

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

S.D. MYERS, INC.

CLAIMANT/INVESTOR

and

THE GOVERNMENT OF CANADA

RESPONDENT/PARTY

GOVERNMENT OF CANADA

MEMORIAL ON COSTS

4 NOVEMBER 2002

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PART A. INTRODUCTION

1. Canada submits this Memorial on Costs in accordance with the Tribunal's direction at the Damages Hearing¹ and paragraph 309 of the Second Partial Award.
2. Canada submits that in the circumstances of this case, each party should bear its legal costs and share equally the arbitration costs of these proceedings.

PART B. SUMMARY OF CANADA'S ARGUMENT

3. This arbitration spanned more than four years. It raised several novel and complex legal issues under NAFTA Chapter 11, required the production of thousands of documents, called upon the expertise of accountants, economists, PCB experts, and U.S. lawyers, required substantial briefs from the parties and resulted in 20 awards addressing procedural and substantive obligations under NAFTA Chapter 11.
4. Throughout these proceedings, Canada faced broad, vague, shifting and exaggerated claims. The Investor alleged breaches of four distinct NAFTA obligations and amended its claim for damages several times. The Investor increased the claim from US\$ 10 million to US\$ 71 million. The Investor ultimately lowered it to about US\$ 53 million just prior to the damages hearing.² The Investor was not simply refining its case during the proceedings; it continuously revised and supplemented its claims as the arbitration proceeded. Canada incurred considerable costs clarifying, testing and rebutting these shifting claims.
5. Canada also incurred substantial and unnecessary costs because of the Investor's conduct during the arbitration. The Investor's lack of cooperation, repeated refusals to produce documents, introduction of evidence at late stages of the

¹ Transcript, 26 September 2001, p.1057, ll. 19-24

² In its Second Partial Award, the Tribunal reduced the quote population by 50% because of the speculative nature or lack of documentation of the Investor's claim.

proceedings, and exaggerated allegations resulted in increased arbitration and legal costs for Canada. Those costs exceeded those that Canada could reasonably have been expected to incur if the Investor had presented its case more efficiently.

6. The determining factors that outweigh or rebut any presumption that might hang on the Investor's modest success are the novelty of this arbitration, the inflated amount of the Investor's claim, and the increased costs incurred by Canada due to the conduct of the Investor during the extended damages assessment phase of the arbitration.
7. Every NAFTA Chapter 11 tribunal that has assessed costs has focused on novel issues and each has declined costs to the "successful" party, regardless of the degree of success or whether that party was the respondent government or the investor. The circumstances of this arbitration likewise justify an award directing that each party should bear its own legal costs and share equally the arbitration costs of these proceedings.

PART C. APPLICABLE LAW

1. Authority to Award Costs

8. Article 1135(1) of NAFTA entitles a tribunal to "award costs in accordance with the applicable arbitration rules."
9. Articles 38 and 40 of the UNCITRAL Rules govern awards of costs. Article 38 of the UNCITRAL Rules gives the tribunal authority to fix the costs of an arbitration.³

2. What Costs Can Be Awarded

10. Article 38 of the UNCITRAL Rules provides an exhaustive definition of the categories of costs that can be awarded by a tribunal. It states:

³ Articles 38 and 40 of the *UNCITRAL Arbitration Rules*, adopted by Resolution 31/98 of the General Assembly on December 15, 1976, 31 U.N. GAOR Supp. (No. 17) at 34-50, U.N. Doc A/31/17 (1976).
[Tab 1]

[...] 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 arbitral tribunal;
- 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.

[emphasis added]

11. Therefore, in addition to arbitral costs, legal costs can be included in an award of costs to the extent a tribunal considers these legal costs reasonable. Whether legal costs are reasonable will depend on circumstances such as the factual and legal complexity of the case and the time spent on the case.⁴

3. How Costs Are To Be Awarded

12. Article 40 of the UNCITRAL Rules addresses allocation of costs in arbitration:
 - (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 the 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.
 - (3) When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

⁴ Berger, Klaus Peter *International Economic Arbitration* (Deventer: Kluwer, 1993), at p. 618 – 9 [Tab 2]; See also Redfern, Alan & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (London: Sweet & Maxwell, 1999) at p. 408. [Tab 3]

