

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
(‘MYERS’)

-and-

Government of Canada
(Respondent)
(‘CANADA’)

PROCEDURAL ORDER No. 3

Confidentiality of material prepared for the purpose of the proceedings

1. MYERS having confirmed by Mr Appleton’s letter dated 26 May 1999 that it had no objection to publication of its Statement of Claim submitted under Article 18 of the UNCITRAL Rules, the following documents may be released into the public domain immediately:

- The Notice of Intent
- The Notice of Arbitration
- The Statement of Claim
- The Statement of Defence

- 2. As a further temporary measure the parties shall not release into the public domain any other documents prepared in connection with the proceedings before 30 June 1999 or the date on which the parties enter into a confidentiality agreement, whichever is the earlier.
- 3. Either party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or renewed.
- 4. This Order supersedes Procedural Order No. 2.

Signed: Martin Hunter
(on behalf of the Tribunal)

Dated: 10 June 1999

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. MYERS, Inc.

(Claimant)

('MYERS')

-and-

GOVERNMENT OF CANADA

(Respondent)

('CANADA')

PROCEDURAL ORDER No. 11

(concerning confidentiality in materials produced in the arbitration)

With reference to Procedural Orders Nos. 2, 3 and 4 and the parties' submissions during the Third Case Management Meeting in Toronto on 28 October 1999 the Tribunal orders as follows:

Hearings, Transcripts of Hearings and Submissions

1. In accordance with Article 24.4 of the UNCITRAL Rules all hearings shall be held in camera unless the parties agree otherwise.
2. All transcripts and other records taken of hearings (except those documents mentioned in Procedural Order No.3, paragraph 1, namely the Notice of Intention, Notice of Arbitration, Statement of Claim and Statement of Defence) shall be kept confidential and may only be disclosed according to the conditions established below for 'Protected Documents'.

The Tribunal

3. The Tribunal confirms that by letter of 24 March 1999 it consented to the publication of the identity of its members.

Decisions of the Tribunal

4. According to NAFTA Article 1137 and its Annexe 1137.4, awards may be published by either party. This includes not only the final award, but also interim, interlocutory, partial and preliminary awards.
5. Other decisions of the Tribunal may also be disclosed or published. This includes Procedural Orders of the Tribunal unless they contain information that is to be treated as confidential according to paragraphs 2 and/or 7 of this Order.

Confidential Business Information

6. Subject to NAFTA Article 1129, no document over which business confidentiality has been claimed in these proceedings between MYERS and CANADA or copy thereof ('Protected Documents'), or information recorded in those documents, shall be disclosed except in accordance with the terms of this Order or with prior written consent of the party that claimed business confidentiality over the document.

7. If any person in possession of a Protected Document receives a request pursuant to law to disclose a Protected Document or information contained therein, that person shall give prompt written notice to the party that claimed confidentiality over the document so that party may take such steps as it considers appropriate not less than thirty (30) days before disclosure unless the law requires disclosure in a shorter period of time.

8. The party claiming privilege shall identify each Protected Document with the notation:

‘CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO
CONFIDENTIALITY ORDER UNAUTHORISED DISCLOSURE
PROHIBITED’.

9. Protected Documents identified by the parties and information recorded in those Protected Documents may be used only in these proceedings between MYERS and CANADA and may be disclosed only for such purposes to and among:

- (a) counsel whose involvement in the preparation or conduct of these proceedings is reasonably necessary;
- (b) officials or employees of the parties whose involvement in the preparation or conduct of these proceedings is reasonably necessary;
- (c) independent experts or consultants retained or consulted by the parties in connection with these proceedings; and
- (d) witnesses who in good faith are reasonably expected to offer evidence in these proceedings and only to the extent material to their expected testimony.

