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Washington DC

Toronto

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

**INVESTOR'S 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)

On November 13, 2000, this Tribunal rendered a *Partial Award* and a *Separate Opinion* concluding the initial phase of this NAFTA Investor-State arbitration. Within the *Partial Award*, the Tribunal indicated that the Government of Canada ("Canada") had performed an unlawful violation of its international law obligations and as a result would have to pay compensation to the Investor. The Tribunal found that the compensation awarded to the Investor at the conclusion of this quantification phase should undo the material harm inflicted by a breach of an international obligation.¹

In the dispositive provisions of the *Partial Award*, the Tribunal found that:

325. CANADA shall pay to SDMI compensation for such economic harm as is established legally by SDMI to be directly as a result of CANADA's breach of its obligations under Articles 1102 or 1105 of the NAFTA.
326. Such compensation shall be quantified in accordance with the principles set out in this *Partial Award*, at the second stage of the arbitration as contemplated by paragraph 1 of Procedural Order No. 1.

The Tribunal did not make any determination on the precise methodology to be used to quantify the damages caused to the Investor other than to conclude that, in light of the unlawfulness of Canada's measures, that the fair market value standard would not be a "logical, appropriate or practicable measure of the compensation awarded" to this Investor.² The Tribunal indicated within the *Partial Award* that the disputing parties would have the opportunity to address submissions on the precise methodology to be used to quantify the compensation owed by Canada to the Investor.³

Pursuant to the terms of Procedural Order No. 17, the Investor submits this Memorial on the quantification of compensation owed by Canada as a result of the Tribunal's *Partial Award* and *Separate Opinion* of November 13, 2000.

¹ *Partial Award* at para. 315.

² *Partial Award* at para. 309.

³ *Partial Award* at para. 314.

PART ONE: GENERAL INTRODUCTION

1. S.D. Myers, Inc., the Investor in this arbitration, is a private family-owned waste remediator located in Tallmadge, Ohio. The Investment, described as Myers Canada, is an affiliate of the Investor operating in Canada.
2. The Investor is entitled to full compensation from Canada for all damages caused to it and to its Investment arising from Canada's unlawful *PCB Waste Export Ban*. The calculation of damages should take into account those cash flows that would have been earned by the Investor and the Investment but for the operation of Canada's unlawful *PCB Waste Export Ban*.⁴
3. This calculation of damage must take into account the extensive activity that the Investor and Investment undertook in Canada before the operation of Canada's unlawful *PCB Waste Export Ban*. Relevant factors must include:
 - a) The existence of over 1000 solicited bids and orders made by the Investor and the Investment **at the request** of Canadian holders of PCB wastes (which have been attached to this Memorial in a set of 14 three-inch tabbed binders) in Canada with a revenue value of over **\$106 million** dollars;
 - b) The fact that the Investor and the Investment engaged in an organized communications campaign with every known holder of PCB waste in Canada as well as a general advertising campaign before the making of Canada's unlawful *PCB Waste Export Ban*;
 - c) The fact that the Canadian PCB waste remediation market was price-sensitive and the quoted prices from the Investor and the Investment were substantially lower than those issued by Canadian competitors;
 - d) The fact that the Investor's treatment facility in Ohio was located considerably closer to the majority of Canada's PCB wastes than its main competitor, which was in Northern Alberta. This reduced the environmental concern of Canadian customers over the increased risk of transportation spills due to larger trucking distances; and
 - e) The record of success that the Investor had achieved in the United States market in terms of market share, environmental protection and customer service.

⁴ As evidence for arguments made in this Memorial, the Investor has submitted an Independent Valuators' Report prepared by Low, Rosen, Taylor Sorriano dated February 23, 2001 attached to the Witness Statement of Howard Rosen. [Hereafter referred to as *Independent Valuators' Report*.]

4. The Investor worked with the Investment in a joint and concerted fashion in order to obtain PCB waste remediation business in Canada. But for the operation of Canada's unlawful *PCB Waste Export Ban*, the Investor would have been in a position to remediate all of the contracts it had been asked to bid on from its Tallmadge, Ohio facility.⁵
5. The *Independent Valuators' Report* sets out their opinion as to how the Tribunal should quantify the damages caused by Canada's unlawful *PCB Waste Export Ban* to the Investor and the Investment. The *Independent Valuators' Report's* methodology in summary is set out as follows:
 - a) The value of the Investor's and Investment's business activity that was known in Canada is assessed. This value is then augmented with a second value to take into account unrealized market activity. This unrealized activity has been appropriately discounted to take into account the level of risk associated with the bids, but also the prominent market position of the Investor and the Investment. The result of these two numbers represents the success rate on quoted business for the Investor and the Investment.
 - b) This expected value must then be discounted to reflect the relevant period of disability (which is approximately 18 months). The total is the expected volume of revenue lost by the Investor and Investment;
 - c) This expected revenue loss is then assessed to produce a loss of cash flow attributable to the Investor and the Investment (by deducting all appropriate expenses). This figure constitutes the base compensation amount to which the Investor and the Investment is entitled to compensation under the NAFTA;
 - d) This base lost cash flow figure is then augmented by out of pocket losses and then an applicable rate of interest applied to the total of these figures to produce the total losses to put the Investor and the Investment into the position they would have enjoyed but for the wrongful acts of Canada (not including the costs of this arbitration, including professional representation).
6. As a result of Canada's unlawful actions, the Investor has lost significant business opportunities and has also been forced to incur significant costs that it would otherwise not have incurred. The *Independent Valuators' Report* indicates that the quantum of revenue lost to the Investor and the Investment due to Canada's unlawful acts can be calculated on the following range:

⁵ *Independent Valuators' Report* at 3.

<u>Success Rate on Bids</u>	<u>Revenue loss⁶</u>
50%	\$51,476,192
66%	\$67,318,784
70%	\$71,732,419

6. In addition, the Investor and Investment suffered out-of-pocket damages of US\$2,446,421, not including professional costs or the costs of this arbitration.⁷
7. The Investor and Investment have suffered a loss of cash flow as follows:

<u>Success Rate on Bids</u>	<u>Lost Cash Flow⁸</u>
50%	\$28,152,421
66%	\$35,779,421
70%	\$38,052,421

The Investor submits that this Tribunal should follow the recommendation of the *Independent Valuators' Report*, which provides that damages in this claim should be based on an assessment that the Investor and Investment would have received a success rate on bids of not less than 66% of the attached identifiable bids made.⁹

8. The Investor is also entitled to obtain interest on its damages from Canada. The Investor submits that this rate of interest should be based on a rate of return equal to, or greater than, their own internal rate of return within their own companies. As a result of these lost opportunities, the Investor and Investment have suffered the following aggregate losses, not including costs and disbursements:¹⁰

⁶ Losses in US dollars include lost orders and loss of scrap metal revenue.

⁷ A description of these losses is set out in Appendix V of the *Independent Valuators' Report*.

⁸ Losses in US dollars include lost cash flow from business and out-of-pocket costs.

⁹ A description of these losses is set out at 6 of the *Independent Valuators' Report*.

¹⁰ A description of these losses is set out in Appendix VI of the *Independent Valuators' Report*.

<u>Success Rate on Bids</u>	<u>Further Losses¹¹</u>	<u>Total Loss¹²</u>
50%	\$25,337,000	\$53,489,421
66%	\$32,201,000	\$67,980,421
70%	\$34,247,000	\$72,299,421

9. In addition to the aforementioned damages, the Investor seeks its costs for this arbitration, and the full amount of the costs and disbursements for those professionals retained to represent it in this arbitration.

¹¹ Losses are in US dollars and reflect investment income on lost profits and have been rounded to the nearest thousand dollars.

¹² Losses in US dollars have been rounded to nearest thousand dollars.

