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**CONFIDENTIAL –**
**SUBJECT TO PROTECTIVE ORDER**

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

# INVESTOR'S REPLY MEMORIAL (DAMAGES PHASE)

BETWEEN:

**S.D. MYERS, INC.**

Claimant / Investor

**- and -**

**GOVERNMENT OF CANADA**

Respondent / Party

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# INVESTOR'S MEMORIAL (DAMAGES PHASE)

## GENERAL INTRODUCTION

Pursuant to the terms of *Procedural Order No. 19*, the Investor submits this Reply Memorial to respond to issues raised by Canada in its Counter-Memorial on Damages. This Reply Memorial is organized as follows:

Part One addresses issues raised by Canada in its Counter-Memorial (Damages) whose determination will assist in the quantification of damage, namely:

A. What type of economic activity is covered by this NAFTA process (the Investor and Investment question); and

B. Causation: What was the root cause of the harm at issue, was it Canada's *PCB Waste Export Ban* commencing in 1995 or was it the US closure of the border in 1997?

Part Two responds to Canada's position on the identification of the relevant PCB waste market in Canada and the selection of a valuation approach.

Part Three responds to Canada's submissions on burden of proof and the assessment of interest and costs.

In summary, the Investor replies as follows:

1. This Tribunal has already determined that S.D. Myers, Inc. was an Investor and that it had an Investment in Canada. Canada attempts to narrowly confine that finding to suggest that the only Investment that S.D. Myers, Inc. had in Canada was a loan to Myers Canada. This approach is not supported by the evidence.

   The Investor's economic activity that constitutes an investment under the terms of the NAFTA includes:

   (a) S.D. Myers, Inc.'s own activity in Canada from 1993 until 1997, which on its own constitutes an enterprise, and is thus an investment as defined by NAFTA Article 1139;

   (b) S.D. Myers, Inc. jointly working with Myers Canada in concerted action to obtain economic success within the Canadian PCB remediation market (when referring to joint action throughout this Reply Memorial (Damages), we refer to "the Myers Companies"). The Myers Companies were able to obtain almost 1000 bids, quotes

and orders for PCB waste remediation contracts at the request of Canadian holders of PCB wastes;

(c) S.D. Myers, Inc.'s inter-corporate loans to Myers Canada.

Each of these activities is an investment in Canada by S.D. Myers, Inc. S.D. Myers, Inc. is entitled to compensation for harm caused by Canada's unlawful conduct to every one of these investments, so long as the Investor does not obtain double-recovery for its harm.

2. Canada's attempt to lay the blame for the failure of the Myers Companies to succeed in Canada cannot be put at the feet of the United States Government. The effect on the Myers Companies arising from Canada's *PCB Waste Export Ban* was devastating. Canada's actions wiped out nearly two full years of work to secure a book of orders, bids and quotes for the Myers Companies in Canada. When nearly fifteen months later Canada re-opened the border to the export of PCB waste, the Myers Companies were not able to recover to the position they occupied at the time of the unlawful ban. When the U.S. Government decided to close the US border to imports of PCB waste in July, 1977, the Myers Companies still had not recovered to the position that they had been before Canada's wrongful act. The harm done by Canada resulted in permanent impairment to the Myers Companies.

3. This is not a delay claim with respect to NAFTA Articles 1102 and 1105 as Canada asserts. The international law principle of compensation that is applicable in this NAFTA claim is that Canada must put the investor into the position that it would have been but for Canada's wrongful act.

4. Canada's Counter-Memorial mischaracterizes what S.D. Myers, Inc. did in Canada and the nature and extent of the market within which it worked. The Myers Companies competed directly with Chem-Security in the Canadian market. The Myers Companies viewed Chem-Security as their principal competitor and Chem-Security viewed the Myers Companies as its main competitor when dealing with holders of Canadian PCB wastes.

5. Canada has asserted that there were a number of independent reasons why Canadian customers would not want to do business with the Myers Companies. The Investor submits this is simply not credible in light of the evidence before this Tribunal.

6. Canada's evidence that the Myers Companies did not have a "head start" in the Canadian market does not withstand scrutiny. In fact, their extensive Canadian marketing provided them with a valuable head start on the Canadian PCB waste market that was rendered useless as a result of Canada's unlawful *PCB Waste Export Ban*.

7. Canada claims that S.D. Myers, Inc. has not met its burden of proof in this claim. The Investor simply rejects this submission outright.

8. To reply to Canada's experts, the Investor has submitted evidence with this Reply (Damages) from the following additional experts:

| | | | |
|---|---|---|---|
| (a) | Jeffrey Harder | - | Independent Valuation expert to address the valuation methodologies applied by Canada and the Investor. |
| (b) | Peter Wallace, P.Eng. | - | Canadian PCB Industry expert to address the Canadian PCB market and customers between 1993 and 1997. |
| (c) | Prof. Roger Ware | - | Professor of Economics specializing in industrial organization to discuss market behaviour issues raised in this Claim. |

Howard Rosen, the Investor's Independent Valuator, has filed a *Revised Independent Valuation Report* with this Reply Memorial. Finally, the Investor submits reply evidence from S.D. Myers, Inc. from Bob Rasor and Dana Myers.

## PART ONE: THE CHOICES BEFORE THIS TRIBUNAL

Canada asserts:

A. The only investment that requires compensation is S.D. Myers, Inc.'s investment in Myers Canada; and

B. The only entitlement of S.D. Myers to compensation is for the delay in access to the Canadian market.

In light of the evidence and the facts, neither proposition is sustainable, but each requires a response.

### A. Defining the Investor and the Investment

1. The Tribunal has already unanimously found that S.D. Myers, Inc. has an investment in Canada at the time of the marking of the *PCB Waste Export Ban* [1]. The Tribunal did not, however, exhaustively define what that Investment was.

> *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* [2].

The Investor submits that a review of the evidence and the NAFTA must result in a finding that S.D. Myers, Inc.'s investment in Canada went far beyond Myers Canada.

2. NAFTA Article 1116 provides that an investor may bring a claim for harm done to its investment caused by a governmental action that violates a NAFTA obligation contained within Section A of NAFTA Chapter 11. The scope of economic activities covered by NAFTA investor-state claims was intended to be very wide. NAFTA Article 1139 defines an "investor of a Party" as:

> *a Party or state enterprise thereof, or a national or an enterprise of such a Party, that seeks to make, is making or has made an investment.*

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[1] See para. 218 of the *Partial Award* and para. 41 of the *Separate Opinion*.

[2] *Partial Award* at para. 230. Professor Schwartz addressed the same matter at para. 39-42 of his separate opinion.

3. In its discussion of the NAFTA Investment Chapter, the US *Statement of Administrative Action* states:

> *"Investment" is broadly defined in Article 1139, and both existing and future investments are covered. "Investor of a Party" is defined to encompass both firms (including branches) established in a NAFTA country, without distinction as to the nationality of ownership, and NAFTA-country nationals. The chapter applies where such firms of nationals make or seek to make investments in another NAFTA country*.[3]

The NAFTA definition of "investment" demonstrates the broad, but not exhaustive types of activities that constitute an investment.

4. It has already been established by the Tribunal that Myers Canada constituted an Investment of S.D. Myers, Inc. As the extent of the Investment may also be relevant, the Investor submits that Myers Canada constitutes an Investment of S.D. Myers, Inc. in the following ways:

(a) It was a participant in a joint enterprise with S.D. Myers, Inc. in which it participated in profits of the enterprise [4] (Article 1139-Investment (e) or where its remuneration depends substantially upon the production, revenues or profits of an enterprise (Article 1139-Investment (h); and

(b) It was the recipient of a loan from its affiliate S.D. Myers, Inc. (Article 1139-Investment (d)).

5. S.D. Myers, Inc's operations in Canada themselves constituted an investment as:

(a) It had direct activity in Canada. An investor operating in the territory of another NAFTA country constitutes an investment as this activity operating in Canada constitutes an Enterprise (Article 1139-Investment (a));

(b) It was a participant in a joint enterprise with Myers Canada in which it participated in profits of the enterprise (Article 1139-Investment (e) or where its remuneration depends substantially upon the production, revenues or profits of an enterprise (Article 1139-Investment (h)); and

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[3] *Statement of Administrative Action* at 140.

[4] The NAFTA Tribunal has found that S.D. Myers, Inc. worked with Myers Canada in joint cause: *Partial Award* at para. 232.

(c) It invested economic resources into intangible property in Canada, such as marketing to enhance its goodwill in Canada, which it used for the purpose of economic benefit (Article 1139-Investment (g)).

6. The relationship between S.D. Myers, Inc. and Myers Canada was described by Professor Schwartz as follows:

> *S.D. Myers expected that both S.D. Myers and its affiliate would share in the profits obtained from contracts performed wholly or partly in Canada; Employees of S.D. Myers and those of Myers Canada acted in concert in many respects. At times, employees from S.D. Myers actually came to Canada to work in combination with employees of Myers Canada on marketing and other pre-contractual efforts. During the short period when the border was open, seven contracts were actually carried out involving the export of PCBs to the S.D. Myers' facilities in the United States. Myers Canada received a share of the revenues for its efforts to assist customers on these contracts. An employee of S.D. Myers, Lynn Fritz, came to Canada to further assist customers with such matters as draining equipment and arranging for transportation.*
>
> *The basic raison d'etre of Myers Canada was to promote and serve the interests of S.D. Myers. The role of Dana Myers as the directing mind and controller of both companies ensured that the relationship would continue*[5].

7. Canada's own governmental memoranda indicate that S.D. Myers, Inc. was engaging in economic activity in Canada before the time of the making of the *PCB Waste Export Ban*[6].

8. Finally, it is important to note that S.D. Myers, Inc.'s activities in the Canadian PCB market are an investment as they are covered by the definition and are not excluded by any exclusionary provisions contained within Article 1139. This exclusion, at the end of the broad list of economic activities covered as an investment, states:

> *but investment does not mean,*
>
> *(i) claims to money that arise solely from*

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[5] *Separate Opinion* at para. 38.

[6] George Cornwall, Letter to PCB Interdepartmental Committee, November 1, 1995 set out as Tab 47 of the Joint Volume of Documents for the Merits Phase.

> *(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or*
>
> *(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or*
>
> *(j) any other claims to money,*
>
> *that do not involve the kinds of interests set out in subparagraphs (a) through (h);*

S.D. Myers, Inc.'s activities will either involve its enterprise in Canada (paragraph (a)) or its loan to Myers Canada (paragraph (d)), its interest in intangible property in the Canadian PCB market (paragraph (g)) or its interests arising from the commitment of capital or other resources in Canada to economic activity there (paragraph (h)).

9. Canada's continual attempts to argue that S.D. Myers, Inc. did not have an investment in Canada are not credible. S.D. Myers, Inc. had a real and substantial investment in Canada through its own branch activities and joint efforts, in addition to any investment that it had in Myers Canada. Together, these interests were protected as "Investments" under the terms of the NAFTA's Investment Chapter when Canada made its unlawful *PCB Waste Export Ban*.

*The NAFTA Services and Investment Chapters*

10. Finally, resolving the outstanding questions with respect to the "investor - investment" issue requires this Tribunal to deal with the inter-relationship of the NAFTA Investment and Cross-Border Services Chapters. Canada reiterates its arguments from the Merits Phase that its *PCB Waste Export Ban* was really a measure relating to cross-border service providers. It continues to argue that the services offered by S.D. Myers, Inc. to Canadian holders of PCB waste do not constitute an investment because S.D. Myers, Inc. was offering Canadian waste holders a service[7]. The Investor disagrees with Canada's submission and asserts in reply that Canada has misread the terms of the NAFTA dealing with the inter-relationship of the Investment and the Cross-Border Services Chapters.

[7] Counter-Memorial (Damages) at para. 101.

11. This Tribunal has already found that there are situations where more than one NAFTA Chapter could apply to a government measure[8]. A government regulation could apply at the same time to cross-border financial service providers, investments and cross-border service providers[9]. In order to deal with "multiple-aspect" situations, the NAFTA has some specific provisions identifying whether certain types of activities are covered as cross-border services or an investment. NAFTA Article 1201 provides that NAFTA Chapter 12 applies to measures adopted by a Party relating to cross-border trade in services. Paragraph 2 of the definition of a cross-border service provider in NAFTA Article 1213 provides that:

> *2. For the purposes of this Chapter:*
>
> *"**cross-border provision of a service**" or "**cross-border trade in services**" means the provision of 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 Party to a person on 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.*

Thus, a cross-border service provided by an investment (as defined by NAFTA Article 1139) in the territory of another NAFTA Party is not covered by the cross-border service provisions of the NAFTA. This is the clear and unambiguous expression of the NAFTA.

