or 24 November 1995 and certain other matters within their direct knowledge.

4. The Tribunal is not prepared to redraft the questions itself.

Accordingly, the Tribunal directs as follows:

5. The witnesses shall be those named in Procedural Order No.8 unless the parties agree that other persons who are currently available would be more appropriate.

6. On the understanding that Mr John Mylocki will be able to testify on the 'Part B matters' at the witness hearing scheduled for February 2000, Dr Jim Martin shall not be required to answer written questions.

7. The questions to be addressed to the named witnesses shall be those set out in Part A of the attachment to CANADA's letter dated 10 November 1999. (CANADA shall review questions 25 and 26; if they are duplicative CANADA shall amend them accordingly).

8. The introductory instructions to witnesses shall be as formulated by CANADA, save that the second paragraph shall be amended to read as follows:

> 'You must answer the questions to the best of your *personal knowledge*. You may consult lawyers in connection with the formulation of your answers,

including the lawyers representing CANADA in the arbitration. The Tribunal prefers that you should not consult other witnesses or colleagues. However, if for any reason you find it necessary to do so the identity of such persons must be disclosed.'

9. CANADA shall use its best endeavours to submit the written answers of the witnesses to MYERS and the Tribunal as soon as possible and in any event not later than Friday 10 December 1999.

10. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or reviewed.

Signed: .....

(on behalf of the Tribunal)

Dated: 26 November 1999

ESSEX COURT CHAMBERS Barristers
24 LINCOLN'S INN FIELDS LONDON WC2A 3ED

Procedural Order # 13

31 December 1999 BY FAX

Appleton & Associates +1 416 815 8801
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Trade Law Division, Dept of Foreign Affairs etc, Canada +1 613 944 3213
For: Mr Joseph de Pencier

cc: Faculty of Law, University of Manitoba +1 204 474 7580
For: Professor Bryan Schwartz

Ladner Downs +1 604 622 5807
For: Mr Edward C Chiasson QC

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I thank Mr de Pencier and Mr Appleton for their recent letters concerning the procedure for dealing with US law issues.

Modern international arbitral tribunals rarely direct that matters of *law* (whether or not 'foreign' to one or more members of the relevant tribunal) are to be introduced by means of expert *testimony* (see, eg, Redfern & Hunter, 3rd edn, p.311). The Tribunal accordingly declines to give the directions sought by CANADA.

However, there is nothing in the Rules to prevent either party from engaging US lawyers to act as co-counsel, and to address the Tribunal on issues of US law at the hearing. Indeed, if any matters of US law are to be debated, the Tribunal would welcome the assistance of US co-counsel.

If CANADA elects to proceed in this way, the Tribunal directs that it shall deliver a 'Memorandum on US Law Issues' by Monday 17 January 2000; and that MYERS may deliver a 'Reply Memorandum on US Law Issues' by Monday 7 February. An opportunity for US co-counsel to deliver oral arguments will be given after the witness testimony is completed. The parties are encouraged to make the memoranda as concise as possible, and to agree upon a page limit for them.

These directions constitute Procedural Order No. 13.

Yours truly

J Martin Hunter
(on behalf of the Tribunal)

TELEPHONE 0171 813 8000 FAX 0171 813 8080 DX No 320
e-mail: clerksroom@essexcourt-chambers.co.uk

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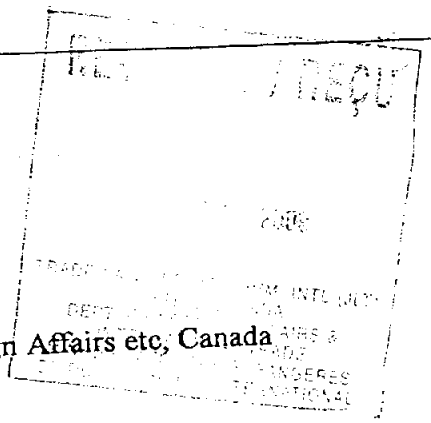
24 LINCOLN'S INN FIELDS LONDON WC2A 3ED



BY FAX

24 January 2000

Appleton & Associates +1 416 815 8801
For: Mr Barry Appleton

Trade Law Division, Dept of Foreign Affairs etc, Canada +1 613 944 3213
For: Mr Joseph de Pencier

cc: Faculty of Law, University of Manitoba +1 204 474 7580
For: Professor Bryan Schwartz

Ladner Downs +1 604 622 5807
For: Mr Edward C Chiasson QC

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I refer to my letter of 21 January, and to the parties' various letters of 18 and 19 January. After deliberation, the Tribunal directs as follows:

1. The Tribunal wishes to hear the parties on how it should treat the *Metalclad* material before concluding its deliberations on the question. This will take place at the hearing in Toronto.

2. The provisions of Procedural Order No.1 paragraph 30 concerning the transcript still apply. The Tribunal will not need it on an 'overnight' basis, because its main purpose is for reference during later deliberations when memories may begin to fade. The usual week to ten days later would be fine. The Tribunal would appreciate receiving the transcript in 'minuscript' hard copy (preferably copied double-sided) *and* on one or more floppy disks; but the Tribunal does not wish to add to the expense unnecessarily and will gratefully accept whatever the parties arrange for themselves.

3. The Tribunal proposes that the sitting hours should be approximately 9.30am to 5.30pm with three breaks (mid-morning, mid-afternoon and lunch). This should provide at least 6 hours 'flying time' per day.

4. Subject to the need to interpose witnesses to accommodate their schedules, the Tribunal proposes that MYERS' witnesses will be examined first (in the order chosen by Mr Appleton) followed by CANADA's witnesses (in the order chosen by Mr de Pencier or his colleagues.

5. The Tribunal suggests that the parties should try to agree on arrangements for the oral examination of Mr Hickman; failing agreement the Tribunal will give directions after hearing the parties in a telephone conference to be held as soon as practicable.