PART TWO: FACTS

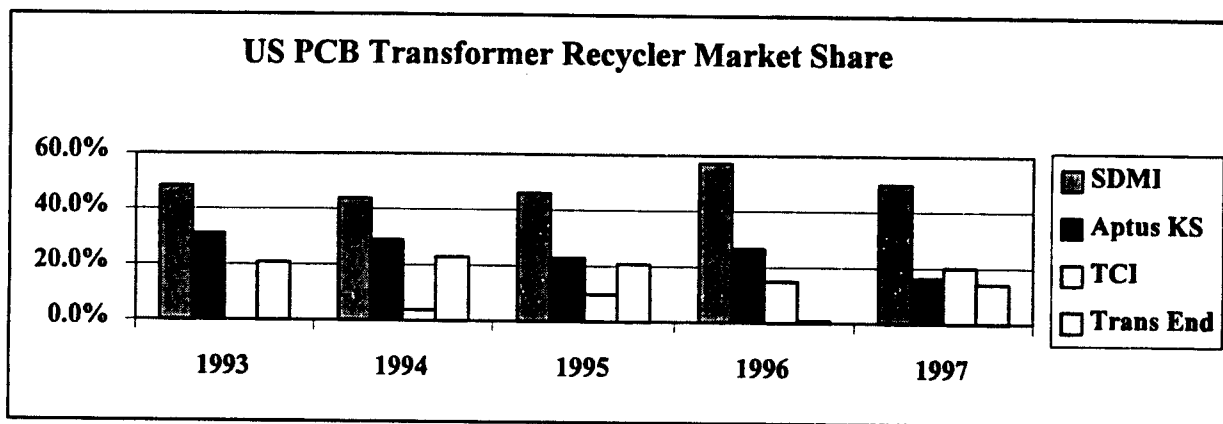
10. S.D. Myers, Inc., the Investor in this arbitration, is a private family-owned waste remediator located in Tallmadge, Ohio. Since the early 1980's, the Investor performed hazardous waste disposal and material recycling services. The Investor utilizes a recycling process, which it developed for dealing with waste contaminated with polychlorinated biphenyls ("PCB") and received approval for this technology from the United States Environmental Protection Agency ("EPA") in 1989.
11. In 1993, Myers Canada was incorporated as an affiliate of S.D. Myers, Inc. to enhance the Canadian presence for the Investor in Canada. Myers Canada operated as an adjunct of S.D. Myers, Inc. in Canada and together S.D. Myers, Inc. and Myers Canada operated within the Canadian market to obtain business to be undertaken jointly. Myers Canada, the Canadian operations of S.D. Myers, Inc. and the joint operations of Myers Canada and S.D. Myers, Inc. are referred to within this memorial as "the Investment".
12. In October 1995, the Investor received permission from the US government to import PCB waste from Canada to the United States through an enforcement discretion letter from the EPA. This enforcement discretion letter allowed S.D. Myers, Inc. to import PCB wastes into the US for treatment and final destruction as of November 20, 1995. Subsequent to the provision of the enforcement discretion to S.D. Myers, Inc., similar enforcement discretion letters were issued to other EPA-approved facilities in the United States. On March 18, 1996, the EPA revoked these individual enforcement discretions in favour of a general "Import for Disposal Rule", which had identical effect: permitting S.D. Myers to import PCB wastes into the United States for treatment and final destruction.
13. On November 16, 1995, the Canadian government issued an emergency order closing the Canadian border to exports of PCB waste. The Canadian border was re-opened for shipments of PCB waste on February 7, 1997, some 15 months later.
14. On July 20, 1997, the United States Court of Appeals for the 9th Circuit quashed the EPA's general Import for Disposal Rule in *Sierra Club v. E.P.A.*¹³ Given that Canada's *PCB Waste Export Ban* deprived S.D. Myers, Inc. of its market position, resulting in direct detriment to the Investor and its Investment, S.D. Myers, Inc. did not pursue a new enforcement discretion after July 1997 and none was granted. The US border has remained closed to PCB waste imports since that time.

¹³ (U.S. Ct. App., 9th Cir.), CA 9, No. 96-70223, July 7, 1997. The EPA did not appeal this decision, which held that, under the relevant legislation, the EPA was only permitted to provide enforcement discretion on a case-by-case basis, and not in the global manner contemplated under the Import for Disposal Rule.

15. Hazardous waste could not be shipped to the United States until Canada had provided its consent to the export. Under paragraph 16(1)(c) of Canada's *Export and Import of Hazardous Waste Regulations*, Canada had 30 days in which to provide its consent. This 30-day waiting period could have been used by Canada to delay shipments to the United States. Accordingly, the effective period that the Canadian border was closed to the transportation of PCB waste from Canada to the United States would have been no less than 611 days.

Operations

16. S.D. Myers, Inc. is a successful waste remediator in the domestic US market. During the relevant period, the Investor maintained its position as an industry leader within the competitive US market for PCB contaminated equipment remediation, maintaining a 48% share of the US market for PCB transformer remediation, as can be seen from the following chart.¹⁴



17. Myers Canada worked with S.D. Myers, Inc. in Canada to obtain business that could be jointly developed. The integration between the companies was seamless. In some cases, S.D. Myers, Inc. would bid for work in Canada with the expectation that the Canadian-based operations would be undertaken by Myers Canada. In all situations, Myers Canada would bid for work with the understanding that the final PCB waste remediation would be undertaken by S.D. Myers, Inc. in Tallmadge, Ohio.¹⁵ Together the Investor and the

¹⁴ *Independent Valuator's Report* at 17.

¹⁵ In the *Partial Award*, the Tribunal recognized that the business operation of the Investor and the Investment were seamlessly connected and interdependent. In its *Partial Award*, the Tribunal found:

Although SDMI did give consideration to developing a treatment facility in Canada, the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility. It was envisaged that Canadian entities would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the contract as its remuneration. The business

Investment engaged in activity that would result in the remediation of PCB wastes at S.D. Myers, Inc.'s US facilities.

18. The *Independent Valuators' Report* examined the commercial relationship between S.D. Myers, Inc. and Myers Canada in the course of the quantification of damages. In their Report, they conclude:

Together, the Investor and the Investment formed an integrated operation which was designed to remediate and dispose of Canadian PCB wastes. Neither the Investor nor the Investment, on their own, could have serviced the Canadian market to the same level of efficiency and profitability. Their Investment performed sales, site services and organized transportation, and the Investor performed the remediation of the PCB wastes at its Tallmadge, Ohio facility as well as being intimately involved with marketing, sales and administrative functions of the joint operation.¹⁶

Based on the Canadian contracts actually transferred to Tallmadge for processing, it is apparent that the remuneration was determined based on the equitable sharing of the revenue available from the Canadian contract as between the Investment and the Investor.¹⁷ The equitable sharing was in fact established via a transfer pricing mechanism that assesses the relative contribution of the Investor and the Investment to servicing the Canadian customers. As such, if not for the Event, the Investor would have realized profits from processing the Canadian PCBs (i.e. in addition to the repayment of its loans to the Investment).¹⁸

19. S.D. Myers, Inc. viewed that the operation of the Investment would result in an effective Canadian-located presence which would enhance the ability of SD Myers, Inc. and Myers Canada to maintain their competitive position against current or future competitors from Canada or the United States.¹⁹
20. The Investor assumed that its operations in Canada would be similar to its operations in the United States. Accordingly, it believed that its market leadership position in the US market would translate into at least a similar leadership position for the operations of its

was done by marketing, customer contact, testing and assessment of oil and other like services. SDMI personnel from the USA participated in these activities (para. 93).

¹⁶ *Independent Valuators' Report* at 9.

¹⁷ In a footnote to this citation in the *Independent Valuator's Report* at 8, the Report notes that "Invoices to Canadian customers from the Investment and to the Investment from the Investor regarding the 7 shipments that were shipped over the border between February 7, 1997 and July 20, 1997".

¹⁸ *Independent Valuators' Report* at 9.

¹⁹ The *Independent Valuators' Report* confirms that Myers Canada initially sought Canadian business other than PCB waste remediation in 1989, but from 1991 onwards the Investment worked with S.D. Myers, Inc. on PCB remediation from Canada. Statement of Dana Myers, February 28, 2001 at para. 8.

Investment (that is its Canadian operations, the operations of Myers Canada and the joint operations between it and Myers Canada).²⁰

21. There were a number of reasons why the Investor reasonably believed that it would be successful in the Canadian market. These reasons include:
- a) The fact that the Canadian operation was in many respects merely an ordinary expansion into a larger geographic market of its existing US business operations;
 - b) The proximity of its Tallmadge facility over the main competitor in the Canadian market, which would provide it with a sustainable competitive advantage over other competitors, such as the Swan Hills facility due to the costs associated with the transportation of the materials from the client to the processing facility;
 - c) The effective price advantage available to the Investor and the Investment because of its geographical proximity to the majority of PCB wastes held in Canada;
 - d) The strong interest in orders that the Investor and the Investment received from Canadian holders of PCB waste;
 - e) The solid EPA record maintained by S.D. Myers, Inc.'s Tallmadge, Ohio remediation facility; and
 - f) S.D. Myers, Inc.'s commitment to customer satisfaction and service.

Accessing the Market

22. Environment Canada produces an annual national inventory of PCBs in use and PCB wastes in storage in Canada. As of December 31, 1995, there were over 2,960 PCB storage sites in Canada.²¹ Each known holder of PCB wastes in Canada was identified in this national inventory.
23. In the two-year period prior to the opening of the US border in 1995, the Investor and the Investment undertook a comprehensive marketing campaign whereby every known holder of PCB wastes in Canada was contacted.²² This contact was maintained through follow-up calls made to PCB waste holders every one to two months. S.D. Myers, Inc.

²⁰ Statement of Dana Myers, February 28, 2001 at para. 5.

²¹ Environment Canada, *National Inventory of PCBs in use and PCB Wastes in Storage in Canada, 1995 Annual Report*.

²² Statement of Dana Myers, February 28, 2001 at para. 12; Also see the 14 tabbed binders of Contractual Documents supplied by the Investor and Schedule 1 attached to this Memorial.

and Myers Canada also launched an ad campaign in Canadian trade publications. No other PCB waste competitor had undertaken a marketing campaign of this magnitude within the Canadian market.²³

24. The domestic Canadian PCB waste remediation market appeared to react very favourably to the marketing efforts made by S.D. Myers, Inc. and Myers Canada. As a result of these marketing efforts, the Investor and the Investment had significant success in developing a "pipeline of potential purchase orders".²⁴
25. During 1996, the Investor and the Investment continued to seek orders and bids, despite the closure of the border. As Dana Myers stated set in his earlier witness testimony before this Tribunal, the Investor and the Investment continued to operate in Canada on the possibility that the border closure would not be prolonged.²⁵
26. The *Independent Valuators' Report* states that Canadian PCB waste remediation consumers were price-sensitive when making market decisions. Accordingly, the price quoted by a PCB waste remediator was a critical element to the decision of whether the waste would be remediated or stored. The *Independent Valuators' Report* states:

According to our discussions with Canadian PCB owners, the PCB market was highly price sensitive, and the alternative option to disposal was to hold onto the PCB wastes and continue to assume the associated potential environmental liabilities. Given a lower cost disposal alternative such as the Investor/the Investment, a large number of PCB owners who did not dispose of their PCB wastes would have done so. Our interviews indicated that there was a desire to destroy PCBs especially among PCB owners with older sites. Some PCB owners indicated they were reluctant to use the Swan Hills facility due to both environmental concerns and the higher price they charged relative to those of the Investor/the Investment.

