UNDER CHAPTER ELEVEN OF THE NAFTA AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

S.D. MYERS, INC.

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

COUNTER-MEMORIAL (DAMAGES PHASE)

June 7, 2001

Department of Foreign Affairs
And International Trade
Trade Law Division (JLT)
125 Sussex Drive
Ottawa, Ontario
K1A 0G2

Tel: (613) 944-1590
Fax: (613) 944-3213

Table of Contents

PART A: INTRODUCTION

1. In its Partial Award released November 13, 2000 (the "Partial Award"), this Tribunal ruled that Canada must compensate SDMI (the "Investor") for damages sustained by Myers Canada (the "Investment") when Canada prohibited the export of PCB wastes from Canada to the United States between November 20, 1995 and February 7, 1997 (the "PCB export ban").[1] In explaining its approach to compensation, the Tribunal cited with approval the principle first articulated in *Chorzow Factory (Indemnity)*[2] that compensation should undo the material harm inflicted by a breach of an international obligation.

2. Unlike the *Chorzow Factory* case, this case does not arise from an expropriation.[3] During the period of the PCB waste export ban, the Investment pursued the same activities it pursued before the border closed and continued to issue quotes.

3. The PCB export ban merely delayed the possibility of exporting PCBs to the U.S. for disposal by fourteen months. When the Canadian border re-opened in 1997, regulations that previously allowed exports of PCB wastes for landfilling had been replaced by regulations prohibiting exports of PCB wastes to the U.S. for landfilling. This change reduced competition and favoured both the Investor and its Investment. Furthermore, the amount of PCB waste available for disposal had not declined significantly. Had it not been for the subsequent closure of the border by the U.S. government, both the Investor and the Investment could have pursued opportunities to dispose of Canadian PCB wastes.

4. The Investor seeks compensation for lost profits allegedly sustained by the Investor and the Investment because of Canada's closure of the border. The Investor relies on

---

1 The Tribunal held that Canada issued the PCB export ban contrary to its obligations under NAFTA Article 1102 ("national treatment") and 1105 ("minimum standard of treatment"). It also dismissed claims that the ban imposed performance requirements contrary to NAFTA Article 1106 and that the PCB export ban "expropriated" the Investment contrary to NAFTA Article 1110.

2 *Chorzow Factory (Indemnity)* P.C.I.J. Ser. A, No. 17 (1928) at 47; Partial Award, paras. 311 to 313, 315;

3 Paragraph 287 of the Partial Award described the situation this way: "In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed."

about 940 quotations[4] sent to Canadian PCB waste owners between September 1995 and January 1998[5] and an "expert report" estimating the Investor's and the Investment's potential market shares and the profits both of them would have earned from those quotations "but for" the PCB export ban. These include quotes submitted on the basis that they would not bind the recipient if accepted but would be used only to pressure the Canadian government to open the border; quotations submitted long before Canada closed the border and long after Canada re-opened it; lapsed quotations, quotes that remained opened for acceptance in February 1997[6]; multiple quotations submitted for disposal of the same PCB wastes; and bids submitted for work the Investor did not perform and which it had no prospect of performing or performing profitably.

5. The Investor's claim includes damages for business lost for reasons other than Canada's breach such as quotes that were issued after Canada re-opened the border. In addition, the Investor ignores the fact that only a small portion of the PCBs on which it quoted was destroyed during the period of the PCB export ban. Only the actions of the U.S. government in closing the border to PCB waste imports prevented the Investor from remediating the remaining PCB wastes and participating in the market afterward. As the Tribunal noted: "The fact that the border was closed again on the U.S. side in July 1997 cannot be laid at Canada's door."[7]

6. The claim also inappropriately includes lost profits of SDMI's U.S. operations in addition to those allegedly suffered by its Investment, Myers Canada.

7. The Investor's claim lacks an evidentiary underpinning. The Investor offers inadequate contemporaneous documentary evidence supporting the assumptions and

---

4 The number of quotes upon which the Investor relies varied throughout the discovery phase. Originally, the Investor submitted 998 quotations with its Memorial. It's expert claims to rely upon the quantum from 1019 quotes. During discovery, the Investor's counsel reduced the number of quotes to 970 and then to 942.

5 These include quotes submitted between February and July 1997 while the Canadian border was open to exports of PCBs and quotes issued between November 1995 and February 1996 that were open for acceptance when the border opened on February 26, 1997. The total of these quotes exceeds $11Million (CAD).

6 A review of the quotes discloses that several quotes issued beginning in mid-November 1996 remained open for acceptance when the border opened on February 26, 1997.

7 Partial Award, Para. 284, footnote 47.

analysis submitted by its expert. The evidence consists mostly of after-the-fact rationalizations about the Investment's profits on business generated in Canada and questionable quotations. Incredibly, the report prepared by the Investor's expert ("the Investor's Expert" or "Rosen" and the "Rosen Report") employs a basis for calculation that results in an amount thirty million dollars greater than the amount used by the Investor in its Memorial!

8. In November 1995, the Investment had no track record of shipping Canadian PCBs to the U.S. for disposal. Indeed, despite two years of intense marketing effort by the Investor, the Investment held only two contracts to dispose of PCB wastes in the U.S.[8] A number of factors were not taken into account by the Investor and its expert in calculating profits that would have been earned but for the ban. In particular, it is difficult to determine what would have been SDMI and Myers Canada's market share but for the ban given that the border had been closed to U.S. competition since 1979[9] and to measure the impact on prices of this competition. International arbitral tribunals have consistently refused to award lost profits when an investment had not been in operation for sufficient time to establish a track record of profitability and when calculations of lost profits were too speculative. Therefore, compensation for lost profits as proposed by the Investor is not appropriate in these circumstances.

9. The Investor may be compensated for the delay in realizing the benefits of its Investment, caused by the temporary closure of the border. The proper assessment is to ascertain the value of the advance to the Investment,[10] relating to the export of PCB waste, and award an appropriate rate of return on those advances for the period that the ban remained in place. Alternatively, the Tribunal may consider that the reimbursement of the funds relating to the export of PCB waste that SDMI advanced to Myers Canada is appropriate, given the evidence before it.

---

8 Canada notes that the Investor seeks no compensation for profits lost on those transactions alone. Indeed, as discussed later, the Investor offers no evidence from which the net profit on these or any transactions could be calculated.

9 The Investment's Canadian competition would not surrender its market share easily and the Environmental Protection Agency had positioned the Investor's U.S. competitors (some of which were already established in Canada) to compete aggressively for exports of PCB wastes from Canada.

10 This excludes monies advanced for activities not affected by the Export ban, such as, advising PCB

10. However, if the Tribunal determines that an award for loss of profits is the appropriate measure of compensation, the Tribunal should reject the damage claim advanced by the Investor. The Investor and its expert value the wrong business using faulty and incomplete data,[11] incorrect assumptions, faulty analysis and improper methodology.

11. Finally, the Tribunal should not accept the Investor's submissions regarding interest costs and the currency of the award. The Investor seeks rates of interest exceeding those available from Canadian courts in similar circumstances. As to costs, given the result of the first phase, each party should bear its own costs for the liability phase. In terms of the damages phase, given the lack of production, co-operation, and the extra work Canada has had to undertake, to sort out and analyze the Investor's "evidence," Canada should be awarded its costs of this phase. Finally, any compensation paid to the Investor should be in Canadian dollars.

12. The issues before the Tribunal during this phase of the arbitration are therefore:

(a) What are the applicable principles of compensation?

(b) What damages are compensable under NAFTA Chapter 11 for a claim brought under Article 1116 of the NAFTA? What losses cannot be recovered?

(c) What losses, if any, does the evidence proffered by the Claimant prove?

(d) What is the appropriate measure of damages for a delayed opportunity?

(e) Has the Claimant mitigated its damages?

(f) Is the Investor entitled to interest on the award and, if it is, what is the appropriate rate and term?

---

waste owners about their options for remediating PCB wastes, laboratory testing of PCB wastes and draining transformers.

11 Despite several requests from Canada, the Investor declined to produce information necessary to determine net profits lost during the PCB waste export ban. Among other things, the Investor refused to provide information about salary and wages throughout the ban (thereby preventing a searching analysis of a key component of its costs and the extent to which inflation contributed to those costs), information about contracts with other companies for the transportation and destruction of PCB wastes (which information is critical to determining the relative costs – and hence the profits margins – for disposing of various types of PCB wastes).

(g) Is the Investor entitled to all or any of the costs of these proceedings?

(h) Is the Investor entitled to compensation measured in U.S. dollars?

PART B: FACTS

1. SDMI

13. SDMI is a privately held corporation based in Tallmadge, Ohio. Until 1999,[12] the company processed equipment contaminated with polychlorinated biphenyls (PCBs) for disposal in the U.S. Companies engaged in this type of business are called "volume reducers".[13]

14. SDMI had been issuing quotes for PCB disposal services to Canadian companies since 1993, even though the US ban on imports precluded them from providing the proposed services.[14]

2. SDMI and the Investment

15. Myers Canada was incorporated under the Canada Business Corporations Act in 1993. SDMI lent money to Myers Canada and SDMI had an expectation that it would share in the income or profit, if there was any.[15]

16. Initially, SDMI considered developing a PCB waste treatment facility in Canada and advanced money to the Investment for that purpose.[16] However, the Investor soon abandoned that project and focussed its attention on obtaining Canadian PCB wastes for treatment in its U.S. facility. To that end, SDMI continued lobbying the EPA for authority to import PCB wastes into the U.S.[17] by petitioning for exemption allowing

---

12 Cross-Examination of Dana Myers, February 15, 2000, Q.475; Partial Award, para. 39.

13 Lexecon Report, Section II, para. 5.

14 Farkas Berkowitz Report, Business Risk, p.7

15 Partial Award, para 111 and 226.

16 Canada's Counter-Memorial, Liability Phase, para. 46; Cross-Examination of Michael Valentine, Q100-107.

17 Canada describes much of this activity in its Counter-Memorial, Liability Phase, paras. 28 and 132-134; see also: Tribunal Partial Award, November 13, 2000, paragraph 113 and the Notice Of Arbitration, October 30, 1998, page 3. The earliest lobbying activity occurred in 1991.

the company "to import PCB waste from Canada for disposal."[18]

17. SDMI's marketing strategy was to obtain the publicly available database of PCB Canadian owners from Environment Canada, and start a mailing campaign, providing free cost estimates for PCB disposal in the U.S.[19] In 1993,[20] the Investment began marketing SDMI's services in the "French speaking regions of Canada"[21] through advertising, contacting companies on the EC list and testing, assessing and draining oil and transformers. SDMI engaged in similar activities elsewhere in Canada.

18. While the Investor adduced no evidence showing when or by whom the decision was made, SDMI envisaged that Canadian PCB owners and brokers would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the resulting contract as its remuneration.[22]

19. The Investment contributed little to the marketing or delivery of the Investor's services.[23] It searched for a fixed facility in Canada and pursued a mobile destruction facility and a technology-licensing venture. It also provided electrical and laboratory services, and sales contacts for SDMI's PCB export and processing operations.[24]

20. The Investment did not "handle" PCBs or PCB wastes: it had no facilities[25] and no

---

18 Farkas Berkowitz Report, Business Risk, paragraph 4.

19 SDMI gives the impression that the Canadian customers contacted them for quotes. However, SDMI admitted that as a part of their marketing campaign, they obtained information on the PCB inventory in Canada from Environment Canada, and used this to contact the PCB owners in Canada. Any "request" is likely as a result of initial contact from SDMI, and not any goodwill or reputation that SDMI created in Canada. White Report, at 8.

20 Myers Canada started "marketing efforts" in Canada in 1993. Response to Interrogatory, #34.

21 Cross-Examination of Michael Valentine, Q 451-454.

22 Partial Award, para. 93; Dana Myers testified that the Investment would receive a fee representing 10% of the value of each contract but did not say when that decision was made, nor did he say whether the fee would be paid whether the Investment performed any services. Cross-Examination of Dana Myers, Q323.

23 Canada's Counter-Memorial (Liability Phase), paras. 37-47.

24 Cross-Examination of Michael Valentine, Q108, 120-129; Cross-Examination of Scott Myers, Q71, 79; Further Direct Examination of Dana Myers, Q7-8, 23, 35-39, 351-363.

25 The only evidence confirming physical presence in Canada is a ten-month lease of "telephone answering and handling a reasonable amount of incoming mail" services in Mississauga, Ontario dated August 26, 1996, between "S.D. Myers Inc." and BDO Professional Centre. The agreement was month to month, at a rate of $178.00 a month, and terminated June 30, 1997. SDMI Response to Canada's First Request for Documents, Tabs 12 and 14, Annexes to Canada's Counter-Memorial, Liability

specialized personnel.[26] To fulfil contracts for disposal and site inspections the Investment contracted with other companies to perform these PCB related services.[27] SDMI was responsible for Myers Canada's "technical and logistical support" and for "underwriting insurance and bonding coverage".[28]

21. Most sales and marketing activities in Canada involved SDMI staff.[29] SDMI staff in Tallmadge commonly used Myers Canada letterhead in their dealings with Canadian companies and organisations. Of the approximately 455 price quotes provided by SDMI during the Liability Phase of these proceedings, approximately 317 (70%) received price quotes from SDMI in Tallmadge and on SDMI letterhead, not operating through the Investment. Approximately 90 (20%) received price quotes from SDMI in Tallmadge but on Myers Canada letterhead. Approximately forty (9%) received price quotes from SDMI in Tallmadge on a mixture of SDMI and Myers Canada letterhead.[30] Only 1% of Canadian customers and organisations that

---

Phase, Volume Vol. I, Tab 12.

26 SDMI's produced a list of 15 named individuals (and unnamed "various secretarial support staff") described in the document as "Staff of S.D. Myers, Inc. working with S.D. Myers (Canada) Inc....for specific periods over the period of the joint venture.", and described in the cover letter to SDMI's response to Canada's First Request as a list of "all staff of S.D. Myers (Canada) Inc. and S.D. Myers, Inc. related to the Canadian business and an indication of their responsibilities." Nowhere in the list of responsibilities is there any indication that those individuals ever conducted an business in Canada: SDMI Response to Canada's First Request for Documents, Tabs 10 and 20, Annexes to Canada's Counter-Memorial, Liability Phase, Volume I, Tab 15.

27 For example, Myers Canada invoiced Borden Catelli on December 19, 1997 for incineration and transport services. An invoice from Proeco to Myers Canada dated January 31, 1998 shows that the services were actually performed by Proeco: Myers Response to Canada's First Request for Documents, tab 28.

28 Affidavit of Rev. Michael Valentine, sworn July 19, 1999, paras. 32 - 33, Investor's Memorial Schedules, Tab 1.

29 Affidavit of. Michael Valentine, sworn July 19, 1999, paras. 23, 25, 27 and 28, Investor's Memorial, Liability Phase, Schedules, Tab 1. In paragraph 23 of his affidavit Rev. Valentine claims that for that part of Ontario not serviced by Myers Canada "all sales activity, correspondence with customers and potential customers, the negotiation and execution of services contracts were conducted by and through the offices of S.D. Myers, Inc." In paragraph 25 he describes the hiring of staff in Tallmadge Ohio and the establishment of "a separate group within our Tallmadge offices to coordinate all market and order information and to communicate with any Canadian customers concerns, questions or inquiries." In paragraph 27, he states that the "coordination of information, however, was centralized in the offices of S.D. Myers, Inc." In paragraph 28, he describes the development of general promotional material and sales literature by SDMI, the preparation "in our office in Tallmadge" of responses to requests by Canadian customers for formal bid processes or formal quotes, and the development of pricing quote information "at our offices at Tallmadge".

30 SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-

would deal with Myers Canada representing Myers Canada.

22. The Investor has not produced the information necessary to assess the total gross amount it spent on its Investment during the relevant period (between November 15, 1995 and July 7, 1997.) The gross amount spent between 1993 and 1998 was $1,022,748. The Investor has not produced the documentation to establish what expenses related to non-PCB waste activities such as the lab, search for a fixed facility, testing and other services, and what those activities earned, allowing for a calculation of the net amount related to PCB waste exports.