- (4) No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.
13. Article 40 establishes the basic rule that costs enumerated in Article 38 may either be borne by a party or be apportioned between the parties if the tribunal determines apportionment is reasonable. In assessing if apportionment is reasonable, the tribunal is to have regard to the circumstances of the case.
14. Article 40 distinguishes between arbitral costs, referred to in Articles 38(a) – (d) and (f)), and costs of legal representation and assistance, referred to in Article 38(e).⁵ It establishes a different treatment for apportionment of arbitral costs⁶ than for legal costs.
15. Article 40(1) creates a rebuttable presumption that arbitral costs are paid by the unsuccessful party. As it notes, “...the costs of arbitration shall in principle be borne by the unsuccessful party”.⁷ Gotanda has termed this “a slight presumption”, indicating that it is weak and easily rebutted.⁸
16. One of the circumstances in which the UNCITRAL drafters considered it appropriate to deviate from the presumption that the successful party be awarded arbitral costs was if a claim was partially successful.⁹ The UNCITRAL drafters believed that if a claim was only partially successful, arbitrators should consider apportioning arbitral costs rather than following the presumption that the unsuccessful party bears the costs of arbitration.¹⁰

⁵ Berger, *supra* at p. 617 [Tab 3]; see also, John Yukio Gotanda, “Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations” 21 *Michigan Journal of International Law* 1 (1999) at p. 9. [Tab 4]

⁶ Defined in Article 38(a) – (d) and (f).

⁷ See Baker, Stuart Abercrombie & Mark David Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Deventer: Kluwer, 1992) at pp. 213-214 [Tab 5]. See also Nurick, Lester “Costs in International Arbitration” 7 *ICSID Review* 57 (1992) at p. 59 [Tab 6]; Berger, *supra*, at p. 617. [Tab 2]

⁸ Gotanda, John Yukio, *Supplemental Damages in Private International Law*, (The Hague: Kluwer, 1998) at p. 183. [Tab 7]

⁹ Baker & Davis, *supra*, at p. 214. [Tab 5]

¹⁰ *Ibid.*

17. In contrast, in the case of legal costs, there is no presumption that the unsuccessful party will bear the costs of the successful party. Article 40(2) of the UNCITRAL Rules gives arbitrators discretion to assess which party will bear legal costs or to apportion them between the parties if apportionment is reasonable in the circumstances.¹¹

4. Criteria Relevant to Apportionment of Costs

18. Where the tribunal apportions legal or arbitral costs, the guiding principle is what is reasonable in the circumstances of the case.¹²
19. One factor in apportioning costs is the degree of success achieved by a party.¹³ The tribunal will consider whether a party prevailed on its claims and, if so, the extent to which it recovered the amount claimed.¹⁴ Even where a claimant succeeds completely, tribunals have been reluctant to order that the unsuccessful party bear the whole of the winning party's legal costs.¹⁵
20. The fact that a party had only partial success is relevant to determining that an award of costs should be apportioned between the parties and to the quantum of apportionment. In particular, some tribunals have required that the partial success be substantial before ordering apportionment in favour of the successful party.¹⁶
21. As noted by Gotanda:

Where a party has prevailed on some but not all of its claims, tribunals have taken a variety of approaches. Some tribunals have awarded a party a portion of the costs and fees claimed to a party that has partially prevailed. Others have

¹¹ Dore, Isaak I., *Arbitration and Conciliation under the UNCITRAL Rules: A Textual Analysis* (Boston: Martinus Nijhoff, 1986) at p. 68 [Tab 8]; See also Baker & Davis, *supra*, at p. 209 and at p. 213 – 4 [Tab 5] which notes that whether arbitrators should be entitled to award legal fees at all was a hotly debated issue in the drafting of the UNCITRAL Rules. Hence, it was eventually decided to leave whether and to what extent to award legal costs to the discretion of the arbitrators, Berger, *supra*, at p. 617. [Tab 2]

¹² John Yukio Gotanda, "Awarding Costs and Attorneys' Fees in International Commercial Arbitrations" 21 *Michigan Journal of International Law* 1 (1999) at p. 7. [Tab 4]

¹³ Baker & Davis, *supra*, at p. 214 [Tab 5]. See also, Berger, *supra*, at p. 619. [Tab 2]

¹⁴ Gotanda, *supra*, at p. 176 *et seq.* [Tab 7]

¹⁵ Redfern & Hunter, *supra*, at p. 407. [Tab 3]

¹⁶ Gotanda, *supra*, at p. 182. [Tab 7]

awarded a partially successful party only a part of the costs claimed, but no attorneys' fees. A number of tribunals have ordered the parties to bear their own costs and to share equally the costs and expenses of the tribunal.