12. In the context of the present case, S.D. Myers, Inc. operated in Canada as an investment as defined by NAFTA Article 1139. To the extent that S.D. Myers, Inc. operated in Canada as an investment, it could not qualify as a cross-border service under the terms of NAFTA Article 1213 contrary to Canada's suggestion.

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[8] *Partial Award* at para. 294, 299.

[9] Indeed, the NAFTA Tribunal in the *Pope & Talbot* claim found that a government measure could apply to multiple NAFTA chapters at the same time. In that claim, the Tribunal found that Canada's Softwood Lumber Export Control Regime applied to trade in goods (NAFTA Chapter 3) as well as the NAFTA Investment Chapter. See *Re: Pope & Talbot & Canada*, Award re: "Measures Relating to Investment" at para. 33.

## B. Is the Investor Limited to Compensation only for Delay?

13. There is a fundamental difference in the approaches taken by Mr. Rosen and Mr. Rostant in the valuation of this claim that centered on the issue of how did the *PCB Waste Export Ban* harmed the Investor.

14. Canada suggests that the *PCB Waste Export Ban* merely delayed the opening of the PCB waste remediation market in Canada, and that it was the closure of the US border that really damaged the company some 18 months later. Canada argues that the Tribunal should only treat the *PCB Waste Export Ban* as a temporary delay in the regular business operations of the company. It states:

> *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* [10].

Mr. Rostant, in his Forensic Accounting Report, states:

> *To the extent nothing changed during the Delay Period and the PCBs were potentially available after the Delay Period, SDMI was therefore only delayed in obtaining the business*[11].

15. The Investor submits that Canada's submissions are not correct and that the evidence demonstrates that the Myers Companies were poised to obtain a significant amount of business in the Canadian PCB remediation market and would have during the 18 months between the closure of the border by Canada and the closure of the border by the United States. Thus, for the Investor, the closure of the US border represents an end date upon which damages occurring to the Myers Companies should be assessed, not the starting point.

16. Since Canada has only viewed the "Investment" as the loan advanced from S.D. Myers, Inc. to Myers Canada, Canada claims that the only damages should be the impact of this 14 ½ month delay on the return of expenditures to S.D. Myers, Inc[12] because S.D. Myers, Inc. still owned

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[10] Counter-Memorial (Damages) at para. 161.

[11] KPMG Investigations Report at 16 (emphasis added).

[12] Counter-Memorial (Damages) at para. 173.

the physical assets of Myers Canada at the time that the *PCB Waste Export Ban* was expired[13].

17. Moreover, Canada submits that this Tribunal should dismiss the Investor's claims for quotes that were still available for remediation once Canada re-opened the border on February 7, 1997[14].

18. In the alternative, Canada concedes that this Tribunal could compensate the Investor by reimbursing it for its expenditures made in Canada to Myers Canada[15]. On this basis, Canada states that the damages should be CDN $1,022,278. If the Tribunal were to consider the actions taken by S.D. Myers, Inc. to obtain business in Canada to be relevant, then this damage is increased by CDN $ 2,205,733 to total CDN$ 3,228,011[16].

19. The approaches advocated by Canada are simply inconsistent with the applicable international law and the Tribunal's determination in the Partial Award.

20. The *Revised Independent Valuation Report*, unlike Canada's Forensic Accounting Report, bases its assessment of that loss on the business activity would have been done by the Myers Companies during the relevant period.

21. Canada has failed to adequately respond to the valuation methodology presented by the Investor, and ignored this important principle. Canada could have provided a meaningful assessment of the Investor's damages on the same basis of presentation, but instead has relied upon a completely different methodology, which cannot apply if:

(A) This Tribunal determines that Canada must compensate the Investor for the harm caused to the Myers Companies arising out of Canada's breach; or

(B) The harm created by the *PCB Waste Export Ban* was the operative cause of the damage occasioned to the Myers Companies; or

(C) This Tribunal determines on the basis of the evidence before it that the Myers Companies did a substantial amount of economic activity before and during the *PCB*

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[13] Counter-Memorial (Damages) at para. 174.

[14] Counter-Memorial (Damages) at para. 158.

[15] Counter-Memorial (Damages) at para. 178.

[16] Counter-Memorial (Damages) at para. 181.

*Waste Export Ban* that was spoiled by the time that Canada rescinded its wrongful Ban.

22. The Investor submits that to adopt a "delay" approach would be improper and would not adequately compensate the Investor. It was the *PCB Waste Export Ban* that was the operative cause of the damage occasioned to the Myers Companies. For Canada's theory to be correct, Canada would need to prove that by the time of the border closure by the US government, the effect of Canada's wrongful actions had been completely undone by its reopening of the border. A review of the evidence indicates that in the period between the lifting of Canada's *PCB Waste Export Ban* and the imposition of the US border closure, the Myers Companies had not returned to the position that they would have been in but for Canada's *PCB Waste Export Ban*. Accordingly, it is simply not possible that the Myers Companies were only delayed, and that it was the US action that caused the real harm, for Canada to "lay the blame at the feet" of the US government.

23. On the other hand, the Investor's methodology considers Canada's unlawful *PCB Waste Export Ban* by assessing, not the entire potential Canadian market, but the very specific group of companies with which the Myers Companies had engaged in commercial discussions.

24. The Investor's approach can be summarized as follows:

(a) take the known business activity of the Myers Companies in Canada (this has been evidenced through the contracts upon which the companies bid or quoted);

(b) discount this activity by a specific factor to take into account the percentage of contracts that would have been reasonably completed based on evidence regarding the Myers Companies activities in the U.S. and on the state of the market in Canada. (This has been subdivided into one group of actual orders placed and another group of bids and quotes made by the company. The bids and quotes have had a sharply lower completion rate than the orders);

(c) calculate this value over the relevant period of disability (which is approximately 20 months) to obtain the expected lost gross revenue; and

(d) discount this expected revenue loss by the gross margin of the respective product being remediated to produce a loss of Incremental Cash Flow.

This loss of Incremental Cash Flow figure then constitutes the base amount to which the Investor and Investment are entitled under the NAFTA.

This loss must also be augmented by appropriate out of pocket losses and by an applicable rate of interest applied to the total of these figures to produce the total necessary to put the Investor and the Investment into the position they would have enjoyed but for the wrongful acts of Canada.

The effects upon the Myers Companies from Canada's unlawful *PCB Waste Export Ban*:

(a) diminished the revenue streams of Myers Canada and harmed S.D. Myers, Inc.'s revenue making potential;

(b) destroyed the head start enjoyed by the Myers Companies over other American PCB waste remediators;

(c) destroyed the competitive advantage enjoyed by the Myers Companies in the Canadian marketplace;

(d) eroded the book of bids and quotes obtained by the Myers Companies; and

(e) diminished the credibility of the Myers Companies in the Canadian market place.

25. The most valuable asset that the Myers Companies had was the goodwill which generated a book of quotes and orders. If unimpeded by Canada's actions, this goodwill combined with the infrastructure of the Myers Companies, would have resulted in a significant amount of business for the Myers Companies. The impact of the *PCB Waste Export Ban* was to make the Investor unable to act upon this goodwill and conduct its ordinary business in Canada.

26. Canada's approach, however, asserts that the goodwill of the Myers Companies was unaffected by the *PCB Waste Export Ban*[17], and that the Myers Companies were in just as good a position at the end of the *PCB Waste Export Ban* as they were just before its imposition (other than for a figure that Canada calculates would have been the Myers Companies' share of the actual PCB wastes destroyed in Canada during the period of the Ban). This approach is faulty:

(a) it assumes that the goodwill, the orders and bids booked by the Myers Companies would remain constant without variation over the nearly 15-month period of Canada's *PCB Waste Export Ban*;

[17] Counter-Memorial (Damages) at para. 174 .

(b) it fails to take into account the development of new competitors who would not have had any significant competitive presence when the *PCB Waste Export Ban* came into effect;

(c) it fails to account for any loss of goodwill that developed as a result of the Myers Companies inability to process PCB wastes as a result of Canada's *PCB Waste Export Ban*; and

(d) it uses a notional market share for the Myers Companies based on a time period after the harm occurred to the Myers Companies. Canada's assessment has grossly underestimated the competitive position of the Myers Companies within the Canadian PCB waste remediation market, and relies upon the effects of its own wrongful action to limit the compensation due the investor. A fundamental input into its model is therefore flawed.

27. During the period of the *PCB Waste Export Ban*, the Investment could not ship PCB wastes to the United States for processing. After the *PCB Waste Export Ban* was lifted, the Investor was unable to mitigate its damages because of the effects of the *PCB Waste Export Ban*. The damage done to the Investor was attributable directly to the unlawful action of Canada.

28. The only significance of the US closure of the border on July 20, 1997 is that it is an event that breaks the chain of direct causation arising from Canada's unlawful *PCB Waste Export Ban* and provides an ending point for the determination of the Investor's entitlement.

29. Canada, however, says that it is not July 20, 1997 that is the appropriate end point but February 7, 1997, when Canada re-opened the border. That approach, if adopted, would not fully compensate the Investor, because it would not taken into account that:

(a) there were new competitors in the Canadian marketplace because of the time provided to them to take up a position as a result of the *PCB Waste Export Ban*;

(b) the Myers Companies required time to ramp up their Canadian marketing team and also needed time to contact and rebuild its old customer leads after the reopening;

(c) there was a lag time, due to regulatory and logistical concerns, which would occur between the placement of an order and the time for pick up and site processing of that order (up to 45 days); and

(d) there was a marked diminution in the credibility of the Myers Companies due to their inability to access contracts upon which they had bids outstanding. This diminution of credibility turned into a destruction of the sizable goodwill of by the company.

30. Canada's next response is that by November 1995, S.D. Myers, Inc. only had two orders in Canada, which shows an 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[18]. The Investor rejects this view. Principally, the reason why the Myers Companies were unable to translate their extensive number of quotes and bids into firm orders was the fact that when the border finally did open, Canada promptly closed it in violation of its NAFTA obligations. Again, Canada is relying upon the consequences of its own wrongful act to limit the Investors' entitlement.

31. But for the imposition of the *PCB Waste Export Ban*, at the behest of Canadian competitors, the Myers Companies would have engaged in a significant amount of waste remediation in Canada. The inability of the Myers Companies to obtain this work as a result of Canada's actions is evidence of the direct harm caused to S.D. Myers, Inc. and Myers Canada as a result of Canada's unlawful *PCB Waste Export Ban.*

32. Canada commits the same error when it asserts that the value of the Canadian PCB market should be assessed only upon the basis of those PCBs that were actually destroyed during the *PCB Waste Export Ban*[19]. Since the amount of PCBs that were destroyed was small, Canada concludes that the actual damage done to the Myers Companies was small. This conclusion demonstrates Canada's misunderstanding of the nature of the harm done to the Myers Companies.

33. The fact that only a small amount of PCBs were remediated in Canada during the time of the *PCB Waste Export Ban* demonstrates the harmfulness of the ban in the light of the significant operations difficulties occasioned by Chem Security at its Swan Hills facility and the acknowledgment by Canadian officials that there were no real Canadian alternatives ready to step into S.D. Myers, Inc.'s shoes. Chem-Security was unable to process waste during a large part of this time due to a fire and environmental safety issues.

34. At the end of the *PCB Waste Export Ban*, Canada had been able to achieve one of its objectives of keeping S.D. Myers, Inc. out of its market so that domestic competitors could achieve market dominance. When the *PCB Waste Export Ban* was over, the Myers

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[18] Counter-Memorial (Damages) at para. 43.

[19] Counter-Memorial (Damages) at para. 189

Companies found that their head start in the market was lost and that there were now a large number of competitors accessing the Canadian market who would not have been competitors to the Myers Companies at the time that the *PCB Waste Export Ban* was made.

35. It is the Investor's position that the proper approach to determining the losses arising from Canada's unlawful action is that taken by the Investor's Independent Valuator. Such an approach would be entirely consistent with the applicable principles of international law and the facts in this claim.

36. Canada's actions wiped out nearly two full years of work to secure a book of orders, and bids and quotes. When nearly 15-months later Canada re-opened the border to the export of PCB waste, the Myers Companies were not able to recover the position they occupied at the time that Canada made its unlawful Ban. When the US government decided to close the US border to the import of PCB waste in July 1997, the Myers Companies still had not returned to the position that they had been at before Canada's wrongful act. Accordingly, Canada's attempt to lay the blame for the failure of the Myers Companies to succeed in Canada cannot be put at the feet of the United States Government.

37. The harm done by Canada resulted in permanent impairment to the Myers Companies[20]. Accordingly, this is not a delay claim. The international law principle of compensation is that Canada must put the investor into the position that it would have been but for Canada's wrongful act.