23. Apart from information derived from correspondence sent to Canada by SDMI and an unofficial tour of SDMI's headquarters in Tallmadge, Ohio, Canada had little knowledge of SDMI's business activities. Before December 1995, Canada had no knowledge whether SDMI conducted business in Canada.[31]

3. The Regulatory Environment

24. Throughout the 1990's, SDMI and its competitors provided a wide range of disposal options for owners of PCB wastes in the U.S. These included high temperature incineration, chemical dechlorination and landfilling.[32] Some of the options, particularly the ability to landfill PCB light ballasts[33] and hydraulic equipment containing less than 500ppm of PCBs, were more liberal than those then existing in Canada.[34]

25. However, the U.S. regulatory regime also included provisions more stringent than

---

Memorial, Liability Phase, Volume II, Tabs 54 – 60; Canada's Summary of SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Liability Phase, Volume IV.

31 Affidavits of Victor Shantora para. 64; John Myslicki para. 28; and Roy Hickman para. 19; Joint Book of Documents, Liability Phase, Volume VII, Tabs 167, 166 and 165, respectively.

32 Farkas Berkowitz Report, Products that SDMI Did and Did Not Process In The U.S., page 3; White Report, Section 2.2.

33 However, many states had banned this practice by 1992.

34 Canada did not have a class of 50-500 ppm PCB equipment. All equipment, soils and other items containing PCBs above 50 ppm were basically classified as PCBs and subject to the regulatory regime. Hence, in Canada municipal landfills could not be used dispose of drained PCB-contaminated mineral oil transformers, and drained and hydraulic equipment containing between 50-500ppm of PCBs. Although not encouraged light ballasts could be disposed in municipal landfills in Canada. Generally Canadian chemical waste landfills were also subject to greater restrictions than their U.S. counterparts

those in Canada. These included a requirement that PCB wastes placed in storage be destroyed within one year[35] and "cradle to grave" liability for PCB owners under the U.S. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[36]

4. Excess Capacity in the U.S. PCB Waste Disposal Market

26. By the 1990's, excess PCB waste disposal capacity in the U.S.[37] began driving U.S. disposal costs downward. In 1995, for example, incineration prices in the U.S. fell well below $1 per pound.

27. Like its competition, SDMI had excess processing capacity.[38] In 1995-96, SDMI was operating at less than 50% of its processing capacity.[39]

28. In an exemption petition submitted to the USEPA in February, 1995[40] SDMI described a five year plan to import Canadian PCB equipment and askarel liquids. SDMI maintains that there was no fixed period that SDMI intended to operate in Canada.[41]

5. SDMI's U.S. Competition

29. Myers was not the only PCB volume reducer in the U.S. At least two other

---

and were therefore not engaged in the PCB disposal business.

35 Canada does not - nor did it at any relevant time - require destruction of PCB wastes within one year after they are placed in storage.

36 As noted later, after Canada opened its border to PCB exports, these two requirements and cost were the most significant factors considered by Canadian PCB owners when choosing between storing and disposing of PCB wastes.

37 Farkas Berkowitz Report, at 4: reference to EI Digest, March 1996, page 28.

38 Farkas Berkowitz Report, at 7: reference to Mike Valentine, quoted in EI Digest No. 3 (1998), page 15 as saying "We believe that the average facility is operating at 50 to 60 percent of their actual processing capacity."

39 White Report, Section 5.0: in 1995-1996, the maximum processing capacity of SDMI's Resource Recovery unit at Tallmadge was about 26.5 MM# for drained weight transformers. During that same time, the company disposed of 10.2 MM# per year.

40 "Why EPA Should Grant S.D. Myers, Inc.'s Exemption Request Now," pages 3-B-2, p.1 & p.2, by Dana S. Myers, Feb 2/95.

41 Canada notes that the five year plan delivered to the EPA contradicts SDMI's reply to Canada's interrogatory # 13 to which the company responded: "There was no fixed period SDMI expected to operate in Canada..."

companies employed the same business model.[42] In addition, two other U.S. firms[43] competed with SDMI in the processing of contaminated lighting ballasts.[44] Other companies also competed with SDMI for other segments of the U.S. PCB waste disposal market.[45]

30. SDMI was an agent for U.S. incinerators, and could not offer disposal services by itself to customers with high concentration PCBs.[46] SDMI mainly processed transformers and capacitors containing high concentrations of PCB liquids referred to generically as "askarel" liquids.[47] Although SDMI also accepted PCB containers and bulk wastes, they did not have capacity in-house to deal with drained askarel liquids or residues[48] from these processes nor could it deal with contaminated soil and contaminated debris.[49] SDMI required the services of U.S. EPA approved incinerator to destroy the residue and debris. Typically, SDMI subcontracted all site services,[50] the transportation and the incineration of askarel liquids, porous material, any soils or other miscellaneous solids and capacitor cores.[51] In its EPA filings,

---

42 Trans-End in Ashtabula, Ohio and Trans-Cycle Industries ("TCI") in Pell, Alabama.

43 Full Circle Ballast Recyclers in the Bronx, New York and Salesco Systems (now Superior Special Services) in Phoenix Arizona.

44 Lexecon Report, para. 6; SDMI letter to EPA dated December 4, 1995, SDMI Response to Canada's First Request for Documents, Tab 35; Joint Book of Documents, Liability Phase, Volume I, Tab 25.

45 The companies included: Rollins Environmental Inc.; Laidlaw Environmental Services; Chemical Waste Management; Dynex; AETIS; and EnviroSource Treatment and Disposal Services Inc., (Envirosafe); SDMI Letter to EPA dated January 12, 1995 (sic. 1996), SDMI Response to Canada's First Request for Documents, Tab 30, Joint Book of Documents, Liability Phase, Volume II, Tab 34; Affidavit of Victor Shantora sworn October 4, 1999, paras. 78 - 80 and Tab M, Annexes to Canada's Counter-Memorial, Liability Phase, Vol. III, Tab 64; SDMI letter to EPA dated March 28, 1991, SDMI letter to EPA dated December 17, 1993, SDMI letter to EPA dated October 10, 1994, SDMI Letter to EPA dated January 12, 1995 (sic. 1996), SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Liability Phase, Vol. II, Tabs 46, 39, 36 and 34; SDMI letter to EPA dated December 4, 1995, SDMI Response to Canada's First Request for Documents, Tab 35.

46 Lexecon Report, Section II, paras. 4, 5 and 8.; White Report, Section 2.1.

47 Canada's Counter-Memorial, Liability Phase, paragraphs 24 to 28; Farkas Berkowitz Report, Products that SDMI Did and Did Not Process in the U.S., p.3-4, and Schedule "C".

48 e.g. PCB contaminated wood, paper, sludges, capacitor cores.

49 e.g. contaminated construction waste, protective clothing.

50 e.g. local regulatory approvals, manifesting, draining transformers, packaging, labelling, and loading.

51 Canada's Counter-Memorial, Liability Phase, paragraphs 26 and 27 describe the activities for which the Investor held licences from the EPA; see also the Affidavit of.Michael Valentine at paras. 7-12; Response to Interrogatory, #39.

SDMI confirms that it disposed of no "Articles" in the U.S.[52]

6. SDMI's U.S. Market Share

31. The following table taken from Appendix "C" of the Farkas Berkowitz Report[53] shows SDMI's market share of various segments of the U.S. PCB waste disposal market between 1992 and 1995:

S.D. MYERS -MARKET SHARE				
Waste Type Disposed	Year			
	1992	1993	1994	1995
Capacitors	2.7%	5.2%	9.2%	5.2%
Articles	0.0%	0.0%	0.0%	0.0%
Transformers	28.1%	53.2%	36.9%	34.9%
Bulk	0.4%	0.4%	0.3%	0.4%
Containers	0.4%	0.5%	0.4%	0.7%
TOTAL	1.2%	1.2%	0.9%	0.9%

32. In those years, SDMI's share of the total U.S. PCB waste disposal market hovered around 1.1% while its share of the U.S. transformer market fluctuated between 28.1% and 53.2%. The company's average share of the U.S. transformer market during that time was 38.3%. It is common ground that recycling transformers containing PCB wastes was the most profitable segment of the market.

7. The Canadian PCB Waste Disposal Market

33. When the Investor first considered entering the Canadian PCB market in 1993, the U.S. border had been closed to PCB waste exports from Canada for ten years. While businesses in the Canadian market provided services similar to those available in the U.S.,[54] service providers were generally smaller and incineration services for the

52 Farkas Berkowitz Report, Products that SDMI Did and Did Not Process in the U.S., p. 4: "Articles" as defined by the EPA are drums that contain PCB-contaminated liquids, soils or debris.

53 Farkas Berkowitz Report, SDMI's Share of the U.S. PCB Market, and Schedule "C". These numbers are taken from the EPA figures based on SDMI's voluntary submissions to the EPA.

54 A number of Canadian companies engaged in packaging, transport of PCBs, pre-processing activities, site inspections, and sale of PCB destruction services such as Customs Environmental Services, Sani-Mobile, Greenport Environmental Services and Proeco. These were companies engaged in "handling"

destruction of high concentration PCBs were available only to Alberta PCB waste owners through a waste treatment facility in Swan Hills, Alberta.[55] This left PCB owners in Ontario, Quebec and eastern Canada with virtually no alternative but to store their high concentration PCBs.

34. By early 1995, the Canadian PCB waste disposal market had expanded significantly. Beginning in February 1995, the facility at Swan Hills accepted PCBs from other provinces for incineration.[56] The Canadian market then had two high temperature incinerators. In addition, there was a thermal destruction company and numerous PCB destruction and decontamination companies that operated fixed and mobile incinerators, or decontaminated various types of PCB wastes by different processes. The latter group shipped the remaining PCBs for destruction through chemical treatment or in incinerators located across Canada.[57]

35. In 1996, the Canadian PCB market was estimated by some to be worth $400 million.[58] This estimate was based on the pricing assumption of $1 per pound, and was considered grossly inflated.[59]

36. The potential liability risk associated with U.S. disposal and transportation to the U.S. were important factors in decision making for Canadian PCB owners. Some of the companies that demonstrated the most opposition to sending PCBs to the U.S. for disposal, were Canadian companies with U.S. parents.[60]

8. Competition in the Canadian Marketplace

37. Neither SDMI nor Myers Canada ever expected a monopoly over export of PCB wastes from Canada. The preamble to the Addendum to the 1994 Business Plan for

---

PCBs but not destruction per se. See: Canada's Counter-Memorial, Liability Phase, para. 262.

55 The Tribunal acknowledged the existence of a Canadian PCB waste disposal industry in its Partial Award and described it as "virtually non-existent in 1990" and "fledgling" in later years: see the Partial Award at paras. 110 and 122.

56 Joint Book Of Documents, Liability Phase, Volume II, Tab 39.

57 Affidavit of Victor Shantora sworn October 4, 1999, paras. 16, 17, 19 and Tab E, Annexes to Canada's Counter-Memorial, Liability Phase, Vol. III, Tab 64; White Report, Sections 2.3 and 10.

58 Farkas Berkowitz Report, Prices for Disposal of PCBs in the U.S., p.4; Cross-Examination of Michael Valentine, Q 9, 58, 101, 161, 424.

59 Farkas Berkowitz Report, Prices for Disposal of PCBs in the U.S., p.4.

60 White Report, Section 4.1.

Myers Canada states (at 1.A(b)):

> "We already explained in our Business Plan, V, II, issued August 15, 1994, the actual situation, at this point the only new element is that our petition have been turned down by USEPA. The border might be open in couple of years because of the NAFTA ***but it won't be open only for us that's for sure, it will be open at large for everyone.***" (emphasis added)[61]

38. The competition foreseen in SDMI's 1994 Business Plan developed in late 1995 and early 1996.[62]

39. To further address competition, SDMI had a non-competition agreement with at least one Canadian PCB waste broker.[63] However, the Investor continues to deny this fact and refuses to provide any documentation.[64]

40. By March 1996, several U.S. based PCB disposal companies had mobile treatment licensees or sales offices in Canada.[65]

9. Pricing in the Canadian Market

41. Prior to February 1995, Chem-Security functioned as a monopoly. Between February and November 1995, the Canadian industry was developing as a result of the Alberta border opening.[66] With the emergence of SDMI after November 15, 1995, and other U.S. competition after January 19, 1996, prices in the Canadian PCB market fell.

42. Canadian PCB waste owners had waited for years to dispose of their PCBs[67] and with the emergence of significant new competition it is reasonable to assume that they would have waited until the downward cycle of pricing stabilized.[68] After all, disposal was not an urgent requirement. Canada had no one year storage limit for PCB waste and therefore during the relevant time Canadian PCB owners were never under legislative pressure to dispose of their PCB wastes; nor were they required to phase out in use equipment containing PCBs. In addition, the "cradle to grave"

---

61 Myers' Company for Environmental Development Myers Inc., "Addendum"; Response to Canada's First Request for Documents, Tab 9, Annexes to Canada's Counter-Memorial, Vol. I, Tab 9.
62 KPMG Report, Section 6.2.
63 White Report, Section 1.2.1 and 2.3.
64 Interrogatory #4.
65 Farkas Berkowitz Report, Activities of SDMI's U.S. Competitors in Canada
66 KPMG Report, Section 6.1
67 Joint Book of Documents, Liability Phase, Proctor and Redfern Report, 1993, Tab 4.

liability of U.S. PCBs under CERCLA, i.e. the increased risk of liability, concerned several Canadian PCB owners considering the possibility of shipping their waste to the U.S. for disposal. These factors, together with costs drove decision-making throughout this time.[69]

43. PCB owners were very price sensitive.[70] That Canadian PCB owners were waiting for prices to drop is evidenced by the fact that SDMI had only two "orders" in Canada as of November 15, 1995. SDMI's inability to turn any significant number of quotes into orders strongly indicates that the owners of Canadian PCBs were waiting to see what the competition would offer.[71]

44. SDMI adjusted its general price lists based on market conditions and depending on each customer.[72] Initially, SDMI set prices at approximately 50% of Chem-Security prices, which was approximately 10-30% higher than prevailing U.S. prices.[73]

45. By September 1995, due to competition in the market place SDMI's price advantage had significantly diminished to about 10-20% higher than Chem-Security. Canadian prices, in general, continued to drop during 1996 and 1997, further shrinking Myers initial price advantage.[74]

10. The Enforcement Discretion

46. After a 4-year battle with the U.S. EPA, on October 26, 1995 SDMI obtained an enforcement discretion effective November 15, 1995. This enabled the company to import PCBs from Canada to the U.S., for disposal.[75]

47. In its application for Enforcement Discretion, SDMI requested that it alone be granted Enforcement Discretion. However, the EPA invited forty-two companies to apply for Enforcement Discretion.[76] By November 15, 1995 at least ten companies

---

68 KPMG Report, Section 6.2.
69 White Report, Section 4.2.
70 Rosen Report, at p.13
71 Response to Interrogatory, #143.
72 Response to Interrogatory, #36(b).
73 Response to Interrogatory, #40.
74 White Report, Sections 8.4 and 9.4.
75 Notice of Arbitration, October 30, 1998, page 3. See Appendix 5.
76 Joint Book of Documents, Liability Phase, Volume II, Tab 68. See Appendix 7.

had applied for such relief.[77]

48. SDMI attempted throughout 1995 and 1996 to keep these companies from competing directly with it for access to the Canadian market.[78] For example, on December 4, 1995, SDMI complained to the Administrator of the EPA that all the time and effort expended by the company in securing the enforcement was wasted because:

> "your agency is rushing all our competitors through (even though they never followed the Congressionally mandated methods for importing by applying for exemptions) and even though it did not take them a six month wait for the people in enforcement discretion to act. . . .
>
> If it is your policy to have 'equity in the workplace,' I would like to ask you to make sure that inequities in the U.S. marketplace don't get extended to the Canadian marketplace. . .
>
> We have been told that any U.S. permitted disposal facility will be approved. This would include landfills for transformers, which will put over 100 pounds of PCBs into the ground for every average sized 5500 pound transformer. . . .
>
> We are losing money daily because of these inequities . . ."[79]

49. By January 19, 1996, ten U.S. based competitors had received Enforcement Discretion and could also import Canadian PCBs into the U.S.[80]

11. The Border Closure

50. On November 20, 1995, the Canadian government closed the border through the issuance of the emergency Interim Order.[81]

51. By the time they received the enforcement discretion, SDMI or its Investment had issued 187 quotes but only two of them materialized into purchase orders from PCB owners.[82]

52. On March 18, 1996, the U.S. EPA introduced the "Import for Disposal Rule" which

---

77 Joint Book of Documents, Liability Phase, Volume VIII, Appendix to Affidavit.

78 See, for example, letters to the EPA complaining about: regulatory inconsistencies (April 17 and 20, November 8 and 10, 1995); lack of enforcement (December 12, 1995); and, failure of American disposal companies about to receive enforcement discretions to meet Canadian environmental standards (January 12, 1996): Cornwall Affidavit, Joint Book of Documents, vol. VIII Tabs 13, 14, 22, 23 and 26.