6. At present the Tribunal does not contemplate requesting additional direct testimony (the Tribunal will no doubt feel free to ask the witness questions at any time during his or her examination). The parties may apply to the Tribunal for leave to introduce additional direct testimony at any time. At this late stage in the proceedings, leave will only be granted where the proposed new direct testimony is for the purposes of rebuttal.

7. The Tribunal does envisage putting *some* time limit on cross-examination and awaits the parties' response to the Tribunal's letter of 21 January.

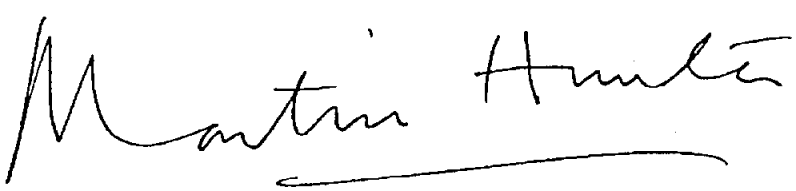
8. The Tribunal proposes that counsels' oral submissions on US law will be part of the closing statements phase - preferably first, but this is at the choice of each party. The Tribunal proposes that there will be two complete 'rounds' of closing statements, starting with MYERS' counsel and finishing with CANADA's counsel. Bearing in mind that the Tribunal may wish to discuss a considerable number of matters with counsel during (or after) counsels' closing arguments the Tribunal envisages about half a day for each party - ie, a total of one day.

9. Experience shows that *some* post-hearing written material is almost always needed. Whether this material will assume the status of post-hearing briefs depends on whether we run out of time to complete the oral closing statements to the satisfaction of the parties and the Tribunal. The Tribunal envisages that the question should be kept under review during the hearing, with a general predisposition against the submission of post-hearing briefs unless it is really necessary.

10. The Tribunal will appreciate receiving in electronic form whatever parts of the record that the parties can provide without incurring excessive cost or effort. If they can put the joint book of documents onto CD ROM that will be a tremendous benefit to the Tribunal for use in its deliberations, and indeed for the purpose of incorporating passages from the record into the award. But the Tribunal appreciates that cost considerations are important. Where possible, CD ROM format is preferred to floppy disks; and Microsoft Word is preferred to Word Perfect.

The contents of this letter shall constitute Procedural Order No.14. As always, the parties may apply at any time for its provisions to be amended or supplemented.

Yours truly



J Martin Hunter
(on behalf of the Tribunal)

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24 LINCOLN'S INN FIELDS LONDON WC2A 3ED

BY FAX

24 January 2000

+1 416 815 8801

Appleton & Associates
For: Mr Barry Appleton

Trade Law Division, Dept of Foreign Affairs etc, Canada
For: Mr Joseph de Pencier

cc: Faculty of Law, University of Manitoba
For: Professor Bryan Schwartz

Ladner Downs
For: Mr Edward C Chiasson QC

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

No doubt the parties realised that their letters of 21 January 'crossed' with my letter of 24th. This was because I sent my letter from home in the early hours of Monday 24th, and I did not see the parties' letters until I went to my office later in the day.

In fact, I believe that the matters discussed in the parties' 21 January letters have been resoved except:

1. **Duration of hearing, and time limits for cross-examination.**

The Tribunal's broad plan is to be with the parties on Monday 14, Tuesday 15 and Wednesday 16 February with Thursday 17th 'in reserve'. The Tribunal plans to hold its first session of deliberations on the award on the Thursday or Friday, depending upon when the hearing finishes. The Tribunal will in any event disperse by Friday evening at the latest. Ideally we would spend Monday and Tuesday hearing testimony, and Wednesday on closing arguments. If we need to 'spill over' into Thursday we will do so. However, my own view (although I have not yet consulted my fellow arbitrators on the question) is that we can complete the testimony in two days without imposing specific time limits for cross-

examination of individual witnesses. It should be enough for the parties to be aware that the plan is to hear all the witnesses within approximately twelve hours of actual hearing time.

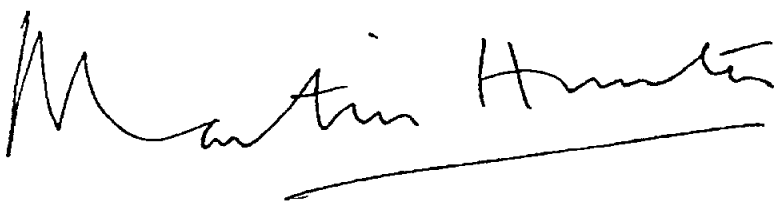
2. Opening statements.

The purpose of the pre-hearing memoranda (which, incidentally, arrived at my office this morning) is indeed to eliminate or at least reduce the length of oral opening statements. It is sometimes useful for counsel for each party to 'set the scene' by highlighting the main points that they wish the members of the Tribunal to keep particularly in their minds when they hear the witnesses; but this is not compulsory, and in any event should be done in no more than 20 to 30 minutes each.

I believe that these matters (taken with Procedural Order No. 14) deal with all the outstanding procedural questions except for what we are going to do with Mr Hickman - on which the Tribunal is waiting to hear further from the parties.

The contents of this letter shall constitute Procedural Order No.15. As always, the parties may apply at any time for its provisions to be amended or supplemented.

Yours truly



J Martin Hunter
(on behalf of the Tribunal)

ESSEX COURT CHAMBERS
Barristers
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BY FAX

31 January 2000

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For: Mr Edward C Chiasson QC

Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I refer to my letter of 27 January 2000. The Tribunal has deliberated on the procedural applications contained in Mr de Pencier's letter dated 25 January 2000.

