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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26 February 2001 BY FAX

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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

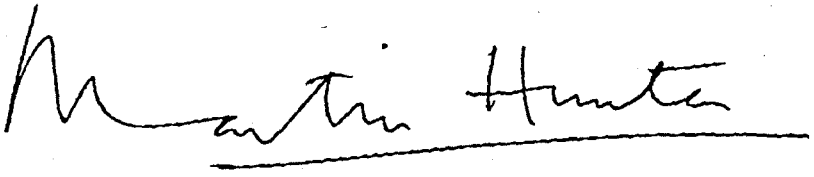
context of the procedure adopted was that hearing time should be minimised by having as much as possible of the argument and testimony delivered to the Tribunal in writing in advance of the hearing.

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)