79 SDMI letter to EPA dated December 4, 1995, SDMI Response to Canada's First Request for Documents, Tab 35, Joint Book of Documents, Liability Phase, Volume I, Tab 25.

80 Lexecon Report, Section IV, para. 9.

81 Partial Award, paras. 161 – 188.

82 Response to interrogatory #143; KPMG Report, Section 6.3.

allowed for the importation of Canadian PCBs, and effectively did away with the need for Enforcement Discretion.[83]

12. SDMI Operations in Canada after the Border Closure

53. SDMI had made a "business decision" to focus on PCB waste remediation from Canada to the United States in the period 1990-1997, rather than services such as recycling or disposing, and testing and life extension services for electrical transformers. It did not consider other areas of business even after the border closed.[84]

54. SDMI and Myers Canada did not collect any information about the Canadian PCB inventory after March 1995, nor the amount of the inventory that was destroyed thereafter.[85]

55. If anything, the operations of SDMI with respect to the export of PCB wastes from Canada stayed relatively constant after the Interim Order was made. 12 named staff of SDMI (seven of whom had just been hired in October, 1995) were employed by S.D. Myers (Canada) Inc. as of November 1, 1995. Only two stopped this work in the period immediately after the Interim Order was made.

56. SDMI did business with approximately 473 Canadian companies or organisations. Approximately 470 of those companies had contact with SDMI and/or Myers Canada for price quotes for services. Approximately 455 received price quotes from SDMI. Only 15 Canadian holders of PCB wastes received price quotes from Myers Canada.[86] Much of the work bid on by SMDI was work that it could not perform.[87]

57. SDMI had issued quotes to Canadian PCB holders on different types of PCBs, not

---

83 The enforcement discretion lapsed upon the coming into force of the Import for Disposal Rule.

84 Response to Interrogatory, #5 and 8(c) and (d).

85 Response to Interrogatory, #147 to 150.

86 SDMI Response to Canada's First Request for Documents, Tab 28, Joint Book of Documents, Liability Phase, Volume II, Tabs 54 - 60: This is a sample of three double bankers' boxes of documents produced to Canada by SDMI. The complete set of documents, numbering thousands of pages, has not been annexed to Canada's Counter-memorial due to their volume. Canada's Summary of SDMI Response to Canada's First Request for Documents, Tab 28, Joint Book of Documents, Liability Phase, Volume IV.

87 White Report, Section 6.1

just transformers. Canadian quotes also included services that did not require PCBs to be exported to the US. SDMI did not segregate bid proposals by PCB type. SDMI did not make bid proposals to customers with only askarel transformer or capacitor PCB wastes.[88] Much of the work bid on by SDMI and Myers Canada involved services that they could not perform.[89]

13. The Border Reopens

58. Canada closed the border on November 20, 1995. The process of drafting the new Canadian export regulations began in March 1996. On October 5, 1996,[90] having decided to re-open the border, Canada published a new regulatory protocol to deal with exports. In October of that year, Environment Canada issued a special edition of its newsletter "Resilog" to over 2000 Canadian companies and posted it on its website. The newsletter indicated that Canada was prepared to take steps to reduce the processing time for notices that would have to be resubmitted once the regulations were in force. SDMI was one of the companies that took advantage this offer and their officials contacted the Environment Canda's notice officer regularly before Canada published the regulations in Canada Gazette II.[91]

59. The border stayed closed until February 7, 1997, when it was re-opened by Canada. By then, prices in the U.S. had dramatically fallen. Some firms were offering chemical detoxification services at less than $0.10 per pound.[92]

60. After Canada announced the re-opening of the border, PCB disposal prices dropped in the Canadian market by approximately 42%. Competition from multiple U.S. firms meant lower prices in Canada and a reduced market share for SDMI. The decline in prices resulting from increased competition led SDMI and Myers Canada to re-bid on a number of projects.[93]

61. At that time, SDMI and Myers Canada actively issued quotes, presumably believing

88 Response to Interrogatory, # 70, 76, 77; Tabs 347, 441, 585, 697, 818, 894, 894.
89 KPMG Report, Section 6.1.
90 Canada's Memorial (Liability Phase), para. 169.
91 Cross-examination of Michael Valentine, Q 437-445.
92 Farkas Berkowitz Report, reference to (EI Digest, March 1996, page 28) and (EI Digest, No. 3, 1998, page 16).

it would be able to capture its share of the market, after the border opened. Other SDMI quotes were lost because they were not competitive. A substantial portion of the value of quotes "lost" by the Investor was lost due to factors other than Canada closing the border.[94]

62. During the export ban, a relatively small portion of PCBs were destroyed in Canada, effectively leaving the rest of the inventory available to SDMI and its competitors to bid on.[95]

63. On February 7, 1997, the border re-opened. After four years of aggressive marketing to Canadian PCB owners, six months notice to ramp up its export business, and after issuing almost a thousand quotes, by February 7, 1997, SDMI received only 43 sales orders.[96] SDMI completed seven shipments in the five months prior to the U.S. closing the border on July 20, 1997.

14. The U.S. Closes the Border

64. On July 7, 1997 the U.S. Court of Appeals for the 9th Circuit overturned the EPA's Import for Disposal Rule in Sierra Club v. E.P.A.[97] The ruling essentially negated the Import for Disposal Rule and recognized the continued effect of the 1980 ban on the import of PCBs into the U.S. The Court of Appeals decided that the opening of the U.S. border by the EPA to imports of PCB waste contravened U.S. law and was invalid.[98]

65. Despite a last ditch effort by SDMI[99] and others to obtain a stay of proceedings pending the expiry of the period within which to bring an appeal, the EPA closed the

---

93 Lexecon Report, Section II, paras. 10 and 11, and Section IV, B, para 37.
94 Response to Interrogatory, #156(a).
95 KPMG Report, Section 6.3.
96 Response to Interrogatory # 157.
97 *Sierra Club v. E.P.A.*, (U.S. Ct. App., 9th Cir.), Joint Book of Documents, Vol. II, Tab 51.
98 Affidavit of John Myslicki sworn October 4, 1999, para. 47, Joint Book of Documents, Liability Phase, Volume VII, Tab 166.
99 SDMI filed a motion for leave to intervene in June 1996 and submitted a brief to the court on the main application. After the court rendered its decision, SDMI applied for interim relief which the EPA argued ought not to be granted because, among other things, while the Solicitor General of the United States had yet to reach a final conclusion in the matter, it is " . . . unlikely that any party will persuade the Court to rehear this matter, or ultimately to revise its opinion."– EPA's Opposition to Intervenor's Emergency Motion Under Circuit Rule 27-3 for Injunctive Relief dated July 22, 1997.

border to PCB waste imports to the U.S. as of 12:01 am local time Sunday, July 20, 1997. Entry of PCB wastes into the U.S. under PCB Waste Export Permits issued under the Canadian *PCB Waste Export Regulations* have not been allowed since then.[100]

PART C: THE INVESTOR FAILS TO DISCHARGE ITS BURDEN OF PROOF

66. Although international tribunals are not bound by formal rules of evidence, they still concern themselves with matters of proof[101]. The burden of proof includes the duty to produce evidence in support of the claim;[102] the mere assertion of a claim or allegations of facts is not sufficient. Article 24 of the UNCITRAL Arbitration Rules[103] confirms that the claimant bears the burden of proving the facts relied on to support its claim. This means that the Investor must establish its allegations on the evidence, subject to refutation by Canada. The Tribunal recognized in the Partial Award that the Investor had the burden of proving its case.[104]

67. The degree of proof that must be achieved is the "balance of probability." However, the Tribunal should require a more rigorous degree of proof on matters that are improbable, far-fetched, or unsupported by evidence, where the Investor is in exclusive control of the evidence. [105] Where a claimant fails or refuses to provide

---

100 Affidavit of John Myslicki, para. 47, Joint Book of Documents, Liability Phase, Volume VII, Tab 166.

101 M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence in International Tribunals* (Kluwer Law International, 1996) p. 117, cited in *United States-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the WTO Appellate Body, 25 April 1997. AB-1997-1. In the NAFTA context see *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, (1996), 1 T.T.R. (2d) 975, paras 125-128; see also Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (London: Sweet & Maxwell, 1999), pp. 314-315.

102 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Grotius Publications, 1987), at 328-9; *The Queen Case (1872)* supports the proposition that the burden of proof includes "a duty to produce evidence, and to disclose the facts of the case" and the *Taft Case (1926)* was also cited on this point. Cheng notes that the burden of proof is tied to the duty to produce evidence. The party having the "burden of proof must not only bring evidence to support the allegations, but also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof".

103 UNCITRAL Arbitration Rules, adopted on December 5, 1976.

104 Partial Award, para. 316.

105 Redfern & Hunter, pp. 314-315.

documents in its possession, or refuses to admit that no documents support its allegations, the opponent is unable to test the case, and the tribunal is unable to make balanced determinations. By providing the tribunal with all the evidence at their disposal, the parties can assist the tribunal in deciding the case on the basis of the facts.[106]

68. The evidence tendered by SDMI does not support the assumptions made in the Investor's memorial or in the Rosen Report, in particular with respect to costs, market share, and prices. In *INA Corp v. Government of the Islamic Republic of Iran*[107] the respondent expert report was given little weight because the material in support of the report was not produced. The Investor refused to produce material in its possession that Canada and its experts viewed as relevant to the damages calculations. As a result, the Investor's calculations are unsupported and speculative. The Claim should be dismissed because of the Investor's failure to prove the quantum of damages.

PART D: PRINCIPLES OF COMPENSATION

1. Guidance Provided By The November 13, 2000 Partial Award

69. In its November 13, 2000 Partial Award the Tribunal found that Canada should compensate SDMI for the economic harm directly resulting from Canada's breach of its obligations under Article 1102 or 1105 of the NAFTA.[108]

70. The Tribunal considered that the drafters of the NAFTA intended to leave it open to tribunals to determine an appropriate measure of compensation, based on the specific

---

106 Kazazi, at 322.

107 (1985) 8 Iran-US C.T.R. 373, 382 [attached to Canada's April 19 Motion For Production Of Documents]. The Tribunal stated: "The Respondent's attempt to excuse its non-compliance by merely stating that the documents were "voluminous" is not convincing. The Respondent did not raise this asserted excuse until the hearing, long after the date for submission of these materials had passed; even then, the Respondent gave no indication of the actual amounts of material involved or any description of the alleged problems involved which prevented submission of the material by the Respondent or their inspection by INA. In assessing the evidentiary weight of the Amin report, the Tribunal must draw negative inferences from the Respondents failure to submit the documents which it was ordered to produce. In sum, the Amin report is so qualified and limited, and so influenced by unexplained, specifically adopted (and not generally accepted) accounting techniques, that it cannot be considered to reflect the value of Shargh at the time of nationalisation."

108 Partial Award, para. 325.

circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. The Tribunal held that it would be premature at the liability stage to attempt to set out detailed principles for calculating the compensation payable[109].

71. The Tribunal held that the drafters of the NAFTA did not state that the "fair market value of the asset" formula (found in Article 1110 - Expropriation) applies to all breaches of Chapter 11. The Tribunal considered that the application of the fair market value standard was not a logical, appropriate or practicable measure of the compensation to be awarded in this case[110].

72. The Tribunal recognised that it had no authority to award punitive damages[111].

73. The Tribunal adopted the principle of international law stated in the *Chorzow Factory (Indemnity)* case: "...reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." It stated that whatever approach was taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.[112]

74. The Tribunal agreed that the following principles also apply[113]:

- the burden is on SDMI to prove the quantum of the losses in respect of which it puts forward its claims;
- compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes;
- the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the Article 1102 and 1105 NAFTA, and not from other causes;
- damages for breach of any one NAFTA provision can[not] take into account any damages already awarded under a breach of another NAFTA provision; there must be no "double recovery".

109 Partial Award, paras. 309 and 314.
110 Partial Award, paras. 307 to 309, 314.
111 Partial Award, para. 308, footnote 53.
112 Partial Award, paras. 311 to 313, 315.
113 Partial Award, para. 316 and 325.

75. The Tribunal also stated that Canada's breach of Article 1105 neither increased nor diminished the damages to which SDMI is entitled to for the breach of Article 1102[114].

76. The Tribunal indicated that it would assess compensation payable to SDMI on the basis of the economic harm that SDMI legally can establish.[115]

2. Chapter 11 Principles of Compensation

77. While Chapter 11 includes principles of compensation for an expropriation, it does not specify the methodology to calculate damages for a breach of Article 1102 or 1105. The Chapter does, however, provide some limits regarding compensation that a tribunal constituted under Section B of Chapter 11 can award.

78. Under Article 1135 the Tribunal has the authority to award monetary damages, but not punitive damages, and any applicable interest and/or order the restitution of property, as well as costs. Article 1135 reads, in relevant part:

> Article 1135: Final Award
>
> 1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:
>
> (a) monetary damages and any applicable interest;
>
> (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.
>
> A tribunal may also award costs in accordance with the applicable arbitration rules.
>
> 2. [...]
>
> 3. A Tribunal may not order a Party to pay punitive damages

79. In accordance with the *Vienna Convention*[116] principles of interpretation, Article 1135 must be interpreted taking into account the ordinary meaning of the terms in their context, including other provisions of Chapter 11 and the NAFTA as a whole, and in the light of its object and purpose.

---

114 Partial Award, para. 317.
115 Partial Award, para. 318.
116 Vienna Convention on the Law of Treaties, 1980, C.T.S. 37, Article 31.

80. Article 1135 must be read together with Articles 1116 and 1117 which provide that an investor can make a claim for a breach of Section A of Chapter 11 for "loss or damage by reason of, or arising out of, that breach". Therefore, only damages that have a direct causal relation to the breach, in this case the PCB Interim Order, are compensable.

81. Finally, Article 1131 of the NAFTA provides that "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Therefore, in its determination of damages the Tribunal shall, in addition to the provisions of the NAFTA cited above, consider general principles of compensation in international law.

82. The only decision to date under Chapter 11 dealing with the issue of compensation is *Metalclad Corporation v. United Mexican States*[117] in which the tribunal found an expropriation of a landfill concession. The Tribunal awarded compensation based on the actual investment of the investor in the project.

(a) Only Damages To The Investor With Respect To The Investment Can Be Compensated

83. Chapter 11 also provides an additional critical indication regarding compensation. In the case of a Chapter 11 claim, an investor can only be compensated for losses *with respect to its investment*, in this case Myers Canada. The basis of this limitation is the words of the Chapter 11 obligations themselves. A reading of Chapter 11 in the context of the rest of the NAFTA Agreement, including Chapter 12, also confirms that SDMI cannot receive compensation under Chapter 11 for its cross-border service activities but is limited to compensation for its losses in its capacity as an investor.

i. Nature of the Investment

84. In its Partial Award the Tribunal found that at the relevant time Myers Canada was an "enterprise", that SDMI was an "investor" for the purposes of Chapter 11 of the

117 *Metalclad Corporation* v. *United Mexican States* ("Metalclad"); ICSID Case No. Arb (AF)/97/1/(2000). The decision of the British Columbia Superior Court in the set aside proceedings did not affect the determination of damages except with respect to the date interest starts running, United Mexican States v. Metalclad Corp., Vancouver Docket No. L002904, ¶ 76 (B.C. S.C., May 2, 2001).