The Tribunal considers that the general principle to be applied is that, where written direct testimony is submitted with a memorial as evidence on which the relevant party relies, the witness in question should be offered for oral examination at the witness hearings *unless* the opposing party states that his or her presence is not required. Where a party fails or refuses to produce any such witness the written testimony will not be ruled inadmissible, but the Tribunal is likely to attach little or no weight to the written testimony concerned to the extent that it is not corroborated by other documentary or witness evidence. However, exceptional circumstances may justify exceptional measures, especially where the Tribunal itself wishes to have the benefit of hearing a particular witness 'live'. Applying this principle to the present circumstances the Tribunal directs as follows:

1. By Friday 4 February CANADA shall notify MYERS and the Tribunal as to which of the witnesses whose written direct testimony is relied upon by MYERS shall be required to attend for oral examination at the forthcoming hearing.

2. By Friday 4 February MYERS shall notify CANADA and the Tribunal as to which of the witnesses whose written direct testimony is relied upon by CANADA shall be required to attend for oral examination at the forthcoming hearing.

3. For the avoidance of doubt the above directions apply to witnesses whose written statements were submitted with the parties' Supplemental Memorials.

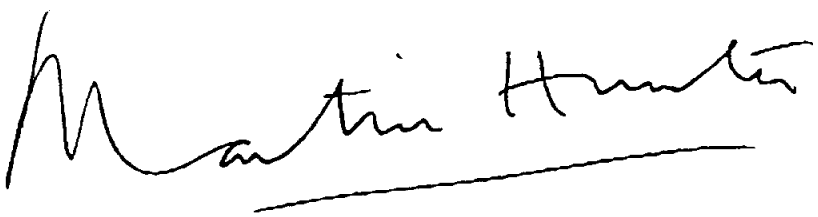
4. Assuming that MYERS notifies CANADA confirms that it wishes to examine Mr Roy Hickman orally at the forthcoming hearing it is the responsibility of CANADA to offer him for such examination. The Tribunal notes that the date of the witness hearings had been fixed before Mr Hickman's written testimony was submitted with CANADA's Memorial.

5. Exceptionally, however, given the nature of Mr Hickman's duties overseas, CANADA may offer Mr Hickman for oral examination by telephone conference and in this event shall make appropriate technical and administrative arrangements for such examination during the forthcoming hearing. The question of the weight that should be given to testimony tested in this manner may be addressed by the parties' counsel during the closing statements.

6. After deliberation the Tribunal confirms the personal view I expressed concerning the duration of the hearings and time limits for cross-examination, as set out in paragraph 1 of Procedural Order No. 15 (see my letter of 24 January).

The contents of this letter shall constitute Procedural Order No. 16. As always, the parties may apply at any time for its provisions to be amended or supplemented.

Yours truly



J Martin Hunter
(on behalf of the Tribunal)

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
('MYERS') **(Claimant)**

- and -

GOVERNMENT OF CANADA
('CANADA') **(Respondent)**

PROCEDURAL ORDER No. 16

(concerning confidentiality in materials produced in the arbitration)

Introduction

1. At an early stage in the arbitration the parties attempted to agree on a confidentiality regime, but were unable to do so. The Tribunal was therefore required to make an order. Initially the Tribunal made a temporary order in the form of Procedural Order No.3. In November 1999, after considering the parties' proposals and submissions, the Tribunal made a permanent confidentiality order in the form of Procedural Order No. 11.

2. Procedural Order No. 11 contained *inter alia* the following provisions:

   - *In accordance with Article 24.4 of the UNCITRAL Rules, all hearings shall be held in camera unless the parties agree otherwise*

   - *All transcripts and other records taken of hearings (except those documents mentioned in Procedural Order No.3, paragraph 1, namely the Notice of Intention, Notice of Arbitration, Statement of Claim and Statement of Defense)*

shall be kept confidential and may only be disclosed according to the conditions established below for 'Protected Documents'.

- *According to NAFTA Article 1137 and its Annexe 1137.4, awards may be published by either party. This includes not only the final award but also partial and preliminary awards.*

- *Other decisions of the Tribunal may also be disclosed or published. This includes Procedural Orders of the Tribunl unless they contain information that is to be treated as confidential according to paragraphs 2 and/or 7 of this Order.*

- *Protected Documents identified by the parties and information recorded in those Protected Documents may be used only in these proceedings between MYERS and CANADA and may be disclosed only for such purposes and among:*

  (a) counsel whose involvement in the preparation or conduct of these proceedings is reasonable necessary;

  (b) officials or employees of the parties whose involvement in the preparation or conduct of these proceedings is reasonable necessary;

  (c) independent experts or consultants retained or consulted by the parties in connection with these proceedings; and

  (d) witnesses who in good faith are reasonably expected to offer evidence in these proceedings and only to the extent material to their expected testimony.

3. During the arbitration it emerged that it has been CANADA's practice to make available to the representatives of the Canadian provinces and territories copies of certain materials filed in NAFTA Chapter 11 arbitrations through a process known as the 'C-Trade' mechanism. This is "...a federal-provincial/territorial committee comprised of senior trade officials...[who] consult with one another throughout the year on matters relating to international trade policy."

4. MYERS objected to this practice in the present arbitration and asserted that it is contrary to the provisions of the Procedural Order No.11 insofar as the disclosure includes Protected Documents or information.

5. Following MYERS' objection CANADA agreed not to distribute any further Protected Documents or information pending a ruling from the Tribunal.

6. On 10 March 2000 CANADA delivered to the Tribunal and MYERS a written submission in which *inter alia* it contended that CANADA's longstanding practice was well known and not a departure from the provisions of Procedural Order No. 11.

CANADA asserted that sharing Protected Documents and the information with the provinces and territories is necessary to enable CANADA to meet its obligations under Article 105 of the NAFTA. CANADA referred to the inclusion in the NAFTA of provincial initiatives and obligations. Evidence was presented to show that the participants in the C-Trade mechanism keep the material confidential.

7. In response, MYERS stated *inter alia* that it had not been aware of CANADA's practice, and questioned the extent to which confidentiality was in fact maintained within the provincial and territorial governments. MYERS noted that the provinces and territories are not Parties to the NAFTA. In addition to the provisions of Procedural Order No.11, MYERS contended that a general principle of confidentiality applies in arbitration proceedings.