10. All persons receiving Protected Documents shall be governed by this Order. Each party shall have the obligation of notifying all independent experts, consultants and witnesses retained by such parties of the obligations under this Order. The obligations created by this Order shall survive the termination of these proceedings.
11. This Order is binding on all persons receiving Protected Documents pursuant to paragraphs 9(a) and (b) of this Order. The party making disclosure pursuant to paragraph 9(a) and (b) of this Order shall take reasonable steps to inform all recipients of Protected Documents of their obligations under this Order.
12. It shall be the responsibility of the party who is to disclose Protected Documents to any person in accordance with paragraphs 9(c) and (d) of this Order, to ensure that such person who is to receive Protected Documents, or the information contained therein, executes a Confidentiality Agreement in the form attached as Appendix "A" before gaining access to any Protected Document. Each such Confidentiality Agreement shall be immediately filed with the President of the Tribunal, who shall keep such Agreement confidential. Where Protected Documents are to be disclosed to a firm, organization, company or group, all employees and consultants of the firm, organization, company or group with access to the Protected Documents, must execute and agree to be bound by the terms of the Confidentiality Agreement attached as Appendix 'A'.
13. At the conclusion of these proceedings, all Protected Documents and copies thereof are to be returned to the party who supplied the Protected Documents, and all documents containing information from a Protected Document shall be destroyed, subject to the requirements of the *National Archives of Canada Act*.
14. This Order is without prejudice to any assertion of privilege. In the event the Tribunal orders production of a document for which privilege is claimed, the party asserting privilege may claim the protection available under this Order.

15. Notice pursuant to this Order shall be provided to the Claimant by sending notice by fax to the counsel of record for MYERS, while these proceedings are pending (or after the completion of these proceedings, to MYERS direct) and to CANADA by sending notice by fax to the General Counsel of the Trade Law Division of the Department of Foreign Affairs and International Trade (or his or her successor or designate).

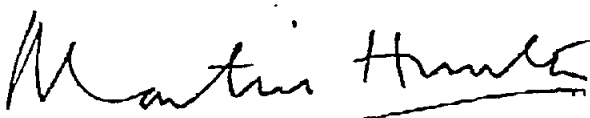
Specific Applications by Parties

16. If a party considers that certain documents and information should be treated in a different way from that ordered above, it may submit an application to the Tribunal to that effect, explaining the reasons why it considers such different treatment necessary.

Other matters

17. Each party may apply to the Tribunal at any time for the terms of this procedural order to be supplemented, varied or reviewed.

18. The above directions having been made, it still appears to the Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of the working relations between the parties if during the proceedings they both were to limit public discussion of the case to a minimum.

Signed: 
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(on behalf of the Tribunal)

Dated: 11 November 1999

[Appendix 'A': Confidentiality Agreement in the form already agreed by the parties]

APPENDIX "A"
S.D. MYERS, Inc v CANADA
CONFIDENTIALITY AGREEMENT

TO: The Government of Canada (and its legal counsel); and S.D. Myers, Inc.
(and its legal counsel).

FROM: [Name]
[Address]
[Affiliation]
[Position]

1. IN CONSIDERATION of being provided with information and documentation ("Protected Documents") in connection with this proceeding over which claims for confidentiality have been advanced, I hereby agree to maintain the confidentiality of such information or documentation. It shall not be copied or disclosed to any other person nor shall the information or documentation so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the order of the Arbitration Tribunal regarding confidentiality, a copy of which is attached as Schedule "A" to this Agreement, and agree to be bound by the same.
3. In the event that I am required by law to disclose any of the information or documentation, I will provide the General Counsel of S.D. Myers, Inc. and the Government of Canada with advance written notice in conformity with the attached Order so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the information or documentation which is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to the information or documentation.

4. I will promptly return any Protected Documents received by me to the party that provided me with such Protected Documents, or the information recorded in those Protected Documents, at the conclusion of my involvement in these proceedings. All documents containing information from a Protected Document will be destroyed.

5. I acknowledge and agree that in the event that any of the provisions of this Confidentiality Agreement are not performed by me in accordance with their specific terms or are otherwise breached, that irreparable harm may be caused to either of the parties to this arbitration. I acknowledge and agree that either of the parties to this arbitration is entitled to injunctive relief to prevent breaches of this Confidentiality Agreement and to specifically enforce the terms and provision hereof in addition to any other remedy to which any party to this arbitration may be entitled at law or in equity. The prevailing party in any such litigation will be entitled to payment of its legal fees and disbursements, court costs and other expenses of enforcing, defending or otherwise protecting its interests hereunder.

6. I agree to submit to the jurisdiction of the courts of the Province of Ontario (in the case of the residents of Canada) or State of Ohio (in the case of residents of the United States of America) to resolve any disputes arising under this Agreement.

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____, _____

.....
(Print name)

.....
(Witness)

.....
(Signature)