

## Archived Content

Information identified as archived on the Web is for reference, research or recordkeeping purposes. It has not been altered or updated after the date of archiving. Web pages that are archived on the Web are not subject to the Government of Canada Web Standards. As per the [Communications Policy of the Government of Canada](#), you can request alternate formats by [contacting us](#).

## Contenu archivé

L'information archivée sur le Web est disponible à des fins de consultation, de recherche ou de tenue de dossiers seulement. Elle n'a été ni modifiée ni mise à jour depuis sa date d'archivage. Les pages archivées sur le Web ne sont pas assujetties aux normes Web du gouvernement du Canada. Conformément à la [Politique de communication du gouvernement du Canada](#), vous pouvez obtenir cette information dans un format de rechange en [communiquant avec nous](#).

**APPLETON & ASSOCIATES**

INTERNATIONAL LAWYERS

*Washington DC Toronto*

December 15, 1999

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

**INVESTOR'S SUPPLEMENTAL  
MEMORIAL**

BETWEEN:

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

Claimant / Investor

- and -

**GOVERNMENT OF CANADA**

Respondent / Party

**INVESTOR'S SUPPLEMENTAL MEMORIAL**  
**TABLE OF CONTENTS**

GENERAL INTRODUCTION ..... -1-

PART ONE: THE FACTS ..... -3-

    A. The Reasons behind the PCB Waste Export Ban ..... -3-

    B. Expressions of concern in the November 21st and 24th Privy Council Meetings . -5-

    C. Misleading concerns about the US Government ..... -6-

PART TWO: ARGUMENT ..... -9-

    A. S.D. Myers, Inc. had an Investment in Canada ..... -10-

        (i) Myers (Canada) is an affiliate and received a loan from Myers ..... -10-

            An Affiliate ..... -10-

            A Loan ..... -11-

        (ii) Myers was operating in joint cause with Myers (Canada) ..... -13-

            Evidence that Myers and Myers (Canada) worked jointly ..... -14-

        (iii) Myers committed capital and other resources to Canada ..... -16-

        (iv) Myers is entitled to share in the assets of Myers (Canada) ..... -16-

        (v) Myers was operating in Canada as an enterprise of the Investor ..... -17-

    B. The Investment was operating in Canada ..... -19-

    C. Canada's Measure Relates to Investors and Their Investments ..... -21-

        The Investment Chapter addresses investors and investments broadly -21-

    D. There is no Conflict with Specific Environmental Agreements ..... -25-

        (i) PCB Wastes are covered by the *Transboundary Agreement* ..... -25-

        (ii) The *Transboundary Agreement* is an Article 11 Agreement ..... -27-

        (iii) The NAFTA overrules the *Basel Convention* ..... -28-

    E. The PCB Waste Export Ban was an Extraterritorial Act ..... -30-

    F. Canada has Violated Four Obligations Contained in NAFTA Chapter 11 ... -32-

        (i) National Treatment ..... -32-

        (ii) Minimum Standard of Treatment ..... -34-

        (iii) Performance Requirements ..... -42-

            Canada cannot use the Performance Requirement Exception ..... -42-

        (iv) Expropriation ..... -45-

            Interpreting the term "Expropriation" ..... -45-

            Canada's Expropriatory Actions ..... -46-

            Impairing the Investor's economic value in its Investment ..... -49-

            The Police Power ..... -49-

    G. The Damages are Appropriate ..... -52-

    H. NAFTA Chapters 3 and 11 are Consistent ..... -53-

PART THREE: SUBMISSIONS ..... -55-

## INVESTOR'S SUPPLEMENTAL MEMORIAL

### GENERAL INTRODUCTION

1. This is a Claim about how the Government of Canada ("Canada") designed an export ban in a way which discriminated against an American company and its investment in Canada. The arguments of the Investor, S.D. Myers, Inc. ("Myers") are contained in the Investor's Memorial of July 20, 1999 and in this Supplemental Memorial of December 15, 1999 which has been filed in reply to the Counter-Memorial submitted by Canada on October 30, 1999.
2. Within this Supplemental Memorial and the Memorial, the Investor will establish its case as well as clarify issues raised by Canada in its *Statement of Defence* and its Counter-Memorial.
3. In summary, the Investor makes the following arguments:
  - (i) Myers is an American investor with an investment in Canada. This investment takes three different forms:
    - (a) Myers (Canada), an affiliate of Myers to which Myers made a loan;
    - (b) The Myers - Myers (Canada) joint venture which operated in Canada during the relevant period; and
    - (c) Myers itself, which operated in Canada on its own as a branch of the US company.