Discussion

8. The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any *general principle* of confidentiality exists in an arbitration such as that currently before this Tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between the disputing parties.

9. There is no direct contractual link between the disputing parties in the present case, and there is no arbitration agreement between them. In the absence of an established *general principle* it is necessary to examine the treaty itself and the UNCITRAL Rules, which apply to the arbitration proceedings by election of MYERS exercising its right under Article 1120 of the NAFTA, as well as the Tribunal's previous procedural orders.

10. Article 25.4 of the Rules states:

> *Hearings shall be held in camera unless the parties agree otherwise.* .....

11. Following common practice in international commercial arbitrations, the Tribunal directed that the evidence-in-chief ('direct testimony'), the opening submissions and the trial exhibits should be delivered to the Tribunal and exchanged between the parties in advance of the substantive hearing. Much of this material would otherwise have been presented at the hearing and, pursuant to Article 25.4 of the Rules, would have remained private as between the parties and the Tribunal.

12. It would be artificial and might adversely affect the efficient organisation of Chapter 11 arbitration proceedings if such materials were to be deemed to be less private merely because they were to be delivered in advance of an oral hearing, or even after to it in the form of post-hearing briefs. Such written materials effectively form part of the hearing. 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.

13. Furthermore, Article 25.4 is written in mandatory terms ('Hearings *shall* be held ... *unless* ...). A close examination of the manner in which Section III of the Rules was crafted reveals that the drafters had the distinction between mandatory and permissive terminology well in mind. Accordingly, the Tribunal takes the view that it has no authority to derogate from the provision contained in Article 25.4 in the absence of agreement between the parties.

14. On the plain terms of the Treaty, CANADA is the 'Party' to the NAFTA, not any of the provinces or territories. CANADA speaks on behalf of the Party in defending Chapter 11 cases. This is consistent with CANADA's international and domestic law, under which the federal government has authority to enter into treaty obligations with other states.

15. There are a number of areas of economic regulation in which, under CANADA's constitution, the provinces and territories ordinarily have the exclusive authority to legislate, or have authority that is concurrent with that of the federal government but subject to federal paramouncy. The NAFTA touches on some of these areas. In the interests of promoting compliance with NAFTA, and in light of that the fact that federal-provincial consultation is an important part of the Canadian constitutional culture, it is understandable that the federal government is eager to share information with the provinces and territories about current developments.

16. Nonetheless, the provinces and territories are not generally exempt from the rules applicable to the sharing of information with those who are not disputing parties in a Chapter 11 arbitration. It is true that Article 105 of NAFTA requires parties to take necessary steps to promote compliance with NAFTA. However, the Tribunal does not accept that the interest of promoting compliance reasonably requires more than the disclosure of the following: the **pleadings** provided for in Articles 18 and 19 of the Rules (which identify the claims and defences and the material facts alleged to support them); **procedural orders** (which provide important guidance in a number of different respects); and the **eventual award(s)** (which provide interpretations of the NAFTA and identify conduct that complies with or violates its requirements).

17. A special situation would exist in a case where an investor is bringing a Chapter 11 claim against the federal government on the basis that a provincial measure has caused loss to the investor. While the federal government be the respondent in such a case, not the province, the sharing of information with that particular province may be necessary to give CANADA a fair opportunity to defend the claim.

The Tribunal accordingly determines that:

18. Although understandable and (as the Tribunal accepts) in good faith, 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, and its temporary predecessor Procedural Order No. 3.

19. In the absence of agreement between the parties the Tribunal has no power to direct that the *in camera* provision contained in Article 25.4 of the Rules shall not be applied; and that in the light of Procedural Order No. 1 in this specific case the pre-hearing materials submitted to the Tribunal (other than the Statements delivered underArticle 18 and 19 of the Rules) fall within the scope of Article 25.4.

20. In any event, the Tribunal is not satisfied that distribution of more than the classes of documents identified in paragraphs 1, 2, 4 and 5 of Procedural Order No. 11 is necessary to facilitate CANADA's compliance with Article 105 of the NAFTA.

And the Tribunal directs as follows:

21. Procedural Order No. 11 shall remain in force without amendment.

22. No further distribution of the Protected Documents or information shall be made to provinces and territories in the absence of agreement between the parties or further directions from the Tribunal,

23. CANADA shall obtain, from an appropriate official in each jurisdiction to which Protected Documents or information has been made available, written confirmation that such documents or information have been, and will be, kept confidential. CANADA shall confirm to the Tribunal and to Myers that such confirmation has been obtained, but need not attach copies of the written confirmations.

24. Either party may apply at any time for the terms of this Order to be supplemented, varied or reviewed.

Martin Hunter

Signed: .....

(on behalf of the Tribunal)

Dated: 13 May 2000

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
('MYERS') (Claimant)

- and -

GOVERNMENT OF CANADA
('CANADA') (Respondent)

PROCEDURAL ORDER No. 17

Introduction

1. Paragraph 1 of Procedural Order No.1 stated as follows:

> *As a first stage of the proceedings the Tribunal will determine (in a partial award) liability issues and issues as to the principles on which damages (if any) should be awarded, leaving the calculation of the quantification of such damages, if any, to a second stage. Expert evidence on the calculation of any such quantification will not be required during the first stage.*

2. In its Partial Award dated 13 November 2000 the Tribunal directed that CANADA shall pay compensation to MYERS, the amount to be determined in a second stage of the arbitration.

3. By a letter dated 4 February 2001 The Tribunal invited the Disputing Parties to agree on the procedure for the second stage of the arbitration. Failing such agreement, the Tribunal would hold a case management meeting with the Disputing Parties before the end of February 2001.

4. The Disputing Parties having failed to agree upon the procedure to be followed for the second stage of the arbitration, the Tribunal held a case management meeting with the parties' representatives on 21 February 2001, in Toronto.

5. This Procedural Order gives directions for the second stage of the arbitration, following the Disputing Parties' submissions at the 21 February 2001 case management meeting.