NAFTA and that Myers Canada was an "investment"[118]. The Tribunal declined to find other bases on which SDMI could contend that it had standing to maintain its claim including that (a) SDMI and Myers Canada were in a "joint venture", (b) Myers Canada was a "branch" of SDMI, (c) SDMI had made a "loan" to Myers Canada, or (d) SDMI's "market share in Canada" constituted an "investment":[119] [120]

> It is not necessary to address these matters in this context and the Tribunal does not do so, although they may be relevant to other issues in the case. Insofar as they are, they will be dealt with at the appropriate time.

85. The Investor has not made further representations concerning this issue except to refer the Tribunal to the decision in *Pope & Talbot, Inc. v. Government of Canada*[121] and suggesting that this decision concludes that market share can be an investment under Article 1139(g). The *Pope & Talbot* decision cannot be read to support this conclusion.[122] Furthermore, "market share" does not in itself constitute an investment, as it does not fall within the exhaustive list of "investments" found in Article 1139 of the NAFTA. The three NAFTA Parties agreed on this point in the context of the *Methanex* case[123].

86. In its February 4, 2001 letter to the parties, the Tribunal asks whether marketing and related expenditures constitute an investment. SDMI's marketing and related expenditures in Canada do not, on their own, constitute an investment, as they do not fall within the definition of investment of Article 1139 of the NAFTA[124]. Indeed, it cannot be that simply by placing advertisement in Canadian newspapers, U.S. companies automatically become investors with investments in Canada.

---

118 This issue is being contested by Canada in the Federal Court of Canada set aside proceedings, *Attorney General of Canada v. S.D. Myers, Inc.*, T-225-01. However, for the purposes of this Memorial, Canada made its submissions on the basis of the finding in the Partial Award that Myers Canada was an investment in Canada of SDMI.

119 Partial Award, paras. 225, 229 and 230.

120 With respect to the other possible "investments" raised in the Tribunal's Partial Award, Canada relies on the submissions made in its Counter-Memorial and Supplementary Memorial during the Liability Phase. In particular see Paras 218-251 of Canada's Counter-Memorial, Liability Phase.

121 Interim Award dated June 26, 2000, at paras. 96-98.

122 The Tribunal simply concluded that part of the Investment's business was to sell softwood to the U.S. market.

123 *Methanex*, Memorial on Jurisdiction and Admissibility of Respondent United States ofAmerica, at p. 31; Article 1128 Submission of the Government of Canada, paras. 58-62; Article 1128 Submission of the Government of United Mexican States, paras 23-24.

ii. Ordinary Meaning And Purpose of Chapter 11 Provisions

87. The Chapter 11 obligations provide guarantees regarding the treatment of investments and investors with respect to their investments. For example, Article 1110 provides that "no party may directly or indirectly nationalize or expropriate an *investment* of an investor". Article 1106 prohibits performance requirements "in connection with the establishment, acquisition, expansion, management, conduct or operation of an *investment of an investor*".

88. Similarly, Articles 1102 and 1105, for which Canada was held liable in this case, are obligations relating to investments. Article 1102 specifies that a Party must accord national treatment to (a) "investors of another Party...*with respect* to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition *of investments*"[125]; (b) "*investments of investors* of another Party (...)". Article 1105 requires that "*investments of investors*", and not "investors" *per se*, be accorded a minimum standard of treatment.

89. Thus, when one considers the ordinary meaning of Articles 1102 and 1105, it seems clear that only losses with respect to an investment (made or to be made) in Canada are compensable. Given that the NAFTA obligations relate to the investment of an investor of another Party or to the investor with respect to its investment, compensation for damages arising out of a breach of these obligations must also be with respect to its investment.

90. The Tribunal recognized in its Partial Award that the harm to the investment formed the basis of compensation to SDMI:[126]

> Insofar as this conduct caused harm to SDMI by injuring its investment, Myers Canada, Canada must pay compensation to SDMI.

91. In light of the Tribunal's finding concerning the nature of the investment, the measure of compensation owed to SDMI by reason of Canada's breach are the

---

124 However, marketing expenditures by SDMI's investment, Myers Canada, are part of the investment.
125 Article 1102(a) provides protection to the investor when the measure affects the relationship between the investor and its investment or in the pre-establishment phase of the investment. Similarly, only damages that flow from this relationship can be claimed by the investor.
126 Partial Award, para. 301.

damages suffered by SDMI with respect to its Investment, Myers Canada.

92. This means that the Investor cannot claim damages it suffered with respect to its own PCB remediation operations in the United States. Those are not damages that relate to its investment in Canada.

93. This conclusion is confirmed by the object and purpose of Chapter 11, which is to protect investors when making investments in another NAFTA country and to "increase substantially investment opportunities in the territory of the Parties"[127]. The purpose of Chapter 11 is not to protect investors' operations in their home country but to protect their investment in the territory of other NAFTA Parties. The investment provisions of NAFTA protect "investors" with respect to their "investments"[128]. Other Chapters of the NAFTA protect nationals of other NAFTA Parties with respect to other aspects of their operations. For example, Chapter 12 protects SDMI as a cross-border service provider.

iii. The Relationship Between Chapter 11 And Chapter 12 Supports The Conclusion That SDMI May Only Claim Damages With Respect To Its Investment

94. In considering the relationship between Chapter 11 and Chapter 12 in the Partial Award, the Tribunal noted: [129]

> Consideration of the relationship between Chapters 11 and 12 is more complex. Insofar as the focus is merely on the fact that the two chapters may relate to the same activity, the Tribunal's observations concerning Chapters 3 are apt, but it may be that the question is not whether there is a conflict between Chapters 11 and 12, but whether the cross-border supply of services involves an 'investment'.
>
> This latter issue has not been addressed fully by the Disputing Parties and may be of more significance to a consideration of damages. The Tribunal finds it not relevant to liability in this case.

95. Canada believes that the finding regarding the application of Chapter 11 and Chapter 12 is relevant both to liability and damages. Canada submitted in the Liability Phase that the Investors' PCB remediation activities in the U.S. could not be compared to those of Canadian PCB remediation offering the same service in Canada because that

---

127 Article 102 of the NAFTA.

128 J. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, (Canada Law Book, 1992) at 275.

invited a comparison that fell outside the ambit of Chapter 11. The issue is currently under review by the Federal Court of Canada. It is also important to make this distinction for the damages phase.

96. Chapter 11 deals with investment and Chapter 12 with the provision of cross-border services. While the purpose of Chapter 11 is to protect investors in relation to their investments in another NAFTA country, the provisions of Chapter 12 protect service providers of other NAFTA Parties that seek to provide services from their home country. Indeed, when one looks at Chapters 11 and 12 and the structure of the NAFTA, it is obvious that the Parties intended Chapter 11 to cover only foreign investment in another NAFTA country, in this case the investment of an American investor in Canada. This distinction between the coverage of Chapter 11 and of Chapter 12 was made very clearly by the Tribunal in the recent decision, *In the Matter of Cross-border Trucking Services.*[130]

97. This distinction is further made obvious by the fact that with respect to financial services, the Parties decided to cover, in one single chapter, both foreign direct investment and cross-border trade[131]. If the Parties had wanted to include, in whole or in part, cross-border trade in services in Chapter 11, they would have specifically provided so, as they did in the case of financial services. They did not. This is part of the "object, purpose and context" under Article 31 of the *Vienna Convention* that the Tribunal must take into consideration when interpreting the provisions of Chapter 11 and addressing the issue of what losses are to be compensated.

98. It is worth noting the definition of "cross-border provision of a service or cross-border trade in services" which includes a service "(a) from the territory of a Party into the territory of another Party, (b) in the territory of a Party by a person of that

---

129 Partial Award, at paras. 299-300.

130 *In the Matter of Cross-border Trucking Services*, USA-Mex-98-2008-01, February 6, 2001. The Tribunal analysed separately measures relating to investments in trucking services under Chapter 11 and measures relating to cross-border trucking services under Chapter 12. It was clear that the analysis under Chapter 11 referred to investment into the territory. Contrast for example the comparison in paras. 248 - 252 (examining a breach of Chapter 12) and that of paras 279-291 (examining a breach of Chapter 11).

131 See Article 1401, which is worded in a similar fashion as Article 1101 but specifically adds a reference to "cross-border trade", as well as 1405(3), which provides national treatment for cross-

Party to a person of another Party, or (c) by a national of a Party in the territory of another Party; but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment – Definitions), in that territory".[132]

99. The *U.S. Statement of Administrative Action* comments:

> Chapter Twelve should be read together with Chapter Eleven (Investment), which establishes rules pertaining to the treatment of service firms that choose to provide their services through a local office or subsidiary, rather than cross-border.

100. For example, where a U.S. architecture firm located in the U.S. provides drawings to a Canadian customer, the service is covered by Chapter 12. Where the Canadian subsidiary of a U.S. architecture firm provides the drawings to the Canadian customer, the service to the Canadian customer is covered by Chapter 11.

101. Different chapters of NAFTA can cover different aspects of a transaction. In the case of SDMI, the provision of PCB remediation services to Canadian PCB owners is a cross-border service. The service (PCB remediation) is provided in the territory of a Party (the U.S.), by a person of that Party (a U.S. company), to a person of another Party (the Canadian company). Chapter 12 covers this relationship. Myers Canada's activities in Canada and SDMI's relationship with Myers Canada[133] are covered by Chapter 11.

102. SDMI cannot therefore be compensated under Chapter 11 for damages to its cross-border services (i.e. its U.S. PCB remediation services). Any claim regarding a breach of national treatment with respect to SDMI's PCB remediation activities must be brought under the state-to-state dispute settlement provisions in NAFTA Chapter 20, which do not provide for financial compensation. Other U.S. PCB service companies were also restricted in providing PCB remediation services to Canadian companies but they do not have a claim under Chapter 11.

103. The mere fact that SDMI owned a marketing enterprise in Canada is irrelevant, as SDMI was not providing the PCB remediation services through its Investment. Had

---

border financial service providers.

132 Article 1213.

133 For example, SDMI's management, conduct, operation or sale of Myers Canada.

Myers Canada been operating PCB remediation services in Canada then SDMI could have been said to operate PCB remediation services through its Investment and these activities would have fallen within the scope of Chapter 11. This was the case for USPCI (a U.S. hazardous waste treatment and disposal company) that was providing PCB remediation services in Canada through their investment, PPM.[134] It should be noted that if SDMI operated PCB services through its Investment, it would not have been affected by the Interim Order or the subsequent closure of the border by the United States.

104. Chapter 11 protects the Investment and the Investor with respect to its Investment. Compensation can therefore only be claimed by the Investor for its losses relating to the Investment, not as a cross-border service supplier, as this would be outside the scope of Chapter 11 and is therefore beyond the jurisdiction of this Tribunal.

iv. The Investor's Misconstruction of Article 1116

105. The Investor, however, has included in its Claim losses to its own cross-border service activities. The Investor's Claim seems to be predicated on its understanding that Article 1116 allows an investor to bring a Chapter 11 claim on its own behalf and therefore that it allows the Investor to recover any damages it suffers. The Investor states:[135]

> Moreover, NAFTA Article 1116 makes it clear that losses to the Investor are compensable. Specifically, NAFTA Article 1116 permits an Investor of a Party to submit a claim to arbitration and requires that "the investor has incurred loss or damage by reason of, or arising out of, that breach."

and later:

> NAFTA Article 1101 says nothing about limiting the availability of damages caused to an investor, in its own territory, as a result of a breach of NAFTA Party. NAFTA Article 1101(1)(a) indicates that NAFTA Chapter 11 applies to measures adopted or maintained relating to investors of another party, regardless of whether those investors are present in the territory of another NAFTA Party when the breach occurred.
>
> Accordingly, NAFTA Articles 1101(1), 1102, 1105 and 1116, indicate that NAFTA investors are to be compensated for all losses sustained as a result of breaches of NAFTA Articles 1102 and 1105.

106. The Investor's argument shows a clear misunderstanding of the purpose of the

134 Farkas Berkowitz Report, p. 4; White Report, section 2.3.4.

investment chapter, discussed above, and of Article 1116. Article 1116, which gives a right of action to the Investor, does not entitle the Investor to claim for any and all of its losses. Even in cases where an investor makes a claim on its own behalf, the claim must be for losses in relation to the investor's investment, not in relation to any of the investor's other activities.

107. When considering the right of action of an investor under Article 1116, one must refer to the corresponding obligations. As demonstrated above, the obligations at stake here – Articles 1102 and 1105 – apply with respect to investments not investors *per se*. The claim for damages for a breach of these obligations must therefore also only include damages with respect to investments in the territory of another Party. The right of action, and any claim to damages thereof, cannot be broader than the obligations themselves on which is based the claim.

108. Articles 1116 and 1117 serve different functions and apply in different circumstances depending on the nature of the investment.[136] An example of a claim that could be brought under Article 1116 arises where the breach affects an investor's property in the territory of another NAFTA Party, for example, where a government expropriates the investor's land. In such a case, although the measure affects the investment, the investor suffers the loss of his land directly. Article 1116 is also meant to cover the pre-establishment dimension, as well as cases in which the measure affects the relationship between the investor and its investment.

109. To the extent that the Investor is claiming for loss of profits that would have accrued to Myers Canada (therefore asking damages on behalf of its Investment), the Claim was not properly brought under Article 1116. A claim of that nature should have been brought under Article 1117.

110. The fact that the Claim was brought under Article 1116 does not mean that it can claim for damages suffered to its own PCB activities in the U.S. It only means that SDMI can claim damages it suffered in its capacity as a U.S. investor with an

---

135 Investor's Memorial, paras. 63, 65 and 69.

136 Chapter 11 provides a procedure for an investor to bring a claim either on its own behalf, for losses in relation to its investment (Article 1116) or, if the investment is a juridical person owned or controlled by the investor, on behalf of its investment (Article 1117).

investment in Canada. The SDMI operations in the U.S. are not "investments" in territory of another NAFTA Party. A proper measure of the damages that SDMI can claim can be achieved by examining what SDMI's damages would have been if it did not own PCB remediation facilities in the U.S. SDMI's claim must be with respect to Myers Canada.

3. Principles of Compensation in International Law

111. Under international law only direct damages caused by the breach can be taken into account in the calculation of compensation. Indirect, remote, or speculative damages are not allowed. Double recovery must be avoided. Furthermore, the NAFTA specifically prohibits punitive damages. Finally, the possibility for a claimant to mitigate its losses must be taken into account in assessing compensation.

(a) Only Direct Damages Caused by the Breach Can Be Compensated

112. Articles 1116 and 1117 establish that there should be a clear and direct nexus between the breach and the loss. The damages must be "by reason of, or arising out of" the breach.

113. A requirement that damages are proximate, direct and an immediate consequence of the breach is also found in international law[137]. Damages arising out of causes other than the breach should not be allowed[138]. "Damages are disallowed when they are not a natural consequence of the wrongful act for which the respondent government is liable under international law"[139]. For example, in *Peruvian Guano Company (Great Britain)* v. *Chile*[140] the claim for expected profits of the Peruvian Guano Company because of Peru's inability owing to war to comply with a contract with the Investor for carrying and selling of guano was rejected on the basis that the damages were a consequence but not directly caused by the operations of the Chilean land or

137 See generally M. M. Whiteman, *Damages in International Law*, Volume III, U.S. Government Printing Office, Washington, 1943, p. 1765 ff; Also B. Cheng, at 241 ff.

138 See *SPP* where the tribunal recognized that an international convention that came into effect after the breach and limited the development of the tourism project would have limited the future profits of the project.