These three forms of the investment meet at least five of the definitions of Investment set out in NAFTA Article 1139.

- (ii) The *PCB Waste Export Ban* related to Investors and their Investments and as such is a proper matter for consideration by this Tribunal.
- (iii) There is no conflict between the NAFTA and the *Basel Convention*. Canada knew that PCB wastes were covered under Canada's obligations under the *Transboundary Agreement*. Indeed, Canada took an action that was inconsistent with this bilateral agreement, the *Basel Convention* and the NAFTA.
- (iv) Canada failed to act in a manner consistent with four of its obligations contained within NAFTA Chapter 11, namely:
  - (a) Canada imposed a discriminatory regime which harmed the operations of an American-based investment for the purpose of aiding Canadian-based investments. This intent can be demonstrated from the evidence which

has been produced by the Investor and from the adverse inference that this Tribunal must take from Canada's refusal to produce relevant evidence.

- (b) Canada failed to act in accordance with its international law obligations by working with at least two Canadian-based firms to impose a measure designed to harm their foreign competitor. Canada also violated its international law obligations by arbitrarily designing, imposing and maintaining a measure. Canada failed to observe its own process standards, which reflected accepted international norms and upon which the Investment relied, in imposing this arbitrary measure. Canada has attempted to suppress all of the evidence dealing with its failure to meet these international law obligations. Despite Canada's attempt, the Investor has been able to provide sufficient evidence to the Tribunal to demonstrate Canada's true intent in imposing and maintaining this measure.
- (c) Canada imposed a regime with an effective requirement that all PCB waste be processed and serviced in Canada. This measure constituted a performance requirement which was prohibited under the NAFTA. Canada's assertions that this performance requirement can be justified by some exception to the NAFTA is untenable given the evidence submitted by the Investor that Canada's own officials questioned the environmental legitimacy and efficacy of this measure.
- (d) Canada imposed a measure that had the immediate impact of depriving the Investor of the effective use of the principal function of its Investment: the remediation of Canadian PCB waste. Canada took this measure in a discriminatory manner with the intent to prevent the investment from being able to carry out its business functions. Canada's argument that there cannot be an actual expropriation unless Canada actually took away the Investment for its own use is simply not correct. An expropriation will occur whenever a government acts to prevent an investor from substantially enjoying its property. Finally, Canada's argument that it was merely acting in accordance with the *bona fide* application of its general regulatory power or its police power cannot be substantiated. The evidence indicates that its action displayed an absence of *bona fide* intent and that it was not for any true environmental or health protection purpose.
- (y) Canada has argued that the terms in NAFTA Chapters 3 and 11 are inconsistent and that Chapter 3 must overrule the NAFTA's Investment Chapter provisions. This argument is incorrect as the provisions within these two NAFTA Chapters are not inconsistent with each other.

## PART ONE: THE FACTS

### A. The Reasons behind the PCB Waste Export Ban

1. Canada claims that the *PCB Waste Export Ban* was made because Canada believes that PCB wastes are a significant danger to health and the environment when exported without assurances of safe transportation and destruction. This statement is not correct. The *PCB Waste Export Ban* was not made out of any concern for transport or destruction risk.<sup>1</sup> Canada has not produced any evidence that officials expressed any concern over transportation to the Investor. The only transportation risk raised by officials was concern over the *PCB Waste Export Ban*, which would dramatically increase the amount of PCB waste being shipped over long distances within Canada.<sup>2</sup>
2. Canada did not evidence any *bona fide* concern over PCB destruction as a primary motive for the *PCB Waste Export Ban*. Canada was aware that the Investor met Canadian standards for the disposal of PCB waste.<sup>3</sup>
3. Canada's true motive for imposing the *PCB Waste Export Ban* was to protect the economic interests of Canadian firms. This interest was being protected by the personal actions of the Minister of the Environment, Sheila Copps and the then - Deputy Minister of the Environment, Mel Cappe.<sup>4</sup>
4. Canada did not adopt a *PCB Waste Export Ban* policy that was consistent with Canada's international law obligations. The *PCB Waste Export Ban* violated the terms of the

---

<sup>1</sup> John Hilborn "Export of PCBs to the United States" Memorandum, dated October 27, 1995, specifically states as a key consideration that: "An Interim Order to amend the PCB Waste Export Regulations quickly is not a viable option because it cannot be demonstrated that closing the border is required to deal with a significant danger to the environment or to human health". Schedule 6 of the Memorial.