Second stage memorials

6. By 1 March 2001 MYERS shall deliver to CANADA and the Tribunal its Memorial on all outstanding quantification issues.

7. By 28 May 2001 CANADA shall deliver to MYERS and the Tribunal its Counter-Memorial on quantification issues.

8. The Memorials shall be accompanied by the documentary and other evidence, including written expert testimony, relied upon by the party submitting the Memorial in question.

Evidence gathering

9. By 12 March 2001 the Disputing Parties shall exchange requests for the production of further documents and requests for interrogatories, if any.

10. By 26 March 2001 the "requested party" shall either provide the documents and interrogatories requested or supply reasons as to why the requested party refuses to produce such documents or interrogatories.

11. In the event of any disputes concerning evidence gathering thereafter the Tribunal will give procedural directions designed to resolve such disputes as soon as practicable.

"Experts"

12. Within 30 days of delivery by CANADA of its Counter-Memorial, the Disputing Parties' expert witnesses shall meet to discuss the scope of the differences between them, and shall submit a joint report to the Tribunal identifying, in summary form, (a) the matters on which they agree and (b) the matters on which they disagree.

13. As soon as practicable thereafter, and in consultation with the Disputing Parties, the Tribunal will decide whether a Tribunal expert should be appointed pursuant to Article 27(1) of the UNCITRAL Rules to assist in the determination of issues that are outstanding as between the Disputing Parties' expert witnesses; and, if so, the Terms of Reference of any such Tribunal expert.

14. By 30 July 2001 the Disputing Parties shall submit, simultaneously, short pre-hearing memoranda, in "bullet-point" form, summarising their respective positions on the outstanding quantification issues.

Second stage hearing

15. A second stage witness hearing, to be held in Toronto, shall start on Wednesday 5 September 2001, estimated to last for four days.

16. The Tribunal will give further directions for the conduct of the second stage hearing later.

17. Either party may apply at any time for the terms of this Order to be supplemented, varied or reviewed.

Signed: .....

(on behalf of the Tribunal)

Dated: 26 February 2001

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
('MYERS') **(Claimant)**

- and -

GOVERNMENT OF CANADA
('CANADA') **(Respondent)**

PROCEDURAL ORDER No. 18

Introduction

1. By a letter dated 8 February 2001 CANADA notified the Tribunal and MYERS that it had that day filed an application to the Federal Court of Canada seeking to set aside the Tribunal's Partial Award dated 13 November 2001. In the same letter CANADA stated that it intended " .....to ask the Tribunal to delay the assessment of damages until the courts complete judicial review of the Tribunal's partial award on liability".

2. By a letter dated 13 February 2001 the Tribunal informed the Disputing Parties that it would hear oral argument on CANADA's application at the case management meeting scheduled for 21 February 2001. By the same letter, the Tribunal directed that CANADA should deliver its reasoned application by close of business in Toronto on Thursday 15 February 2001, and that MYERS should deliver a reply by close of business on Monday 19 February.

3. By a letter dated 15 February 2001 CANADA delivered to the Tribunal and MYERS a document entitled "Application for a Stay of the Arbitral Proceedings pending the Outcome of the Federal Court of Canada Application to set aside".

4. By a letter dated 19 February 2001 MYERS delivered to the Tribunal and CANADA a document entitled "Investor's Response to CANADA's Submission on Stay of Arbitration".

The positions taken by the Disputing Parties

5. The Tribunal heard oral argument by Counsel for the Disputing Parties at the case management meeting held in Toronto on 21 February 2001.

6. The Tribunal established at the outset that neither of the Disputing Parties contended that there were any mandatory provisions of:

   (a) the applicable substantive law (the NAFTA itself and international law),
   (b) the applicable procedural rules (the UNCITRAL Arbitration Rules of 1976),
   or
   (c) the procedural law of Canada

that directed the Tribunal to determine CANADA's Application one way or the other.

7. It was equally clear that the Tribunal had power either to grant or deny CANADA's Application pursuant to the general procedural powers conferred on it by Article 15.1 of the UNCITRAL Arbitration Rules. Under that provision the Tribunal is the master of its own proceedings. It was therefore common ground between the Tribunal and the Disputing Parties that the decision was a matter for the Tribunal's discretion.

8. The Tribunal's point of departure is the presumption that a party to an arbitration (whether claimant or respondent) is entitled to have the arbitration proceedings continued at a normal pace. Accordingly, for CANADA to succeed it must demonstrate to the Tribunal that the arbitration should be suspended pending the proceedings in the Federal Court.

9. CANADA's arguments in support of its application for a suspension of the arbitration were fully stated in its Application dated 15 February 2001. It is therefore not necessary to set them out again *in extenso* in this Order. It is sufficient to summarise them as being primarily matters relating to costs and prejudice. At the hearing, CANADA asserted that MYERS would not suffer prejudice if a suspension were to be granted. Standing alone a lack of prejudice to MYERS does not assist CANADA; and Counsel for CANADA conceded that there is minimal, if any, prospect of prejudice to CANADA in the sense of "legal prejudice", which relates to procedural unfairness (for example, where the live testimony of witnesses may be lost).

10. The real thrust of CANADA's position is "balance of convenience", with particular emphasis on the possibility of wasted effort and costs if the arbitration proceeds and the Tribunal's Partial Award does not survive CANADA's challenge in its domestic courts. But here again there is minimal, if any, prejudice to CANADA because (as its Counsel recognised) by far the greater part of the risk in respect of costs falls potentially on MYERS.

11. A further "balance of convenience" matter was advanced by CANADA. This was that it was in the interests of both CANADA and the general public that conclusive

guidance should be given on matters of interpretation of the NAFTA. However, this argument takes insufficient account of the fact that it is the duty of this Tribunal to *both* of the Disputing Parties to determine the disputes between them as expeditiously and efficiently as practicable.