A large portion of the PCB owners we spoke with indicated that subsequent to the Event, they had disposed of their PCBs in Canada but if they had an option they would have at least considered the Investor/the Investment. Others indicated they definitely would have used the Investor/the Investment and that they still haven't disposed of their PCBs due to the high costs of disposal in Canada.²⁶

²³ See the independent review of these marketing activities undertaken at 17-18 of the *Independent Valuators' Report*. Statement of Dana Myers, February 28, 2001 at para. 13.

²⁴ Statement of Dana Myers, February 28, 2001 at para. 17.

²⁵ Testimony of Dana Myers, Merits Hearing Transcripts, February 15, 2000, Vol. 2 at 436-437.

²⁶ *Independent Valuators' Report* at 13-14. (Emphasis in original)

27. Subsequent to Canada's closing of the border, Canadian customers became hesitant to commit orders to S.D. Myers, Inc. or its Investment, given that its ability to fulfil the contract (at any time in the future) was in doubt due to Canada's unlawful acts.²⁷

The Investor and Investment's Record in Canada

28. In the course of their sales efforts in Canada prior to the border closing in July 1997, S.D. Myers, Inc. and Myers Canada quoted on over 1,000 projects for a total exceeding CDN\$106 million dollars as reflected in the summary provided in Table 1.²⁸

	Contract	
	Number	Amount (CDN\$)
Quotes	900	\$104,537,113
Orders	112	\$2,359,866
Total	1012	\$106,896,978

29. Schedule 1 attached to this Memorial contains a list setting out the identity, date and amount of contracts upon which the Investor and the Investment quoted or had purchase orders that were affected by Canada's unlawful *PCB Waste Export Ban*.³⁰
30. The Investor and the Investment were only able to complete seven contracts for PCB waste remediation after the unlawful *PCB Waste Export Ban* was finally removed, for which they received revenues of CDN\$ 182,256.

²⁷ Statement of Dana Myers, February 28, 2001 at para. 21.

²⁸ The summary in Table 1 does not include the inventories of PCB contaminated wastes held by the Government of Canada other than those upon which it bid. For example, the Investor made a bid to the Canadian Department of Defence in 1995. Documents provided to the Investor through Canada's Access to Information procedure confirmed that this contract was not awarded to the Investor solely on the basis that the Investor was non-Canadian in violation of Canada's obligations to provide national treatment to S.D. Myers, Inc. as an American investor operating in Canada. See Joint Book of Documents, Tabs 47 and 92.

²⁹ Based on the documents contained in the information in the 14 three-inch Contractual Document Binders provided with this memorial.

³⁰ This Schedule is provided as a convenience for the arbitrators. It sets out brief summary information on contracts upon which the Investor and Investment made quotations or had purchase orders (which are set out in the 14 tabbed Contractual Document Binders).

31. As a result of Canada's unlawful *PCB Waste Export Ban*,³¹ the Investor and the Investment lost market share in Canada. As well, the closure assisted the market performance of new domestically-owned Canadian competitors,³² a fact which was in accordance with Canada's protectionist objectives.
32. In the period subsequent to November 20, 1995, many of the potential customers of the Investor and the Investment engaged in waste remediation contracts with Canadian competitors.³³ Accounting managers and pricing specialists at S.D. Myers, Inc. recorded the direct effect of the ban on these quotes with the following annotations made on a number of the original pricing proposal documents. Examples of such annotations include:
- a) Irving Forest Services quote for \$608,259 which was annotated stating "Went to S-H would have used S.D.M. because of *political* climate created by Ms. Copps! Dead went to S-H- in Nov. Company intimidated by Government to ship to S.H.";³⁴
 - b) Beldon Canada Inc. quote for \$4,584 which was annotated stating "Kill went to Bovar even if more \$\$!!";³⁵
 - c) Caoutchouc Acton quote for \$2,831 which was annotated stating "Dead- don't want to wait for borders to open.";³⁶
 - d) Cytec Canada quote for \$2,000 which was which was annotated stating "Material went to S-H... company was told to eliminate ASAP C-S prices were about 20% higher than S.D.M.";³⁷

³¹ In its *Partial Award*, this Tribunal found that Canada's closure of the Canadian border to the export of PCB waste was not undertaken for a *bona fide* environmental reason, but rather for the purpose of the protection of Canada's domestic market in violation of Canada's NAFTA Articles 1102 and 1105 obligations.

³² *Independent Valuator's Report* at 22.

³³ See Testimony of Dana Myers, Transcripts, February 15, 2000, Vol. 2 at 289-290 re: contracts lost to Chem-Security from Stelco and Manitoba Pool Elevators.

³⁴ See Irving Forest Services, Limited Contractual Documents Binder Tab 404.

³⁵ See Beldon Canada Inc. quote at Contractual Documents Binder Tab 67.

³⁶ See Caoutchouc Acton quote at Contractual Documents Binder Tab 108.

³⁷ See Cytec Canada, Inc. quote at Contractual Documents Binder Tab 169.

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- e) AP Green Refractories Canada quote for \$3,814.00 which was annotated stating "dead--- shipped to Swan Hills";³⁸ and
- f) Dryden Hydro bid for \$16,496 where the annotation states "Lost - Chem- Securities - \$21,000.00".³⁹
33. The *Independent Valuators' Report* concludes that the Canadian PCB Waste Export Ban had a significant harmful effect on the business operations of the Investor and the Investment. In addressing the effect of the PCB Waste Export Ban, the *Independent Valuators' Report* states:
- Our review of the Investor / the Investment's customer file documents revealed that in the course of their sales efforts in Canada prior to the border closing in 1997, the Investor quoted on over 1,000 projects.⁴⁰ When the Investor performed a quote, their customer provided them with their PCB inventories which they wanted disposed. Canadian PCB owners who weren't interested in disposal, generally would not require disposal quotes. The files reviewed indicated that the Investor/The Investment often bid on a Canadian customer's PCB inventory in late 1995 or early 1996 and then due to the Event, and the increasing competition that the Event allowed, the Investor/The Investment re-quoted on the same (or similar) inventory at a lower price once the border re-opened in February of 1997. Since this pattern illustrates that the Investor had lost their distinct competitive advantage between November 1995 to February 1997, and was a direct result of the Event....⁴¹
34. S.D. Myers, Inc. and Myers Canada would have found success in the general PCB waste remediation market in Canada but for Canada's unlawful acts. In the US market, S.D. Myers, Inc. held a 48% average share of the entire US market for PCB transformer remediation. In addition, S.D. Myers, Inc. had a general success rate of 45% upon all bids in the US market.⁴²
35. In Canada, it is reasonable to conclude that S.D. Myers, Inc. and Myers Canada would have received a success rate on bids no less than its US experience of 45%. Indeed, the Investor submits that on account of the following factors, S.D. Myers, Inc. and Myers Canada reasonably expected to have a Canadian success rate far in excess of 45%:

³⁸ See AP Green Refractories Canada quote at Contractual Documents Binder Tab 37.

³⁹ Dryden Hydro bid in the Contractual Documents Binder Tab.

⁴⁰ In a footnote to this citation in the *Independent Valuator's Report* at 26, the Report notes that this conclusion is based on the Investor's Canadian customer file information, which is set out in the 14 tabbed Contractual Document Binders supplied with this Memorial.

⁴¹ *Independent Valuators' Report* at 19.

⁴² *Independent Valuators' Report* at 6.

- a) There were far fewer competitors operating in the Canadian market than in the American market;
 - b) Together S.D. Myers, Inc. and Myers Canada had a significant first mover advantage in the Canadian PCB remediation market.⁴³
 - c) S.D. Myers, Inc. and Myers Canada provided PCB waste remediation quotes that were significantly lower than the listed prices of their principal Canadian competitors;⁴⁴
 - d) In most cases, there were shorter transportation distances for customers remediating wastes at the S.D. Myers, Inc. Talimadge facility in comparison with its main Canadian competitor. However, the marketing abilities of S.D. Myers, Inc. and Myers Canada was so effective that waste holders located in Northern Alberta (close to Chem-Security) decided to do business with S.D. Myers, Inc. rather than Canadian competitors;⁴⁵
 - e) There were serious operational problems plaguing the ability of the main competitor to the Investor and the Investment, Chem-Security, from accessing the Canadian PCB waste market;⁴⁶ and
 - f) S. D. Myers, Inc. and Myers Canada maintained ongoing customer contacts and post-contract support.
36. Many holders of PCB wastes indicated that they wished to use the Investor and the Investment, but could not because of the *PCB Waste Export Ban*. For example, David Sheppard, Ph.D., Senior Specialist, Environmental and Regulatory Affairs at 3M wrote on December 6, 1995:

Your quotation is attractive for at least two reasons. First your facilities are 1000's of miles closer to our facilities than the only approved Canadian destruction facility at Swan Hills, Alberta. All other factors being equal, given a choice I would prefer to minimize the risk of a transportation incident by shipping to a closer facility.

⁴³ *Independent Valuers' Report* at 18.