38. Finally, on these preliminary points, Canada has called into question the sufficiency of the *Independent Valuators' Report*[21]. The Investor submits that this report provides an accurate basis for this Tribunal to make findings of compensation. Canada says that there is considerable uncertainty as to what would have occurred but for Canada's closure of the border. According to Canada, Mr. Rosen's analysis is speculative[22].

39. As more thoroughly discussed in Part Three of this Reply, the Investor submits that the Investor's damages methodology is not speculative[23]:

(a) The Investor's model does not speculate as to what comprises the relevant market;

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[20] *Revised Independent Valuation Report* at 7 .

[21] Counter-Memorial (Damages) at paras. 183 - 184.

[22] Counter-Memorial (Damages) at para. 182.

[23] *Revised Independent Valuation Report* at 10 .

(b) The Investor does not identify the largest possible market but it relies only upon that portion where the ordinary business records of the company indicate that there was direct contact with the customer about the remediation of PCB waste in Canada;

(c) The PCB remediation business in Canada is not a new business for the Investor but an extension of a business line into an adjacent territory;

(d) The Investor has not claimed a success rate of 100% for all of the companies with which it had commercial contact, but a success rate that is based upon a conservative application of its existing market experience in a similar area in the more competitive United States market;

(e) The Investor has obtained independent review and verification of the appropriateness of its methodology;

(f) The *Customer Comments Listing* supports the market preference assumptions represented by management and used by the Independent Valuators;

(g) The Independent Valuator has had every item on the *Bids & Quotes Listing* reviewed so that an appropriate marginal rate can be applied to ascertain the amount of profit that would have been generated by the appropriate transaction;

(h) Interest calculations are based on the actual historic experience of the company; and

(i) All materials relied upon by the Independent Valuators have been provided to Canada so that they can independently review the valuation report.

40. To assist the Tribunal, the Investor has commissioned an evaluation of the different methodologies employed by Canada and the Investor by a third valuation expert, Jeffrey Harder of the firm of BDO Dunwoody in Vancouver, British Columbia. Next to Mr. Rosen, Mr. Harder appears to have the greatest amount of experience in Canada in dealing with NAFTA valuation issues as he has in fact attended as an observer for the Government of Canada on valuation during the hearings in another NAFTA Chapter 11 claim.

41. Mr. Harder concludes that the valuation methodology followed by Mr. Rosen is consistent with professional valuation and damages quantification techniques and that the methodology employed by Canada's expert is not appropriate in these circumstances. Specifically, Mr. Harder states:

> *LRTS used a proportion of the dollar value of all orders received and quotes issued from November 15, 1995 to July 20, 1997, in predicting Myers' revenue had the border not been closed. In our view, this is a reasonable methodology for predicting what Myers' revenue would have been but for the closing of the border.*[24]

In dismissing the appropriateness and sufficiency of the methodology employed by Mr. Rostant, Mr. Harder states:

> *KMPG suggests that because the estimation of what Myers earnings would have been had the border not closed is too speculative, a loss of earnings or cash flow approach to measuring damages is inappropriate. We disagree with this position. The nature of business valuation and damages quantification professional practice is to predict what a business' future earnings will be, or would have been but for an event which reduces or changes a company's earnings*[25].

42. In addition, Professor Roger Ware has independently reviewed the economic presumptions regarding the use of the "head start" theory used by Mr. Rosen in the *Independent Valuators' Report*. In Professor Ware's opinion, the head start theory in this Claim is appropriate and reasonable[26]. Indeed, Professor Ware commented that in his view, the valuator's assessment of the market was more credible than that suggested by Canada's economist in light of the significant head start enjoyed by the Myers Companies in the Canadian PCB waste remediation market[27].

43. Accordingly, the Investor submits that this Tribunal should adopt the view that this NAFTA Claim needs to be addressed by following the well-established international law principles regarding damages.

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[24] *Harder Report* at para. 10.

[25] *Harder Report* at para. 31.

[26] Expert Report of Professor Roger Ware at para. 18.

[27] Expert Report of Professor Roger Ware at para. 9.

## PART TWO: FACTUAL ISSUES

### I. The Market

44. The Investor submits that the Canadian PCB market in which the Myers Companies participated in the years 1993 to 1997 is simple to identify but that Canada has not appropriately identified this market. Canada's Counter-Memorial (Damages) mis-characterizes the methodology applied by the Investor and the Investor's Independent Valuators in calculating the damages caused by Canada's unlawful action in instituting and maintaining the *PCB Waste Export Ban*. In particular, Canada, on its own and through its experts, has appeared to confuse two basic concepts: the Canadian PCB waste remediation market and the listing of contracts upon which the Myers Companies (that is S.D. Myers, Inc. and Myers Canada) bid.

45. Canada has referred to PCB waste remediators such as S.D. Myers, Inc. as volume reducers[28]. This is not an accurate description of what S.D. Myers, Inc. did. The term "volume reducers" is used loosely to describe companies that reduce the level of PCB contamination to an acceptable limit and perform no further work.[29]

46. S.D. Myers, Inc. was a full-service PCB waste remediator[30]. It remediated PCB waste by taking away an entire waste product, such as an entire electrical transformer, treating the recyclable components under appropriate environmental regulations, recycling the re-usable elements from the transformer and its casing and removing the residual PCB waste.

47. The Myers Companies' principal competitor in Canada was Chem-Security. This was the only company that could and did compete with the Myers Companies all over Canada. Indeed, the *Customer Comments Listing* produced by the Investor indicates that with respect to the nearly 1000 companies to which bids and quotes were issued, Chem-Security was the competitor disclosed by the largest number of these companies[31].

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[28] Paragraph 13 of Counter - Memorial (Damages).

[29] Supplemental Statement of Dana Myers at para. 22

[30] Supplemental Statement of Dana Myers at para. 22.

[31] *Revised Independent Valuation Report* at Appendix D.

48. In his expert report on the state of the PCB market in Canada during the relevant time-period, Peter Wallace confirms that there were two real competitive forces within the Canadian PCB waste remediation market in 1995: Chem-Security and the Myers Companies[32].

49. Canada's 1995 national PCB waste inventory listed some 3,945 different PCB waste storage sites in Canada[33]. While this national inventory does not claim to identify all sites in Canada, it does appear to be the only available approximation of the inventory of PCB wastes at the time of the making of the *PCB Waste Export Ban*.

50. To obtain business in Canada, the Myers Companies looked to companies listed on the PCB waste inventory. While the Myers Companies advertised in Canadian magazines focussed on hazardous waste management, the largest part of Myers' time and effort was focussed on making direct contact with future clients. Starting in 1993, the Myers Companies began a contact campaign with Canadian holders of PCB wastes. The object of this campaign was to ascertain whether the company still had PCB wastes, and if so what kind and amount of wastes were available for disposal, whether the company intended to destroy the waste and whether the company was interested in employing the Myers Companies to destroy the waste.

51. In its Counter-Memorial (Damages), Canada asserted that the Investor's Claim should be discounted due to an absence of contemporaneous evidence demonstrating that the Investor and the Investment actually contacted PCB waste holders in Canada[34]. The *Customer Comments Listing* provided by the Investor demonstrates a contemporaneous electronic record evidencing some of the activity actually done by the Myers Companies to obtain business in the Canadian market.

52. The *Customer Comments Listing* shows that the Myers Companies contacted approximately 2500 different Canadian companies that held PCB waste in Canada to discuss potential work[35]. This Listing demonstrates that the Myers Companies had direct first-hand contact with a company officer handling PCB waste management in about two-thirds of the Canadian companies holding PCB wastes.

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[32] Statement of Peter Wallace at para. 28.

[33] Canada makes this admission at para. 157 of its Counter-Memorial (Damages).

[34] Counter-Memorial (Damages) at 7.

[35] A count of the number of companies contacted comes to 2517 but there is the possibility of some duplication due to similar names provided for the same company.

53. As a rule, the Myers Companies did not provide bids or quotes upon PCB wastes held by a company unless they were asked to do so. In the words of Dana Myers:

> *It was not worth our while to prepare quotes for cold-calls. We only prepared quotations for companies that had PCB wastes that they wanted to remediate and that we wanted to deal with.*[36]

54. S.D. Myers, Inc. found in the U.S. that they had a much higher success rate in obtaining contracts from companies that asked S.D. Myers, Inc. for bids than in obtaining contracts from cold-calls to the industry or from general advertising[37]. Not only did S.D. Myers, Inc. find this principle useful in its existing business lines, but it also found that the greater the amount of contact between a company and a potential client results in a greater likelihood of a successful business conclusion. This has also been supported in the report prepared by Professor Roger Ware, a professor of economics and industrial organization[38].

55. Out of the 2,500 companies contacted, the Myers Companies were asked to provide bids and quotes to some 600 companies dealing with nearly 1000 different PCB remediation contracts in Canada. It is upon these quotes for PCB remediation contracts that the Myers Companies have based their Claim for damages[39].

56. In this damage claim, S.D. Myers, Inc. has not represented that the nearly 1000 contracts upon which it provided bids and quotes represent the entire Canadian PCB waste remediation market. That market can be best identified as containing the totality of the national PCB waste inventory, which was considerably larger than the nearly 1000 contracts upon which the Myers Companies made bids[40]. This smaller list provides a sub-set of the Canadian PCB waste remediation market where the Investor, and its independent valuator, believe that there would be a higher likelihood of commercial success for the Myers Companies.

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[36] Supplemental Statement of Dana Myers at para. 16.

[37] Supplemental Statement of Dana Myers at para. 14(c).

[38] Expert Report of Professor Roger Ware at para. 24.

[39] Canada relies on an analysis of the respective letterhead used by Myers Canada and S.D. Myers, Inc. in the PCB waste remediation contracts upon which it bid to suggest that the two companies operated separately. This argument is an attempt to rely on form over substance. This Tribunal has already made the necessary findings that the Investor and Investment operated in tandem to compete in the Canadian PCB waste remediation market, and in competition with Canadian firms such as Chem-Security.

[40] In fact, the real Canadian PCB waste market could be even larger than that identified on the government's National Inventory due to undisclosed wastes. See Statement of Peter Wallace at paras. 9-10.

57. The Investor's approach only seeks damages for a percentage of that sub-set of the Canadian PCB waste market that actually had contact with the Investor and the Investment and that requested a quote on the PCB wastes that were held by that company[41].

58. As stated in the *Revised Independent Valuation Report*, the valuation methodology used does not include the population of other PCB inventories in Canada for which the Investor/Investment has not provided a fee quote. This is important because "[c]onsideration of this additional inventory would tend to increase the losses as calculated in the LRTS Report."[42]

59. Accordingly, Canada is simply incorrect when it suggests that the Investor's approach to the quantification of the Canadian PCB waste remediation market is erroneous, extravagant or speculative.

