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**THE NORTH AMERICAN FREE TRADE AGREEMENT**

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

**BETWEEN:**

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

Claimant

**-and-**

**GOVERNMENT OF CANADA**

Respondent

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**SUPPLEMENTARY COUNTER-MEMORIAL  
OF THE GOVERNMENT OF CANADA  
(DAMAGES PHASE)**

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## **Background**

1. Procedural Order 17 directed the disputing parties to produce all documents and answer all interrogatories requested by March 26, 2001. Disagreement arose regarding the Investor's refusals to provide documents and interrogatories requested by Canada. Canada filed two motions for production, on April 19 and May 14, 2001. When Canada filed its Counter-Memorial on Damages, May 28, 2001, many documentary issues remained outstanding. The resistance of the Investor to document production caused difficulties for Canada's experts in analyzing the Investor's claim. The preparation of Canada's Memorial was further impeded by the fact that the Investor's Memorial itself as well as the LRTS Report on which it relied contained incomplete information and lacked supporting documentation and evidence to justify the claim advanced.
2. On June 21, 2001, the Tribunal met the parties to resolve the outstanding documentary issues. Following that meeting, the Investor provided Canada with some additional material. In addition, as contemplated in Procedural Order 19, Mr. Rostant and Mr. Armstrong from KPMG attended at the SDMI facilities in Tallmadge, Ohio to collect additional information and interview Ms. Donna Horell, SDMI's former financial controller.

## **Additional Information Provided By The Investor Confirms Canada's Initial Analysis**

3. Canada maintains its legal position on damages as set out in the Counter Memorial filed May 28, 2001. Further, the additional information had little impact upon Canada's damages estimate.
4. The additional information obtained by Canada substantiates Canada's conclusions and calculations presented in Canada's Memorial on Damages and verifies the assumptions underlying the calculations in the KPMG Report. It has allowed Canada

to further refine some of the damages calculations, which were otherwise based upon assumptions.

5. To the extent that any adjustments were made to the KPMG Report, Canada asks that the Tribunal rely on the amounts in the KPMG Revised Report, filed herein.
6. More specifically, the additional evidence confirmed that:
  - the Rosen Report incorrectly used the cost from a single SDMI department for all the PCB disposal revenue which results in an overstated contribution margin from PCB disposal;
  - Large soil quotes should be removed from the calculation of SDMI's lost income;
  - Out-of-Pocket costs claimed in the Investor's Memorial and the Rosen Report are composed primarily of fixed costs that would have been incurred regardless of Canada's breach and should therefore be excluded from the claim.
7. While Canada and its experts did not receive full answers to all its questions or all of the supporting documents as requested and ordered, concerns in respect of critical items and conclusions have been satisfied. None of the additional evidence received by Canada lend credibility to the Investor's inflated claim.

#### **The Additional Information Identifies Further Errors in the Rosen Report**

8. Additional information provided in Tallmadge identified additional elements that the Rosen Report should have taken into account but did not:
  - the existence of an employee profit sharing program;
  - the distribution of PCB disposal revenue amongst various departments.

## Conclusion

9. Canada's estimate of the economic harm to SDMI as a consequence of injury to its investment, Myers Canada, is as follows:

(rounded)	Alternative 1	Alternative 2	Alternative 3
Reimbursement of investment in Myers Canada	\$1,023,000	-	-
Compensation for delay caused in earning a return on the Investment	-	248,000	-
Losses incurred by Myers Canada, on a contribution margin approach			169,000
	1,023,000	248,000	169,000
Extra costs	9,600	9,600	9,600
Interest	•	To the discretion of the Tribunal	
	\$ 1,032,600	\$ 257,600	\$ 178,600

  
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