139 Whiteman, p. 1830-1831.

140 Whiteman, p. 1831.

sea forces.

114. Only direct damages caused by Canada's Interim Order, and not by other causes such as the closure of the U.S. border, can be compensated in this case. The Tribunal in its Partial Award recognized that: "the fact that the border was closed again on the U.S. side in July 1997 cannot be laid at Canada's door".[141]

115. Many factors not related to Canada's breach limited SDMI's ability to secure Canadian PCB business during the ban and afterward, such as Canadian PCB owner's fear of U.S. liability, owner's lack of desire or budget to dispose of their PCBs, non-competitive pricing, and the fact that some inventory for which SDMI issued quotes remained in use. In addition, SDMI indicated that it decided to stop pursuing the Canadian market because it "was not fun anymore"[142]. If for any of these reasons, the Investor suffered losses, these are extraneous to Canada's breach and Canada cannot be held liable for it.

116. Canada submits that losses to the Investor or its Investment that occurred after Canada re-opened the border in February 7, 1997 were not caused by Canada's breach and should not be included in the compensation calculations. The Investor has not established why *any* damages after February 7, 1997, should be attributed to Canada's breach. However, numerous quotes made after the re-opening of the border were included in the Investor's calculation of its lost profits.[143]

117. The Investor has not provided any reason why PCBs that were still available to it once the border re-opened should be included in the damages for which Canada should be held liable. Furthermore, the Investor has not made any distinction in its calculation of damages between PCBs destroyed during the ban for which it had issued a quote and those still available to it.

118. Moreover, any loss of profits suffered by SDMI for PCB remediation services it could have provided to Myers Canada for processing of Canadian PCBs were not directly caused by the breach but are only consequential to Myers Canada's damages.

---

141 Partial Award, par. 284, at note 47.
142 Cross-Examination of Dana Myers, Q437, 474.
143 KPMG Report, section 6.3: 174 quotes worth $7.1 million were made after February 7, 1997.

They therefore cannot be compensated.

(b) Speculative Losses and Damages That Were Not Foreseeable Cannot Be Compensated

119. Only those damages that could reasonably have been foreseen at the time of the breach should be compensated. The use of hindsight is "unsupportable and arbitrary."[144]

120. This case is distinguishable from cases dealing with breach of contract and termination of concession agreements by a government. In this case, the existence of a breach and resulting damages could not have reasonably been foreseen.

121. Here, the Government of Canada closed the border immediately after the EPA started granting enforcement discretions. Prior to that, the border had been closed for over ten years. By acting so quickly, the Government of Canada could reasonably have expected that it would avoid the establishment of investments whose business would involve sending PCBs to the U.S. Canada did not know that damages were being caused to Myers Canada. In fact, while Canada was aware of the existence of SDMI and its interest in the Canadian market, Canada was not aware until after the event that SDMI had an investment in Canada.

122. Certainly the extent of damages claimed in the Investor's Memorial was not in the contemplation of the Parties. While grossly exaggerated, the Statement of Claim indicates that the Investor itself only foresaw damages of about US $ 20 million.

123. In addition, the Investor's claims based on increased U.S. plant capacity were not reasonably foreseeable at the time. In fact, the Investor makes it clear that it wanted to enter the Canadian market to extend the usefulness of its existing facilities.[145] Increasing capacity in an industry where the supply of PCBs was finite and shrinking makes little sense. In fact, SDMI's letters to the EPA mention a five-year plan using the existing excess capacity, and their exemption petition repeatedly declares use of

144 M. Ball, *Damages in Claims by Investors Against States - Please Do Not "Split the Baby"* (Globe Business Publishing Ltd.) available in the International Law Office newsletter at http://www.internationallawoffice.com/ld.cfm?Newsletters__Ref=3355

145 Cross-Examination of Dana Myers, Q 475.

existing (not expanding) facilities.[146] The report upon which the Investor relies to argue that it would have increased its U.S. capacity in order to deal with Canadian PCBs was commissioned in 2000 for the purposes of this arbitration and not during relevant period (1995-1997). The Investor fails to show any evidence that this expansion was being contemplated at the time. Claims for lost profits based on the assumption of increased capacity[147] should therefore be rejected.[148]

124. Damages should not be speculative, uncertain or remote.[149] This principle was summarized in the *Percy Shufelt (US)* v. *Guatemela*[150] award:

> [damages] must be the direct result of the contract and not too remote or speculative...(but as) may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it.

125. In her treatise on damages, M. Whiteman makes the following comments:

> However in order to be allowable, prospective profits must not be too speculative, contingent, uncertain and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible. If the evidence shows that there is doubt that profits would have been realized if the wrongful act had not occurred, damages will be disallowed.151
>
> [...]
>
> Whether the claim is for the loss of profits arising from a tort or from a contract, the claimant must ordinarily show that the loss of profits arose from an established or existing business, occupation, investment, or contract, and that prior experience in the business, occupation, investment, or in the execution of the contract which was wrongfully breached or interfered with by the government, indicated that future profits were probable.152

126. Arbitral tribunals have held that possible but contingent and indeterminate damages

---

146 White Report, section 5.2.

147 This would eliminate Scenario III of the Rosen Report, as it is dependant on 2 plant expansion projects.

148 *Amco Asia Corp. and others* and *The Republic of Indonesia* ("Amco I"), 24 ILM 1022 (1984): The Amco Tribunal rejected a similar claim: the Tribunal refused to take into account the claimant's argument that it intended to upgrade hotel facilities thereby increasing its investment's profits.

149 *Amco I*, at 1057. The Tribunal found that: "According to the rules and principles common to the most important legal systems the ICSID arbitral states - the damages reimbursable in case of a breach of contract are only those which are direct and foreseeable. The requisite of the direct nature of the damages is nothing but a consequence of the need for a cause to effect relationship between the breach and the damage. The requisite of the foreseeability is contemplated practically everywhere."

150 (1930) 2 RIAA 1081, at 1099.

151 Whiteman, p. 1837.

152 Whiteman, p. 1872.

cannot be taken into account in calculating compensation.[153] In dealing with claims for lost profits on investments, international tribunals have rejected speculative losses and generally refused to award compensation for lost profits[154] where the investment did not have a profit history and/or had not been in operation for a sufficient period.

127. In *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*[155], the enterprise (AAPL) accused the Sri Lankan government of destroying its installation. The Investor's pleas for damages to intangible assets (i.e. goodwill and loss of future profits) based on a discounted cash flow ["DCF"[156]] valuation were rejected because they were not "reasonably anticipated" or probable. The Tribunal concluded that the evidence did not sufficiently demonstrate the enterprise's ability to earn revenue in the future because the company had no previous record in conducting business for even one year of production. In fact, the Tribunal stated that the company had no future profitability or goodwill due to the fact that it was such a new enterprise.

128. A similar conclusion was reached in the *Southern Pacific Properties (Middle East) Ltd. (Hong Kong), et al* v. *Arab Republic of Egypt*, ("SPP").[157] SPP had a detailed

---

153 *Chorzow Factory*.

154 *American Manufacturing and Trading, Inc.* v. *Republic of Zaire*, 36 I.L.M. 1531 (1997); In this case the company, AMT, initiated an action against Zaire for violation of its rights under a US-Zaire B.I.T. by failing to compensate AMT for property damage and losses caused by Zaire's armed forces. AMT sought the fair market value for the losses, plus loss of profits, 8% interest and the costs of the proceedings. The Tribunal established the responsibility of Zaire for all the losses of AMT and then proceeded to discuss compensation. Initially, it was argued that since it was not an expropriation case, it could not be assimilated into an expropriation analysis when determining what damages should be awarded. The Tribunal also stated that in evaluating damages, it would choose the method that was the most plausible and realistic in the circumstances of the case. This was done by assessing "the existing conditions of the country and not by making abstraction based on a criterion for the assessment which does not correspond at all to the reality, nor to the current happenings in Zaire, nor indeed to the commercial and industrial activities of the Claimant." The Tribunal rejected the analysis proposed by AMT which used as its context normal circumstances in a country providing a stable environment for investors. Because the situation was precarious the "lucrum cessans or loss of profits is not at all measurable without a solid base on which to found any profit to take or for predicting the growth or expansion of the investment made." Ultimately, the Tribunal limited the compensation to damnum emergens; Also see *Sola Tiles, Inc.* v. *Iran*, (1987) 14 Iran-U.S.C.T.R. 460, at 479-481, where the tribunal rejected compensation for lost profits because of the short history of profitability.

155 30 I.L.M. 577 (1991).

156 The use of the discounted cash flow approach to valuing damages is common in cases where the losses extend into the future. The discounted cash flow method models out the loss of cash flow into the future then discounts it back to present value.

157 *Southern Properties (Middle East) Ltd. (Hong Kong), et al* v. *Arab Republic of Egypt* ("SPP"), ICSID

agreement with the Government of Egypt to develop two international tourist complexes in Egypt. A joint venture company was established for their development. The Government later took a series of measures that in effect cancelled the project. SPP claimed the value of it subsidiary's shares (SPP(ME)) in the joint venture company and lost profits (both *damnum emergens* and *lucrum cessans*). In the ICSID proceedings, the SPP claim based on a DCF valuation was deemed an inaccurate reflection of the value of the lost investment. It was felt that the valuation was too speculative as the project was not in existence for a sufficient period of time to generate the information needed for a meaningful valuation. In other words, using the DCF method resulted in "possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, [could not] be taken into account."[158] Finally, "out-of-pocket" expenses including development costs (i.e. loans and capital investment) were awarded, only if they were properly documented and were in connection with the project. Loss of opportunity was also taken into consideration in the compensation calculation.

129. In a recent case, *Wena Hotels Ltd. v. Arab Republic of Egypt*[159] dealing with expropriation of hotels, the Tribunal also rejected the DCF calculation as speculative. Finding that the Investor had operated one of the two hotels for only 18 months and had not completed renovations of the other when the properties were seized, the tribunal held that an award based on a DCF calculation would be too speculative. Instead, it awarded an amount equal to the amount the Investor had invested in the hotels. The Tribunal held that the claims for lost profits based on the DCF method of calculation, as well as lost opportunities and reinstatements costs, were inappropriate as they were too speculative. The Tribunal cited *Metalclad* as well as the SPP case to support its decision and concluded that the proper calculation of the market value of the investment taken immediately before the expropriation was the actual

---

Case No. ARB/84/3, 8 ICSID Review 328.

158 See *Chorzow* case as referenced in *SPP*, at 234. The Tribunal in SPP went on to explain that this principle was also echoed in the Amoco case, where the Tribunal stated there would be "no reparation for speculative or uncertain damage."

159 Case No. ARB/98/4. (ICSID, December 8, 2000); This case is currently being appealed by Egypt.

investment in the two hotels:[160].

> Like the Metalclad and SPP disputes, here, there is an insufficiently "solid base on which to found any profit...or for predicting the growth or expansion of the investment made" by Wena [citing American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. Arb/93/1, at 28 (1997) Annex W115]

130. Finally, in *Metalclad*, although the Tribunal found that there had been an expropriation, it did not compensate for goodwill and refused to use the DCF method because the landfill project had not been in operation long enough. It held[161]:

> where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.

131. And concluded[162]:

> The Tribunal agrees with Mexico that a discounted cash flow analysis is inappropriate in the present case because the landfill was never operative and any award based on future profits would be wholly speculative.
>
> Rather the Tribunal agrees with the parties that fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project.

132. Tribunals have refused to award compensation for future losses based on DCF calculations where doing so involved too much speculation because of the absence of track record on which to base the calculations. In this case, the Investor seeks to calculate damages for lost profits had the border remained opened. The degree of speculation required for the Tribunal to assess these lost profits is important and subject to the same frailties as the DCF method. Although SDMI may have had an established PCB remediation business in the US, it had no history with respect to cross-border service of PCB remediation. Its Investment, Myers Canada had no record of profitability and no experience in shipping PCBs to the U.S. for destruction. The absence of this history makes it difficult to determine how real the quotes were and how to factor in contingencies like the customer's concern with U.S. liability, and customer motivation to dispose of their PCB inventory. Some quotes were sent to companies that had no intention of destroying their PCB inventory,[163] or

160 At para. 124.
161 At para. 120.
162 At para. 121-122.
163 Based on the handwritten comments on the Investor's documents, many holders of PCB wastes

from customers who state that they will not dispose, unless mandated to.[164] What would have occurred in a market where U.S. competition would have been present is pure speculation given that the border had been closed since 1979. As a result, the Investor's method of calculating damages should be rejected.

(c) No double recovery

133. The principle that there should be no double recovery is generally accepted in international law and in domestic legal systems around the world. This must be considered in determining which elements to take into account in awarding compensation.

134. For example, in the *SPP* case, the Claimant proposed two alternative methods of valuation. The first valued the investment at the time the project was cancelled based on the DCF method. The alternative sought out-of-pocket expenses and lost opportunity. It was held that the first approach already accounted for lost opportunity: to claim both would have meant double recovery.

135. In the *Liberian Eastern Timber Corporation (LETCO)* v. *Government of the Republic of Liberia* case,[165] the Investor was awarded lost profits, costs and expenses as a result of the expropriation. However, the Tribunal was aware of the problem of double recovery, and took steps to avoid it. In its calculation of costs and expenses

---

indicated that they had no budget or motivation to dispose of those wastes. Others indicated hesitation due to liability issues. For example, Ball Packaging Canada Inc. (Tab 58) is a quote that included inventory that was still in use. Further this documentation includes a note (presumably from the SDMI employee) that states:

"11/03/95 May not be able to take material offline until 1997, may not get money until 97 but could likely be 96. Described our method of destruction for him, had to reassure about Superfund liability, as they are American-based company and worry about such things."
"3/07/96 Don't have the money because of hard economic times according to Alan Yee. They just laid off a bunch of people at his plant..."
"10/29/96 ... he said that he wouldn't have the money until possibly 1998."

164 Tab 215: Handwritten note "Kill. Will not move unless mandated to. On hold. Check 98"; Tab 476: Handwritten on offer "Kill. Old age - will only move if mandated to"; Tab 587: Letter to SDMI from customer "Further to your quotation and your recent telephone call reminding us of the subsequent border opening, please be advised that at this time we do not anticipate shipping our PCBs. Our resolution is to wait until it is mandated by the Government." [sic]

165 ICSID Reports (1985); Vol. II.

certain investments and advance payments that had already been included in the DCF calculation of lost profits, were deducted.

136. Similarly, in this arbitration, the Investor seeks double recovery in its calculations. The Investor's claim for out-of-pocket expenses overlaps with its claim for lost profits. The costs incurred to generate revenue and profits should not be compensated in addition to the loss of profits themselves. In reviewing the Rosen Report, KPMG noted that of the U.S. $2.4 million claimed in out-of-pocket costs, US $838,000 represented "funds advanced to Myers Canada by the Investor to develop the Canadian PCB business. It is double counting to include these costs and to claim a loss of contribution margin as the margin could not have been attained without expending these sums."[166] In addition, the Investor's calculations include numerous duplicate quotes that must be disallowed.

(d) Canada's Intent Is Not Relevant To The Determination Of The Quantum Of Damages

137. As stated in the express provisions of Article 1135(3) and in the Partial Award, the Tribunal has no jurisdiction to award punitive damages of any kind. There is no ambiguity and this provision should be given its full effect.[167] Therefore, any discriminatory intent of the Government of Canada which the Tribunal may have found, is irrelevant in the determination of the compensation owed by Canada.