<sup>2</sup> John Hilborn "Justification for Interim Order" Memorandum, dated November 16, 1995, specifically addresses this concern. Schedule 29 of the Memorial.

<sup>3</sup> Letter from Dana S. Myers to Sheila Copps outlining policy alternatives to the *Interim PCB Waste Export Ban*, dated December 1, 1995. Schedule 36 of the Memorial.

<sup>4</sup> Memorial at Schedule 56 sets out the evidence linking Ms. Copps, Mr. Cappe, senior departmental officials and representatives of Canadian PCB remediation concerns. Mr. Cappe's daybook has not been provided to the Investor by Canada. The Investor submits that this document contained evidence that indicates that Mr. Cappe and Ms. Copps had meetings where they discussed their knowledge of the discriminatory aspects of this measure. Canada asserted no claim of Cabinet Privilege for this material and the Investor submits that an adverse inference must be taken from Canada's failure to disclose this incriminating evidence.

*Canada-US Transboundary Agreement*, which governed the issue of PCB waste activity between Canada and the United States.

5. Canada has claimed that the *Transboundary Agreement* does not apply in this circumstance<sup>5</sup> but evidence produced by Canada demonstrates that this position is false. Canada sought confirmation from the United States in a diplomatic note dated December 6, 1995 that PCB waste was in fact covered by the *Transboundary Agreement*, as Canada's own legislation and regulations defined PCBs as hazardous waste. Canada received confirmation in December 1995 and again in January 1996 that US legislation and regulations defined PCBs as hazardous waste, so that PCBs were covered by the *Transboundary Agreement*.<sup>6</sup>
6. Canada's assertion is misleading when it states that it had to follow the provisions of the *Basel Convention* in banning trade in PCB wastes<sup>7</sup>. The terms of the *Basel Convention* provide that bilateral agreements with non-parties to the *Basel Convention*, such as the *Transboundary Agreement*, prevail over the terms of the *Basel Convention*. Moreover, Canadian officials were aware that the export of PCB wastes to the United States with EPA approval was consistent with Canadian law and with Canada's obligations under the *Basel Convention* and the *Transboundary Agreement* as early as September 1994.<sup>8</sup> Accordingly, Assistant Deputy Minister Clarke and Deputy Minister Cappe originally advised the Minister to permit exports to the United States.<sup>9</sup>
7. Canada claims that on October 27, 1995, it was surprised that the EPA would permit PCB imports into the United States without receiving Canada's views on the subject.<sup>10</sup> This statement is false. Canada was aware that permission to import was soon to be granted and had ample opportunity to make its concerns known to the EPA. For example, on March 14, 1995, Chem-Security informed the Minister about the EPA's hearings into the import of PCB wastes, stating:

---

<sup>5</sup> Counter-Memorial at 111.

<sup>6</sup> Diplomatic note from the Embassy of Canada to the US State Department dated December 6, 1995, and Response note dated January 23, 1996. Schedule 4.

<sup>7</sup> Counter-Memorial at paragraph 109.

<sup>8</sup> John Hilborn, "Confidential: Requested Directly by Minister's Office", September 7, 1994, set out at Schedule 5. See also paragraph 95 of the Affidavit V. Shantora set out at Schedule 64 of the Counter-Memorial.

<sup>9</sup> Memorandum to Minister, October 1, 1994, set out at Schedule 6.

<sup>10</sup> Counter-Memorial at paragraph 6.