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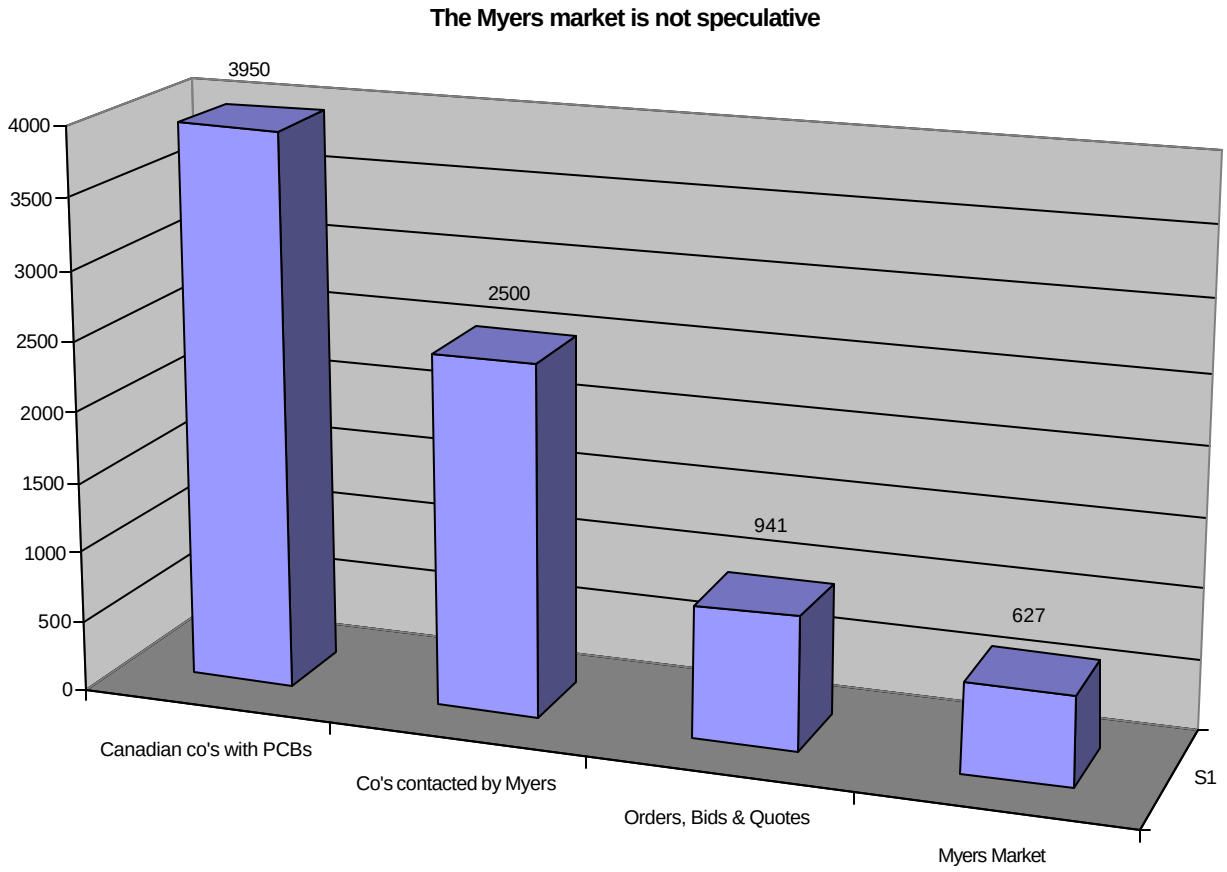
[41] At page 3 and following of the *Revised Independent Valuation Report*, Mr. Rosen states that the *Bids & Quotes Listing* was identified by interviewing employees and management at the Myers Companies and by it reviewing their business records. This Listing was then reviewed in light of any suggestions made by Mr. Rostant and then re-reviewed by Mr. Rosen and his staff in order to refine the accuracy of the listing.

[42] *Revised Independent Valuation Report* at 8. The Report goes on to explain that; "This distinction is absolutely critical to the assessment of the LRTS Report. **The losses in the LRTS Report are based on a percentage success rate being realized by the Investor/Investment on quotes actually issued to Canadian customers**. As the Investor/Investment did not issue quotes to every PCB holder (i.e. potential customer) in Canada, the Investor/Investment implied **market share** is substantially lower that the success rates in the LRTS Report . . . ." [emphasis in original].




60. Canada points to several categories of quotes that they claim are outside of the scope of this arbitration[43]. The Investor disagrees with the vast majority of Canada's observations, however, it does agree that there are a few cases where revision to the *Bids & Quotes Listing* is appropriate.

61. In response to the concerns expressed by Canada, the Independent Valuators have reviewed the entire set of material underlying the *Bids & Quotes Listing*[44] in preparation of a *Revised*

[43] Counter-Memorial (Damages) at para. 150.

[44] As a result a number of bids and quotes were removed by the Independent Valuators because of errors in the original inputting process. These errors included the inclusion of duplicate bids, cut-off errors involving bids for dates outside the relevant period, bids that were not for the disposal of PCB related materials, double-counted bids and unopened tenders that were not returned. Revised Independent Valuation Report at 4.

*Bids & Quotes Listing*. The *Revised Bids & Quotes Listing* sets out nearly 1000 different bids or quotes made by the Myers Companies for PCB waste remediation contracts in Canada for a total market value of $104 million[45].

62. During their review, the Independent Valuators were able to address previous concerns voiced by Canada regarding the production of contemporaneous evidence for the material comprising the Canadian market for the Myers Companies. At Canada's request, the Independent Valuators have located additional supporting material for bids made to 24 companies, which were already included in the *Bids & Quotes Listing*.

## II. Market Motivations

63. Canada argues that there were a number of independent factors that influenced the decisions of Canadian PCB waste holders, namely:

(a) Fear of US liability for exports of Canadian PCB waste;

(b) Lack of need to dispose of PCB wastes;

(c) The PCBs remaining in use; and

(d) Pricing concerns from quotes from the Myers Companies.

*Environmental Liability in the United States*

64. Canada argues that potential US liability was an important factor in the decision making of Canadian PCB holders on whether to dispose or store their holdings[46]. The Investor disputes this submission.

65. A review of the *Customer Comments Listing* demonstrates that the vast majority of companies either were clearly not worried about environmental liability arising from shipping

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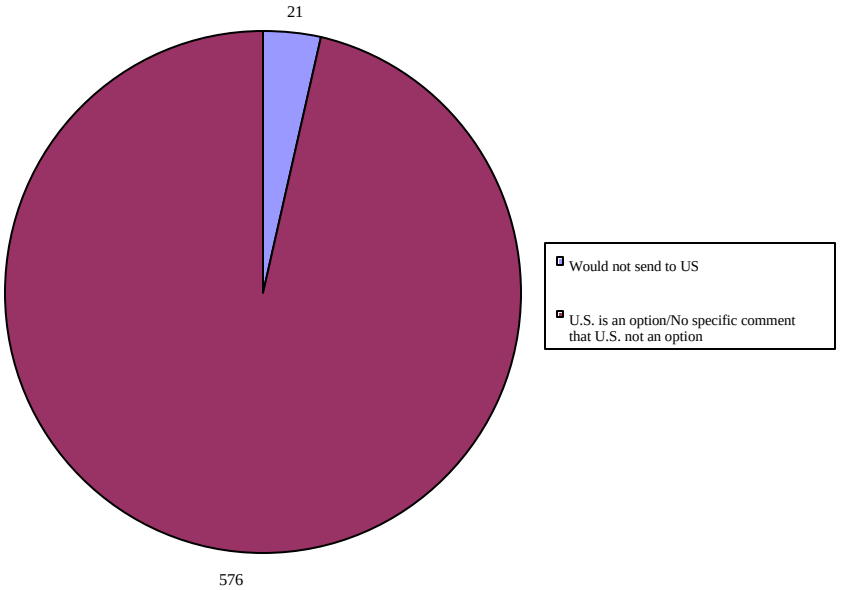
[45] As a result of this third revision, the *Independent Valuators' Report* has submitted a listing of 947 bids, contracts and quotes on a master recording of 1055 tabs. Due to the revisions made in response to Canada's Counter-Memorial (Damages) and Mr. Rostant's Report, the Investor has maintained the original tab numbering used in the initial production filed with the Memorial (Damages) and then augmented it with additional bid identifier numbers. This will result in a consistent set of document numberings throughout this phase and also explains why the *Revised Bids & Quotes Listing* identifies 1055 tabs for only 940 bids and quotes.

[46] Counter-Memorial (Damages) at para. 36.

PCB wastes to the United States, did not express any concern about US liability or were aware of US liability issues but did not consider them important enough to dissuade the companies from shipping PCB waste to the United States[47].

66. The *Revised Independent Valuation Report* provides a chart[48] indicating the importance placed on US environmental liability by the companies with which S.D. Myers, Inc. had commercial contacts in Canada. These results, based on contemporaneous notations taken by the sales and marketing staff dealing with Canada in S.D. Myers, Inc.'s Tallmadge, Ohio offices, indicate that Canada's representations that US environmental concerns dissuaded Canadian companies from contracting with the Myers Companies are simply wrong. Of all the comments recorded, only 21 companies indicated that they had strong enough concerns to prevent them from shipping PCB waste to the United States at the time, another 576 companies simply did not consider it necessary to even raise this issue or stated that the US was an option. Accordingly, the Investor submits that contemporaneous evidence indicates that Canada is simply incorrect when it suggests that US liability concerns were a real decision-making factor for the Canadian PCB waste holders contacted by the Myers Companies[49].

**The Vast Majority of PCB Holders Would Ship to the U.S.**




[47] See the *Revised Independent Valuation Report* at 27.

[48] *Revised Independent Valuator's Report* at *27.*

[49] Statement of Peter Wallace at paras. 11-15.

*Canadians Wanted to Remediate PCB Waste*

67. Canada states that Canadian PCB waste holders were not eager to treat their PCB waste because in 1995 "disposal was not an urgent requirement". Canada suggests that lack of eagerness was an important decision-making factor for the Canadian PCB market[50].

68. The evidence provided by the Investor indicates that Canada is mistaken about this concern. The *Customer Comments Listing* shows that only 26 out of 597 companies stated that they were inclined to continue to store their PCBs rather than dispose them[51].

69. In his witness statement, Peter Wallace indicates that central Canadian PCB waste holders had been waiting for some time to destroy their PCB wastes because no Canadian remediator could process the job until 1995, when Chem-Security was permitted to accept waste from outside Alberta [52]. Mr. Wallace also indicates that the announcement by Chem-Security that it would then process Canadian waste resulted in a paradigm shift within the Canadian market as then PCB waste holders in Central Canada could have their waste removed and remediated [53]. This desire to treat wastes was increased by the opening of the US border and strong market presence of the Myers Companies in Canada. Mr. Wallace described the entry of the Myers Companies coupled with the opening of the Canadian border to exports as contributing to the momentum for disposal over continued storage[54]. Mr. Wallace disputes the characterization made by Canada in its Counter-Memorial (Damages) that Canadian PCB waste holders wished to store their wastes in November 1995 rather than destroy them. In fact, Mr. Wallace strongly suggests that the market sentiment was exactly the opposite [55].

70. Many holders of PCB wastes in Canada were very anxious to rid themselves of environmental liability related to the storage of these wastes. Contrary to Canada's suggestion that PCB waste

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[50] Counter-Memorial (Damages) at para. 42.

[51] *Revised Independent Valuation Report* at 23 - 24.

[52] Statement of Peter Wallace at para. 6.

[53] Statement of Peter Wallace at paras. 6, 8.

[54] Statement of Peter Wallace at para. 18.

[55] Statement of Peter Wallace at para. 6, 18.

holders were not interested in disposal options, the *Customer Comments Listings* and the Expert Report of Peter Wallace clearly indicate this was not the case. According to Mr. Wallace, most PCB waste holders wanted to get rid of their inventories and some were so eager that they were even willing to pay the inflated prices charged by Chem-Security.[56] This, combined with the fact that the Myers Companies had very competitive pricing suggests that the disposal option was clearly more attractive than storage.

*In-use PCBs Were Not a Factor*

71. Canada suggests that since S.D. Myers, Inc. included several examples of in-use PCB wastes within its market approximation these wastes should not be included within the Canadian PCB market calculation as it would take too long to remediate them. The Investor disagrees with Canada's conclusions about in-use PCB wastes.

72. The vast majority of bids and quotes issued by the Investor were for PCB wastes that were in storage. Dana Myers reports that if a customer wished to obtain a quote for PCB waste that was in-use the company would comply as generally this was an indication that the device was going to be taken out of service[57]. Since all in-storage PCB wastes initially come from in-use PCBs, it is reasonable to conclude that the Myers Companies would provide bids and quotes on in-use PCBs.

*Pricing Issues*

73. Canada suggests that Canadian PCB waste holders would have stored their wastes rather than remediate them. Canada's only support for this critical assumption is the fact that according to Canada it was cheaper to store PCBs than to remediate them. Since Canadians holding PCBs exhibited a concern about the price for PCB waste disposal, Canada concludes that they would not quickly dispose of their PCBs at the time of the making of the *PCB Waste Export Ban*[58]. The Investor disagrees with Canada's reasoning on this important issue.

74. There is no debate that holders of PCB wastes wanted to have them remediated in a cost-effective manner. Indeed, in 1995, it is reasonable to conclude that Canadian PCB waste owners would have been concerned about the price of PCB waste remediation given the very large difference in price between the high prices quoted by Chem-Security and the lower prices quoted by the Myers Companies. Since the Myers Companies quotes were significantly lower

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[56] Statement of Peter Wallace at paras. 34.

[57] Supplemental Statement of Dana Myers at para. 18.

[58] Counter-Memorial (Damages) at para. 43.

than those of Chem-Security, Canadian PCB waste holders reacted very favourably to the Myers Companies[59]. As Mr. Wallace states, the PCB waste disposal market was "price-driven", and if the border had been open, "PCBs would have flowed south to S.D. Myers, Inc."[60]

75. Canada suggests that Canadian PCB waste companies would not engage in PCB waste remediation contracts in a market with declining prices[61]. The Investor cannot agree with this characterization, which fails to consider the desire of Canadian waste holders to remediate their PCB wastes.