138. Notwithstanding this, SDMI invites the Tribunal to award punitive damages:

- The Investor suggests that: "if there can be demonstrated any special intention by a government to harm an investor, international law permits the Tribunal to award damages even if they would otherwise be considered too remote."[168]

- The Investor submits that even remote damages should be

166 KPMG Report, section 6.1, p. 27.

167 J. Y. Gotanda, "Awarding Punitive Damages In International Commercial Arbitrations In The Wake Of Mastrobuono v. Shearson Lehman Hutton, Inc.", 38 *Harv. Int'l L.J.* 59 at 76: "thus when the parties expressly provide in the arbitration agreement that the arbitrator shall have, or shall not have the authority to award such damages, that express provision shall be conclusive on the availability of such relief."

compensated because of Canada's discriminatory intent.[169]

139. Accepting the Investor's propositions would amount to awarding punitive damages and would be outside the Tribunal's jurisdiction and contrary to the practice of international arbitration tribunals.[170]

(e) Mitigation

140. International law recognizes the obligation of an investor to mitigate its losses. This obligation includes exhausting local remedies available to the claimant to undo the wrong complained of. In addressing this issue, Whiteman noted.[171]

> Among the factors to be considered in the measurement of damages is the question as to whether the claimant has taken steps, the opportunity existing, to mitigate his loss. The absence of such effort will usually influence the amount of the award adversely. One of the effects of the requirement that a claimant must exhaust local legal remedies that he may have in the state where the injury occurred, is that by so doing the claimant may be able, by the immediate presentation of his evidence, to have his case definitely settled, thus perhaps preventing unnecessary expense on his own part, as well as on the part of both the claimant and the respondent governments.

141. The Investor argued in its Memorial (Liability Phase) that the NAFTA did not provide an obligation to exhaust local remedies. The question of exhaustion of local remedies as a jurisdictional pre-requisite is independent from the consideration of whether local remedies have been exhausted in the context of an assessment of damages. It is well established in international law that part of the claimant's mitigation duty includes exhausting local remedies to correct the wrong.

142. The Investor's failure to seek prompt local judicial remedies available to it will affect the amount of compensation. In this case, judicial review of the Interim Order was available. Had the Investor taken such action, the border might have re-opened earlier and losses would have been diminished.

143. The consequences of the obligation to mitigate are that:

- where the Investor failed to mitigate its damages, compensation must be reduced accordingly

---

168 Investor's Memorial, para. 51.
169 Investor's Memorial, para. 92.
170 See J. Y. Gotanda, *Supplemental Damages in Private International Law*, Kluwer, 1998, pp. 226-229; also see B. Cheng, at pp. 234-235.
171 Whiteman, at p. 199.

- where the Investor did mitigate its losses, the amount recovered through mitigation should be deducted from the claim itself to avoid double compensation.

144. PART G addresses more fully the mitigation options available to the Investor in this case.

PART E: APPLICATION OF THE PRINCIPLES OF COMPENSATION

145. The Investor's calculations of damages present an inaccurate picture of the compensable losses. Numerous claims must be rejected because they are speculative, duplicative, include damages that do not relate to the investment or were not directly caused by Canada's breach, or have no evidentiary basis. In addition, the Investor's calculations are based on unproven assumptions and faulty analysis. The KPMG summarized these failures by noting:[172]

> In summary, we believe that the manner in which the Rosen Report applied their methodology is speculative, is not supported by the facts, contains numerous errors both in data and application, and ultimately results in an overstated claim that cannot be supported.

146. Canada submits that the appropriate measure of damages can be calculated by awarding the Investor a return on its advances to its Investment during the delay period caused by the breach. Alternatively, the Investor should be reimbursed its advances to its Investment. Finally, should the Tribunal adopt the Investor's approach to damages and seek to establish compensation for lost profits, a number of important adjustments must be made to the Investor's calculations.

147. Based on the method advanced by Canada, compensation to the Investor with respect to its Investment would be CDN $248,000. Based on the Investor's loss of profits approach and with the appropriate adjustments for duplications, period of the breach, market share and prices, the compensation owed would be CDN $ 153,000.

1. Evidentiary Failures And Inaccuracies Of The Investor's Claim

148. The Investor's lack of supporting documentation and its refusal to provide access to

172 KPMG Report, at p.3.

documents that Canada and its experts view as essential hampered Canada's ability to calculate the appropriate quantum of damages. For example, the Investor has not established that the expenditures included in Rosen's calculation relate to the Investment or that they were made in pursuit of the Investment. Canada and its experts were denied access to the relevant documents to determine whether these numbers are valid.[173] Canada therefore had no choice but to base certain of its calculations on the Investor's unproven numbers. This however does not constitute an endorsement by Canada of the Investor's numbers. Either Canada is given access to documents that support these numbers or the Tribunal must reject the unsupported claims.

(a) SDMI Fails To Establish Which Quotes Would Have Been Completed

149. The Investor's claim is that: "but for" Canada's PCB Waste Export Ban, the Investor would have converted quotes into sales orders and would have earned additional profits as a result[174]. The Investor has not produced sufficient and credible evidence to establish this assertion.

150. The Investor fails to demonstrate, with reasonable certainty, that the quotes upon which its expert, relied for its report, and which were submitted to this Tribunal as "evidence", would have been completed "but for" the ban. The Investor submitted over 900 quotes for PCB remediation services. Many of the quotes provided show that SDMI lost these contracts independently of the border closure.[175] The Investor asks the Tribunal to assume that it would have been in a position to remediate *all* of the quotes it had bid on,[176] yet the Investor includes millions of dollars worth of quotes that were:

- already issued, completed, and paid for;[177]

---

173 KPMG Report, at 44.

174 Investor's Memorial, para. 4; and Rosen Report, at 3.

175 Handwritten comments appearing to be notes from telephone conversations with, and correspondence from, customers regarding quotes reveal that many of the quotes were provided for budgetary purposes only, that the potential customers were not interested in having the remediation done, but just required the cost, and would not destroy unless required by law.

176 Investor's Memorial, para. 4; and Rosen Report, at 3.

177 KPMG Report, schedule 10; Tabs 35, 74, 143, 283, 287, 291, 545, 568, 569, 571, 644, 666, 695, 713, 733, 752, 755, 799, 810, 844, 847, 868, 909, 913, 914, 920, 924, 932.

- issued without any proof of date or outside of the relevant time period;[178]
- issued and not completed because of the Sierra Club/US action;[179]
- lost because they were not price-competitive;[180]
- issued for budgetary purposes only;[181]
- for inventory that was not de-commissioned;[182]
- for inventory that SDMI could not process itself, but would partly or wholly contract out (with a 10-15% mark-up), or for goods or services that were not the disposal or export of PCB related materials;[183]
- to SDMI from sub-contractors;[184]
- for locations that SDMI deemed inaccessible, or improbable;[185]
- to PCB owners who indicated that they were under no pressure to dispose of the inventory, were not interested or not in a hurry to destroy their inventory, and that they would only do so if required by law;[186]
- to PCB owners who indicated that they had no money in their budget to dispose of the inventory;[187]
- to PCB owners who indicated that they had liability concerns about shipping

---

178 KMPG Report, section 6.1; Tabs 5, 7, 9, 13, 14, 16, 20, 22, 26, 30, 35, 36, 39, 40, 41, 43, 51, 52, 58, 59, 65, 71, 85, 86, 88, 91, 92, 94, 95, 99, 104, 105, 106, 109, 110, 111, 114, 124, 127, 130, 131, 133, 136, 138, 146, 149, 154, 163, 164, 165, 167, 170, 175, 177, 179, 181, 193, 195, 196, 197, 198, 199, 200, 201, 206, 214, 215, 219, 220, 223, 236, 237, 238, 239, 240, 248, 253, 255, 262, 270, 271, 274, 279, 283, 284, 286, 288, 291, 292, 298, 299, 306, 312, 314, 315, 316, 317, 320, 321, 323, 328, 332, 338, 341, 343, 345, 347, 350, 354, 358, 359, 361, 362, 364, 365, 366, 369, 370, 374, 375, 376, 378, 380, 381, 383, 385, 394, 395, 397, 399, 400, 407, 408, 414, 416, 428, 430, 439, 450, 453, 457, 462, 470, 475, 488, 491, 492, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 507, 509, 517, 519, 522, 524, 526, 528, 530, 531, 539, 544, 547, 548, 553, 554, 555, 559, 561, 564, 568, 569, 571, 575, 582, 586, 593, 594, 599, 600, 610, 612, 613, 615, 616, 621, 625, 626, 632, 633, 634, 635, 636, 637, 640, 642, 643, 643, 647, 648, 656, 658, 664, 665, 667, 670, 672, 673, 674, 675, 676, 677, 678, 681, 685, 692, 695, 704, 709, 711, 713, 715, 716, 717, 721, 724, 732, 733, 734, 736, 738, 740, 741, 744, 745, 748, 755, 757, 759, 760, 764, 765, 767, 768, 769, 781, 782, 783, 785, 786, 787, 788, 796, 801, 822, 823, 829, 832, 839, 841, 842, 843, 845, 846, 848, 851, 860, 868, 870, 871, 878, 886, 890, 892, 894, 901, 909, 910, 913, 915, 916, 920, 921, 925, 929, 936, 941.

179 KPMG Report, section 6.1; Tabs 58,170, 236, 320, 321, 347, 350, 395, 470, 499, 547, 561, 568, 569, 599, 673, 732, 760, 781, 860.

180 Tabs 5, 80, 156, 161, 273, 381, 389, 414, 418, 423, 425, 651, 692, 845.

181 Tabs 61, 73, 76, 121, 169, 220, 346, 381, 423, 562, 632, 659, 742, 752, 818, 923

182 Given the time required for decommissioning, it is unlikely that in-use PCBs would have been destroyed during the period of the ban. KPMG Report, section 6.1; Tab 353.

183 KPMG Report, section 6.1 and schedule 12; Tabs 88, 188, 191, 347, 441, 585, 659, 697, 818, 894, 895.

184 For example, Tabs 308, 309, 310, 318. These quotes are for transformer draining and site services to be supplied by Green-port Environmental Managers, Ltd. to SDMI. This is a cost to SDMI, not a potential source of profit. Additionally, these quotes did not involve activity that was prevented by the Interim Order.

185 Tabs 168, 562.

186 Tabs 78, 138, 214, 215, 216, 244, 285, 326, 351, 352, 353, 392, 476, 484, 508, 534, 565, 587, 749, 752.

187 Tabs 58, 231, 282, 351, 466, 575, 615, 752.

PCBs to the U.S.;[188]

- duplications of other quotes for the same or part of the same inventory, either to the same PCB owner, or to a broker and a PCB owner;[189] and
- different from those considered by its own expert, including many quotes that are based on "circumstantial evidence" where SDMI was unable to produce any documentation in support;[190]
- not *bona fide* quotes.[191]

151. The evidence shows that a substantial portion of the value of quotes "lost" by the Investor were not lost because of Canada's closure of the border but because of other factors, were not available to the Investor in any event, or were improperly included in the Investor's calculations.

152. The Investor's claim ignores and contradicts the applicable U.S. regulatory process and resulting time delays, all of which the Investor itself considered burdensome and

---

188 KPMG Report, section 6.1; Tabs 167, 392.

189 KPMG Report, schedule 11; Tabs 9, 40, 41, 65, 66, 92, 93, 94, 113, 130, 131, 154, 201, 202, 204, 205, 220, 221, 254, 255, 263, 265, 285, 299, 343, 362, 363, 420, 421, 423, 424, 425, 426, 427, 428, 431, 433, 434, 435, 439, 440, 449, 450, 453, 460, 461, 466, 467, 492, 493, 504, 505, 516, 517, 518, 520, 521, 525, 526, 531, 532, 536, 537, 539, 540, 541, 547, 553, 554, 555, 558, 559, 560, 561, 568, 574, 575, 578, 579, 580, 581, 582, 583, 586, 588, 590, 591, 592, 595, 596, 597, 599, 600, 607, 608, 609, 610, 624, 625, 626, 627, 630, 651, 652, 661, 662, 666, 667, 669, 678, 679, 689, 690, 691, 692, 693, 694, 695, 699, 700, 703, 730, 739, 747, 748, 755, 761, 762, 765, 766, 772, 773, 774, 775, 778, 779, 788, 790, 800, 824, 826, 831, 833, 834, 837, 839, 849, 852, 855, 863, 864, 865, 867, 868, 869, 877, 887, 888, 894, 895, 896, 897, 900, 901, 902, 920, 939.

190 Correspondence from Appleton & Associates, May 9, 2001, stating: "The Investor relies upon the documents submitted in support of the Rosen Report for the relevant period in question. There is a discrepancy between the Rosen list of 1019 quotes and the Investor's production of 942 contractual documents, a difference of 77 bids. Of these 77 bids, 27 are undated and 50 are based on circumstantial reference to the bids in other corporate records supplied by the Investor for which the Investor has not been able to provide copies of the original contractual supporting documents. These "circumstantial files" have been included by Rosen in their calculation of damages because of the existence of these bids as mentioned in business records such as the "Notes on Canadian Losses due to Border Closing" prepared by Dan Roberts dated September 13, 1998 and provided to Canada as supporting documentation to the Rosen Report. As explained above, the vast majority of the dated bids and quotes provided by S.D. Myers (Canada) fell within the relevant period of review. Rosen has included the value of these undated bids and quotes, discounted by the percentage of dated bids and quotes which fell within the relevant period of loss (i.e. prior to July 17, 1997)".

191 For example, Tab 158 was clearly a politically-motivated quote. In the letter to the customer forwarding the quote, SDMI noted: "S.D. Myers, Inc. appreciates your interest in supporting us in our action against Sheila Copps' temporary ban on exporting PCBs to the United States [...] We are requesting a restricted purchase order with a 120 to 150 day cancellation clause. We will be very open to any Terms and Conditions you apply to this purchase order". In a number of other cases, SDMI indicated that the customer would not be held to the purchase order but that it would help SDMI's political campaign.

a cause of both significant delay and lost business.[192]

(b) SDMI Fails To Provide Credible Evidence

153. Much of the evidence submitted by the Investor must be dismissed by the Tribunal as irrelevant or incredible. For example, to support the argument for a higher success rate, the Investor submits that it had a "plan" to expand capacity of its Ohio facility and relies upon documents created after the arbitration was initiated.[193] Further, in response to Canada's request for documentation regarding financing applications, permits, and plans[194] the Investor either refused to answer, or failed to confirm the absence of evidence. Clearly the Investor's evidence on these issues lacks probative value and falls short in supporting such speculative plans.

(c) SDMI Fails To Establish Its Marketshare

154. The Investor's Expert bases its analysis on assumptions regarding market share provided to it by the Investor. However, the Investor produced no documentation or evidence to support these assumptions, such as:

- SDMI had a 48% U.S. PCB market share.
- this market share would translate into a 48% Canadian market share;
- Myers Canada would exceed SDMI's U.S. success rate on bids;
- the U.S. and Canadian markets were similar in terms of treatment of PCBs;
- the U.S. competition would not enter Canada with ease, and together would have no impact on the Investor's ability to convert quotes to sales orders;
- the only factor contributing to the development of the Canadian industry was the Event;
- SDMI and Myers Canada had a "first-mover" advantage;
- the Canadian PCB owners would not wait for competitive pricing;

155. In fact, letters from the Investor to the EPA at the relevant period reflect the competitiveness of the market, the speculative nature of the quotes and belie the Investor's assertions that its bids and quotes were tantamount to contracts: even at the stage where notices of cross-border PCB shipments were being sent to U.S.

192 Contrary to the Investor's Memorial, letters from SDMI to the EPA indicate that SDMI found the process and associated time delays cumbersome and frustrating. Letter from Dana Myers to Lynn Goldman, U.S. EPA, dated March 22, 1996; Letter from Dana Myers to Lynn Goldman, U.S. EPA, dated March 29, 1997; Draft letter by Mike Valentine to Lynn Goldman, U.S. EPA, April 15, 1997.

193 KPMG Report, section 6.1, pages 24 and 27; Valuator's Scope of Review, section H, Tab 36.

194 March 27, 2001 Interrogatory #124. Canada's Request for Documents #122.

authorities the Investor was concerned about competitors moving in and taking those shipments.[195]

(d) The Volume of Material Does Not Support The Investor's Inflated Claim

156. In preparing the defence to this claim, Canada was inundated with volumes of irrelevant documents, which are used by the Investor to support an inflated claim.