Tribunals also differ on how to allocate costs and fees between the parties. Some tribunals award costs and fees in proportion to the parties' level of success on the claims....Other tribunals offset the reimbursement claims.¹⁷

22. Tribunals have also considered whether the damages sought were excessive, as part of their assessment of the degree of success of a claimant.¹⁸ For example, the authors of *International Chamber of Commerce Arbitration* note the following case:

In one unpublished major arbitration lasting many years and where hundreds of millions of dollars were in dispute, the claimant obtained an award in its favour, but for a far smaller amount of damages than claimed. The tribunal stated that: "Despite the magnitude of the efforts and the resources deployed by the parties neither one nor the other has really obtained victory." Accordingly the tribunal found it equitable to divide equally the arbitration expenses, and to provide that each side would support its own legal fees. In other similar cases a tribunal might find that arbitration costs "follow the event" but that each side would bear its own party costs.¹⁹

23. In *Final Award No. 6527*²⁰ the tribunal determined that the claimant's claim was justified, but that the damages sought were excessive. As a result, it ruled that under the circumstances it was "appropriate [that] each party ... bear its own legal costs and for the parties to share equally the other costs of the proceedings."
24. In addition to the extent of success, other factors generally considered in apportioning arbitral and legal costs²¹ include:
- (a) whether a party engaged in dilatory tactics,²²
 - (b) the conduct of the parties in the litigation,²³ and
 - (c) whether a party maintained excessive, frivolous or unreasonable positions.²⁴

¹⁷ Gotanda, *supra*, at pp. 22-23. [Tab 4]

¹⁸ Craig, W. Laurence, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (Dobbs Ferry, N.Y.: Oceana Publications, 1998) at pp. 395-96. [Tab 9]

¹⁹ *Ibid.*, at p. 396.

²⁰ *Final Award No. 6527*, (ICC 1991) at para 33 [Tab 10]

²¹ Gotanda, *supra*, at p. 186 *et seq.* [Tab 7]

²² Berger, *supra*, at p. 617. [Tab 2]

²³ *Ibid.*; and Gotanda, *supra*, at pp. 187-8. [Tab 7]

25. There have been five NAFTA Chapter 11 arbitrations concluded to date. In *Ethyl Corp. v. Canada*, the parties settled the litigation and hence there was no tribunal award of costs. In the other four NAFTA Chapter 11 cases, the tribunal awards reflect the criteria discussed above and either apportion arbitral and legal costs or order that the parties bear their own costs.
26. In *Azinian v. Mexico*²⁵ the Claimant failed entirely on the merits. Nonetheless, the tribunal ordered each side to bear its own legal costs and to share the arbitral costs equally. The Tribunal noted that where a Claimant fails completely it is usual to award costs to the Respondent. However, the Tribunal declined to do so on the following grounds:

In this case, however, four factors militate against an award of costs. First, this is a new and novel mechanism for the resolution of international investment disputes. Although the Claimants have failed to make their case under NAFTA, the Arbitral Tribunal accepts, by way of limitation, that the legal constraints on such causes of action were unfamiliar. Second, the Claimants presented their case in an efficient and professional manner. Third, the Arbitral Tribunal considers that by raising issues of defective performance (as opposed to voidness ab initio) without regard to the notice provisions of the Concession Contract, the Naucalpan Ayuntamiento may be said to some extent to have invited litigation. Fourthly, it appears that the persons most accountable for the Claimants' wrongful behaviour would be the least likely to be affected by an award of costs...²⁶

27. In *Metalclad v. Mexico*²⁷ the Claimant succeeded on both of its claims under Articles 1105 and 1110. In the circumstances of the case, the Tribunal found it equitable for each party to bear its own costs and half the advance payments to ICSID. This costs award was not varied on statutory review, although the reviewing Court awarded Metalclad 75% of its statutory review costs where

²⁴ Gotanda, *supra*, at p. 173, at pp. 188-9 and generally at pp. 173 – 192 [Tab 7]. See also: Nurick, *supra*, at p. 58 [Tab 6]; and Wetter, J. Gillis & Charl Priem, "Costs and Their Allocation in International Commercial Arbitrations", 2 Am. Rev. of International Arbitration 249 (1991) at p. 327. [Tab 11]

²⁵ *Azinian, Davitan & Baca v. United Mexican States*, ARB (AF)/97/2, November 1, 1999 at pp. 40 – 41. [Tab 12]

²⁶ *Ibid.*

²⁷ *Metalclad Corp. v. United Mexican States*, ARB(AF)/97/3, August 30, 2000, at p. 42. [Tab 13]

Mexico achieved partial success in its application to set aside the Tribunal judgment.²⁸

28. In *Waste Management Inc. v. Mexico*²⁹ the Tribunal dismissed the arbitration for failure to comply with the waiver requirement in Article 1121 of NAFTA. It ordered the Claimant to pay the arbitral costs and each party to bear its legal costs.
29. Most recently, the Tribunal in *Mondev International Ltd. v. The United States of America*³⁰ dismissed the investor's claim entirely and ordered that each party bear its own costs. In doing so it recognized that success is not measured as a simple win or a loss on the merits, but that the novelty of investor-state issues, and the importance of understanding the scope and limits the NAFTA in its infancy were also relevant factors in assessing costs:

NAFTA tribunals have not yet established a uniform practice in respect of the award of costs and expenses. In the present case the Tribunal does not think it appropriate to make any order for costs or expenses, for several reasons. First, the United States has succeeded on the merits, but it has by no means succeeded on all of the many arguments it has advanced, including a number of arguments on which significant time and costs were expended. Secondly, in these early days of NAFTA arbitration the scope and meaning of the various provisions of Chapter 11 is a matter both of uncertainty and of legitimate public interest. Thirdly, the Tribunal has some sympathy for Mondev's situation, even if the bulk of its claims related to pre-1994 events. It is implicit in the jury's verdict that there was a campaign by Boston (both the City and BRA) to avoid contractual commitments freely entered into. In the end, the City and BRA succeeded, but only on rather technical grounds. An appreciation of these matters can fairly be taken into account in exercising the Tribunal's discretion in terms of costs and expenses.³¹

5. Settlement Discussions Are Not Relevant to Costs Assessment

30. Canada anticipates that the Investor may mention settlement discussions in its submission on costs.³² Canada submits that in the circumstances of this case, any

²⁸ *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, May 2, 2001 at p. 48. [Tab 14]

²⁹ *Waste Management Inc. v. United Mexican States*, ARB(AF)/98/2, June 2, 2000. [Tab 15]

³⁰ *Mondev International Limited v. United States of America*, ARB(AF)/99/2, October 11, 2002 [Tab 16]

³¹ *Ibid.*, at para 159

³² The Investor did not secure Canada's consent to disclose any documents about settlement. A party cannot unilaterally disclose privileged settlement negotiations.

settlement discussions between the disputing parties are irrelevant and inadmissible.

31. There is no clear rule in international arbitration indicating whether, and in what circumstances settlement discussions should be considered in awarding costs. Generally, domestic court rules governing the treatment of offers to settle deem settlement offers relevant only if they meet or exceed the amount of the final award. By analogy, any settlement discussions between Canada and the Investor would only be relevant if the damages awarded in the Second Partial Award met or exceeded the amounts proposed in the Investor's offer to settle. There can be no suggestion that this occurred in this case. Hence, the Tribunal should not take any settlement discussions into account when determining apportionment of costs.
32. If the Investor raises settlement discussions between the parties, and if the Tribunal proposes to consider such negotiations in assessing or apportioning costs, Canada requests an opportunity to comment on these discussions and their relevance to costs.

PART D. COSTS INCURRED BY CANADA IN THIS ARBITRATION

1. Arbitration Costs

33. As directed by the Tribunal, the disputing Parties in this arbitration bore the arbitration costs equally.³³ Canada has paid its share³⁴ of the arbitration costs accrued to date. Canada has further undertaken to pay its share of the Tribunal's final invoice when rendered.

2. Legal Costs

34. Canada also incurred significant legal costs, including the fees and expenses of its lawyers as well as those of its expert witnesses and accountants.³⁵

³³ To date, US\$853,500.00

³⁴ US \$426,750.00

³⁵ See Redfern & Hunter, *supra*, at p. 405 for description of what legal costs reasonable include. [Tab 3]

a. Legal Fees

i) Legal Fees of Government Counsel

35. Lawyers employed by the Government of Canada represented Canada in the arbitration. Based on the time records of the litigation counsel of the Civil Litigation Section and the Trade Law Bureau, the time spent on this arbitration by Government counsel totalled 7220.6 hours.³⁶ This includes time for assembling evidence, reviewing and drafting memoranda of argument or appearing before the arbitrators. The number of hours expended by counsel – particularly during the Damages Phase – reflects the intensity of effort required by Canada’s counsel to address the case presented by the Investor and the numerous complex and novel issues raised by the claim.

ii) External Legal Costs

36. To properly address and brief the Tribunal with respect to the legal issues relating to the enforcement discretion granted to S.D. Myers, Canada retained U.S. counsel with Garvey, Schubert & Barer, a Washington law. A Memorandum on U.S. Law was submitted to the Tribunal during the Liability Phase of this arbitration. Counsel from that firm also appeared before the Tribunal to explain the relevant principles.

iii) Investor’s Counsel

37. Based on the Investor’s submissions, Canada acknowledges that counsel for the Investor will claim its legal costs, including legal fees, in its Submission on Costs. In accordance with Article 38(e), such costs must be reasonable. Canada submits that one relevant factor to consider in assessing the reasonableness of legal fees is the experience of the counsel and whether their hourly rates reflect the Canadian market rate.³⁷