76. The *Customer Comments Listing* indicates that at least 105 companies on the *Revised Bids & Quotes Listing* disclosed that they disposed their PCB wastes with Chem-Security during the period that the border was closed to exports[62]. Clearly, if these PCB wastes were treated by Chem-Security during the period where the *PCB Waste Export Ban* was operational, then pricing, although critical, was not the only determinant of market decision making.

77. Mr. Stillman's analysis of price sensitivity amongst PCB waste holders is incorrect. Professor Ware addresses this error in Stillman's analysis by concluding that the term "price sensitive" is used by Mr. Rosen to reflect the decision that PCB waste holder's make in determining whether they would store or dispose. They are price sensitive when making that decision, and once they have decided it may be more costly to then switch back again. Contrary to what Mr. Stillman's suggests, Mr. Rosen does not assert that price is an important consideration in deciding whether or not to switch suppliers of PCB disposal services but rather when choosing whether to store or dispose.[63]

78. Canada has adverted to the ongoing reduction of prices in the quotes made by the Myers Companies when attempting to re-enter the Canadian PCB remediation market[64]. This deterioration of revenue potential illustrates some of the damage done by the effects of the 18 month delay caused by the *PCB Waste Export Ban*.

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[59] Statement of Peter Wallace at para. 31.

[60] Statement of Peter Wallace at paras. 16, 24, 40.

[61] Counter-Memorial (Damages) at para. 42.

[62] *Revised Expert Valuation Report* at Appendix D.

[63] Statement of Prof. Roger Ware at para. 36.

[64] Counter-Memorial (Damages) at para. 60.

79. Canada also asserts that the failure of S.D. Myers, Inc. to obtain more than two completed orders in the five days before the Canadian border became closed to it in 1995 is evidence that the Canadian PCB waste holders did not want to destroy their waste in and were waiting for further price reductions[65]. Canada's only proof for this view comes from a conclusion that Canada draws from the evidence. Canada asserts that:

> *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*[66].

The Investor disagrees with these assertions.

80. Canada's assertions ignore the importance that Canadian companies put on ridding themselves of the liability concurrent with holding PCB wastes. The Investor's Canadian PCB waste market expert, Peter Wallace, describes the impact that the tragic PCB fire in St. Basil-Le-Grand, Quebec had on Canadian PCB waste holders. He states that the St. Basil fire demonstrated the costs that could be incurred by Canadian companies that stored their PCBs. When Chem-Security announced that it could process Pan-Canadian PCB wastes, the Canadian PCB market began to seriously consider having their PCB wastes remediated. It also made it easier for companies that had PCBs in active use to consider taking them out of use, as these wastes could now be treated[67].

81. In his expert report, Peter Wallace reports that Canadian PCB waste holders were satisfied with the prices provided by the Myers Companies and were eager to take advantage of those prices[68]. In light of this finding, Canada's representations that companies were waiting for even better pricing to occur from Canadian companies before contracting with the Myers Companies are simply excessive.

*The Faulty White Survey*

82. Canada relies on a survey conducted by Mr. White of potential Canadian PCB waste remediation customers contacted by S.D. Myers, Inc. Mr. White based his survey on an initial

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[65] Counter-Memorial (Damages) at para. 43.

[66] Counter-Memorial (Damages) at para. 45.

[67] Statement of Peter Wallace at paras. 11 -13.

[68] Statement of Peter Wallace at para. 31.

list of 45 companies that were contacted in 2001 about their attitudes during the period of the *PCB Waste Export Ban.* Only 29 companies responded to Mr White's questionnaire.

83. Mr. White reports that the survey candidates were selected at random from companies that appeared in correspondence produced by the Investor in the first phase of this arbitration[69]. Mr. White does not disclose why he selected companies from this source rather than from the actual *Bids & Quotes Listing* produced by the Investor with its Memorial (Damages). Mr. White also does not disclose particulars about how he selected these companies and whether the contacts were made by him or by someone else.

84. The collection of correspondence on which Mr White relies represents at best a fraction of the market for which the Investor now claims damages. Mr. White has drawn 29 companies out of a sample of 73 (there being only 73 companies in the correspondence on which he relied)[70]. By contrast, the Investor has analysed over 900 bids and quotes. These materials were available for Mr. White to analyse for himself, yet he chose to rely instead on a much narrower sample[71].

85. Mr. White claims that his findings indicate that the potential risks of disposing PCBs in the United States weighed heavily on the minds of potential Myers customers. The risks identified by Mr. White are US legal liability, uncertainty about the border opening, "red tape", and the need for liability insurance[72]. In short, Mr. White paints a picture of Canadian PCB holders paralysed by fear from doing business with S.D. Myers, Inc. because it handled PCB waste in the United States.

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[69] White Report at 35. The correspondence referred to may be found in the Joint Books of Documents, vol. 2 at tab 72. There is a total of 73 companies referred to in this material.

[70] While there is some overlap between the companies Mr White surveyed and the *Revised Bids & Quotes Listing*, there is also some divergence. Thus, of the 29 companies that responded to Mr White's survey, four of them represent companies for which the Investor is not claiming any damages. (The four companies listed by Mr White but not appearing in the Investor's bids and quotes listing are Kawartha Ridge District School Board, Quno Corporation, Thomas Specialities Ltd., and Toronto Transit Commission.) Of the remaining 25 companies, there are 23 which appear both on the *Revised Bids and Quotes Listing* and in the *Customer Comments Listing*. Also, of the 29 companies surveyed, five do not appear in the *Customer Comments Listing*. (They are 3M Canada Inc, Kawartha Ridge District School Board, Quno Corporation, Thomas Specialities Ltd., and Zircatec).

[71] By unnecessarily constraining himself to such a small sample, Mr White has put into question the representative value of his findings.

[72] White Report at 37 - 38.

86. However, a review of the Investor's contemporaneous *Customer Comments Listing* reveals a very different picture. The Investor's analysis reveals that the majority of these companies did not express the concerns about shipping to the US ascribed to them by Mr. White. This is in keeping with the Investor's findings over the entirety of the *Revised Bids & Quotes Listing*[73].

87. One company relied on by Mr. White is Chrysler Canada. In response to Mr. White's 2001 survey, Chrysler Canada reportedly expressed "serious concerns with U.S. liability"[74]. The Investor's contemporaneous *Customer Comments Listing* tells an altogether different story.

88. In August 1995, the Investor recorded in its *Customer Comments Listing* Chrysler's responses to a questionnaire sent by the Investor. Chrysler stated that were the border opened "in the following weeks", they "would be interested to give us an order to do the work"[75]. There is no indication of concerns over US liability here. Indeed, some suspicion of Canada's motives in keeping the border closed is recorded in an entry of early October 1995, where a Chrysler representative informed S.D. Myers, Inc. of a report that Chem-Security was lobbying the federal government not to permit PCB exports until it reached full capacity[76].

89. Following the imposition of Canada's unlawful *PCB Waste Export Ban*, notes in the *Customer Comments Listing* from November and December 1995 record that Chrysler, together with General Motors and the Ford Motor Company, were lobbying the Minister of the Environment to allow PCBs to cross the border[77]. The three companies had a meeting scheduled with the Minister to discuss the matter.

90. Customer comments from 1996 reveal that Chrysler remained interested in doing business with the Myers Companies in spite of the *PCB Waste Export Ban*. In particular, the Chrysler representative told the Myers salespeople their price was 'great compared to Chem-Security'[78]. As 1996 wore on, Chrysler began expressing doubts that the border would open. In late 1996, the *Customer Comments Listing* records that Chrysler sent a large PCB shipment to Chem-Security. Yet even after that time, in January 1997, Chrysler remained

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[73] *Revised Independent Valuation Report* at 27 - 28.

[74] White Report at 70, response 4(b).

[75] *Customer Comments Listing*, Part A at 369

[76] *Customer Comments Listing*, Part A at 369.

[77] *Customer Comments Listing*, Part A at 368.

[78] *Customer Comments Listing*, Part A at 369.

interested in staying in touch with S.D. Myers, Inc. in case more PCBs were discovered[79]. It was only in February 1997 that Chrysler communicated to Myers salespeople that "Chrysler Canada has taken the position to not send their PCBs to the U.S.A."[80].

91. In summary, the customer comments for Chrysler Canada reveal that the company was clearly not concerned about US liability at the time Canada promulgated its unlawful *PCB Waste Export Ban*, and remained unconcerned for much if not all of 1996.

92. The Investor submits that Mr White's survey results are unreliable for the following reasons:

(a) They were drawn from a biassed and unrepresentative sample;

(b) There are serious methodological flaws with Mr. White's methodology which makes the accuracy of the study unknown;

(c) There are serious concerns with respect to the knowledge of the undisclosed company respondents; and

(d) There are concerns with respect to the completeness and bias contained within the questionnaire itself.

93. Clearly there are discrepancies between Mr. White's findings and the recorded evidenced in the *Customer Comments Listings*. It is for the Tribunal to determine which is the more credible record. In the Investor's submission, the *Customer Comments Listing* represents a contemporaneous record of customer attitudes and concerns from 1995 to 1997, while Mr White's survey represents only unrepresentative reconstructions and recollections.

94. Given the many flaws with Mr. White's study, the Investor submits that his results are simply not credible. They fly in the face of the contemporaneous client comments maintained by the Investor, and the first hand market impressions of two different market participants, Mr. Wallace and Mr. Myers. Thus, the Investor submits that Mr. White's conclusions should not be given any weight by this Tribunal.

## III. US Market Share

[79] *Customer Comments Listing*, Part A at 370.

[80] *Customer Comments Listing*, Part A at 370.

95. Canada questions the overall US market share of S.D. Myers, Inc. and provides market share figures to imply that the US market experience of S.D. Myers, Inc. is not a useful proxy to determine the success of the Myers Companies in the Canadian market[81]. The Investor submits that Canada's use of market share is misleading and its conclusions incorrect.

96. First, it must be noted that Canada relies upon a market share analysis based on alleged experiences of the Myers Companies in the Canadian market during the "open period" of February 7 to July 20, 1997[82] rather than relying upon the US market share figures provided in Berkowitz Report. Canada only relies upon the Berkowitz Report to show that S.D. Myers, Inc. enjoyed a leadership position in the US transformer market. This supports the Investor's argument. Accordingly, the Investor submits that the Tribunal should give little or no weight to the analysis in the Berkowitz Report.

97. Canada simply mischaracterizes the Investor's claims about market share. The Investor has not claimed a market success rate for the *entire* Canadian PCB waste remediation market. Rather, the Investor claims only in relation to those PCB inventories upon which it made bids and quotes. This approach relies on actual evidence of existing commercial relationships between the Myers Companies and Canadian waste holders, and is therefore not speculative (as Canada contends).

98. Moreover, the Investor does not rely upon the US market share of S.D. Myers, Inc. to model its success in the Canadian market. The Investor submits only that its dominant position in the U.S. transformer market provides support for the general proposition that the Myers Companies would also have been successful in the Canadian PCB remediation market[83].

99. The success rate selected by the Independent Valuators is based on the historic success rate of S.D. Myers, Inc. in turning quotes into purchase orders in the US PCB waste remediation market. This success related primarily to transformers, but also related to more comprehensive "turnkey" disposal service including, for example, ballasts, capacitors and soils. This success rate was challenged by Mr. Rostant, who suggested it inappropriately relies on the Investor's success in the US transformer market.[84] The Investor disagrees with Mr. Rostant.

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[81] Counter-Memorial (Damages) at para. 31 and Berkowitz Report at Table "C" ("Berkowitz Report").

[82] Counter-Memorial (Damages) at para. 188 and Lexecon Report at para. 30.

[83] *Revised Independent Valuation Report* at 26.

[84] KPMG Report section 6.1 at 25.

100. PCB waste derived from transformers is the most difficult of all PCB waste to dispose. The Myers Companies were experts in transformer remediation, and could have leveraged their strength in this field to offer a full "turnkey" service for disposal of all a waste holder's PCBs. Furthermore, the U.S. success rate used as a proxy by the Independent Valuators was based on a U.S. experience where the Myers Company did not enjoy as strong a competitive advantage as it had in Canada. Accordingly, the success rate used in Canada likely understates the performance of the Myers Companies[85].

101. Both Professor Ware[86] and Mr. Rosen[87] found that, had the border remained open between November 1995 and July 1997, S.D. Myers, Inc. could have used its known leadership in the US transformer market to obtain a larger market position in the entire Canadian PCB waste remediation market. Similarly, Mr. Wallace observes that the Myers Companies' ability to dispose of transformers, combined with their ability to provide "turnkey" solutions, gave them a distinct competitive advantage over the existing players in the Canadian market.[88] Accordingly, as recycling transformers containing PCB wastes was the "most profitable segment of the market"[89], this was the market segment that the Myers Companies were seeking to exploit had the border remained open in 1995.[90]

102. The success rate selected by the Independent Valuators was based upon interviews undertaken with senior management of the Investor. Canada's Forensic Accounting Expert contends that the Independent Valuators relied improperly upon these managerial representations.[91] For further support of the success rate decided upon by the Independent Valuators, the Investor now provides a contemporaneous business record of bids and quotes made by S.D. Myers, Inc. in the US transformer market for the years from 1995 to 1997.[92] This document indicates that the Investor experienced a success rate of 75% (67% on a monetary value basis) during that period.