157. What the Investor's documents do show, is that:

- SDMI had an active marketing campaign to import Canadian PCBs to the US, started at a time when the U.S. did not allow such imports, and SDMI did not know if or when that status would change. This was a highly speculative venture;
- SDMI issued quotes to Canadian PCB owners of which there were 3,945. The number of quotes issued to Canadian PCB owners and on which SDMI has relied on for its claim has ranged from 158 to 911 and to 1,019;[196]
- After 2½ years of an aggressive marketing campaign to Canadian PCB owners, SDMI received 2 sales orders prior to the Event. With 6 months notice for ramp up time, SDMI was able to complete 7 shipments in 5 months, prior to the U.S. border closing again; and
- SDMI's share of the U.S. transformer market was 28% in 1992, 53.2% in 1993, 37% in 1994 and 34% in 1995. SDMI's share of the total PCB disposal market was around 1% in all years.[197]

2. Investor's Claims That Should Be Disallowed

158. Canada submits that the following claims in the Investor's Memorial should not be allowed because they do not meet the principles of compensation enunciated above or simply do not have any evidentiary basis:

- Claims for loss of profits by the Investor and its Investment are speculative and should not be allowed. At the time of the breach, the Investment had not yet made a single shipment of PCBs from Canada to the U.S. There is no business history on which to base the calculations of future profits.
- Claims for damages after to February 7, 1997 should be rejected. Claims for quotes that were still available to SDMI and Myers Canada once the border re-opened cannot be attributed to Canada's actions and should not be calculated in

195 Letter from Dana Myers to Lynn Goldman, U.S. EPA, dated March 22, 1996; Draft letter by Mike Valentine to Lynn Goldman, U.S. EPA, April 15, 1997.

196 In the liability phase SDMI referred to 158 quotes – add Cross-Examination Michael Valentine. The number of quotes has ranged from 911 to 1,019 since the filing of the Memorial.

197 Valuator's Scope of Review, document H-03; Farkas Berkowitz Report at p. 3 and Appendix C.

the amount of compensation. Canada is not liable for the U.S. closure of the border in July 1997.

- Loss of profits to the Investor's own PCB remediation operations that would have been generated had Myers Canada obtained Canadian business are indirect consequences of the breach with respect to the Investment and too remote to be awarded. More importantly, compensation for losses to the cross-border service provided by SDMI cannot be compensated under a Chapter 11 claim.
- The Investor's argument that SDMI would have increased its U.S. capacity should be rejected as it is entirely speculative and was not reasonably foreseeable or in the contemplation of the parties at the time of the breach.
- Costs disbursed in order to generate profits (some of which were included in Rosen's assessment of out-of-pocket expenses) cannot be awarded in addition to lost profits, as it would amount to double counting. By definition, profits are equal to revenues minus costs, and therefore the costs cannot be counted twice.
- The Investor's claim for out-of-pocket costs should be rejected, as it is not supported by evidence.[198]

159. In addition, Section 6.0 of KPMG's Report identifies numerous incorrect assumptions made by the Investor and the Investor's Expert that affect the elements to be included and the value of that compensation.

3. Proposed Approaches To Measuring Damages

160. In its Partial Award, the Tribunal did not decide on the appropriate methodology to calculate the damages but simply stated: "in this case, the Tribunal considers that the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded".[199]

161. This is not a case of illegal expropriation. The cases of illegal expropriation on which the Investor relies[200] are not applicable to this case. While the operation of the Investment was affected during the 14 ½ -month period of the Interim Order, once the ban was removed the Investor had the full benefit of its Investment. It can therefore be said that SDMI's benefit of its Investment was, at best, delayed.

162. In concluding that there was no expropriation, the Tribunal noted in its Partial

198 KPMG Report pp. 53-54.
199 At paragraph 309.
200 Investor's Memorial, paras 52.

Award:[201]

> In this case the closure of the border was temporary. SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive advantage. This may have significance in assessing the compensation to be awarded in relation to Canada's violations of Articles 1102 and 1105 but does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110.

163. Summarising the situation, it stated: "An opportunity was delayed".[202]

164. In fact, the Canadian border was closed for 14 ½ months not 18 months (from November 20, 1995 to February 7, 1997).[203] It is the value of that delay that should be calculated.

165. An important question in determining the value of the delay is whether SDMI truly had a "first mover" advantage in the Canadian market.[204] Theoretically, if the Investor had a first-mover advantage that was lost as a result of the delay caused by Canada's closure of the border, that lost advantage should be compensated. The evidence shows that this was not the case. The day after the EPA granted enforcement discretion to SDMI it wrote to 42 of its U.S. competitors to invite them to apply for similar exemptions.

166. The Lexecon Report confirms that the Investor's claim for first-mover advantage has no basis.[205] The Lexecon Report explains that: "first mover advantages exist when it is costly for customers to switch from their current suppliers. If (as Rosen suggests) SDMI could compete successfully with Chem Security by offering lower prices, then this implies that customers switching costs must not be large – which implies that first-mover advantages are small at best".[206]

167. On December 4, 1995, SDMI complained to the Administrator of the EPA that all the time and effort expended by the company in securing the enforcement discretion

---

201 At paragraph 284.
202 At paragraph 287.
203 The Investor's Memorial refers to 611 days but in fact the border was closed for only 446 days.
204 "First-mover advantage" is a term recognized in economics as the advantage a company gains by being first to market with a new product or service; Lexecon Report, section IV.A.
205 Lexecon Report, paras. 25-27.
206 Lexecon Report, para. 26.

extended on October 26, 1995, was wasted because:[207]

> "your agency is rushing all our competitors through (even though they never followed the Congressionally mandated methods for importing by applying for exemptions) and even though it did not take them a six month wait for the people in enforcement discretion to act. . . . If it is your policy to have 'equity in the workplace,' I would like to ask you to make sure that inequities in the U.S. marketplace don't get extended to the Canadian marketplace. . . We have been told that any U.S. permitted disposal facility will be approved. This would include landfills for transformers, which will put over 100 pounds of PCBs into the ground for every average sized 5500 pound transformer. . . We are losing money daily because of these inequities . . ."

168. By mid-January 1996, (two months later) the EPA granted enforcement discretions to 10 other U.S. firms.

169. In addition, in Canada, apart from Swan Hills, other Canadian competitors were already doing PCB remediation work or acting as brokers, providing advice on costs, and coordinating transport for processing elsewhere.[208]

170. All of the Canadian and U.S. competitors were working from the Environment Canada PCB national registry. Given that there was no competitive advantage, Canada submits that the measure of damages is therefore limited to an appropriate rate of return on the sums SDMI advanced to its Investment prior to and during the ban. The majority of PCB inventory over which the Investor had issued quotes was still available when the border re-opened and could have been pursued by SDMI and Myers Canada, if the U.S. had not later re-closed the border.

171. There is a large disparity between the claim of US$ 68 million in damages and the advances to Myers Canada by SDMI of about CDN $1 million.[209] Of that amount advanced to Myers Canada by SDMI, a large portion was spent on pursuing projects that were not affected by the Interim Order (i.e. locating a PCB facility in Canada and setting up a testing lab). It would make no sense given the circumstances of this case to award damages so disproportionate to the actual sums expended in relation to the Investment.

172. In determining the appropriate method of compensation, the Tribunal should ensure,

---

207 SDMI letter to EPA dated December 4, 1995, SDMI Response to Canada's First Request for Documents, Tab 35, Annexes to Canada's Counter-Memorial, Vol. II, Tab 25.
208 White Report, section 2.3.
209 KPMG Report, at p.45. The amount is $1,022,748.

in accordance with the principles of the *Chorzow Factory* case, that the Investor is not put in a more advantageous position than if the breach had not occurred.

(a) SDMI Is Entitled To The Return On Expenditures Lost By Reason Of The Delay Caused By The Ban

173. The Investor's loss caused by Canada's Interim Order was the delay on the return of the expenditures relating to the Investment. The compensation can therefore be calculated by using an appropriate rate of return that the Investor would have earned for the period of November 20, 1995 to February 7, 1997, but for the ban, on expenditures in support of the Investment[210].

174. This approach is appropriate because the Investment was not expropriated and SDMI continued having the advantage of its Investment during and after the ban. Myers Canada continued generating business and issuing quotes during the ban. The potential for generating revenue as a result of these efforts was merely delayed. The only loss to the Investor, once the border re-opened, was a delay in the return that the capital advances to Myers Canada were expected to generate. If the Investment did not benefit from these efforts, it was because of the U.S. closure of the border.

175. Based on the equity rate of return in the Rosen Report, 18%, the Investor would be entitled to no more than CDN $ 248,000. Calculations are described in section 7.2 of KPMG's Report and Schedules 1 of the Report.

176. This figure is likely too high because it may include amounts relating to locating a fixed site for remediation activities in Canada.[211] KPMG notes in its report[212] that to the extent that such costs are included in the Investor's Expert's numbers on which KPMG based its calculation, they should be deducted. KPMG indicates that it was not able to do so because it did not get access to Myers Canada and SDMI's records as requested by Canada.[213]

---

210 See next section for a more detailed presentation on the value of the expenditures.

211 The testimony of Dana Myers during the Liability Phase clearly established that Myers Canada and SDMI expended large sums in Canada to locate a site for PCB disposal. It appears that the lab costs were expended by SDMI and not included in the claim. Cross-Examination of Dana Myers, Q8, Q24.

212 KPMG Report, section 7.1.

213 The Investor refused Canada's document production request in this regard. See Response to Canada's Document Production Request, #18.

177. SDMI's direct expenditures pursuing the Canadian PCB business in Canada are not included in this figure because they relate to SDMI's cross-border services and not to its Investment. Should the Tribunal determine that it is appropriate to include these expenditures, the return on these expenditures would represent an additional CDN $535,000.

(b) Alternatively, SDMI Is Entitled To The Reimbursement Of Expenditures

178. Alternatively, Canada submits that the appropriate measure of damages is best achieved by the reimbursement of expenditures with respect to the Investment. This involves determining the advances made by SDMI to Myers Canada for purposes of supporting Myers Canada's attempts to develop the PCB export business in Canada. Compensation is effected by the reimbursement to SDMI of its advances to Myers Canada as SDMI funded Myers Canada through a series of inter-company loans.

179. If this approach is adopted, compensation to SDMI would be of CDN $ 1,022,748. Details of the calculations are described in section 7.1 of KPMG's Report and Schedule 1 of the Report.

180. Only those expenditures properly documented and in connection with the Investment can be taken into account in the damages calculation.

181. SDMI's direct expenditures pursuing the Canadian PCB business in Canada are not included in this figure because they relate to SDMI's cross-border services and not to its Investment. Should the Tribunal determine that it is appropriate to include these expenditures, the compensation for loss of expenditures would represent an additional CDN $2,205,733.

(c) The Investor's Approach: Loss Of Profits

182. The Tribunal cannot accept the Investor's approach to the calculation of damages because there is significant uncertainty as to what would have occurred but for Canada's closure of the border. There is no track record or basis to calculate the economic activity that would have occurred but for the breach. In these circumstances, calculating loss of profits would lead to speculative results. Canada has referred the Tribunal to several arbitration cases that have refused future

profits/revenues calculations in situations where, like here, there is no business history to render the calculation less speculative.

183. In any event, the Rosen Report calculations should be discarded because, apart from technical errors and faulty assumptions, they do not provide a measure of the losses that can be directly attributed to Canada's measure.

184. KPMG noted in its Report: "We are of the opinion, however, that the application of the approach in the Rosen Report is flawed and does not represent the economic consequences that would have accrued to the Investor/Investment, but for the Event".

185. Rosen's proposed method of evaluating losses is inappropriately based on value of all the quotes issued by SDMI and Myers Canada and on un-proven assumptions about market share. Amongst other things, it does not take into account the fact that as a result of the border re-opening in February 1997, many of the quotes included in the calculations of damages were still available to the Investor and its Investment and were, in fact, issued because the border was going to re-open. It also does not take into account the price changes that occurred because of increased Canadian and U.S. competition. Section 6.0 of the KPMG Report describes the errors in the Rosen Report and the basis for rejecting this approach.

186. If the Tribunal determines that it is appropriate to calculate lost profits, which resulted from the breach, the appropriate approach is presented in section 7.3 of KPMG's Report.

187. Both the KPMG Report and the Lexecon Report conclude that the only PCB volumes that should be considered in calculating SDMI's "but for" revenues are volumes for which SDMI submitted a quote that were destroyed between November 20, 1995 and February 7, 1997. From those PCB destroyed, which ones would have gone to SDMI?

188. Prior to the ban, after more than a year of marketing and issuing quotes, SDMI was only able to secure two purchase orders. The Lexecon Report concludes that because neither SDMI or Myers Canada have any business history in Canada prior to the ban, the best indicator of Myers Canada's potential share of the Canadian market

is given by looking at what occurred once the border re-opened. The Lexecon Report estimates Myers Canada's market share, but for the ban, at 25%.[214] It should be noted that in the five month period when the border was opened (February to July 1997) only seven PCB shipments, worth CDN $182,256, went to the U.S. This, notwithstanding, the fact that Canada's new regulations banned export for landfilling which had the effect of eliminating some of SDMI's U.S. competition.

189. The Investor claims that Myers Canada was remunerated for its marketing and broker services by making a 10% commission on revenue generated from business in Canada.[215] There is no documentary evidence of this arrangement between SDMI and Myers Canada. The Investor asks the Tribunal to rely on what occurred for seven shipments once the border re-opened as reflected in Myers Canada's books a year and a half later. This provides no evidence that this would have always been the case or evidence of what the terms of the agreement between SDMI and Myers Canada at the time of the closure of the border were. A number of questions remain unanswered: Was there any geographical division in marketing efforts in Canada between SDMI and Myers Canada and how did that translate into profit sharing?[216] What happened in cases where SDMI did all the advance work and Myers Canada had no involvement in the transaction or in getting the customers (for example, when the business for SDMI was generated by other brokers such as Greenport Environmental)?

190. Nonetheless, even accepting the Investor's assertions regarding the 10% commission, KPMG calculates that the lost profits to Myers Canada's is CDN $ 153,000[217].

191. This number does not include any lost profits to the Investor. As Canada noted earlier, those losses are non-compensable under a Chapter 11 claim and are an indirect consequence of Myers Canada's losses only attributable to the fact that the Investor also operated cross-border PCB remediation services from its U.S. facilities. Should the Tribunal decide nevertheless to award compensation for these losses,

214 Lexecon Report, at para. 30.
215 Interrogatories, question 13(c).
216 Cross-examination of Michael Valentine, Q451-454.
217 KPMG Report, section 7.4.

KPMG's calculations estimate this loss at CDN $ 1,939,000.

192. Finally, the Tribunal should also note Canada's proposed approaches as well as the loss of profits approach are not cumulative as this would amount to double counting.[218]

PART F: MITIGATION

193. It follows from the obligation imposed on Investors to mitigate their damages that where they fail to do so, damages must be reduced accordingly. The Tribunal should therefore take into account the fact that the period of the Interim Order (and therefore the period of compensable loss) could have been substantially shortened had the Investor or its Investment sought judicial review of the Interim Order in a Canadian court.[219]

194. Myers Canada could have used local PCB remediation services in Canada to fill its quotes. Instead of getting a commission from orders sent to SDMI, it could have acted as a broker for Canadian remediation facilities. Many other brokers in Canada, such as Customs Environmental and Greenport Environmental, who had considered sending PCBs to U.S. destruction facilities, continued their business during the period of the ban by using Canadian PCB remediation services.

195. Furthermore, nothing prevented SDMI from establishing local PCB remediation facilities which would have avoided the need for cross-border shipments of PCBs. SDMI or Myers Canada could have purchased mobile incinerators to destroy a portion of the PCBs in Canada and thereby reduced their losses.