³⁶ See Annex I

³⁷ A review of the Canadian Law List shows that Mr. Appleton and Mr. Laird each received their first call to the Bar 11 and 7 years ago, respectively. Mr. Appleton was called to the New York Bar in 1991, the Bar of Ontario in 1992 and the Washington, D.C. Bar in 1998. Mr. Laird was called to the Ontario Bar in

b. Experts Costs

38. Canada also retained the services of various experts during this arbitration to address complex technical issues regarding the Canadian and US PCB Waste disposal market and the accounting and economic issues arising from the assessment of damages. The latter included analysing the PCB market and competition, assessing the validity of S.D. Myers' claim that it had a first-mover advantage, the potential market share of SD Myers "but for the ban" and the effect of the ban on the remaining PCB inventory in Canada after the ban was lifted. Canada's experts not only refuted the claims made by S.D. Myers but also provided valuable information to the Tribunal in their areas of expertise, often on issues not addressed, or insufficiently addressed, by the Investor and necessary to the resolution of the case.

i) KPMG

39. Canada retained KPMG for the Damages Phase to assist with the assessment of damages flowing from the Liability Award. Mr. Derek Rostant of KPMG appeared as a witness during the Damages Phase. Other members of KPMG also assisted Canada in this arbitration.

40. The Investor's conduct of the arbitration compelled KPMG to devote additional resources to review and re-assess its initial calculations, all of which were based on the Investor's initial Memorial on Damages. This conduct included the Investor's shifting allegations regarding the amount of damages claimed, its late production or failure to produce documents requested by Canada and relevant to the assessment of damages, as well as the introduction of new evidence at a late stage.³⁸ While some minor adjustments to the claim for damages are to be

1995. Information on other counsel associated with the firm (Mr. Sharma, Mr. Weiler, and Ms. Marotta) does not appear in the law list but they are known to be more junior.

Litigation counsel with less than 11 years of experience at the bar based in large Toronto or Montreal firms do not charge anywhere near the rates charged by this firm. By way of illustration, the Ontario Rules suggest a range of CAD \$225-300 per hour for lawyers practicing less than 10 years and CAD \$300-400 per hour for lawyers practicing between 10 and 20 years.

³⁸ From the commencement of the damages phase, to do the preliminary analysis and report, (which could be expected in the normal course of proceedings,) it required 1741 hours of work from KPMG. KPMG

expected during the course of an arbitration, the wide variation in the amounts claimed by the Investor in this arbitration were unreasonable and resulted in unnecessary additional work for KPMG. Errors by the Investor's expert, Mr. Rosen, also increased the time necessary to respond to the Damage claim.

41. The attached schedule shows the number of hours expended by KPMG during the Damages Phase of these proceedings. Canada invites the Tribunal to consider the amount of time expended between the delivery of Mr. Rostant's first report and the Damages Hearing. During that time KPMG received and reviewed additional data and reports from the Investor and revised its reports to address changing claims. The total amount of time expended during this time totalled 633.8 hours.
42. Mr. Rostant's work also identified several issues that were not addressed by the Investor in its damages claim. Among these were the identification of various costs factors, the effect of the discretionary employee profit sharing plan, and the appropriate departmental allocation of costs.
43. Overall, the Tribunal relied heavily on KPMG's evidence and Canada's other experts on such issues as other US competitors, Canadian competitors, and the valuation and consumption of PCB inventory in assessing the damages.³⁹ These matters were either not addressed or were inadequately addressed by the Investor.

ii) Lexecon Inc.

44. Canada retained Robert Stillman, a senior Vice President at Lexecon Inc. ("Lexecon"), in the Damages Phase of the arbitration to assess the PCB waste disposal market in Canada and the U.S., its price sensitivity, potential market share for S.D. Myers, the effect of competition on prices in a "but for" scenario and the impact of the Interim Order on the market. All these issues were either not addressed, or insufficiently addressed, by the Investor in its Memorial.

spent 257 hours to prepare and attend the Damages Hearing, which also includes the joint experts meetings. KPMG spent 137.2 hours in preparation of the Matrix, after the Damages hearing. What is objectionable, is the balance of time that KPMG spent in re-casting its reports in the light of the new and additional evidence: 633.8 hours.

³⁹ Second Partial Award at paragraphs 288, 289, 294, 295

45. For example, while S.D. Myers claimed a “first-mover advantage” in the Canadian PCB waste disposal market, it did not explain the concept in the context of the industry, which according to the Investor’s own admissions remained price sensitive. It also failed to consider the effect that competition would have had on prices, had the ban not occurred (i.e. price degradation).⁴⁰ The Tribunal relied on the information and analysis provided by Mr. Stillman and took both of these factors into account in its Damages Award.

iii) Farkas Berkowitz

46. During the Damages Phase, Canada retained Dr. Joan Berkowitz, to provide background and analysis of the U.S. PCB waste disposal market. Dr. Berkowitz provided two written reports and testified during the Damages Phase. Her evidence formed the basis for the analysis and calculations prepared by KPMG and Lexecon.