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85 *Revised Independent Valuation Report* at 27.

86 Expert Report of Prof. Roger Ware July at para. 27.

87 *Revised Independent Valuation Report* at 19-20.

88 Statement of Peter Wallace at para. 32.

89 Admitted by Canada in their Counter-Memorial (Damages) at para. 32.

90 Supplemental Statement of Dana Myers August 3, 2001 at 18.

91 KPMG Report, Section 6.1 at 29.

92 *Revised Independent Valuation Report* at 20.

103. In conclusion, the Independent Valuators stand by their success rate, as does the Investor.[93]

## IV. Competition and the Head Start Theory

104. Canada relies on its expert economist, Mr. Stillman, to argue that because the Myers Companies were not "first movers" their compensation for the loss occasioned by the Canada's ban is limited. Further, Stillman argues that because the cost of PCB waste holders switching from the Myers Companies to Chem-Security was not large, this must mean that, even if the Myers Companies did have a first mover advantage, it was small at best.[94]

105. In reply to Mr. Stillman's opinion on the issue of the head start benefit that the Myers Companies enjoyed, the Investor has sought the expert opinion of Professor Roger Ware, an economist from Queens University who specializes in, *inter alia,* strategic behaviour and first mover advantage.

106. Professor Ware argues against Mr. Stillman's suggestion that the Myers Companies were the second mover because Chem-Security was already established completely misses the point. The real issue is whether the Myers Companies were first movers vis-a-vis other US competitors. Neither Canada, nor its expert Mr. Stillman, have produced any evidence to indicate that Myers was not the first mover in Canada relative to its US competitors. Moreover, the fact that the Myers Companies were more competitive in terms of pricing and distance from the majority of Canadian PCB holders, effectively made them a first mover even compared with Chem-Security.[95]

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[93] *Revised Independent Valuation Report* at 20.

[94] Canada's Counter Memorial (Damages Phase), at paras. 165 & 166

[95] Expert Report of Prof. Roger Ware at para. 31-33. Professor Ware specifically confirms the importance of this by stating:

> *Ultimately, whether or not a firm obtains a dominant share of its market depends on the pricing, costs and the quality of its product. As Stillman himself acknowledges, some firms that have established dominance in a market were not literally the 'first movers'. Stillman uses the example of Microsoft, which is dominant in the word processing and spreadsheets markets. Microsoft was not the first company to develop products for these markets, but it has maintained its strong market position largely because of the quality of its products and its efforts to maintain its competitive advantage. Similarly, it is likely that SD Myers, despite not being literally the first company in the Canadian PCB remediation market, would have maintained a strong market position because it was the dominant U.S. supplier and offered a substantial price*

107. Stillman does not substantiate why he is of the opinion that switching costs are a condition to having a first mover benefit. Moreover, Stillman ignores the possibility that a firm can obtain a competitive advantage for reasons other than switching costs. In refuting Stillman's conclusions, Professor Ware explains why the Myers Companies would have enjoyed a competitive advantage but for Canada's ban. Professor Ware states:

> *Stillman's rejection of Rosen's 'head start' argument is based on the premise that a 'first mover advantage" ...can only exist in a market where it is costly for consumers to switch suppliers...Stillman does not consider the possibility that a firm can obtain a sustainable competitive advantage for reasons other than the existence of switching costs, nor does he explain why he believes that switching costs are a necessary pre-condition for the existence of a first-mover advantage.*
>
> *Stillman's premise is patently untenable: it is widely acknowledged by economists that in a wide range of circumstances, early entrants into a market can earn substantial benefits not available to later entrants. Since his argument is primarily based on his assertion that there are no consumer switching costs in the market for PCB disposal services (as I explain below, Stillman's logic in establishing this assertion is itself faulty), I cannot agree with Stillman's conclusion that the Investor's 'head start' could not have resulted in a sustainable competitive advantage.*[96]

108. Professor Ware concludes that the Myers Companies would have established market dominance in Canada based on its activities and confirms that the 'but for' analysis employed by the Investor's *Independent Valuation Report* is an appropriate methodology to assess the damages suffered by the Myers companies. Contrary to Stillmans suggestion that the Myers Companies did not have a head start over their competitors, Professor Ware states that:

> *...Central, therefore, to the "but for" scenario is an assessment of the market share of this inventory that SD Myers could reasonably have expected to achieve but for the Event*.[97]
>
> *...I find that Rosen's argument that the Investor's early entry into the market would have provided it with a competitive advantage in the form of high market*

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*advantage over the same service supplied by Chem-Security*.

[96] Expert Report of Prof. Roger Ware at para. 18 .

[97] Expert Report of Prof. Roger Ware at para 9.

> *shares and high margins had the event not taken place to be consistent with the facts as I understand them*.[98]

109. The argument that the Myers companies were not first movers is further weakened by the fact that no American competitor to the Myers Companies took steps to develop a strong market presence in Canada[99]. The *Customer Comments Listing* demonstrates the lack of organized US effort from other companies, illustrating that during the 1995 - 1997 time period, no American competitor of the Myers Companies undertook a comprehensive sales and marketing campaign in Canada that reached the companies on the *Revised Bids & Quotes Listing*[100].

110. By the summer of 1995, the Myers Companies had achieved a position of incumbency in the Canadian PCB waste remediation market. As a result of their extensive marketing efforts, the Myers Companies were well known and had a well-developed book of business. As Professor Ware states:

> *...establishment as an effective competitor in the Canadian market requires more than just regulatory approval, and the apparent lack of effort by US firms to penetrate the Canadian market in the period leading up to the Event strongly suggests that these firms would not have been effective rivals to the Investor in the period immediately following the Event*[101].

111. The *Customer Comment Listings* demonstrate the extensive relationships established by the Myers Companies. These relationships provided a valuable head start over other competitors seeking to obtain business in this market. For example, the *Customer Comments Listing* demonstrates that of the 302 companies which commented on competitors, Chem-Security was mentioned by 164 of the companies[102]. Furthermore, no other Canadian or any American competitor was mentioned in over 265 (out of a pool of 597 commenting companies) of the comments made by companies comprising the *Revised Bids & Quotes Listing*.

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[98] Expert Report of Prof. Roger Ware at para. 18 .

[99] See the Statement of Peter Wallace at para. 33; the Supplemental Statement of Dana Myers at para. 30; and the *Revised Independent Valuation Report* at 36-39.

[100] *Revised Independent Valuation Report* at 36.

[101] Expert Report of Prof. Roger Ware at para. 20.

[102] See Appendix D and pages 16 (footnote 12), 26-27 of the *Revised Independent Valuation Report* for an analysis of the *Customer Comments Listing* with respect to competitors and PCB waste holders concerns expressed to the company during the relevant period of time.

112. In summary, Professor Ware refutes the application of the head start theory advanced by Mr. Stillman and concludes that it is appropriate to attribute a head start to the Myers Companies given the facts of this claim. He states:

. *The implication for SD Myers in the period of market closure following the Event is that any reasonable prediction of their market share, given their incumbency status, would have had them enjoying a dominant position throughout most of this period. It is unlikely that other US firms, with no presence in the Canadian market, would have taken significant market share away from SD Myers within a period of a year or so, and then only gradually for the remainder of the period* [103].

This view supports the position taken by the *Independent Valuators' Report* and the *Revised Independent Valuation Report* by Mr. Rosen. Furthermore, the head start that the Myers Companies received are confirmed by the observations of Peter Wallace[104] and Dana Myers[105], who both operated companies actually involved in the Canadian PCB waste remediation market during the relevant period.

## V. Capacity

113. Canada has characterized the Investor's claim as speculative, arguing that it is based on proposed increases to the capacity of S.D. Myers, Inc.'s Tallmadge facility which were either not planned or not reasonable.[106]

114. The Investor responds first by noting that the degree to which plant expansion and capacity increases would have been needed has been overstated by Canada. Among these are types of PCB waste which would never have been processed at the Tallmadge facility in the first place. In particular, PCB-contaminated soils would have been processed by another facility licensed for that purpose. The impact of new Canadian PCB waste shipments on the capacity of the Tallmadge facility must be adjusted downwards to account for these sorts of PCBs wastes[107].

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[103] Expert Report of Prof. Roger Ware at para 25.

[104] Statement of Peter Wallace at para. 44.

[105] Supplemental Statement of Dana Myers at paras. 29 - 31.

[106] Counter-Memorial (Damages) at para. 123.

[107] *Revised Independent Valuation Report* at 5.

115. Canada contends that the Investor has failed to prove it had a plan to expand its facilities to accommodate increased business from the Canadian market[108]. The investor rejects this assertion.

116. Mr. Bob Rasor is the plant manager for the Tallmadge, Ohio facility of S.D. Myers, Inc. In his Witness Statement, Mr. Rasor explains that there was no need to develop a formal expansion plan, because he knew from past experience what expansion would require and how it would occur.[109] Expansion was a simple matter that would have been effected either by adding labour or by incremental capital improvements.[110] Mr. Rasor has provided a video with his witness statement which demonstrates the process and equipment used at the Tallmadge facility to remediate PCB wastes.

117. Mr. Rasor's Witness Statement demonstrates that Canada's sole reliance upon "financing applications, permits, and plans"[111] as proof of S.D. Myers' capacity to expand is mistaken and misleading. Increasing the capacity of the Tallmadge facility was a straightforward affair that left no documentary records precisely because it was relatively easy and inexpensive.

118. Canada also argues that for S.D. Myers, Inc. to increase its capacity in an industry where the supply of PCBs was finite and shrinking made little sense.[112] From this mistaken assumption, Canada would have the Tribunal conclude that S.D. Myers, Inc. would not have expanded its capacity, and therefore should not be permitted to claim damages for waste remediation work that would have been beyond its capacity at the time Canada imposed its unlawful *PCB Waste Export Ban*.

119. Canada's argument on this point is misguided. Canada argues that the PCB market was shrinking. Yet, seen from the perspective of S.D. Myers, Inc., the supply of PCBs in the market would have increased dramatically were it not for Canada's unlawful act. That is precisely why S.D. Myers lobbied for so long to open the borders. Canada says it "makes little sense" to increase capacity in such a case. What is truly nonsensical, however, is Canada's proposition that a company, faced with the opportunity of gaining such a significant source of new business,

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[108] Counter-Memorial (Damages) at para. 153.

[109] Statement of Bob Rasor at para. 15.

[110] Statement of Bob Rasor at para. 14.

[111] Counter-Memorial (Damages) at para. 153.

[112] Counter-Memorial (Damages) at para. 123.

would balk at that opportunity from unwillingness to invest in minor capacity improvements of the sort described by Mr. Rasor.

120. Canada has relied on certain statements made by the President of S.D. Myers, Inc., Dana Myers, to the EPA in 1995 as proof that S.D. Myers, Inc. would not have increased its capacity to handle PCB wastes.[113] In his Supplemental Statement, the President of S.D. Myers, Inc., Mr. Dana Myers, explains the context and significance of his statements to the EPA.[114] In particular, Mr. Myers notes that no expansion of the actual facility in Tallmadge was needed, since there was extra space on the existing site.[115] Mr. Myers also notes that the Tallmadge facility was running below capacity at the time he addressed the EPA,[116] and confirms Mr. Rasor's statement that small capital investments would have sufficed greatly to increase plant capacity.[117] Finally, Mr. Myers observes that his submissions to the EPA were made before he became aware that the company's major Canadian competitor, Chem-Security, had obtained permission to treat PCB waste from outside Alberta.[118]

121. Mr. Myers' submissions to the EPA reflected his views at that time and did not constitute a "pledge" as asserted by Canada.[119] The only obligations placed upon S.D. Myers, Inc. in the handling of imported PCB wastes were those contained in the terms of the Enforcement Discretion and the relevant US EPA laws and regulations governing the handling of PCBs.[120]

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[113] Counter-Memorial (Damages) at para. 123. See also the White Report at pp. 10 and 41.

[114] Supplemental Statement of Dana Myers at paras. 47-55.

[115] Supplemental Statement of Dana Myers at para. 47(a).

[116] Supplemental Statement of Dana Myers at para. 47(b).

[117] Supplemental Statement of Dana Myers at para. 47(c).