196. In addition, where the Investor has mitigated its losses during the period of the ban, amounts received as a result of this mitigation should be appropriately deducted from the claim, to avoid double compensation. For example, it appears from the notes of interviews with Greenport conducted by the Investor's Expert[220] that Myers Canada "sold" some of their "contacts" to Greenport and received 1.5% of the value of

218 KPMG Report, section 7.0, p.43.

219 Such a remedy was available to the Claimant as evidenced by the Federal Court challenge against the Interim Order brought forward by the Centre Patronal de l'Environnement.

contracts that Greenport was able to obtain as a result of these leads. Should the Tribunal decide to award compensation on the basis of Myers Canada's loss of potential business from these quotes, this should be taken into account.

PART G: INTEREST

197. The Investor has claimed entitlement to interest on any award granted.[221]

1. Article 1135

198. Article 1135 (1) of the NAFTA provides that a Tribunal may award "monetary damages and any applicable interest." Interest is a matter within the discretion of the Tribunal, but if the Tribunal chooses to award interest, it should do so with regard to the practice of the courts in the place of arbitration and taking into account the principle that interest is a form of compensation.

2. Pre-Judgment Interest Should Be Awarded At A Reasonable Rate

199. The NAFTA and the UNCITRAL Rules do not prescribe the rate of interest applicable to an award. Consequently, the Tribunal should be guided by the applicable domestic law.[222]

200. Given that this arbitration is against the Government of Canada, and the place of arbitration is Toronto, Ontario, the appropriate rates should not exceed those applicable in the Ontario and Federal Courts for pre-judgment and post-judgment interest.

(a) Pre-Judgment Interest

201. The *Crown Liability and Proceedings Act*[223] deals with pre-judgment interest on awards against the Federal Crown. It provides that where interest is to be included on an award, it should be simple interest "at such rate as the court considers reasonable in the circumstances."

---

220 Response to Interrogatories, #164.
221 Investor's Memorial, paras 96-102.
222 P. Cerina, "Interest As Damages In International Commercial Arbitration", *American Review of International Arbitration*, vol. 4, p. 272.

202. Section 36 of the *Federal Court Act*[224] employs language to the same effect and provides a non-exhaustive list of factors the court may consider in fixing an appropriate rate[225].

203. The *Interest Act*[226] provides that "whenever any interest is payable by the agreement of the parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum."

204. Under the Ontario *Courts of Justice Act*[227] a similar rate of interest would be applicable. The *Courts of Justice Act* provides for the payment of pre-judgment simple interest at fixed rates. Subject to the discretion of the court, the rates applicable are the prescribed "bank rate at the end of the first day of the last month of the quarter preceding the quarter" from the date from which the interest starts running. In this case, the rate would be around 5% per annum[228].

205. The Investor asks for a rate of return equal or greater to that of its U.S. operations.[229] In determining what rate should be applied, the Canadian Federal Court of Appeal held that a plaintiff's average return on investment is not relevant to the determination of the appropriate rate of pre-judgement interest.[230] Moreover, as noted in the KPMG Report, in these circumstances it would be inappropriate because the calculations of losses have eliminated any risk. Instead, the rate of interest should reflect the risk of the venture.[231]

206. International tribunals have generally been wary to award compound interest. For example, in the *Anaconda-Iran, Inc.* v. *Iran*[232] case, the tribunal refused to award it even though contractual stipulations allowed such interest to accrue. Both in the *Crown Liability and Proceedings Act* and the Ontario *Courts of Justice Act* this

---

223 *Crown Liability and Proceedings Act*, R.S. 1985, c. C-50, s.31.
224 R.S. C. 1985, c.F-7.
225 *Federal Court Act*, s. 36(5)
226 R.S., c. I-18, s. 5.3.
227 R.S.O. 1990, c-43, s.128-129.
228 Watson and McGowan, *Ontario Civil Practice, 2001*, (Carswell, 2001), at p. 174.
229 Investor's Memorial, para. 97.
230 *Allied Signal Inc.* v. *Du Pont Canada Inc.* (1998), 78 CPR (3d) 129, 142 FTR 241 (T.D.) additional reasons at (1998), 81 CPR (3d) 110, 149 FTR 130 (TD); affd (1999), 235 NR 185 (Fed C.A.).
231 KPMG Report, sections 6.0, 6.1.

matter does not arise given that simple interest is prescribed.[233]

(b) Date Interest Starts Running

207. The rationale for awarding interest on any award is that money (in compensation for a loss) is being paid later than it should have been. Practice concerning the date that interest starts running ranges from the date of breach, to the date the request for arbitration[234] was filed. Section 31 of the *Crown Liability and Proceedings Act* again provides that, where the order is made on an unliquidated claim, interest should run from the date the person entitled gave notice in writing of the claim to the Crown.[235]

208. In this case, given the limited period of the breach and the Investor's significant delay in filing the arbitration,[236] interest should start from the date of the Claim, October 30, 1998 or alternatively the date the Investor gave notice of its Claim, July 22, 1998. If the Tribunal chooses the date of breach as the starting date, it will reward the Claimant for dragging its feet.

3. Post-Judgment Interest

209. Section 37 of the *Federal Court Act* and section 129 of the *Courts of Justice Act* also provide for payment of interest from the date of judgment. In this case, judgment has yet to be entered and the appropriate rate has yet to be fixed. However, Canada says that the rate should be 5% in accordance with Rule 332 of the *Federal Court Rules*.[237]

PART H: COSTS

---

232 (1986), 13 IRAN-USCTR 199, 234.

233 *Crown Liability and Proceedings Act*, s. 31(4)(b).

234 In *Amco I*, interest accrued from the date of AMCO's application for arbitration.

235 *Crown Liability and Proceedings Act*, s. 31(2)(b).

236 The Investor waited until close to the expiration of the three-year period from the break before filing its claim.

237 Rule 332(2) of the *Federal Court Rules* provides for post-judgment awards on foreign judgments (which includes arbitral awards under sections 34 and 35 of the *Commercial Arbitration Act* according to Rule 326) after registration. This rule provides for the payment of post-judgement interest on an award at the rate prescribed in section 3 of the *Interest Act* (i.e. simple interest of 5% per annum) unless the court orders otherwise.

4. NAFTA Article 1135 And Applicable Arbitration Rules

210. Article 1135 refers to the applicable arbitration rules for the determination of costs.

211. As noted above, the applicable arbitration rules in this arbitration are the UNCITRAL Arbitration Rules. While the Tribunal has wide discretion to award costs, Articles 38-40 give guidance in the event that costs are to be awarded.

212. Article 38 of UNCITRAL gives an exhaustive list of what constitutes "costs". It does not include the cost of executive time. Travel and other expenses of witnesses and costs for legal representation are included. In assessing an award of costs, if any, the Tribunal is limited to award only costs which are enumerated in Article 38.

213. UNCITRAL Article 40[238] states that in general, the unsuccessful party shall bear the costs of arbitration. However, the arbitral tribunal has the discretion to apportion the costs between the parties, if the tribunal deems such apportionment is reasonable. Article 40(2) also gives the Tribunal discretion to apportion the costs for legal representation and assistance and is free to determine which party will bear the costs.

5. NAFTA Chapter 11 Cases

214. In the *Metalclad* case, where the Tribunal concluded that the Mexican Government breached Article 1110, both parties sought awards of costs. The Tribunal decided that each party bore its own costs and shared equally the amounts paid to ICSID.

215. In the *Desona*[239] case, although the Investor was not successful, the Tribunal decided not to award costs with the result that each side bore its own expenditures and the amounts paid to ICSID were allocated equally. Four factors motivated this decision:

---

238 Article 40 of the UNCITRAL Arbitration Rules provides:

Except as provided in paragraph 3, the costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear reasonable costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

(1) the novelty of the Chapter 11 dispute settlement mechanism; (2) the fact that the Investors presented their case in an efficient and professional manner; (3) that the municipality by its action "invited litigation"; and that (4) the persons accountable for the Investor's wrongful behaviour would not be the ones affected by the award of costs.

216. To date perhaps because of the relative novelty of Chapter 11 arbitration, tribunals established under Chapter 11 have not been inclined to award costs against the unsuccessful party.

6. Other International Arbitration Cases

217. In practice, very few international arbitration tribunals have awarded the full costs of the arbitration against the unsuccessful party.[240] Generally the tribunals have exercised discretion in splitting the costs between the two parties despite the fact that the claimant has won the case, or particularly where the claimant was only partially successful.[241]

218. In *Amco I*, the Tribunal decided that each party should bear the expenses incurred by it in the presentation of the case, and that the arbitrator's fees should be shared equally among the parties. This was decided in light of the fact that "both parties did their best to assist the Tribunal to perform its tasks, and considering in addition the size of the claim compared to the amount that will be awarded."[242]

219. Only in cases of procedural bad faith on the part of a party, have tribunals decided to make the unsuccessful party bear the full costs of the arbitration.[243] This is not the

---

239 *Robert Azinian et al* v. *United Mexican States*, ICSID Case No. ARB(AF) 197/2, (1999).

240 See *Compania Del Desarollo de Santa Elena, S.A.* v. *The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Feb, 17, (2000) where costs were not awarded against the unsuccessful party. Also: *American Manufacturing and Trading, Inc.* v. *Republic of Zaire* and *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka.*

241 In *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka*, the tribunal exercised its discretionary power under the ICSID rules by splitting the costs of the arbitration. The Investor bore 40% of the costs, while the Respondent was responsible for the other 60%. The Respondent bore the cost of all the fees and express incurred in the preparation and presentation of its case, while those incurred by the Investor were apportioned with the Respondent. Certain amounts were excluded all together as not being proven necessary "in connection with the proceedings."

242 At paragraph 291.

243 In *LETCO*, Liberia, the unsuccessful party bore all of the costs of arbitration. This decision was

case of Canada in this arbitration.

7. There Is No Basis For Awarding Costs Against Canada In The Circumstances

220. Canada asks the Tribunal to determine that each party should bear its own costs for the Liability Phase and that the Tribunal should award costs to Canada in the Damages Phase, in light of the circumstances of this case including:

- The Investor was only successful on 2 of the 4 grounds complained of in the Liability Phase.
- In the Damages Phase, the Investor grossly exaggerated its claim, increasing it from US$ 20 million (Statement of Claim) to US$ 80 million (Investor's Memorial).
- The Investor has not been forthcoming in disclosing its case and in responding to Canada's production requests.[244]
- Because of the lack of evidence in support of the Investor's Memorial, Canada and its experts incurred significant amounts of additional work.
- Canada has been fully cooperative with the Investor and with the Tribunal

---

based largely on Liberia's procedural bad faith. Liberia had in fact not participated in the proceedings and had taken steps to nullify the results of the arbitration.

244 There was little cooperation by the Investor in answering Canada's Interrogatory and Document Request and in providing the documents Canada's experts requested. In fact, Canada spent considerable effort to try to clarify the Investor's responses. Canada's efforts were necessary to establish the facts, both for the purpose of testing the Investor's case and also to assist the Tribunal in making its determinations. The Investor has not provided supporting evidence, leaving Canada to search for the basis of its claim. Given the quantity and nature of the documents submitted by the Investor in this phase, Canada has had to launch a comprehensive and detailed investigation of the Investor's claim. The Investor has, over the course of these exchanges, provided some additional information in response to Canada's inquiries. However, the Investor has sometimes provided access to such information after a second request, as the response to the first request is often a denial of the existence of such documentation. For example, Canada asked, in its interrogatories (Interrogatory 158) for an explanation of "EM" codes. Fairly, the Investor requested clarification as to what "EM" codes are, what they mean or where they are located on the actual quote. Canada explained with detail on April 17, 2001 that the "EM" codes are the Item codes, or Service codes that are 4 digit numbers, generally starting with a "7" and appear to be coding for the different equipment containing PCBs. On April 18, 2001, the Investor responded: "We can report to you that no such item code or service codes exist. We can inform you that individual quotes and contracts specifically identify different equipment containing PCBs by name, not by digit number identifiers". Canada did not accept this denial and insisted on an explanation of the service and item codes. In order to have the Investor properly address the question, Canada had to include copies of the documentation provided by the Investor. It was only after the insistence of Canada, that, on May 9, 2001, the Investor admitted the existence of the Service Codes. Until that time, it appears that the Investor did not bother to do an adequate investigation to answer the request, if any at all. The Investor states in its response that it is thankful to Canada for clarifying the Interrogatory, and provides material to fully answer Canada's request. Canada is concerned that the Investor is presenting selective information to the Tribunal to make its case, and denying Canada an opportunity to fully assess or refute the claim.

221. More specifically, as a result of the Investor's behaviour, Canada had to spend considerable time and costs to find the evidence necessary to prepare for the Damages Phase.

222. In addition, as noted in Canada's Request for Extension, the Investor presented Canada with various versions of lists and differing numbers. The Investor filed its Memorial, with its supporting documentation on March 1, 2001. The Tribunal granted Canada 90 days to learn the Investor's case, complete its investigations, and respond to the claim. At the time of the filing of this memorial there were still substantial critical information requests outstanding. In addition, on May 9, 2001, (19 days before Canada's filing), the Investor sent a new version of its summary of quotes, and its first indication (apart from a vague reference) as to what documentation the Investor's expert relied upon, and no reconciliation as to their differences. Unfairly, the Investor presented a moving target, complicating the proceedings and preventing Canada from assembling its case without significant additional effort. As a result, Canada expended significant additional expert fees, on a last minute, rush basis.

223. Canada on its part has been as forthcoming as possible in responding to the vague and all-encompassing requests for documents presented by the Investor in the first phase of the arbitration. Canada has also attempted, on numerous occasions, to find common ground with counsel for the Investor, whereas counsel for the Investor has consistently opposed any of Canada's requests.

224. While the starting point is a presumption that the unsuccessful party pays costs, the relevant considerations applicable in this case, which the Tribunal should consider are the delays, additional expenses, uncooperative behaviour and dilatory tactics, all of which confused and extended the Damages Phase and resulted in additional submissions and motions.

PART I: TAX IMPLICATIONS OF THE AWARD

225. The Investor's Memorial contains no claim for tax implications of the award,

therefore it must be concluded that the Investor has abandoned this claim.

PART J: CURRENCY OF THE AWARD

226. The Investor asks for compensation in U.S. dollars.[245] The practice for international arbitration tribunals is to award monetary compensation in the currency of the loss.[246]

227. This case involves a claim for a loss incurred in relation to a Canadian investment because of a breach by the Government of Canada. The quotes were in Canadian dollars, all events giving rise to this Claim occurred in Canada. The Place of Arbitration is in Canada. There is no rationale for an award in any currency other than Canadian currency.[247]

PART K: CONCLUSIONS

228. For the foregoing reasons, Canada respectfully requests that this Tribunal render an award in favour of Canada dismissing SDMI's claim for damages in its entirety for failure to establish quantum of loss.

229. Alternatively, Canada says that this Tribunal fix damages in an amount of no more than CDN $ 248,000 plus simple interest at 5% per annum from the date of the Statement of Claim for the delay caused to SDMI by the Interim Order in earning a return on its expenditures in support of Myers Canada pursuing Canadian PCB export business.

230. Canada respectfully requests that this Tribunal determine that each party bear its own costs for the Liability Phase of this arbitration. For the Damages Phase, Canada asks that this Tribunal order SDMI to pay all costs, disbursements and expenses incurred by Canada in the defence of this claim including but not restricted to, legal,

---

245 Investor's Memorial, PART SIX: Canada be hereby ordered to pay compensation to the order of the Investor in an amount not less than US$67,980,421".

246 Redfern and Hunter, 8-09, p. 365. Adopting this approach would avoid disputes about currency conversion rates which have varied over time.

247 The compensation amount would be freely transferable from Canadian dollars to U.S. dollars, as required by NAFTA Article 1109(1)(e). The existence of the obligation in Article 1109(1)(e) for awards of investor-state tribunals to be transferable suggests that awards are likely to be made in the currency of the territory of the investment.

consulting, and witness fees and expenses, and travel and administrative expenses, as well as the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULY SUBMITTED

DATED in the City of Ottawa, the Province of Ontario, this 7th day of June 2001.

Sylvie Tabet

OF COUNSEL FOR THE GOVERNMENT OF CANADA

Sylvie Tabet

Brian Evernden

Sheila Mann

Fulvio Fracassi