47. Dr. Berkowitz analyzed both the Investor’s U.S. competition and its reports to the U.S. EPA, which matters the Investor had only partially brought to the attention of the Tribunal. Dr. Berkowitz gave the Tribunal a more complete picture with respect to the U.S. market and its differences from the Canadian market, and with respect to S.D. Myers’ allegations concerning to its U.S. competitors and market share.

iv) White and Associates

48. Canada retained Douglas White, a senior environmental consultant and professional engineer in the Damages Phase. Mr. White advised on competition in the Canadian PCB services market and S.D. Myers’ position within that market. His work included an assessment of Canadian competitors and an analysis of market attitude and potential Canadian customers.

49. Part of Mr. White’s analysis of the market was based on a questionnaire addressed to the potential customers and contracts of S.D. Myers. This revealed relevant

⁴⁰ Second Partial Award, at par 185

information that had not been brought forward by S.D. Myers or taken into account in its calculations of its potential market share, notably the concerns of Canadian PCB owners with respect to U.S. liability as a factor in not choosing a U.S. supplier of PCB disposal services. Mr. White also analysed the thousands of pages of “telephone logs” later introduced as evidence of customer attitudes toward S.D. Myers. Based on interviews with various PCB holders listed in the telephone logs, Mr. White demonstrated the limited reliability of these logs.

v) The Investor’s Experts

50. Both of Mr. Rosen’s reports were based on flawed assumptions and matters outside his area of expertise.⁴¹ Further, he accepted uncritically the information produced and positions taken by the Investor.
51. Mr. Harder’s evidence was unnecessary and did not provide any assistance to the Tribunal in assessing the Investor’s claim for damages. In the case of Mr. Ware, we note that the Investor retained his services only after Canada challenged some fundamental assumptions⁴² made by the Investor’s business valuator in his valuation report.

3. Additional Out-Of-Pocket Disbursements

a. Travel Costs

52. With the exception of telephone conference calls, the Tribunal conducted all hearings in Toronto, the place of arbitration. A review of the proceedings shows that counsel for Canada attended six separate hearings in Toronto during the arbitration.⁴³

⁴¹ See: KPMG Report, May24, 2001 Section 6.0 Observations on the Rosen Report; KPMG Reply Report, August 31, 2001, Section 6.0 Other Issues – Rosen Rebuttal Report.

⁴² For example, these included economic assumptions including first-mover advantage.

⁴³ Four of those hearings dealt with preliminary or procedural matters. These include the initial meeting with the arbitrators, the motion concerning cabinet confidence, a procedural hearing following the liability award and a procedural hearing convened to consider documentary production. The remaining two hearings dealt with evidence and argument extending over several days.

53. The offices of counsel of the Investor are in Toronto. Consequently, the Investor incurred no significant expense transporting, housing or supplying its counsel. By contrast, the offices of counsel representing Canada were in Ottawa. Counsel representing Canada from the Department of Justice and the Trade Law Bureau, officials of Environment Canada and the Investment Trade Policy Division of DFAIT and witnesses were required to travel to Toronto to prepare for and to attend hearings.

b. General Services and Supplies

54. Canada incurred costs for services and supplies needed to pursue this arbitration. Canada incurred some of these costs in-house, while private firms provided other services, including printing, photocopying, courier, court reporting and transcripts, business centre facilities and room rental.

c. Cancellation Charges

55. A significant and unnecessary cost that has been shared equally by the parties to date is the hotel cancellation charges incurred as a result of the Investor's actions. The Tribunal will recall that on August 10, 2001, the Investor filed its Reply Memorial with almost 2000 pages of additional evidence. The Investor explained that it was not previously aware of the existence of this material. In addition to increased work for Canada's experts and counsel, the late introduction of this new evidence led to the postponement of the hearing dates and resulted in the cancellation charges levied by the Metropolitan Hotel. Like the Investor, Canada has paid its half of the \$24,792.45 in cancellation costs relating to the Tribunal's reservations. Further, Canada was required to pay the whole of \$ 20,562 in cancellation fees for its hotel reservations, substantially more than any charge that the Investor would have had, being based in Toronto.

PART E. APPLICATION OF THE CRITERIA FOR APPORTIONMENT

56. The circumstances of the arbitration do not warrant an award of costs against Canada for the following reasons:

- The complex issues raised in this arbitration had not been addressed previously by a NAFTA Chapter 11 tribunal;
- The parties enjoyed divided success on liability. Canada successfully defended claims against it regarding expropriation (NAFTA Article 1110) and the imposition of performance requirements (NAFTA Article 1106);
- The Investor enjoyed relatively minimal success as to the amount of damages (less than 10% of his claim);
- The Investor adopted unreasonable or uncoöperative positions that unduly prolonged the proceedings.