12. For its part, MYERS took the position that CANADA must show that its application for a suspension of the arbitration is meritorious, or at least that it had a reasonable chance of success. MYERS pointed out that under the UNCITRAL Model Law regime, to which CANADA has subscribed, there can be no *appeal* as such on the substantive merits of an arbitral tribunal's awards. Leaving aside the much-discussed but rarely upheld "public policy" ground, the basis for challenge of awards of a properly constituted arbitral tribunal can be summarised as "excess of jurisdiction" and "lack of due process".

13. CANADA does not allege lack of due process. It does, however, classify its challenges to the Tribunals determinations in its Partial Award as "jurisdictional". CANADA concedes that it is not enough merely to assert that the Tribunal's determinations in its Partial Award were wrong; it must contend that those determinations were outwith its jurisdiction. MYERS' position is (a) that the challenged determinations are matters of substance that were squarely before the Tribunal on the pleadings, and (b) that CANADA treated them as substantive throughout and is now well out of time (under Article 16(2) of the Model Law-based Canadian Commercial Arbitration Act) to seek to have them treated as questions concerning the Tribunal's jurisdiction.

14. Two further points were discussed during the hearing. The first was the proposition that bifurcation is intended to bring the dispute to a close expeditiously and efficiently, not to permit a party to apply for judicial review mid-stream. The second was that, if the Federal Court were to set aside the award for example on the ground that the Tribunal was wrong in its analysis as to the basis upon which MYERS became an investor, there were a number of other bases on which MYERS could also

be found to have been an investor, or have an investment, in Canada. The Partial Award mentions these matters, but did not decide them. Presumably the Partial Award would have to be remitted to the Tribunal for consideration of the other bases on which MYERS claimed that it was entitled to be treated as an investor, or have an investment, Canada before any other steps could be taken to close the dispute. In the context of these points, the Tribunal invited the Disputing Parties to reflect on the rhetorical question as to whether common sense might indicate that any judicial review of the Tribunal's determinations of the overall issues between the parties should await the Final Award?

15. In the event, this Tribunal does not need to take account of the matters referred to in paragraphs 12, 13 and 14 above in exercising its discretion on whether to order that the arbitration should be suspended. The Tribunal takes the view that on its own submissions CANADA has come nowhere near to discharging the burden on it to show that the proper course for the Tribunal is to suspend the arbitration.

16. In general, although in the case of NAFTA Chapter 11 arbitrations there is no privity of contract between the Disputing Parties, the procedure in international arbitration proceedings is created by agreement of the parties – often by the adoption of a set of procedural rules such as the UNCITRAL Arbitration Rules. An arbitral tribunal has no permanent, independent or institutional life of its own. There are strong policy reasons for not placing the performance of its functions "on hold" (unless of course the parties so agree); and no compelling reasons that it should do so have been provided to the Tribunal in this instance.

Conclusion

17. For the reasons set out above CANADA's Application to suspend the arbitration (initially classified as an application for a "stay" of the arbitration proceedings) is denied.

18. MYERS' claim in respect of its costs in opposing CANADA's Application is denied at this stage; all matters concerning costs will be determined in the Tribunal's Final Award.

Signed: .....

(on behalf of the Tribunal)

Dated: 26 February 2001

ESSEX COURT CHAMBERS *Barristers*

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BY FAX

26 February 2001

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Gentlemen

NAFTA UNCITRAL Investor-State Claim
S. D. Myers, Inc. –v- Government of Canada

I refer to the third paragraph of Mr de Pencier's letter of 8 February; Ms Tabet's letter of 20 February; and to the discussion (at the case management meeting held in Toronto on 21 February 2001) concerning the Tribunal's confidentiality orders in the arbitration.

In summary, CANADA takes the position that the entire "record" of the arbitration proceedings should be made available in the proceedings in the Federal Court of Canada, as is customary in judicial review proceedings. MYERS does not object in principle, but takes the position that the Federal Court should make an order designed to protect its confidential business information

The Tribunal itself has no objection to the entire "record" being placed before the Federal Court; indeed the Tribunal considers that this will be a useful if not essential element in briefing the Court on the issues before it.

The *rationale* for the relevant confidentiality order was to ensure that Article 25.4 of the applicable UNCITRAL Arbitration Rules was respected. That Article states:

> "Hearings shall be held *in camera* unless the parties agree otherwise. ....."

The Disputing Parties did not agree, and the Tribunal took the view that the written evidence and argument, as well as the transcripts of the testimony and argument presented at the hearing, properly fell within the scope of Article 25.4, given that the

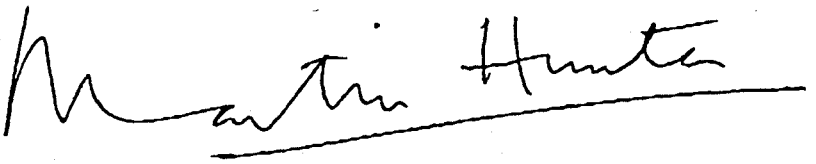
context of the procedure adopted was that hearing time should be minimised by having as much as possible of the argument and testimony delivered to the Tribunal in writing in advance of the hearing.

The Tribunal also takes the view that it has no power to override the mandatory effect of Article 25.4 of the Rules, in the absence of agreement between the parties. That said, the Tribunal has no interest in withholding any relevant material from the Federal Court; and it would be pleased to take such action as it may be legally entitled to take in order to facilitate the orderly consideration and determination in the Federal Court proceedings.

It also appears to the Tribunal that the matter should be capable of resolution by means of a consent order in those proceedings.

The Tribunal consents to this letter being placed before the Federal Court, together with any of its procedural orders that the parties may consider to be relevant.

Yours truly



J Martin Hunter
(on behalf of the Tribunal)

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
('MYERS') **(Claimant)**

- and -

GOVERNMENT OF CANADA
('CANADA') **(Respondent)**

PROCEDURAL ORDER No. 19

Introduction

1. Issues having arisen between the Disputing Parties concerning document production and interrogatories in the second stage of the arbitration, the Tribunal held a further case management meeting in Toronto, Canada, on 21 June 2001.