⁴⁴ Joint Book of Documents, Tab 71, provides examples of the favourable responses of potential customers to S.D. Myers' prices compared to its Canadian competitors.

⁴⁵ Memorial (Initial Phase) at 14, footnote 34.

⁴⁶ *Independent Valuers' Report* at 23.

Second, your quotation is approximately half of that quoted to us by the most competitive agent we have found for the Swan Hills facility. In my mind, there is absolutely no value added to support the extra cost required to deal with Swan Hills. From an environmental perspective, it would be better to invest the money saved by shipping to the US in another environmental protection project.

At present, the border to the US is closed to shipment of PCB waste by the Canadian Federal Government. If that situation were to change, we would ship the PCB waste currently stored at the two 3M Canada sites to the US in preference to Swan Hills for the reasons stated above.⁴⁷

37. The Canadian market operations of the Investor and the Investment were not speculative. The Investor engaged in similar waste remediation services and the Canadian operations merely represented a new market for the Investor's already established and successful business operations. S.D. Myers, Inc. had a very high success rate in the highly competitive US market which had a number of other competitors engaged in marketing to customers at similar or lower prices.
38. In the Canadian market, where there were far fewer competitors with significantly higher waste remediation quotes, one would expect S.D. Myers, Inc. and Myers Canada to perform significantly better.
39. In the *Independent Valuators' Report*, the valuers recommend that in their expert opinion the Investor and the Investment would have received not less than 66% of the contracts they had been asked to bid on if they were able to proceed but for the operation of Canada's unlawful *PCB Waste Export Ban*.⁴⁸
40. As a result of these factors, and especially in light of the value of S.D. Myers, Inc. and Myers Canada actions as first mover in the Canadian market, the Investor submits that its success rate on bids in Canada would likely have been between 66% to 70%.

Timing and Capacity

41. Appendix II of the *Independent Valuators' Report* carefully examines the issue of the capacity of the Investor's Tallmadge, Ohio facility to process PCB wastes from Canada. This report states that:

At the date of the Event, the Tallmadge facility had the capacity to process approximately 594,200 pounds per week of PCBs and PCB contaminated wastes per year operating continually, with 6 day work weeks. Historically, in period of high demand from U.S. based customers, the plan would add a 'swing shift' and extend operations to 7 days per week which resulted in a 25% to 30% boost in production capacity. At the time of the Event, the Investor was processing approximately 223,400 lbs. per week and thus had excess capacity of approximately 370,800 lbs. per week.

⁴⁷ Set out in Schedule 71 of the *Investor's Memorial (Initial Phase)*.

⁴⁸ *Independent Valuators' Report* at 6.

According to the Investor, it would have taken approximately 3 months to ramp up to full production capacity of 594,200 pounds per week, during which time approximately 50 people would have been hired and trained.

....According to the Investor, within 3 months. they could have increased their productive capacity to 1,196,200 pounds per week and there would not have been any downtime for the existing equipment. As was the case when the Investor has expanded in the past, the hiring and training of personnel would have occurred as the equipment was assembled.

Phase Two: the Investor's Tallmadge plant capacity could have been further increased with moderate additional costs to approximately 1,586,600 pounds per week by investing in additional staff, floor space and equipment...

According to the Investor, it would have taken approximately 6 additional months to ramp up to 1,586,600 pounds per week, and there would not have been any downtime for the existing equipment. As in phase one, hiring and training of personnel would have occurred as the equipment was assembled.⁴⁹

42. As early as 1994, it was the stated intention of the Investment to process Canadian PCB Waste as quickly as possible.⁵⁰
43. Canada's overall environmental strategy preferred the destruction of PCB wastes over their storage. In 1989, The Canadian Council of Ministers of the Environment, the collaborative body of Canadian environmental ministers, agreed to: "*shift the emphasis of their cooperative program to rid Canada of PCBs from storage to destruction.*"⁵¹ This policy was strongly expressed in letters opposing the Interim Order written by the Quebec Deputy Minister of the Environment and by the Hon. Brenda Elliott, the Ontario Minister of the Environment.
44. Many holders stored PCB wastes rather than destroyed them. Those holders concerned about environmentally safe and cost-effective PCB waste destruction, would have preferred destruction over storage as the storage of PCB waste carried more risk than responsibly-managed waste reduction. For example, the President of a Quebec Association of PCB waste holders provided his reasons why getting rid of PCB wastes was better than continued storage, as follows:

⁴⁹ *Independent Valuators' Report* at Appendix II at 42-43 (footnotes omitted).

⁵⁰ Business Plan memorandum to Dana Myers and Scott Myers from Richard Cormier and Pierre Lefebvre, August 15, 1994 at 5. Joint Book of Documents at Tab 112. *Independent Valuators' Report*, Appendix II at 39.

⁵¹ Press Release by the Canadian Council of Ministers of the Environment, Charlottetown Meeting, October 19, 1989 at 3.

...PCB waste is expensive to store and there are certain risks associated with its storage. The St. Basile PCB fire in 1989 was a fire at a PCB waste storage site. . . The option of transporting PCB waste from Quebec to the Alberta Special Waste Treatment Centre is not ideal for a number of reasons.

First, the Alberta Waste Treatment Centre is located thousands of kilometres from Quebec and so the transportation costs are prohibitive; there are closer destruction facilities in Ohio and Pennsylvania.

Second, there is a greater environmental risk associated with the transportation of PCB waste over such a large distance.

Third, on the average, fees for destroying PCB waste by the Alberta Special Waste Treatment are much higher than the fees charged by the United States' waste destruction companies.

Fourth, the Alberta Special Waste Treatment Centre does not have sufficient capacity to destroy PCB waste currently stored in the rest of Canada in an expeditious manner.

There is little prospect that other similar PCB waste destruction centers in Canada will become available; the Quebec Government has indicated to me and I believe that it is highly unlikely that Quebec will have a permanent facility because of public opposition. Existing available capacity to destroy PCB waste in the Alberta Special Waste Treatment Centre is ten times less than the existing available capacity in the United States.⁵²

45. At the time of the making of the *PCB Waste Export Ban* there were few options available for Canadian holders of PCB wastes. In a public hearing before the US EPA, the President of that same Quebec Association of PCB waste holders gave the following statement supporting the opening of the US border to Canadian PCB waste.

... First of all it would be less expensive, something around 50 per cent less. And Secondly, the distance between Quebec and Ohio is around 500 miles, compared to the Quebec-Alberta distance. You have the Swan Hill facility. That's around 2,000 miles. So if there is less transport, there is going to be less risk involved.

And sure, there is always a very small risk involved during the transport, but that risk is far smaller compared to the risk of the storage of the PCBs in a big warehouse for a number of years. And we had the perfect example in Quebec in August of 1988, when a huge fire occurred in a PCB storage facility. A lot of damage was done to the environment, water, air, and soil. And a small town of around 3,000 people had to be evacuated for several weeks. The town is called St. Basile le Grand... So it is important to dispose of those existing PCBs before we relive another accident like the one in '88.⁵³

⁵² Affidavit of Michael Cloghesy, President of the Centre Patronal de l'environnement du Quebec in *Centre Patronal de l'environnement du Quebec and General Waste Transport Inc. and the Minister of the Environment and the Attorney General of Canada*, Federal Court of Canada, Trial Division, December 15, 1995 at 5 and 19.

⁵³ Statement of Michael Cloghesy at the Environmental Protection Agency Informal Public Hearing on S.D. Myers, Inc.'s Petition to import PCBs for Disposal. March 6, 1995 at 77.

Thus, there clearly was a strong sense from the holders of PCB wastes that, if there were a cost-effective option available, it would be preferable to destroy the waste rather than to store it.

PART THREE: ARGUMENT

46. The objective for this Tribunal is to place the Investor back into the position it would have been in "but for" the happening of the illegal act.⁵⁴ In the *Partial Award*, this NAFTA Tribunal recognized the compensation principles established by the Permanent Court of Justice in the *Chorzow Factory case*,⁵⁵ which provides:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.⁵⁶

This compensation principle has been supported by a number of international tribunal decisions⁵⁷, which have applied the compensation rule to lost profits and any consequential damages resulting from harm caused to investors who were denied economic benefits that would otherwise have been available to them "but for" a country's unlawful conduct.

47. Within its reasons in the *Amoco case*, the Iran-US Claims Tribunal extended its analysis of the *Chorzow Factory case* to determine principles related to compensation in the case of a lawful expropriation. Judge Charles Brower took the opportunity in his Concurring Opinion to further clarify the decision of the *Chorzow Factory case* in the context of a modern valuation and business analysis. Judge Brower states:
17. I agree that in the case of any taking, lawful or unlawful, 'the value of the enterprise at the moment of the dispossession' is to be awarded (additional remedies being available in the case of an unlawful expropriation)...
 18. In my view *Chorzow Factory* presents a simple scheme: If an expropriation is lawful, the deprived property is to be awarded damages equal to 'the value of the undertaking' which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking,

⁵⁴ In the words of this Tribunal "compensation should undo the material harm inflicted by a breach of an international obligation". *Partial Award* at para 315.

⁵⁵ At para's 313 - 315 of the *Partial Award*. At para 317 the Tribunal stated: "In summary, the Tribunal will assess the compensation payable to SDMI on the basis of the economic harm that SDMI legally can establish."

⁵⁶ *Chorzow Factory* at 47. [Emphasis added].