1. Novel Issues Raised in the Arbitration

57. This arbitration raised novel and complex issues with respect to the interpretation and application of the NAFTA provisions on investment. This Tribunal was among the first to consider issues such as the definition of investment under NAFTA, the scope of Chapter 11, the meaning of the national treatment, minimum standard of treatment, performance requirements and expropriation obligations and the relationship between NAFTA Chapter Eleven and various other chapters of the NAFTA. Similarly, this was the first tribunal to consider the principles and measure of compensation in a case not involving expropriation.
58. As there have only been four completed arbitrations, every NAFTA Chapter 11 tribunal has focused on novel issues. The novelty of issues and the development of an understanding of Chapter 11 has been basis alone for each tribunal to decline to award costs to a “successful” party.

2. Limited Success

59. The Investor’s success can be measured by examining the whole claim including success on liability and success on the amount of damages awarded. With respect to both elements, the Investor has achieved only partial success.

60. First, with respect to the allegations for breaches of the national treatment, minimum standard of treatment, performance requirements and expropriation provisions, Canada successfully defended the claims that the measure resulted in an expropriation and imposed performance requirements.
61. Second, the award of damages of CDN \$6 million represents less than 6% of the damages claimed at the outset of the Damages Phase, (US\$ 71 million⁴⁴) and still less than 10% of the US \$53 million claim maintained at the Damages Phase hearing.⁴⁵ Canada was overwhelmingly successful in its defence of the inflated claim brought by S.D. Myers.
62. While the Investor may argue that the only measure of success in a NAFTA Chapter Eleven arbitration is whether the Investor enjoyed *any* success, the jurisprudence noted above does not support this position.
63. Given these circumstances it would be unreasonable, unfair and contrary to relevant case law to award the Investor its legal or arbitral costs.

3. The Conduct of the Parties in the Litigation

64. Canada conducted the arbitration in good faith and with appropriate dispatch. Canada proceeded with diligence and sought to assist the tribunal through the submission of its legal briefs and expert reports.
65. By contrast, the Investor's presentation of its case created additional work for both Canada and the Tribunal and far exceeded the "inevitable re-focusing and refining"⁴⁶ that occurs in any adversarial dispute. In particular, the unreasonable and excessive positions taken by S.D. Myers with respect to its assessment of damages unduly prolonged the arbitration. The shifting and expansive nature of the claim resulted in an unduly extended and expensive arbitration.

⁴⁴ which converts to approximately CDN \$106 million

⁴⁵ which converts to approximately CDN \$79.5 million

⁴⁶ Reference is made to the Tribunal's comments in paragraph 2 of the Second Partial Award

a. The Moving Target: Quantum

66. Throughout the Damages Phase, the Investor’s claim presented a moving target. The claim for damages was grossly excessive and presented without any basis. The following table shows the variation in quantum:

| Date | Pleading/Submission | Quantum Claimed/Awarded |
|--------------------|-------------------------------|--------------------------------|
| 21 July 1998 | Notice of Intent | US\$ 10 million |
| 30 Oct 1998 | Statement of Claim | US\$ 20 million |
| 15 Jan 2001 | Investor’s Summary on Damages | US \$70,921,000 |
| 1 Mar 2001 | Damages Memorial | US\$ 67,800,000 |
| 10 Aug 2001 | Damages Reply Memorial | US\$ 53 million |
| 21 Oct 2002 | Second Partial Award | CAD \$ 6,050,000 |

b. Shifting Evidentiary Basis

67. During the Liability phase, the Investor was requested to (and presumably produced) “copies of *all* written contracts between either the Investor or Myers Canada and holders of Canadian PCB waste for disposal services.”⁴⁷ Following the First Partial Award in November 2000, the Investor stated that “[Canada] has had within its possession for *over a year* virtually all of the evidence upon which the Investor intends to rely for the damages phase.”⁴⁸ [emphasis added] Four months later, the Investor filed its US \$68 million claim based now on over 1000 “quotes and orders” - a significantly different and larger set of documents than was indicated at the outset of the Damages Phase, when the procedural schedule was being set. Canada can only speculate about other evidence that may have been useful during the Liability Phase, which only became available at the Investor’s inclination during the Damages Phase.

⁴⁷ This was in response to Canada’s Requests Numbers 28 and 29.

⁴⁸ Letter from the Investor to the Tribunal, 15 Dec 2000.

68. Despite assertions that it was ready to proceed with the Damages Phase,⁴⁹ the Investor was not ready to file when required to do so. Instead, it submitted its case piecemeal over several months. There were serious deficiencies in the Investor's supporting documentation. Furthermore, the Investor only produced these materials to Canada after repeated refusals.⁵⁰ This forced Canada's counsel and experts to expend significant time, effort and money reviewing the material provided by the Investor and its experts, identifying the data upon which the Investor's claim relied, and identifying data which should be produced, to assess the potential claim. Each time the Investor introduced new evidence, Canada's experts had to rebuild their analysis, and in many cases amend or re-issue their reports. Canada's experts identified errors and omissions in the Investor's theory and calculations; many matters which the Investor still failed to address at the hearing. The Investor eventually produced, a mere two weeks before the scheduled hearing, a massive volume of evidence – presenting a virtually brand new case. This caused an adjournment of the hearing. Both parties have thus far carried significant costs for this adjournment.
69. The Investor's conduct with respect to production of documents requested by Canada was also unfortunate. While the Investor willingly produced materials supporting its case, it unduly delayed its responses to Canada's production requests both in the Liability and the Damages Phases.
70. For its part, Canada's refusal to disclose cabinet confidences flowed from its long-standing policy of not producing such documents in any litigation.⁵¹ Otherwise, Canada responded diligently to the Investor's numerous requests for documents and produced thousands of pages.