*I attended the March 6 hearing, and the message that I received is that the U.S. EPA is uncertain of Canada's position on this issue. Moreover, a clear articulation of the Canadian Government's position is viewed to be extremely important as the U.S. EPA considers this issue over the next several weeks.<sup>11</sup>*

8. Moreover, Jeff Smith, lobbyist for Chem-Security and member of the Minister's staff earlier that same year, advised Canada that PCB waste imports into the United States would be permitted by the EPA "within three to six months of the closing date" of the EPA's hearings into opening the border.<sup>12</sup> Smith continued to advise the Deputy Minister and Minister (with whom he appears to have been on a first name basis) throughout the summer, culminating in a facsimile on 27 October, 1995 that most likely provided Canada with its first copy of the enforcement discretion letter sent by the EPA to Myers.<sup>13</sup>

**B. Expressions of concern in the November 21st and 24th Privy Council Meetings**

9. Canadian officials involved in the interdepartmental process leading up to the implementation of the *PCB Waste Export Ban* have provided accounts of meetings held on November 21<sup>st</sup> and 24<sup>th</sup> 1995 that confirm the Investor's allegation that this measure was imposed directly at the behest of Minister Copps, in order to benefit the business interests of the Canadian-based competitors of Myers and Myers (Canada).
10. Officials from at least Industry Canada and the Department of Foreign Affairs and International Trade (DFAIT) voiced their disapproval for implementing the *PCB Waste Export Ban*. They apparently thought [the *PCB Waste Export Ban*] was "ill-conceived" and that

*... it was not being done on the merits, but rather for 'political' reasons that had nothing to do with the substance of the issue.<sup>14</sup>*

In fact, apparently even "some Environment Canada officials were not happy with the *PCB Waste Export Ban* and were quite 'expressive' on this point".<sup>15</sup> This fact confirms the implications from the string of memoranda written by John Hilborn between August 1994 and November 1995, that Ms. Copps had set her mind on imposing an immediate

---

<sup>11</sup> Letter from A.F. Mathes to Sheila Copps, March 14, 1995, set out as Schedule 7.

<sup>12</sup> Facsimile from Jeff Smith to François Guimont, April 27, 1995, set out at Schedule 8.

<sup>13</sup> Documents set out at Schedule 9.

<sup>14</sup> Witness Statement of Aharon Mayne, Department of Foreign Affairs and International Trade, at answer 25, set out at Schedule 10.

<sup>15</sup> Witness Statement of Reg Plummer, Department of Finance, at answer 25, set out at Schedule 11. Witness Statement of Aharon Mayne, Department of Foreign Affairs and International Trade, at answer 25, set out at Schedule 10.



ban, regardless of the government's domestic or international legal obligations, the costs to Canadian PCB waste holders or the best interests of the environment.<sup>16</sup> The memoranda commenced by advising the Minister to allow exports; shifted to advising her that an immediate ban was not possible and recommending alternative measures; to eventually providing details as to how the ban might actually be justified.<sup>17</sup>

11. It is also clear that Canadian officials were well aware that "there would need to be ministerial consultation"<sup>18</sup> and yet at the time of the imposition of the *PCB Waste Export Ban*, the Minister of Health was not even aware of the issue or the requirement that she hold a personal belief that there was an immediate danger to the health of Canadians that required implementation of the *PCB Waste Export Ban*.<sup>19</sup>
12. Canadian officials knew full well that the investment of one American-based PCB waste remediation firm would be affected by the *PCB Waste Export Ban: Myers*. Only Myers and its Canadian competitors were discussed at these meetings.<sup>20</sup> Canadian officials also knew about the imminent opening of the US border to PCB waste shipments by Myers at least 12 months in advance, which is why DFAIT officials noted that the issue "was not new, in their view, and it should not have taken Environment officials by surprise."<sup>21</sup>

**C. Misleading concerns about the US Government**

13. Canada states that one of its reasons for concern about the EPA's granting permission to Myers to import PCB wastes into the United States was that certain US-based competitors landfilled PCB wastes - a practice with which Canada disapproved<sup>22</sup>. Canada

---

<sup>16</sup> Reg Plummer, Answer 27: "Industry raised the issue of needing a legal opinion on the justification of using section 35 of the *Canadian Environmental Protection Act*. It was suggested that the government could be sued on the improper use of this section of the Act. Environment reported that they were finding it a significant challenge to document the significant danger to the environment that PCB exports to the US would pose". Schedule 11. John Hilborn memoranda set out in Schedules 5, 10, 29 and 30 of Investor's Memorial.