⁵⁷ The ICSID Tribunal award in *Amco Asia Corp. v. Indonesia* (Merits Award) 1 ICSID Reports 413 at 500, adopted the reasoning of the *Chorzow Factory case*, calling it the "basic precedent" in international law on compensation.

however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), **judged on the basis of information available as of that date**, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, **plus (in either alternative) any consequential damages**. Apart from the fact that this is what *Chorzow Factory* says, it is the only set of principles that will guarantee just compensation to all expropriated properties.

19. The substantive test of the judgment of *Chorzow Factory* is consonant with the conclusion that the 'value of the undertaking' includes its potential for earning profits. The Court thus described such value as including 'the cessation of the working and the loss of profit which have accrued' as encompassing all elements of damages except those that are 'outside the undertaking itself;' and as embracing 'the worth of the enterprise as a whole' or 'the total value of the undertaking' including 'profit'.⁵⁸
48. Within this Damages phase, this Tribunal should assess the extent of the economic harm suffered by the Investor and the Investment, including the extent of economic benefits foregone "in all probability" if the Canadian border had not been closed. These economic benefits include the value of losses, such as lost profits, consequential losses (such as the loss of competitive advantage and market share), costs and interest thereupon.

Foreseeability and Remoteness

49. This Tribunal has established the need for a direct causal link between Canada's unlawful international conduct and the occurrence of damages.⁵⁹ This direct causal link is particularly relevant when assessing lost anticipated future profits from a "going concern" investment.⁶⁰

⁵⁸ *Amoco Case*, Concurring Opinion of Judge Brower, at 300-2, paras. 17-19.

⁵⁹ At para. 316 of the *Partial Award*, this Tribunal stated that "compensation is payable only in respect of harm that is **proved** to have a **sufficient causal link** with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes."

⁶⁰ In *Amco Asia* (Merits Award) at para. 501, the Tribunal recognized this general principle, when it stated:

... the Tribunal has to state that here again, according to principles and rules common to the main national legal systems and to international law, the damages to be awarded must cover the *direct* and *foreseeable* prejudice. The requirement of *directness* is but a consequence of the requirement of a causal link between the failure and the prejudice; and the requirement of *foreseeability* is met practically everywhere. The Tribunal also recognized that "damages to be awarded must cover the *direct* and *foreseeable* prejudice." [emphasis added]

At paragraph 316 of the *Partial Award* the majority of the Tribunal stated:

... compensation is payable only in respect of harm that is proved to have a sufficient causal link

50. International tribunal decisions have confirmed the principle that damages for anticipated future profits must be direct and foreseeable.⁶¹ As the sole arbitrator's award in the *Shufeldt* claim states, the damages should be direct and "reasonably supposed to have been in the contemplation of both parties as the probable result of the breach."⁶² To be foreseeable, the damages claimed must have been reasonably anticipated by the disputing parties at the time of the breach.
51. If there can be demonstrated any special intention by a government to harm an investor, international law permits the Tribunal to award damages even if they would otherwise be considered to be too remote.⁶³
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with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes.

This finding was further confirmed in para. 325 of the *Partial Award*, which stated:

CANADA shall pay to SDMI compensation for such economic harm as is established legally by SDMI to be **directly as a result** of CANADA's breach of its obligations under Articles 1102 or 1105 of the NAFTA. [emphasis added].

This principle of compensation is a critical element in the international case law. While the terminology used within the decisions differs, all the cases address the same compensation concepts. The cases variously refer to terms such as causality, remoteness and foreseeability.

The *Amoco* Tribunal, at paras. 238-239, was concerned about the speculative nature of long term profit projections sought by the claimant. The *Metalclad* Tribunal, at paras. 120-122, dealt with the question of the speculative nature of future profits while *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (1990) 6 ICSID Review Foreign Investment Law Journal 526 at para. 104, confirms that "uncertain" or "speculative" profits are generally disallowed.

⁶¹ *Asian Agricultural Products* at para. 104 and *Shufeldt v. Guatemala*, (1936) II R.I.A.A. 1081 at 1099.

⁶² *Shufeldt* at 1099. Professor Whiteman states that the assessment of prospective profits requires proof that they are "reasonably anticipated." Whiteman, M.M., *Damages in International Law*, Vol. 3 at 1836-7. Her statement was approved in the Tribunal award in *Asian Agricultural Products* at para. 104.

⁶³ In the *Dix Claim* (1903) IX R.I.A.A. 119, the US-Venezuelan Mixed Claim Commission focussed on the relationship of intent to the remoteness of damages. While this Tribunal found that Venezuela lacked the intent to injure Mr. Dix on the basis of his nationality, the Tribunal upheld the principle that remote damages can be awarded when government measures were intended to harm an investor because of nationality.

Valuation Factors – Anticipated Future Profits

52. Damages for lost profits may be awarded when the loss is a foreseeable consequence of the breach and when such profits can be calculated with reasonable certainty.⁶⁴ Under international law, there has been an array of awards that have provided the aggrieved party compensation not only for actual losses suffered, but also consequential damages such as the loss of possible business profits.⁶⁵
53. The loss of future business profits is an important area of the international law of compensation. In the *Shufeldt* claim,⁶⁶ the arbitrator stated that the lost profits:
- ...must be the direct result of the contract and not too remote or speculative ... (but as) may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it.⁶⁷
54. Compensation for lost profits is a common element of international law compensation awards.⁶⁸ In its discussion of international compensation law, the *Amco Asia* Tribunal noted that the basic principles of international compensation law are comparable with the methods used to quantify damages in contract law. The Tribunal stated:

⁶⁴ In the *Greek Telephone Company Award* (1964) BYIL 216 at 223, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State. In *Sea-Land Service, Inc. v. Iran* (1984) 6 Iran-US CTR 149, the Tribunal cited its decision in *Pomeroy* (1983) 2 Iran-US CTR 372 as a basis for this determination.

⁶⁵ Preliminary Administrative Decisions of the German-American Mixed Claims Commission, *British Yearbook of International Law* (1924), at 222-5; *Janes' Claim* before the American-Mexican Claims Commission, *American Journal of International Law* at 21 (1927), at 362-71; See also *Lighthouses Arbitration* (France/Greece), Claim No. 27, ILR, 23 (1956) at 299; *AGIP Spa v. Congo* (1979) 67 ILR 306 at 326.

⁶⁶ *Shufeldt* (U.S.) v. *Guatemala* (1930) II RIAA 1081.

⁶⁷ (1930) II RIAA 1081 at 1099.

⁶⁸ In *Sapphire International Petroleum Arbitration* (1967) 35 ILR 136 at 186, the Tribunal found that:

This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.

In *May v. Guatemala* (1900) XV RIAA 55 at 72, the Tribunal came to a similar conclusion that compensation should include both the damage suffered and the lost profit. In this case, the investor was "entitled to all the profit to be derived from the railroad until the completion of the term." Similarly, in the *Shufeldt* claim, the arbitrator rendered an award on damages that covered both the losses suffered and the lost profits.

The legal basis of calculation of damages will be set up according to the principles governing the matter, where the prejudice to be compensated results from the failure of a party to a contract to fulfil its obligations under the contract.

This method is justified in the instant case, in spite of the relationship between the host state and the investor not being strictly identical to a private law contract, as earlier shown, but merely comparable to such a contract....

Moreover, it could by no means be contended that if the illegal acts of the State were of delictual nature, the damages to be awarded in compensation of the prejudice should be a lower amount than damages awarded in the framework of contractual liability.⁶⁹

55. In the *Amoco case*, Judge Brower supported the proposition that under international law an investor should receive damages for its "probable performance" in the market. In order to have such damages, it is necessary to obtain a valuation date with respect to restitution value under the *Chorzow Factory case* standard based on the current value of the damages incurred proximate to the date of the Tribunal's award.⁷⁰

Opportunity Loss: Interest and Costs

56. It is not sufficient for this Tribunal to award the Investor the actual amount of its loss at the time of Canada's breach as such an award cannot take into account the harm occasioned to the Investor for being denied its compensation after the time of the breach. Accordingly, international tribunals retain broad discretion to take into account all relevant circumstances, including equitable considerations on a case by case basis, to ensure that full compensation ensues.⁷¹ These types of considerations usually take the form of an award dealing with opportunity loss (that is interest of some form) and awards of costs.
57. Under international law, tribunals can award damages for opportunity loss to a successful party. For example, in its decision in the *Aminoil case*, the Tribunal acknowledged that "...the reasonable rate of return, assessed on a somewhat more liberal scale, constitutes one of the elements of compensation."⁷²

⁶⁹ *Amco Asia* (Merits Award) at 498-499 [emphasis added].

⁷⁰ *Amoco Case*, Concurring Opinion of Judge Brower, at 300.

⁷¹ *Compania Del Desarrollo De Santa Elena, S.A. and The Republic of Costa Rica* (February 17, 2000) ICSID Review-Foreign Investment Law Journal 172 at paras. 90-92. This view was also maintained by a number of Iran-US Claims Tribunal awards such as those in the *American International Group, Inc. v. Iran* (1983) 4 Iran-US CTR 96; *Phillips Petroleum Co. Iran v. Iran* (1989) 21 Iran-US CTR 79; and *Starrett Housing Corp. v. Iran* (1983) 4 Iran-US CTR 112.

⁷² Award in the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (*Aminoil*) (1982) 21 ILM 976 at para. 163.