⁴⁹ Reference to Appleton & Associates correspondence to the Tribunal dated 15 December 2000 indicating that Canada "had all the evidence"; reference to same correspondence in Second Partial Award at paragraph 11. [Tab 17]

⁵⁰ For example, see Counter-Memorial of the Government of Canada, Damages Phase, footnote 244

⁵¹ Under Article 28(3) of the UNCITRAL Rules the Tribunal "may make the award on the evidence before it where a party does not produce documentary evidence when requested". The appropriate remedy in this situation was accordingly for the Tribunal to draw, if necessary, an adverse inference. It did not

c. Lack of Cooperation

71. Despite the urging of the Tribunal,⁵² the Investor maintained unreasonable positions on issues throughout the arbitration, as outlined above. Even the Investor's expert, the "Independent Valuator", participated with the same uncoöperative posture. Where simple concessions should have been made – for example, at the Expert's meeting prior to the Damages Hearing, or during the course of building the matrix - Mr. Rosen advocated his client's position exclusively. The Tribunal witnessed this posture when, during cross-examination,⁵³ Mr. Rosen attempted to explain the source of \$3.7 million in quotes. Mr. Rosen failed to explain why he could not relay that information to KPMG despite numerous meetings, even immediately prior to the Damages Phase Hearing. The only conclusions to draw were that either he did not know the source of the quotes and was not willing to admit that, or that he was simply unwilling to share that information with KPMG. Either way, there is no excuse for the uncoöperative behaviour of the Investor's expert.

4. Costs are Awarded on Conduct of Proceedings, Not Merits

72. Circumstances leading to Canada's imposition of the ban are irrelevant to an award of costs.⁵⁴ In its written submissions,⁵⁵ the Investor has linked its requests

prove necessary to do so in this case. It is not an appropriate factor to consider in making an award of costs.

⁵² See Annex III: Letter from the Tribunal to the disputing parties, 25 April 2001 notes:

The Tribunal is acutely aware that the costs of this arbitration have been influenced by the fact that it has been required to issue some 17 procedural orders, many of which might not have been necessary if the parties had approached disputed procedural questions in a less adversarial manner. The Tribunal therefore urges the parties to make a serious effort to find an accommodation on the extent of the information, documentary and otherwise, that should be supplied to CANADA for the purpose of defending the very substantial claims advanced by MYERS in the arbitration.

⁵³ Damages Hearing Transcript, 23 September 2001, p.609 l.17 – p.610 l.21.

⁵⁴ NAFTA 1135(3) A Tribunal may not order a Party to pay punitive damages.

⁵⁵ See: Investor's Damages Memorial, at paragraph 104:

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."

Investor's Reply Memorial (Damages Phase) at paragraph 171:

for costs to Canada's alleged intent to harm the Investor. Costs are awarded based on the proceedings themselves: the parties conduct during the arbitration and the relative success on the claim.

PART F. CONCLUSION

73. This arbitration raised novel and complex issues. Every other NAFTA Tribunal has held that this alone justifies each party bearing its own costs. Those Tribunals made their costs awards regardless of either party's degree of success. In this case the Investor had only partial success on its liability claim and received only a small fraction of the excessive and ever-changing damages it sought. Moreover, the Investor's conduct forced Canada to make costly and wasteful efforts just to know the case it had to meet.
74. As a result, Canada submits this Tribunal should make an Order that each party should bear their own legal costs and that the parties should share equally the arbitration costs of these proceedings.

THE WHOLE OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT THE CITY OF OTTAWA, PROVINCE OF ONTARIO, THIS 4TH DAY OF NOVEMBER 2002.



Of Counsel for the Government of Canada

Sheila Mann

Brian Evernden

Sylvie Tabet

171. [...]Canada should bear the costs of this entire arbitration (merits and damages) for the following reasons:

- (a) because its conduct was found to be unlawful by this NAFTA Tribunal;
- (b) Because Canada intentionally violated the NAFTA and discriminated specifically against S.D. Myers, Inc. because of its nationality; and
- (c) Because Canada knowingly took a measure that it knew would likely be successfully challenged before a NAFTA Tribunal.