<sup>17</sup> John Hilborn, Dave Campbell and Hugh Dibbs, PCB Export Briefing Note, August 2, 1994 set out in Schedule 12; and Schedules 5, 10, 29 and 30 of the Memorial.

<sup>18</sup> Reg Plummer, Answer 27, Schedule 11.

<sup>19</sup> See paragraphs 132 and 139 of the Memorial, citing documents set out at Schedules 37 and 63 of the Memorial.

<sup>20</sup> Reg Plummer, Answer 28, Schedule 11; Aharon Mayne, Answer 28, Schedule 10.

<sup>21</sup> Reg Plummer, at Answer 27, Schedule 11.

<sup>22</sup> Counter-Memorial at paragraph 137.

has produced no evidence to demonstrate, as of the date that the *PCB Waste Export Ban* was imposed:

- (i) that any US-based competitors were also authorised to import PCB wastes into the United States;
  - (ii) that Canada informed the United States of its concerns about landfilling in connection with the year-long process that led to permission being granted for the import of PCB waste for disposal; or
  - (iii) that Myers or Myers (Canada) were engaged in the practice of landfilling such wastes.
14. Further, Canada's extra-territorial concerns about landfilling in the United States seem misplaced given that in most provinces PCB wastes were either permitted to be landfilled or were being stored indefinitely (i.e. unsecure landfilling).<sup>23</sup> Canada did not manage to obtain the approval of its provinces to impose a country-wide ban on landfilling certain PCB wastes until over a year later. The Canadian and provincial ministers were made aware that if Canada were to continue to prohibit the export of PCB wastes, even if just for landfilling, the "lack of a similar Canada-wide ban may raise concerns about possible barriers to trade under GATT and NAFTA."<sup>24</sup>
15. Canada has made unsubstantiated allegations about the legality of the statute-based practice of granting an enforcement discretion by the US EPA.<sup>25</sup> Canada offers absolutely no proof for its audacious accusation about the lawfulness of the actions of the Government of the United States of America. It is a well known principle of international law that governments are presumed to be acting in good faith and in full compliance with their municipal legal obligations.<sup>26</sup>
16. Section 2605(e)(B) of the *Toxic Substances Control Act* permitted Myers to petition the EPA for an exemption from the general prohibition against importing PCB wastes and authorised the EPA to grant it, so long as "an unreasonable risk of injury to health or environment would not result" and that alternatives to the importation were considered in good faith by Myers.<sup>27</sup> As evidenced in the enforcement discretion letter issued to Myers

---

<sup>23</sup> See attached documents set out at Schedule 27, and Reg Plummer, Answer 33. Schedule 11.

<sup>24</sup> Facsimile from Carl Hrenchuk, Environmental Protection Coordinator, Canadian Council of Ministers of the Environment, to John Hilborn, Environment Canada, October 24, 1996, set out at Schedule 13.

<sup>25</sup> Counter-memorial at paragraph 145.

<sup>26</sup> See, for example: Bin Cheng, *General Principles of International Law* (1953) at 305.

<sup>27</sup> 15 U.S.C. §2605(e)(3)(B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such an

by the EPA, Myers successfully demonstrated the safety and efficiency of its proposal to import and destroy Canadian PCB wastes and the EPA agreed.<sup>28</sup>

17. The practice of permitting regulated parties to petition for, and receive, an exemption from particular regulatory requirements, if compliance with the overall regulatory goals behind the requirements were met, is certainly not foreign to Canadian law and practice, as Canada suggests. For example, the *Canada Shipping Act* and *Canada Transportation Act* both permit the Minister to vary specific regulatory requirements so long as regulatory goals are met,<sup>29</sup> and on December 6, 1994, Canada even tabled an omnibus statute, Bill C-62, which would have permitted Environment Canada officials to legally offer exactly the same kind of dispensation to a Canadian company as the EPA had granted to Myers.<sup>30</sup>

---

exemption if the Administrator finds that -

- (i) an unreasonable risk of injury or environment would not result, and
- (ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be submitted for such polychlorinated biphenyl. An exemption granted under this subparagraph shall be subject to such terms and conditions as the Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.

<sup>28</sup> Set out at Schedule 55 of the Investor's Memorial.