58. International Tribunals have long recognized that it is appropriate to ensure that when a government engages in wrongful conduct targeted upon a foreign investor that full restitution value must ensue. This principle is recognized in the *Chorzow Factory* compensation rule that has been adopted by this Tribunal, as well as in other decisions. In order to come to this conclusion, the Tribunal must look at what the Investor would typically do with its financial returns so that this procedure can be replicated in the compensation award. If the Investor would take the money out of the business, then interest at commercial rates would be an appropriate order. If the Investor reinvested its money within the business, then interest at the equity rate of the company would be the appropriate rate of interest.

59. In order to return the Investor to the position it would have been in but for Canada's conduct, it is necessary to award full costs of this arbitration to the Investor. Articles 38 to 40 of the UNCITRAL Arbitration Rules provide for the awarding of costs related to the expenses and fees of the Tribunal, experts, witnesses, the appointing authority, and legal representation of the successful party. In particular, Article 38(e) explicitly provides that the Tribunal may in its discretion award costs to the successful party in respect of costs for legal representation. Article 38 states as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitrators;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

60. In Article 40 of the UNCITRAL Arbitration Rules, it is provided that the overall costs of the arbitration should "in principle" be borne by the unsuccessful disputing party, but that the Tribunal has the discretion in light of the circumstances of the case to apportion legal costs as it sees fit. Article 40 states:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the

parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

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

Is There a Geographic Limit to Canada's Breach?

61. Proximate damages caused to the Investor in the United States as a result of the *PCB Waste Export Ban* must be included in this Tribunal's compensation award. In its *Partial Award*, this Tribunal found that Canada's *PCB Waste Export Ban* violated Articles 1102 and 1105 of the NAFTA.
62. NAFTA Article 1102 (1) obliges Canada to provide non-discriminatory treatment to "investors" of another Party. Article 1102(2) provides the same protection to "investments" of investors of another Party. Because this Tribunal has found Canada's *PCB Waste Export Ban* discriminated against the Investor and its Investment, the losses occasioned by Canada's breach to both the Investor and its Investment must be compensable.
63. Moreover, NAFTA Article 1116 makes it clear that losses to the Investor are compensable. Specifically, NAFTA Article 1116 permits an Investor of a Party to submit a claim to arbitration and requires that "the investor has incurred loss or damage by reason of, or arising out of, that breach."
64. The NAFTA does not impose any territorial limitation upon an award of damages made to a foreign investor for damage caused to it through a breach of national treatment (Article 1102) or for treatment in accordance with international law (Article 1105). It only provides in Article 1101(1), that as a threshold issue, NAFTA investors may allege that a breach of the Chapter's obligations has occurred with respect to an investment made in the territory of another NAFTA Party.
65. NAFTA Article 1101 says nothing about limiting the availability of damages caused to an investor, in its own territory, as a result of a breach of NAFTA Party. NAFTA Article 1101(1)(a) indicates that NAFTA Chapter 11 applies to measures adopted or maintained relating to investors of another party, regardless of whether those investors are present in the territory of another NAFTA Party when the breach occurred.
66. The *Partial Award* confirmed the testimony of Dana Myers that Canada knew that the Investor was American and that the Investment's business operations were inextricably linked to work done in Tallmadge, Ohio. It is entirely foreseeable that the damage caused to the Investor, in the United States and Canada, by Canada's illegal *PCB Waste Export Ban* is compensable under the NAFTA.

67. Moreover, in *Pope & Talbot and Canada*, the Tribunal was asked to rule on whether access to the US market for a Canadian company represented an "investment" as defined by NAFTA Article 1139(g). The Tribunal concluded:

...the Tribunal concludes that the Investment's access to the U.S. market is a property interest subject to protection under Article 1110...while Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the "business" of the Investment...the Tribunal concludes that the Investor properly asserts that Canada has taken measures affecting its "investment", as that term is defined in Article 1139 and used in Article 1110.⁷³

68. One would expect that since the NAFTA requires diversity of nationality for the espousal of a Chapter 11 claim, it is only logical that damages caused to a foreign national should be recoverable. Any other conclusion would be contrary to the plain meaning of Chapter 11 and inconsistent with the NAFTA's objectives of substantially increasing investment opportunities and providing "effective" procedures for the settlement of disputes.
69. Accordingly, NAFTA Articles 1101(1), 1102, 1105 and 1116, indicate that NAFTA investors are to be compensated for all losses sustained as a result of breaches of NAFTA Articles 1102 and 1105.

⁷³ *Pope & Talbot Inc. and The Government of Canada*, Interim Award by Arbitral Tribunal, June 26, 2000 at paras. 96-98.

PART FOUR: VALUATION OF DAMAGES

70. On November 20, 1995, Canada issued an emergency order prohibiting the export of PCB waste from Canada to the US. The effect of this order, and the subsequent permanent order, was to prevent the ongoing operation of the business operations of the Investor and the Investment in Canada as well as to destroy the dominant Canadian leadership position enjoyed by the Investor and the Investment.
71. The imposition of Canada's unlawful *PCB Waste Export Ban* had an immediate and devastating effect on the Investor's and the Investments's business operations in Canada.
72. The *Independent Valuators' Report* sets out their opinion as to how the Tribunal could quantify the damages caused by Canada's unlawful *PCB Waste Export Ban* to the Investor and the Investment. The *Independent Valuators' Report's* methodology in summary is set out as follows:
- a) The value of the Investor's and Investment's business activity that was known in Canada is assessed. This value is then augmented with a second value to take into account unrealized market activity. This unrealized activity has been appropriately discounted to take into account the level of risk associated with the bids, but also the prominent market position of the Investor and the Investment. The result of these two numbers represents the success rate on quoted business for the Investor and the Investment.
 - b) This expected value must then be discounted to reflect the relevant period of disability (which is approximately 18 months). The total is the expected volume of revenue lost by the Investor and Investment;
 - c) This expected revenue loss is then assessed to produce a loss of cash flow attributable to the Investor and the Investment (by deducting all appropriate expenses). This figure constitutes the base compensation amount to which the Investor and the Investment is entitled to compensation under the NAFTA;
 - d) This base lost cash flow figure is then augmented by out of pocket losses and then an applicable rate of interest applied to the total of these figures to produce the total losses to put the Investor and the Investment into the position they would have enjoyed but for the wrongful acts of Canada (net of the costs of this arbitration, including professional representation).

The Independent Valuators have advised counsel that cash flow is: profit before consideration of non-cash items such as depreciation and amortization.

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73. The Investor submits that, but for the unlawful conduct of Canada, it would have had the necessary production and storage capacity to remediate all of the actual bids and orders obtained by the Investor.⁷⁴
74. As a result of these lost revenues, the Investor and Investment have suffered a loss of cash flow as follows:

<u>Success Rate on Bids</u>	<u>Lost Profits</u> ⁷⁵
50%	\$28,152,421
66%	\$35,779,421
70%	\$38,052,421

75. In addition to the lost revenues, the Investor and Investment suffered out-of-pocket damages of US\$2,446,421, not including professional costs or the costs of this arbitration. These out-of-pocket damages exclude professional fees and the costs of the arbitration, but include ongoing Canadian Market Expenditures such as lobbying efforts and costs associated with mitigation of damages such as management time, incremental marketing expenses, and incremental administrative expenses. These expenses are set out in Appendix V of the *Independent Valuators' Report*.
76. As a result of Canada's unlawful actions, the Investor has lost significant business opportunities and has also been forced to incur significant costs that it would otherwise not have incurred but for these actions.⁷⁶
77. The Investor and the Investment are entitled to interest on the losses attributable to Canada's unlawful actions. According to the financial statements of S.D. Myers, Inc. and Myers Canada, the companies avoided the use of debt in their business, preferring to engage in self-financing. If Canada had not acted illegally in closing the Canadian border in November 1995, the Investor and the Investment would have been able to earn significant profits from their activities. Accordingly, it is likely that the Investor and the Investment would have re-invested the cash flows generated from its Canadian operations back into company operations, or in another business enterprise that would have provided a rate of return equal to, or greater than, an internal rate of return within their own companies.

⁷⁴ Statement of Dana Myers, February 28, 2001, at para 21.

⁷⁵ Losses in US dollars include lost cash flow from business and out-of-pocket costs.

⁷⁶ *Independent Valuators' Report* at Appendices V and VI.

78. International case law supports the proposition that the amount of compensation should reflect the lost opportunity cost of the cash flow that would have been generated by the enterprise but for the illegal act given the circumstances of each case. Therefore, in these circumstances, the Investor and its Investment would have been able to generate an equity rate of return upon the profits from its Canadian operations. The re-deployment of this cash flow would have begun immediately in November 1995 and would have extended well after the time it submitted the Notice of Intent to Submit a Claim to Arbitration in July 1998. The Investor submits that this rate of return, applicable for the pre-judgment period in this claim, should be set on the basis of the internal rate of return of the Investor and Investment.
79. As a result of these lost opportunities, the Investor and Investment have suffered the following aggregate losses, not including costs and disbursements:

<u>Success Rate on Bids</u>	<u>Further Losses</u> ⁷⁷	<u>Total Loss</u> ⁷⁸
50%	\$25,337,000	\$53,489,421
66%	\$32,201,000	\$67,980,421
70%	\$34,247,000	\$72,299,421

80. The Investor submits that this Tribunal should follow the recommendation of the *Independent Valuators' Report*, which provides that damages in this claim should be based on an assessment that the Investor and Investment would have received a success rate of not less than 66% of the contracts upon which they were requested to bid upon.⁷⁹

⁷⁷ Losses are in US dollars and reflect investment income on lost profits and have been rounded to the nearest thousand dollars.