2. After reviewing the issues in question in detail many of them were resolved by consensus. With regard to the remaining issues, the Tribunal proposed (and the Disputing Parties accepted) that Mr Rosen (the principal expert retained by

MYERS) and Mr Rostant (the principal expert retained by CANADA) would make a joint visit to MYERS' facility in Tallmadge, Ohio, (the "Tallmadge visit") to interview relevant personnel and to review the scope of the requested documents and/or information that remains available and capable of being produced by MYERS in a short period and without undue burden.

3. The Tallmadge visit should take place as soon as practicable, and in any event not later than Friday 29 June 2001.

4. The Disputing Parties also agreed that no further Procedural Order concerning document production and interrogatories would be required pending the Tallmadge visit. After the Tallmadge visit the Disputing Parties may submit any remaining document production and/or interrogatories issues to the Tribunal for determination.

5. As a result of these additional procedural steps to be taken during the second stage of the arbitration the following consequential amendments are made to the schedule set out in Procedural Order No. 17.

Further evidence gathering

6. The document production and interrogatories exercise shall be completed by 13 July 2001, subject to any required intervention by the Tribunal.

Further written submissions

7. By 20 July 2001 CANADA may, if it wishes, deliver a Supplemental Counter-Memorial.

8. By 10 August 2001 MYERS may, if it wishes, deliver a Reply Memorial.

9. By 24 August 2001 CANADA may, if it wishes, submit a short Reply Memorial.

10. Memorials shall be accompanied by the documentary and other evidence, including written expert testimony, relied upon by the party submitting the Memorial in question.

11. By 31 August 2001 the Disputing Parties shall exchange and deliver to the Tribunal short Pre-Hearing Memoranda summarising the main points of their respective cases in "bullet point" form.

Other pre-hearing activity

12. During the week beginning 13 August 2001 the experts retained by the Disputing Parties shall meet to review the extent to which they agree and disagree on the matters that are contained in their reports. By 31 August 2001 the experts shall submit a short joint report to the Tribunal identifying (a) the matters in issue on

which they are agreed and (b) the matters in issue on which they are not agreed. In this connection, the experts and the Disputing Parties are reminded that, although the experts are retained (and paid) by the parties, the Tribunal regards them as owing a duty to provide independent professional advice to the Tribunal.

13. By 24 August 2001 the Disputing Parties shall discuss with each other and notify the Tribunal of the names of the witnesses they wish to examine at the second stage hearing. As soon as practicable thereafter the Tribunal will convene a telephone conference to give further directions concerning a detailed timetable for the second stage hearing.

The Second Stage Hearing

14. The second stage hearing shall start on Wednesday 5 September 2001 and continue, if necessary, through Saturday 8 September 2001.

15. The hearing shall be mainly for the examination of witnesses, but short opening statements may be made by counsel for the parties, and adequate time will be set aside for argument on issues of law and closing statements.

Other Matters

16. Either party may apply at any time for the terms of this Order to be supplemented, varied or reviewed.

Signed: .....

(on behalf of the Tribunal)

Dated: 25 June 2001

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
('MYERS') **(Claimant)**

- and -

GOVERNMENT OF CANADA
('CANADA') **(Respondent)**

PROCEDURAL ORDER No. 20

Introduction

1. On 20 July 2001 CANADA delivered a second stage Supplemental Counter-Memorial pursuant to paragraph 7 of Procedural Order No. 19. On 10 August 2001 MYERS delivered a second stage Reply Memorial pursuant to paragraph 8 of Procedural Order No. 19.

2. CANADA made an application asking the Tribunal to revise the procedural schedule for the second stage of the arbitration, on the ground that MYERS Reply Memorial annexed approximately 2000 pages of new documentary evidence as well as several new experts reports and written statements of witnesses of fact. CANADA stated that it needed more than the 14 days provided by paragraph 9 of Procedural Order No. 19 in order to prepare its Reply Memorial. CANADA also requested the Tribunal to convene a telephone conference with the parties for the purpose of discussing the latest procedural situation.

3. On 24 August 2001 the Tribunal held a further case management meeting by telephone conference at which CANADA's application was discussed. Later on the same day, the Disputing Parties' representatives having taken instructions on the

availability of witnesses and others required to be present, a second telephone conference took place and the remaining steps for the second stage of the arbitration were rescheduled, by consensus, as set out below.

Further written submissions

4. Paragraph 9 of Procedural Order No. 19 is amended to provide that CANADA shall deliver its short Reply Memorial by 31 August 2001.

5. The Disputing Parties' short "bullet point form" Pre-hearing Memoranda referred to in paragraph 11 of Procedural Order No. 19 shall be delivered by 14 September 2001.

Other pre-hearing activity

6. The meeting of experts contemplated by paragraph 12 of Procedural Order No. 19 shall take place during the week beginning 5 September 2001. The experts' short joint report to the Tribunal contemplated by paragraph 12 of Procedural Order No. 19 shall be delivered by 14 September 2001.

The Second Stage Hearing

7. The second stage hearing shall start on Friday 21 September 2001 and shall continue, if necessary, through Wednesday 26 September 2001.

8. The Disputing Parties shall endeavour to agree upon the allocation of the available hearing time. Sufficient time shall be allocated for Tribunal questions and short oral submissions by counsel for the non-disputing Parties. Failing agreement by 17 September 2001 the Disputing Parties shall invite the Chairman of the Tribunal to intervene.

Other Matters

9. Either of the Disputing Parties may apply at any time for the terms of this Order to be supplemented, varied or reviewed.

Signed: Martin Hunter .....