<sup>29</sup> *Canada Shipping Act* s. 660.2(7) Subject to any conditions that the Minister considers appropriate, the Minister may exempt for a specified period any ship or class of ships or any operator of an oil handling facility from the application of any provision of this section if the Minister is of the opinion that the exemption is in the interest of preventing damage to property or the environment or is in the interest of public health or safety. Notice of every exemption must be published in the *Canada Gazette*.

*Canada Transportation Act* s. 50(4) The Minister may exempt a carrier or transportation undertaking from the application of all or any part of a regulation made under subsection (1) if the Minister is satisfied that is it not practicable for the carrier or transportation undertaking to provide the information.

<sup>30</sup> Set out at Schedule 14. In particular, please note Sections 5, 9 & 10.

**PART TWO: ARGUMENT**

The Investor makes the following arguments in reply to Canada's arguments:

- A. There is an Investment within the meaning of NAFTA Article 1139
  - 1. S.D. Myers (Canada) Inc. ("Myers (Canada)") is an affiliate of S.D. Myers, Inc. ("Myers") and Myers (Canada) and received a loan from Myers
  - 2. Myers was operating jointly with Myers (Canada) which qualifies as an enterprise within the meaning of the definition of the term "Investment"
  - 3. Myers committed capital and other resources in Canada
  - 4. Myers is entitled to share in the assets of Myers (Canada) upon its dissolution
  - 5. S.D. Myers, Inc. was operating in Canada as an enterprise of the Investor, as defined by NAFTA Article 1139
- B. The Investment was operating in Canada
- C. The Measure relates to Investment
- D. There is no conflict between NAFTA and International Environmental Agreements
- E. The *PCB Waste Export Ban* was an Extraterritorial Act
- F. Canada has violated four obligations contained with NAFTA Chapter 11:
  - (i) Canada has violated its National Treatment Obligation
  - (ii) Canada has not acted in accordance with International Law
  - (iii) Canada has imposed Prohibited Performance Requirements, and
  - (iv) Canada has failed to pay compensation contrary to NAFTA Article 1110
- G. The Damages are appropriate
- H. NAFTA Chapters 3 and 11 are consistent

**A. S.D. Myers, Inc. had an Investment in Canada**

18. S.D. Myers, Inc. is an American Investor with an Investment in Canada. Myers meets the requirement of having an Investment under multiple expressions of the definition contained in NAFTA Article 1139. NAFTA's Article 1139 definition of "investment" contains ten different expressions of what constitutes an investment. For Myers to be able to succeed in this Claim, it does not have to meet each and every one of these ten expressions: merely one. The Investor submits that it is capable of meeting a number of these expressions under this NAFTA Article.

**(i) Myers (Canada) is an affiliate of Myers and Myers (Canada) and received a loan from Myers**

**An Affiliate**

19. The NAFTA defines as an Investment a loan made by an Investor to its affiliate.<sup>31</sup> The NAFTA does not define the term "affiliate". Canada has argued in its Counter-Memorial that the term affiliate must be defined under Canadian law.<sup>32</sup> Canada provides no support for this contention, which the Investor submits is incorrect.
20. The NAFTA provides when domestic law should be the basis for a factual determination. For example, NAFTA Article 201 provides that an entity constituted or organized under applicable law can be an enterprise. In this particular circumstance, under Article 201, Canadian law would govern. NAFTA Article 1131 provides that the NAFTA itself and international law govern in this arbitration. Accordingly, Canada's unsubstantiated position that its laws must define "affiliates" is without merit.
21. The Investor provided the Tribunal with an ordinary definition of the term "affiliate" in its Memorial<sup>33</sup>, which the Investor submits governs in this situation<sup>34</sup> as there is no confusion about the meaning of this term.

---

<sup>31</sup> NAFTA Article 1139 - Investment paragraph (d).

<sup>32</sup> Counter-Memorial at 16, footnote 6 and paragraph 233.

<sup>33</sup> Investor's Memorial, at 20, footnote 48.

<sup>34</sup> Article 31(1) of the *Vienna Convention on the Law of Treaties* establishes that the plain and ordinary meaning of a term should be used.