⁷⁸ Losses in US dollars have been rounded to nearest thousand dollars. Total losses include lost opportunity costs on the lost profits to the expected date of judgment in 2001.

⁷⁹ *Independent Valuators' Report* at 6.

PART FIVE: INTERNATIONAL LAW APPLIED TO THE FACTS

81. This Tribunal must assess the compensation owed to the Investor as a result of Canada's acts, which have been found to be inconsistent with NAFTA Articles 1102 and 1105. While there have not been any decisions by NAFTA Tribunals on the quantification of damages under NAFTA Article 1102 and very little under NAFTA Article 1105, there is a substantial reservoir of international law that can assist the Tribunal.⁸⁰
82. In order to effect adequate compensation, it will be necessary for the Tribunal to take into account the destruction of the competitive advantage obtained by the Investor and the Investment in Canada prior to Canada's measures. The *PCB Waste Export Ban* created a significant postponement of the Investor's and the Investment's operations in the Canadian market. As demonstrated in Part Two of this Memorial, the Investor and the Investment had a significant competitive advantage within the Canadian PCB remediation market. This significant "competitive advantage" must be considered as a key factor in the damages valuation.
83. Further, as a matter of law, this Tribunal is also entitled to take into account in the fixing of damages the "protectionist intent" with which Canada designed the *PCB Waste Export Ban*⁸¹ so as to protect and promote the market share of Canadian competitors at the expense of this specific Investor and its Investment, which were competing in the same business sector. In its *Partial Award* the Tribunal has specifically addressed this by stating:

By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific

⁸⁰ In light of the case law, whether the obligation breached is with respect to unlawful expropriations (as discussed in the Iran - US Claims Tribunal cases), the breach of a concession agreement (*LIAMCO* or *Aminoil*), or the revocation of an investment license (as in *Amco Asia*), the proper compensation level to be provided in international law is the amount equivalent to the restitution of the investment, as provided in the *Chorzow Factory* case. The Tribunal in the *Amco Asia* case at 498-499 used comparable methods of valuation that are used in contracts disputes to inform its valuation.

⁸¹ The Tribunal concluded in the *Partial Award* at para 162.

The evidence establishes that CANADA's policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals. Other factors were considered, particularly at the bureaucratic level, but the protectionist intent of the lead minister in this matter was reflected in decision-making at every stage that led to the ban.

The Tribunal also concluded that the Investor and its Investment were in "like circumstances" with Canadian competitors of the Investor and the Investment such as Chem Security and Cintec because they were in the same "economic" or "business sector" (*Partial Award* at paras 250-251).

circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA...⁸²

Foreseeability of Damages to S.D. Myers Arising from the *PCB Waste Export Ban*

84. This NAFTA Tribunal has required the Investor to establish a “causal link” between the harm suffered and the breach of the specific NAFTA obligation.⁸³ In its findings on facts within the *Partial Award*, the Tribunal has drawn a direct causal connection between the closure of the border by Canada and the harm to the Investor and the Investment.
85. The Investor and Investment acted as a single competitor to Canadian companies. S.D. Myers, Inc.’s and Myers Canada’s competitive marketing resulted in putting them in a position to take business away from domestic companies, which resulted in Canada’s decision to close the border to the exporting of PCB waste. As the Tribunal has concluded:

From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. **It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.**⁸⁴

86. This NAFTA Tribunal has noted in its *Partial Award*⁸⁵ that Canada knew about the possibility that the US was planning to open the border as early as 1994⁸⁶ and certainly in 1995.⁸⁷ The Tribunal also confirms that Canada was aware that S.D. Myers, Inc. was seeking to open the border, operate in Canada and export PCB waste to its US facility.⁸⁸

⁸² *Partial Award* at para. 309. [emphasis added]

⁸³ *Partial Award* at para. 316.

⁸⁴ *Partial Award* at para. 251. [emphasis added]

⁸⁵ *Partial Award* at paras. 164-192.

⁸⁶ *Partial Award* at para. 164.

⁸⁷ *Partial Award* at paras. 166-168. Dr. Schwartz confirms in his *Separate Opinion*, at para. 167, that “...Canada had a long period of advanced warning that the border might be opened and ample time to prepare a response. Officials of the Department of the Environment also had every reason to be familiar with S.D. Myers, Inc. and its safety record...”

⁸⁸ *Partial Award* at paras. 170 and 179.

Canadian officials were aware of the manner in which the Investor and the Investment were to provide services to Canadian customers, especially that the Investor's US facility would be the final destination of the PCB waste from Canada.

87. This Tribunal has already received testimony from Dana Myers stating that a Mr. Hilborn from Environment Canada's Hazardous Waste Branch visited the Investor's US facility and that Mr. Hilborn was aware of the Investor's business plan to have the Investor and the Investment remediate PCB waste from Canada by sending PCB wastes to the US.⁸⁹ In cross-examination from Mr. Everden, Mr. Myers testified:

Q. Do you have any comments on whether landfilling was discussed there, whether Environment Canada officials knew the way in which you did business or proposed to do business with PCBs?

A. ...I called up to Environment Canada and talked to a gentleman by the name of Steve Hart, and I said, 'Look. We have the solution to your PCB problems.' And he says, 'I get a hundred of these calls a day.' I said, 'Well, we've got this facility down in Tallmadge, Ohio. This is what we do.' He says, 'Well, I'll have to send somebody down to look at what you're doing.' So a few months later, John Hilborn came down. I met him at I believe the airport, took him to the facility, showed him everything that we were doing. We had been doing this since 1989. So John Hilborn certainly knew exactly what we were doing...So did Canada know what we were doing? John Hilborn certainly knew, and he was a member of Environment Canada.⁹⁰

Accordingly, officials within the department charged with dealing with hazardous wastes within Environment Canada, knew full-well of the nationality of the Investor and the relationship between the Investor and its Investment before the introduction of the *PCB Waste Export Ban*.

88. In its *Partial Award in S.D. Myers and Canada*, the Tribunal concludes that Canada intended to discriminate against S.D. Myers, Inc and Myers Canada because they were American.⁹¹ The Tribunal further concluded that this intent to discriminate caused substantial harm directly to the Investor and its Investment. The Tribunal states:

Having reviewed all the documentary and testimonial evidence before it, the Tribunal is satisfied that the Interim Order and the Final Order favoured Canadian nationals over non-nationals. The Tribunal is satisfied further that the practical effect of the Orders was that SDMI and its

⁸⁹ Merits Hearing Transcripts, Vol.2, February 15, 2000 at 296.

⁹⁰ Merits Hearing Transcripts, Vol.2, February 15, 2000 at 295-296.

⁹¹ At para. 162 of the *Partial Award*, the Tribunal stated:

The evidence establishes that CANADA's policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals.

investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors.⁹²

89. In his *Separate Opinion*, Professor Schwartz refers to the fact that the threat that S.D. Myers, Inc. and Myers Canada appeared to pose to its Canadian competitors was significant and real. Professor Schwartz notes that senior officials from Chem Security and Cintec were so concerned about the opening of the border that they felt it would “threaten the economic viability of their own operations...” and made these concerns known directly to the Minister.⁹³ It was clear to Canada before their making of the *PCB Waste Export Ban* that the Investor and the Investment had significant market power in the Canadian PCB waste remediation market.
90. The Minister made it clear that she would protect that market for Canadian companies because of this threat and then acted on those statements by closing the border to S.D. Myers, Inc. The protectionist intent behind the measure demonstrated that Canada “intended primarily to protect the Canadian PCB disposal industry from US competition.”⁹⁴ The *PCB Waste Export Ban* was “designed to, and did, curb SDMI’s initiative...”⁹⁵
91. The remedy for a breach of contract under international law includes reasonably foreseeable and anticipated profits.⁹⁶ The Investor’s damages were certainly reasonably foreseeable to Canada in 1995. Canadian officials specifically addressed the economic consequences of a closed border upon S.D. Myers, Inc. well before the *PCB Waste Export Ban* was in place and therefore reasonably foresaw the harm that would be incurred by S.D. Myers, Inc. and Myers Canada directly arising out of the *PCB Waste Export Ban*. In its *Partial Award*, the Tribunal cites a note of October 30, 1995 from Mr. Cornwall outlining the “cons” of the Minister’s possible closing of the border as follows:

⁹² *Partial Award* at para. 193. [emphasis added]

⁹³ *Separate Opinion of Dr. Schwartz* at para. 149.

⁹⁴ *Partial Award* at para. 194.

⁹⁵ *Partial Award* at para. 287.

⁹⁶ The Tribunal in the *May Case* held that in cases where the claimant suffered damages and prejudice, which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned, the compensation payable includes both the damage suffered and the profits lost – *Damnum emergens* and *lucrum cessans* [*May Case*, (1900) XV RIAA at 73]; The Tribunal in the *Shufelât claim* (1930) 2 RIAA at 1099, relied on this proposition in awarding damages.