[118] Supplemental Statement of Dana Myers at para. 50.

[119] Supplemental Statement of Dana Myers at paras. 52 and 54.

[120] Supplemental Statement of Dana Myers at para. 54.

## PART THREE: JUSTIFICATIONS RAISED BY CANADA TO LIMIT DAMAGES

122. Canada has raised a number of other arguments in a further attempt to reduce the compensation due to the Investor. These concerns can be summarized as:

(a) The damages did not arise out of Canada's NAFTA breaches;
(b) The damages claimed were remote or not foreseeable;
(c) The Investor's Claim is merely speculative; and
(d) The Investor failed to mitigate.

Each of these issues is addressed below.

### I. Causation

123. The Tribunal has ordered the Investor to claim only for damages that arose out of Canada's NAFTA breaches.[121] This is consistent with NAFTA Article 1116, which provides that an Investor may submit a claim to arbitration under Chapter 11 where that Investor "has incurred loss or damage by reason of, or arising out of" a NAFTA breach.

124. Canada contends that the damages suffered by S.D. Myers, Inc. arose only indirectly from its breach and therefore are not compensable. The language of indirectness is not to be found in Article 1116, which refers instead to loss or damage incurred "by reason of, or arising out of" the NAFTA breach.

125. That the NAFTA eschews the language of indirectness is unsurprising, for this language has been criticized by leading scholars of the international law of damages. Whiteman observes that:

> *The types of damages denominated speculative or contingent, those regarded as the direct or proximate result of wrong, and those properly to be regarded as non-proximate, indirect, or remote damages are not always clear. The decisions and holdings are not uniform*.[122]

Instead of relying too greatly on the terms "direct" and "indirect", Whiteman summarizes the international law of damages as founded on reasonableness:

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[121] *Partial Award* at para. 325.

[122] Whiteman, vol. 3 at 1766.

> *...damages allowed on account of the commission or omission of an act giving rise to responsibility generally are those which it is reasonable to allow. Damages that appear to be unreasonable in their nature are not properly allowable.*[123]

126. Professor Cheng is similarly suspicious of the language of indirectness. He observes that "the use of the adjectives 'immediate and direct' is not...altogether happy"[124] and quotes approvingly from the Portugo-German Arbitral Tribunal in the *Angola Case*:

> *The problem of responsibility for indirect damages has often been considered by international tribunals and writers on international law. In the well-known Alabama Case, the arbitrators declared that they would not take into consideration this kind of loss. This decision has been criticized, and in subsequent cases, arbitrators have quite often allowed compensation for damages that are not direct. And, indeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links.*[125]

127. Similarly, Professor Cheng quotes from a decision of the German-US Mixed Claims Commission that, "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of."[126]

128. The problems inherent in the language of indirectness may explain why the drafters of Article 1116 preferred instead to refer to loss or damage incurred by reason of, or arising out of the NAFTA breach. The language actually employed in Article 1116 makes clear that the Investor need only show that the damages and losses for which it is claiming compensation were incurred by reason of, and arose out of, Canada's unlawful *PCB Waste Export Ban*. Canada may not avert its NAFTA obligation to make full compensation to the Investor by resorting to claims that the Investor's loss is indirect.

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[123] Whiteman, vol. 3 at 1767 (her emphasis). Whiteman also quotes (at 1767) Grotius that, "the one who is liable for an act is at the same time liable for the consequences resulting from the force of the act": *De jure belli ac pacis* (translation of the 1646 ed., Carnegie Endowment for International Peace, 1925), bk. II, ch. XVII, s. XII, p. 433.

[124] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius, 1994), 241.

[125] *Award I* (1928) 2 R.I.A.A. 1011 at 1031 (translated by Cheng; quoted by Cheng at 241-2).

[126] *War Risk Insurance Premium Claims* (1923), German-US Mixed Claims Commission (1922), p. 33 at 58. Quoted by Cheng at 243.

*Alleged Breaks in the Chain of Causation*

129. While Canada is liable to the Investor for all damage and loss, "direct" or "indirect", incurred by reason of, or arising out of, its breach of the NAFTA, the Investor concedes that Canada is not responsible for loss or damage caused by independent factors intervening to break the chain of causation between the unlawful *PCB Waste Export Ban* and the harm suffered by S.D. Myers, Inc. and Myers Canada.

130. Canada contends[127] that the following intervening factors occurred to interrupt the chain of causation:

(a) Fear of US liability;

(b) Lack of desire by owners to dispose of PCB wastes;

(c) Non-competitive pricing from the Myers Companies; and

(d) The PCBs remaining in use.

131. Properly understood, none of these relate to causation at all. If anything, they go to the extent of harm, rather than causation. For the reasons set out in Part Two above, the Investor submits that these four factors did not break the chain of causation between Canada's wrongful act and the harm done to the Investor and the Investment.

## II. Forseeability

132. Canada claims to have had "little knowledge of SDMI's business activities", and adds that before December 1995, it had "no knowledge whether SDMI conducted business in Canada".[128]

133. If this is meant to suggest that Canada is not liable in damages because the harm suffered by S.D. Myers, Inc. was not foreseeable, that suggestion must be rejected. Indeed, it is inconsistent with the very basis upon which Canada's liability was found.

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[127] Counter-Memorial (Damages) at para. 115.

[128] Counter-Memorial (Damages) at para. 23.

134. The records produced before this Tribunal in the Merits Phase indicate that it was widely known within the Government of Canada that S.D. Myers, Inc. was an American company operating in Canada.

135. An Environment Canada interdepartmental memorandum of November 1, 1995, circulated to the government's "PCB interdepartmental Committee" and copied to key "PCB Regional Contacts",[129] reveals that, prior to Canada's imposition of the *PCB Waste Export Ban*, key government decision-makers were made aware of the presence of S.D. Myers, Inc in Canada. This memo reads in part:

> *I am enclosing a copy of a letter from the US EPA to a US PCB service company, S.D. Myers, granting Myers permission to import PCBs from Canada as of November 15. This is an unexpected development, and may be causing some confusion for federal PCB owners. I understand that Myers has already made representations to some Canadian federal facilities to have their PCBs destroyed in the US.*
>
> *My purpose in writing is to remind you that most federal departments and agencies, as a result of the work of our Committee, have agreed in principle to use the services of Public Works and Government Services Canada (PWGSC) to manage the destruction of federal PCBs. Furthermore PWGSC has selected Chem-Security (Alberta) Ltd's bid for a National contract for PCB transportation and destruction services. Chem-Security has also revised its PCB destruction costs.*
>
> *Therefore I would encourage you not to enter into any contractual arrangements with Myers or any other PCB service company (Canadian or US) until the next Committee meeting, which is scheduled for later this month (November 23 or 30). ...*
>
> *You should also bear in mind that, since 1989, it has been federal government policy to destroy federal PCB wastes in this country, and that will have to be factored into our deliberations. ...*
>
> *George Cornwall*
> *Director*

[129] George Cornwall Letter to PCB Interdepartmental Committee, November 1, 1995 set out as Tab 47 of the Joint Volume of Documents for the Merits Phase.

136. In addition to this widely-distributed memo, there were other documents prepared by the Government of Canada which indicate that Canada knew S.D. Myers, Inc. was operating in Canada before the making of the *PCB Waste Export Ban*.[130]

137. The Investor has addressed issues of foreseeability at length in its Memorial (Damages) at paragraphs 84-95.

## III. Speculation

138. Canada contends that the damages sought by S.D. Myers, Inc. in this Claim are too speculative. To the contrary, the Investor submits that its approach is a entirely reasonable methodology for predicting what the Myers Companies revenues would have been had the border not closed.[131]

139. Less conservative approaches were available to the Investor, which the Investor rejected as too speculative. One such approach was a general market model, by which the Investor would model its losses based on notional lost sales in a notional Canadian PCB market. The Investor concluded that, while such an approach might be acceptable, the more certain and less speculative approach was to identify losses suffered by the Investor using actual evidence of commercial contact between the Investor/Investment and potential Canadian clients. This approach, based on that sub-set of the Canadian PCB waste remediation market contacted by the Myers Companies, is more conservative than the general market model.[132]

140. Canada has suggested that S.D. Myers, Inc. came to Canada to engage in speculative business activity and that this Tribunal should not reward such activity. Any new venture or investment always carries with it an element of business risk. That, however, does not make the venture speculative. Indeed, were Canada's approach given any weight, it would reorder the protection of new or contemplated investments, specifically provided for under the NAFTA, virtually meaningless.

141. Regardlessly, when the *PCB Waste Export Ban* was imposed, the Investor's legal right to export PCB waste from Canada to the United States was not a matter of speculation. Under the terms of both the Canada-US *Transboundary Agreement on Hazardous Waste* and the NAFTA, the Myers Companies had the right to do business in Canada and to export PCB waste to the United States for treatment at EPA-approved facilities. There was nothing

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[130] See John Hillborn's memo on the Export of PCBs to the United States dated November 16, 1995.

[131] See *Harder Report* at page 10.

[132] *Revised Independent Valuation Report* at 2-4. *Harder Report* at 10.

speculative about the Myers Companies' business once the EPA permitted the import of Canadian PCB waste into the United States.

142. Canada argues that Myers Canada had no track record of shipping PCBs to the US.[133] That the Myers Companies had no track record is, of course, due to Canada's imposition of the unlawful *PCB Waste Export Ban*. Canada cannot plead its own wrong to relieve itself of its obligation to compensate the Investor.[134] Furthermore, Canada's submission on this point ignores the long and well-established record of S.D. Myers, Inc. in performing exactly the same type of PCB remediation services in the US, where it was a market leader in transformer remediation. Entering the Canadian PCB market was not a high risk venture for S.D. Myers, Inc. Rather, it was a natural extension of its existing successful US business.

143. In addition, within the *Revised Independent Valuation Report* , the Independent valuators make specific reference to the nature and detail of the financial records maintained by the Investor and provided to Canada. Their report states:

> *The four principals of LRTS have over 70 years of experience dedicated exclusively to the field of damages quantification (mostly pertaining to the quantification of future losses) and, in our experience, rarely is there such a solid foundation of reliable information as is available to us/KPMG in this circumstance.*
>
> *It is particularly useful that documents were prepared contemporaneously with the Event and in the ordinary course of business and that they were produced for these proceedings in their original, unaltered form, context and content. Whereas the Rostant Report largely dismisses these documents, LRTS relies on them as the foundation for its analysis. This is one of the fundamental areas of disagreement between Rostant and LRTS* [135].

Thus, many of the questions raised by Canada are capable of being addressed by a simple and careful review of the evidence produced by the Investor.

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[133] Counter-Memorial (Damages) at para. 8.

[134] This principle is expressed in the Latin maxim, *Nullus commodum capere de sua injuria propria* (No one can be allowed to take advantage of his own wrong).

[135] *Revised Independent Valuation Report* at page 2.

144. Canada has argued that international tribunal decisions on discounted cash flow valuation support its argument that the business of the Myers Companies was too speculative. The cases on which Canada relies are distinguishable from the Claim currently before this Tribunal.

145. For instance, in the *Asian Agricultural Products* case,[136] the investment had just begun operations in Sri Lanka when its facility was destroyed in a battle between government security forces and Tamil Rebels. The investment's business was the export of one product (shrimp) to one market (Japan). The tribunal found that the investment was undercapitalized and was losing money. In the light of these circumstances, the tribunal declined to compensate the investment for loss of goodwill or future profits.

146. The contrast with the facts of this Claim could hardly be more stark. S.D. Myers, Inc. was poised in 1995 to enter and gain a large share of the Canadian PCB waste remediation market. It developed a dossier of bids and quotes upon which it was likely to obtain business if the Canadian border had not been closed. The only thing that stood in the way of the Investor's success was the promulgation of the *PCB Waste Export Ban*. Unlike the investment in the *Asian Agricultural Products* case, the circumstances of this Claim support the conclusion that significant profits were both reasonably anticipated and probable.

147. Canada also seeks to rely on the decision of the ICSID Tribunal in *Wena Hotels Ltd. v. Arab Republic of Egypt*, as support for the proposition that the Myers Companies should not be entitled to future profits that they would have earned but for Canada's NAFTA inconsistent ban, but only the value of its actual investment. In *Wena Hotels*, however, the Tribunal found that the use of the DCF method to calculate lost profits for the expropriation was too speculative because "there is an insufficiently 'solid base on which to found any profit...or for predicting the growth and expansion of the investment made".[137]

148. The Investor completely agrees with the legal theory advanced by the tribunal in the *Wena* case that lost profits ought not to be awarded in cases where the venture being examined is too speculative. However, the evidence in this arbitration, in comparison with the facts in the *Wena* case, illustrate that the Myers Companies activities were far from speculative.