(on behalf of the Tribunal)

Dated: 25 August 2001

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. Myers, Inc.
("SDMI")

(Claimant)

- and -

Government of Canada
("CANADA")

(Respondent)

PROCEDURAL ORDER No. 21
(concerning certain applications for correction and interpretation of the Tribunal's Second Partial Award)

Introduction

1 The Tribunal made its Second Partial Award (the "SPA") on 21 October 2002, and communicated it to the Disputing Parties on the same day.

2 By a letter dated 1 November 2002 SDMI requested the Tribunal to make certain corrections and/or interpretations of the SPA pursuant to Articles 35 and 36 of the UNCITRAL Rules (the "Rules").

3 By a letter dated 13 November 2002 CANADA requested the Tribunal to give an interpretation of the SPA pursuant to Article 36 of the Rules.

4 Both requests were submitted within the time limits specified in the relevant Articles of the Rules.

SDMI's Request

5 SDMI contends that there are three errors in the SPA, as follows:

a. CAN$2,329,319.00 of orders obtained by SDMI were incorrectly omitted from the total value of bids, quotations and orders from which the Tribunal assessed the gross income that would have been received but for CANADA's measure;

b. a deduction of CAN$1,900,000.00 in respect of duplicate bids was incorrectly applied by the Tribunal because CAN$1,100,000.00 already had been deducted to account for duplicate bids, and;

c. paragraph 134 of the SPA contained an incorrect reference to a provision of the NAFTA, and some incorrect comments by the Tribunal concerning the relationship between Chapters 11 and 14 of the NAFTA.

Discussion of SDMI's request

Bids and Orders

6 SDMI refers to the fact that the Tribunal specifically mentioned "orders" at an early stage in its discussion on the value of bids and quotations (see, eg, paragraph 230), but not thereafter.

7 As stated in the text of the section of the SPA, under the heading *The Income Stream, in* reaching its conclusion concerning the value of the bids and quotations

the Tribunal considered a number of elements; made certain specific deductions; and applied its collective judgment. It assessed SDMI's losses during the closure and afterwards. This analysis took into account all of the components of the bid population referred to by SDMI, including completed orders.

8 The Tribunal's analysis reflected its consideration of inventory processed by others both during and after the closure, and its assessment of the effect of delay to its opportunities to process PCBs and PCB wastes. It was and remains the judgment of the Tribunal that its analysis took due account of all of the opportunities available to SDMI, and the effect of CANADA's measure on those opportunities.

9 Accordingly, the Tribunal determines that it would not be appropriate to correct or interpret the SPA as requested by SDMI.

Duplication

10 SDMI contends that the Tribunal made a deduction of CAN$1,900,000 in respect of duplicated quotations, bids and orders. In fact, it did not. The paragraph to which SDMI refers involved the Tribunal's consideration of the value of quotations issued by SDMI after CANADA's closure of the border. The Tribunal's reference to duplication involved some quotations that related to inventory on which SDMI had bid prior to the re-opening of the border. The paragraph in question does not address, and the deduction does not relate to, duplications as such. In determining the deduction to be applied in the relevant context, the Tribunal took into account other broader considerations including its assessment of the reliability of the data.

11 Accordingly, the Tribunal determines that it would not be appropriate to correct or interpret the SPA as requested by SDMI.

Chapters 11 and 14

12 SDMI has correctly identified a typographical error in paragraph 134 of the SPA, and the Tribunal will make a correction pursuant to Article 36 of the Rules in the form of an Addendum to the SPA.

13 Concerning SDMI's request for correction of the Tribunal's comment on the relationship between Chapters 11 and 14, the Tribunal stated in paragraph 134 of the SPA:

> .....*an investor in financial services generally could not bring a Chapter 11 claim*.....
> (emphasis added)

14 It seems clear that investors in financial services acquire some level of Chapter 11 protection, but not all. A Tribunal appointed in a Chapter 11 arbitration initiated by such an investor might be required to analyse the relationship between the Chapters 11 and 14 in considerable detail. However, this case did not involve an investor in financial services, and the Tribunal's passing comment had no effect on its determinations concerning either liability or quantum.

15 Accordingly, the Tribunal determines that it would not be appropriate to correct or interpret the SPA as requested by SDMI, other than to correct the typographical error mentioned above.

. CANADA's request

16 CANADA contends that the Tribunal's award in respect of interest in the SPA is ambiguous, and states that it .....*cannot reconcile its calculation of interest payable under the [SPA] with [SDMI's] publicly announced estimate*.

Discussion of CANADA's request

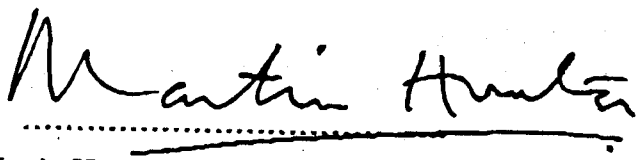
17 In the SPA the Tribunal established a specific procedural regime for dealing with any differences between the Disputing Parties in connection with the calculation of interest, as follows:

> *If the Disputing Parties are unable to agree on the relevant calculations they may place the issue before the Tribunal as a matter to be determined, together with the question of the allocation of costs, in its Final Award. In that event the Tribunal will consider appointing an accountancy expert, in accordance with Article 27 of the UNCITRAL Arbitration Rules, to review the Disputing Parties' respective positions and to report to the Tribunal*
>
> and
>
> *All questions concerning costs and, if necessary, the calculation of interest shall be postponed to the Tribunal's Final Award.*

18 It appears that, at the time of CANADA's request, the Disputing Parties had not attempted to agree on the interest calculations. CANADA's request was premature, and did not conform to the procedure established by the Tribunal. Nevertheless, by a letter dated 21 November 2002 the Tribunal provided informal guidelines concerning the calculation of interest and specified a time limit within which the Disputing Parties should state whether it will be necessary to invoke the procedure for appointing an expert as contemplated by the SPA.

19 Accordingly, the Tribunal determines that it would not be appropriate to interpret the SPA as requested by CANADA.

Signed:



J Martin Hunter (on behalf of the Tribunal)

Dated 2 December 2002