S.D. Myers will certainly seek redress through NAFTA intervention, since they have invested/lobbied heavily to get the border opened.⁹⁷

92. While the Investor submits that its damages are direct and foreseeable, even damages that would otherwise be considered remote could be included in the compensation in this claim given the blatant discriminatory intent of Canada against the Investor and the Investment.⁹⁸ In the case of unlawful government actions, a government must compensate the investor for its lost profits even if they are indirect or remote.⁹⁹
93. The Tribunal notes that the "practical effect" of the *PCB Waste Export Ban* was that the Investor and its Investment "were prevented from carrying out the business they planned to undertake" placing them at a clear disadvantage in comparison to their Canadian competitors.¹⁰⁰ This Tribunal has recognized that "the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility."¹⁰¹ The "competitive advantage" that S.D. Myers, Inc. sought to gain over its US competitors by moving aggressively into the Canadian market may be a factor in the determination of damages. The Tribunal stated:

... SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive

⁹⁷ *Partial Award* at para. 179.

⁹⁸ The *Dix case* supports the principle that even remote damages can be awarded where government measures intend to harm an investor because of nationality. *Dix case* (1903) IX RIAA at 121.

⁹⁹ In the *Petrolane case*, a case of a lawful expropriation, the dissenting and concurring opinion of Judge Khalilian held that lost profit for a lawful expropriation is generally viewed as consequential, indirect, and even remote damage that is not compensable. *Petrolane, inc. v. Iran*, 28 Iran-US CTR at 17. The *Phillips Petroleum case*, [*Phillips Petroleum Co. Iran v. Iran* (1989) 21 Iran-US CTR 79]. Specifically, see paras. 111-116, and 154-158] a case dealing with lost profits for contractual rights to exploit Iranian oil is analogous to the S.D. Myers, Inc. claim. The valuation approach set out by the Tribunal in the *Phillips case* is directly relevant to this present.

Of course, this applicability must be made subject to noting the difference in country risk that should be applied between Canada and revolutionary Iran. The use of the Discounted Cash Flow method in the *Phillips case* needed to take into account the riskier situation of investing in Iran in the absence of an "active and free market". This is not the case with respect to this claim as there is ample evidence of its involvement in the US market and its extensive efforts to gain market share in Canada in anticipation of the opening of the US border.

¹⁰⁰ *Partial Award* at para. 193.

¹⁰¹ *Partial Award* at para. 93.

advantage. This may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 1105...¹⁰²

As a leading provider of the same remediation services in the US, the Investor had a clear expectation that by being the first mover into the Canadian market, and by developing it and lobbying for the open border, it would have the advantage over its US and Canadian competitors in taking a substantial share of the Canadian market.

94. The Investor and the Investment were poised in 1995 to enter and gain a large share of the Canadian PCB waste remediation market and was prevented **but for one circumstance** - the promulgation of the *PCB Waste Export Ban*.¹⁰³ S.D. Myers, Inc. had a long track record in the PCB waste remediation business and made substantial profits in that business as its profits were both reasonably anticipated and probable.
95. The Investor suffered direct, foreseeable and consequential damage to itself and its Investment from Canada's *PCB Waste Export Ban*. The Investor and the Investment are entitled to recover the full value of their losses, including the loss of their business profits that would have been realized but for Canada's unlawful government measure.

Interest

96. If Canada had not acted illegally in closing the Canadian border in November 1995, the Investor and the Investment would have been able to earn significant profits and therefore generate cash flow from their activities.
97. The award of "interest" should compensate the Investor and the Investment for the lost opportunity of re-deploying the cash flow that the "Canadian project" would have generated either back into its main US business, or in another business enterprise that they anticipated would give them a rate of return equal to, or greater than, their own enterprise. The award for compensating the Investor and the Investment for the lost opportunity of access to this cash flow would reflect the damages incurred directly arising from Canada's unlawful *PCB Waste Export Ban* in November 1995.
98. The Investor is entitled to interest as a result of being denied the benefits of its own operations and the operations of the Investment. The rate of interest payable to the Investor should reflect the lost opportunity of the cash flow that would have been generated by the Investor and the Investment but for the operation of Canada's unlawful *PCB Waste Export Ban*.

¹⁰² *Partial Award* at para. 284.

¹⁰³ *Independent Valulators' Report* at 5.

99. In the *Santa Elena* case, the ICSID Tribunal supported such a position when it stated:

... where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.¹⁰⁴

100. The payment of interest reflects the principle that the wrongdoing must make the harmed party whole for its loss. But for Canada's actions, the Investor and the Investment would have been in a position to re-invest the cash flow generated from their business operations related to Canada within their own businesses. S.D. Myers, Inc. avoided the use of debt in their business, preferring to engage in self-financing. Accordingly, the Investor and the Investment, would have re-invested the free revenue generated from its Canadian operations into its main US operation, which operated with a negligible amount of debt.¹⁰⁵ Therefore, in these circumstances, the Investor and its Investment would have been able to generate an equity rate of return with the cash flow from the Canadian operations, which would have been higher than commercial interest rates.¹⁰⁶

101. S.D. Myers, Inc. would have been in a position to earn a rate of return from its profits as early as 1995, and this would have continued well after the time it submitted the Notice of Intent to Submit a Claim to Arbitration in July 1998. Therefore, the Investor is entitled to receive compensation for the lost opportunities it had to use the revenues from its Canadian operations to further its business. This direct consequential loss must be based upon the opportunity lost by the Investor by not re-deploying its cash flow from its Canadian-based business operation.

102. The interest rate that is set by this Tribunal should be assessed as compound interest awarded from the date of Canada's unlawful act (November 20, 1995).

Costs

103. The Investor submits that in light of its success in the Merits Phase of this arbitration and in light of the facts of this Claim, that it is entitled to receive the full costs of the pursuit of its Claim including that the costs of this arbitration and that the legal costs of the Investor's legal representation be borne entirely by Canada.

¹⁰⁴ *Santa Elena* at para. 104.[emphasis added]

¹⁰⁵ *Independent Valuators' Report* at 51.

¹⁰⁶ The re-deployment of this cash flow would have begun immediately in November 1995 and would have extended well past the US closure of the border in July 1997.

104. The fact of Canada's protectionist intent, which was at the centre of its unlawful actions, must surely be relevant to the finding of costs. Since the time that the Investor submitted its Memorial (Phase One), the facts of Canada's "protectionist intent" have been manifest. Canada was unable to contradict this evidence at any point in its submissions. Canada knew that one of the risks of pursuing this matter through two full hearing phases (for merits and damages), and forcing the Investor to assert its full legal rights under NAFTA Chapter 11 and international law, would potentially lead to an adverse ruling and an awarding of costs against it. The UNCITRAL Arbitration Rules clearly provide that "costs" include costs of legal representation to the successful disputing party, and states the "principle" that the costs of the arbitration are to be borne by the unsuccessful party.
105. This claim demonstrates those facts that support the awarding of full costs to the Investor for the following reasons:
- a) The overwhelming evidence in this case demonstrated that Canadian officials intentionally set out to frustrate the business opportunities afforded to the Investor and its Investment under the NAFTA.
 - b) During the internal debate before the promulgation of the *PCB Waste Export Ban*, Canada recognized that its measure would likely be a violation of its NAFTA obligations and that the Investor and its Investment would likely seek compensation under Chapter 11.¹⁰⁷
 - c) In its *Partial Award*, this Tribunal recognized that it was the clear intention of Canada to specifically frustrate the legitimate business interests of the Investor and its Investment, was recognized by this Tribunal in its *Partial Award*.¹⁰⁸
 - d) The Investor has demonstrated a measure of success by prevailing over Canada throughout this arbitration.

In light of these facts, especially the evidence of Canada's deliberate intention to harm the Investor and its Investment based on nationality, it is warranted for this Tribunal to use its discretion under Article 40 of the UNCITRAL Rules to award full costs against Canada.

¹⁰⁷ *Partial Award* at para.179

¹⁰⁸ *Partial Award* at para.162.

Timing of the Valuation Date

106. Within the *Independent Valuators' Report*, the issue of timing of the quantification of damages is an important determination. The *Independent Valuators' Report* addresses this issue as follows:

The effective date of a damages analysis is generally viewed to be the date on which the wrongdoing occurred. Under this premise the effective date of the analysis in this matter would be November 16, 1995 (i.e. The date on which the border was closed due to the actions of the Canadian government).

However, in circumstances where the plaintiff is not able to take immediate action to mitigate the damages (e.g. where an income loss arises as a result of the wrongdoing), the effective date of the analysis is generally extended beyond the date of the wrongdoing to the date on which complete mitigation has occurred; it is at this point that the losses are considered to have crystallized.

Where the plaintiff's position cannot be mitigated (as is the case with the Investment/the Investor), or in circumstances where losses are expected to continue into the future, the effective date of the analysis is taken to be the current date; events which transpire between the date of the wrongdoing and the current date are considered in the quantification of economic damages.¹⁰⁹

107. Accordingly, the Investor submits that taking into account the unlawful nature of Canada's inconsistent acts, the effective valuation date should be the date of the making of the Tribunal's award.
108. The Tribunal has made it clear that it will not assess damages against Canada for the period of time in which the Canada-US border was closed due to action from the United States of America.¹¹⁰ The Investor has not submitted any claim for compensation relating to damages attributable to the closure of the border by the Government of the United States of America in July 1997.

¹⁰⁹ *Independent Valuator's Report* at 30.

¹¹⁰ *Partial Award* at para. 284, footnote 47 with respect to the temporary nature of the border closing.

PART SIX: SUBMISSIONS

In view of the facts and arguments set out in this Memorial, 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 NOT LESS THAN US\$67,980,421.
- 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 of professionals used by the Investor to prepare, negotiate and prosecute this Claim;
 - (iii) appropriate pre and post-judgement interest on these amounts at a commercial rate of interest

Submitted this 1st day of March 2001



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