

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 Annex 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 Tribunal 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 paramountcy. 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 under Article 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.



Signed:

(on behalf of the Tribunal)

Dated: 13 May 2000