149. In this case, it is undisputed that S.D. Myers, Inc. had a long and profitable track record and history of PCB waste remediation in the US which it sought to duplicate on the other side of the border. Moreover, the methodology of predicting the growth and expansion of the Myers Companies by the Investor's expert Mr. Rosen has been confirmed by an independent business

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[136] (1991) 30 I.L.M. 577. See Canada's Counter-Memorial (Damages) at para. 127.

[137] Canada's Counter-Memorial (Damages) at para. 129

valuator as being a "reasonable methodology for predicting what Myers' revenue would have been but for the closing of the border.[138] In addition, the Harder Report dismisses Canada's suggestion that calculation of lost profits to the Myers Companies would be too speculative and confirms the approach employed by Mr. Rosen.[139]

150. Finally, the *Metalclad* Claim, upon which Canada seeks to rely, is also distinguishable. In *Metalclad*, the investment was completely detached from the rest of the investor's business. The investment did not have any pre-existing customer relations or an established book of business. The investor merely purchased a derelict treatment site and proceeded to refurbish it for operations.

151. By contrast, the Investor's Canadian project was an extension of its ongoing and well-established American operations. The Investment could rely on the Investor's established US products and expertise. The Investment also had the significant benefit of a large dossier of identified customers and customer interactions.

## IV. Mitigation and exhaustion of local remedies

152. Canada argues that Myers did not take steps to mitigate its losses. The Investor replies that its opportunities to mitigate were limited, and that Canada's expectations of the steps the Investor ought to have taken to mitigate are unreasonable[140].

153. Canada argues that S.D. Myers, Inc. should have worked around Canada's unlawful act by restructuring its business to reduce its losses. Canada argues that Myers Canada should have become a broker,[141] that it should have purchased mobile incinerators to destroy waste in Canada,[142] and even that it should have established a PCB facility in Canada.[143]

154. None of the these suggestions offers a realistic or fair alternative to an open border. Furthermore, it is unreasonable for Canada to expect S.D. Myers, Inc. to change its entire business plan to mitigate the losses inflicted on it by Canada. The Investor and its Investment

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138 Harder Report at para. 22.

139 Harder Report at para. 20.

140 *Harder Report* at para. 29; *Revised Independent Valuators' Report,* 13-14.

141 Counter-Memorial (Damages) at para. 194.

142 Counter-Memorial (Damages) at para. 195.

143 Counter-Memorial (Damages) at para. 195.

were remediators, not brokers. Mobile incineration was not an option because the Myers Companies would have foregone the Investor's principal advantage in the Canadian market, namely its efficient and profitable Tallmadge facility. Finally, for the Investor to establish a Canadian PCB facility would have been exceedingly difficult.[144] In any event, it is preposterous to expect S.D. Myers, Inc. to respond to Canada's openly hostile treatment to it by *increasing* its investment in Canada.

155. Canada argues that S.D. Myers, Inc. ought to have pursued local remedies before bringing this NAFTA Claim.[145] The Investor submits that this Tribunal should explicitly reject this proposition in its Final Award, for it is clearly contrary to the intent of the NAFTA Parties.

156. There is no requirement under the NAFTA that an investor exhaust local remedies before bringing a Claim. All that is required is that a claimant meet the requirements of NAFTA Articles 1116 and 1120.

157. While the obligation to exhaust local remedies is a well-known principle of international law,[146] this principle has been replaced in Chapter 11 of the NAFTA by a claims initiation procedure that specifically does not require the exhaustion of local remedies. This purpose of this procedure was to provide speedy determinations of disputes between foreign NAFTA investors and NAFTA governments.

158. Canada's argument would require NAFTA investors to exhaust local remedies before availing themselves of the Chapter 11 process. Applying this theory to the current Claim, S.D. Myers would have been required to commence a judicial review proceeding before a Canadian court at the time Canada imposed its unlawful *PCB Waste Export Ban*. S.D. Myers, Inc. would then have had to await the result of that review by the trial judge, and complete any appellate level reviews arising from that result, including any possible determination by the Supreme Court of Canada. Only after exhausting these lengthy processes would S.D. Myers, under Canada's

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[144] In his affidavit in the *Centre Patronal* litigation, Chem-Security Vice President, Art Mathes, attested to the difficulty in locating a PCB destruction facility in Canada. He observed, "Experience throughout Canada has shown that it is extremely difficult to find a community that is willing to host a world-scale hazardous waste treatment centre." Affidavit of Art Mathes, dated May 2, 1996 filed in the *Centre Patronel* case at para. 17

[145] Counter-Memorial (Damages) at para. 142.

[146] It is to be noted that Whiteman's *Law of Damages* (the very source relied upon by Canada for its exhaustion argument) reports that exhaustion of remedies as an element of mitigation applies only to cases of denial of justice: Whiteman, *The Law of Damages*, vol III at 1558 - 1559. This NAFTA Claim is not about denial of justice in its traditional legal form, for S.D. Myers, Inc. is not complaining about an improper Canadian judicial decision.

theory, be free to bring its NAFTA claim. By that time, however, S.D. Myers might very likely be time-barred by NAFTA Article 1116(2), which requires that investors submit claims within three years of first acquiring knowledge of the alleged NAFTA breach and knowledge of loss or damage. Thus, Canada's theory would only permit an Investor to be compensated if that investor had been able to bring a lawsuit from inception to final review within three years from the first occurrence of the harm.

159. This is a case in which this Tribunal has found that representatives of the Investor's competitors obtained preferential access to the most senior decision makers within the Canadian Environment Department and prevailed upon them to invoke emergency powers of the state to prevent the Investor from carrying on its business in Canada. This act has been found to be a violation of Canada's obligations of national treatment and its general obligations under international law. To suggest that S.D. Myers, Inc. somehow failed to mitigate its damages by failing to stop a secret emergency government decision, taken to discriminate against it because of its nationality, is simply untenable.

## V. Geographic Limitations

160. Canada has argued that it is not responsible for damages caused by its wrongful actions to the Investor if these damages occurred outside of the territorial limits of Canada. Canada argues that the architecture of the NAFTA leads to such a conclusion[147]. The Investor respectfully disagrees with this submission.

161. The Investor has argued in its Memorial (Damages) that there are no territorial limits placed upon the damages which a wrongful party must pay. Limits on damages are based on causation rather than geography.[148]

162. In addition to the arguments made by the Investor in its Memorial (Damages), the Investor submits that if the NAFTA intended there to be such a territorial limit, it would have been expressly provided for in the Agreement. NAFTA Article 1102(2), one of the NAFTA provisions violated by Canada in this Claim, provides for no limitation with respect to harm caused to an Investor. Similarly, there is no geographic limitation with respect to a violation of treatment in accordance with international law set out in NAFTA Article 1105. Once there has been a violation by a government of one of these obligations, all damage "arising out of that breach" can be the basis for a NAFTA Chapter 11 investor-state arbitration.[149]

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147 Counter - Memorial (Damages) at para. 93.

148 Memorial (Damages) at paras. 61 - 66.

149 As set out in NAFTA Article 1116.

## PART FOUR: LEGAL ISSUES

163. This Tribunal has found that Canada took unlawful action regarding two different NAFTA obligations through the *PCB Waste Export Ban*. The appropriate compensation test has been set by the NAFTA Tribunal to be that used in the *Chorzow Factory* case, being the principle of integral reparation – that is to put the Investor back into the position it would have been but for Canada's unlawful actions.

### I. Burden of Proof

164. Canada relies upon a respected arbitration text to argue that while the ordinary degree of proof in an arbitration is based on a "balance of probability", this Tribunal should impose a higher standard on matters that are "improbable, far-fetched, or unsupported by evidence, where the Investor is in exclusive control of the evidence"[150]. Unfortunately, Canada has misconstrued the text as nowhere in the cited portion of the treatise does such a proposition appear. The text does however provide an example of a type of issue where tribunals may be more rigorous in cases where startling propositions relating to fraudulent activity of company officials are being alleged[151]. This is a far cry from the only issue that remains to be resolved in this phase of the arbitration --the quantum of compensation owing to the Investor arising out of Canada's breach of its NAFTA obligations.

165. All of Canada's concerns recited in its Counter-Memorial (Damages)[152] regarding production have now been settled by the Tribunal. Canada argues that the evidence tendered by the Investor does not support the assumptions made in its Memorial (Damages) or in its *Independent Valuator's Report*. In light of the strong evidence provided to this Tribunal, the Investor respectfully disagrees with Canada on this issue and reiterates that there is more than sufficient evidence available upon which this Tribunal can find in favour of the Investor's position on quantification of damages.

### II. Interest & Costs

166. Canada cites domestic Canadian court practice for the award of interest in this international arbitration[153]. The governing law of this arbitration is international law. The use of municipal

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[150] Counter-Memorial (Damages) at para. 67.

[151] Redfern & Hunter *Law of Practice of International Commercial Arbitration* (3ed.) at 315.

[152] Counter-Memorial (Damages) at paras. 7, 18, 22, 67, 68, 145, 148, 149, 153, 154, 220, 221 and 222.

[153] Counter-Memorial (Damages) at para. 11.

law with respect to the awarding of interest is simply irrelevant to this proceeding. In order to provide integral reparation so as to make the Investor "Whole", a rate of interest must be awarded that reflects the most reasonable benefit or use the Investor/Investment would have experienced. In the Independent Valuators reports, two alternative calculations of this amount are presented.

167. Canada argues that certain types of damages such as lost staff time should not be compensable as costs under the terms of Rules 38 - 40 of the UNCITRAL Arbitration rules. The Investor submits that it makes no difference whether these damages are considered as costs or as damages arising out of Canada's unlawful acts. The fact is that losses such as the large amount of manpower time lost by the Investor due to Canada's wrongful actions arise from Canada's NAFTA breaches and are compensable to it.

168. Canada argues that the Investor should be liable for the costs in the Damages Phase of this arbitration because of the "lack of production, co-operation and the extra work that Canada has had to undertake". The Investor denies that there has been any lack of production and asserts that it has produced relevant and necessary documents for the use of Canada and the Tribunal.

169. With respect to Canada's claims about non-production of evidence, it is useful to point out that the Investor produced responses to every document request and interrogatory sought by Canada in the Damages phase, which amounted to over 300 requests. The Investor provided further documents and answers to interrogatories, while refusing many on the basis that they were not relevant nor necessary to the quantification of damages in this arbitration. After much correspondence and a Case Management Meeting with this Tribunal, Canada agreed to narrow the list of issues to 56 issues. On the day of the hearing, and without prior notice to the Investor, Canada reduced its list of demands dramatically.

170. As a result of the Case Management Meeting, the Investor was ordered to provide the remaining items at issue to Canada and the disputing parties agreed to permit a site visit to the Tallmadge facility by Mr. Rostant and one Canadian lawyer to meet with a former company employee who could answer questions with respect to the general ledgers of the company. This site visit took place on June 27, 2001 and in order to prepare for the visit the company printed out over 80,000 pages from the company's general ledger.

*Canada's Behaviour is Relevant to Questions of Damage*

171. Canada's unnecessary and onerous document and interrogatory requests have added needless time and expense to this phase of the arbitration, and Canada should bear all of the costs. Canada should bear the costs of this entire arbitration (merits and damages) for the following reasons:

(a) because its conduct was found to be unlawful by this NAFTA Tribunal;

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(a) Because Canada intentionally violated the NAFTA and discriminated specifically against S.D. Myers, Inc. because of its nationality; and

(c) Because Canada knowingly took a measure that it knew would likely be successfully challenged before a NAFTA Tribunal.

172. Canada asserts that the Investor seeks to illustrate the wrongful intent of Canada in order to obtain punitive damages. The Investor has never sought out punitive damages, but it does seek out full compensation. On the issue of compensation, Canada's behaviour is relevant and should assist the Tribunal in awarding full costs to the Claimant. Accordingly, and as more fully set out in paragraphs 103-105 of the Investor's Memorial (Damages Phase), the full costs of this arbitration should be borne by Canada.

## PART FIVE: SUBMISSIONS

In view of the facts and arguments set out in this Reply Memorial (Damages), may it please the Tribunal to declare and adjudge the following:

(a) Canada be hereby ordered to pay compensation to the order of the Investor in an amount of not less than US$ 53,000,000.

(b) Canada be hereby ordered to pay all the costs of this arbitration, including but not limited to:

  (i) the full costs of this arbitration Tribunal;

  (ii) the professional fees and disbursements used by the Investor to prepare, negotiate and prosecute this Claim; and

  (iii) appropriate pre and post-judgement interest on these amounts at a commercial rate of interest.

Submitted this 9th day of August, 2001

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