22. It is clear from the evidence submitted by Rev. Valentine that both Myers (Canada) and the Investor have common control and common ownership.<sup>35</sup> Thus, Myers (Canada) is an affiliate of the Investor.
23. Myers (Canada) was, for all practical purposes, controlled by Dana Myers. The shares of Myers, as well as Myers (Canada), were owned entirely by the four Myers brothers.<sup>36</sup> Dana Myers held the position of Vice-President and Treasurer of Myers (Canada), while Scott Myers was Secretary. Dana Myers effectively controlled all operations for both companies, such that Myers (Canada) was used for the purpose of carrying on the business of Myers.<sup>37</sup>

#### A Loan

24. Paragraph (d) of NAFTA Article 1139 provides that a loan can constitute an investment. Canada has admitted that the financial records of Myers indicate that monies were expended by the company for Myers (Canada). Canada however suggests that because there was no written loan agreement between the two affiliates that no loan took place.<sup>38</sup> The Investor submits that the existence of a loan is an evidentiary issue.
25. The term loan used in NAFTA Article 1139 is not limited to a loan whose terms are reduced to writing. Paragraph (c) of the definition of Investment deals with the issue of "debt securities". Presumably, a debt security is the written evidence of a loan. In the context of NAFTA Article 1139, it is submitted that the term "loan" must mean something different from the term "debt security".
26. *Black's Law Dictionary* defines "loan" as:

*A lending. Delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest.*<sup>39</sup>

---

<sup>35</sup> Supplementary Affidavit of Rev. Michael Valentine at paragraphs 2-5. Schedule 1.

<sup>36</sup> Myers Share Holdings Summary, Schedule 15; Myers (Canada) Federal Income Tax Returns, Schedule 16; and Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine, Schedule 1.

<sup>37</sup> See Affidavit of Dana S. Myers, Schedule 2; Affidavit of Scott D. Myers, Schedule 3; and Supplementary Affidavit of Rev. Valentine, Schedule 1.

<sup>38</sup> Counter-Memorial at paragraph 232.

<sup>39</sup> *Black's Law Dictionary* (6<sup>th</sup> ed), at 936.

27. Myers advanced substantial sums of money to Myers (Canada) from 1993 to 1997. These funds were advanced by way of cheque or wire transfer. The Affidavit of Rev. Valentine attests to this loan and attaches copies of transfers from Myers to its Canadian Investment totalling almost \$1,000,000.<sup>40</sup>
28. The unaudited financial statements for Myers Development from 1993 to 1995 and Myers (Canada) for 1996 and 1997 indicate that funds were transferred from Myers.<sup>41</sup> In the section of each report entitled "Related party transactions", the statements indicate the following:

Advances by way of transfers from Myers

1993	1994	1995	1996	1997
\$285,358	\$241,788	\$472,071	\$26,595	\$65,876

Myers postings to the receivable account from Myers (Canada)<sup>42</sup>, as well as the transaction reports of Myers (Canada) indicate the regular transfer of funds to a bank account for use by Myers (Canada).<sup>43</sup>

29. Canada suggests that there were no interest or payment terms on the loan between the affiliates.<sup>44</sup> This is not correct as Myers (Canada) paid interest to Myers. The unaudited financial statements indicate the following interest items:

Interest charges paid to Myers

1995	1996	1997
\$46,342	\$64,464	\$46,339

Myers' advances in 1993 and 1994 were made without interest and repayment terms.<sup>45</sup>

---

<sup>40</sup> Supplementary Affidavit of Rev. Valentine, paragraph 8, set out at Schedule 1; and Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine, Schedule 1.

<sup>41</sup> Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine, Schedule 1.

<sup>42</sup> Myers, Postings to the Receivable Account from Myers (Canada). Schedule 17.

<sup>43</sup> Myers (Canada), Transaction Reports. Schedule 29.

<sup>44</sup> Counter-Memorial at paragraph 236.

<sup>45</sup> Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine. Schedule 1.

30. It is clear from the evidence of both Dana Myers and Rev. Valentine that the funds advanced to Myers (Canada) were not a gift but a loan.<sup>46</sup> It is clear that Myers provided funds to Myers (Canada) by way of a loan. Myers (Canada) paid interest on the principal of the loan between 1995 and 1997. Thus a loan existed between these two affiliates.

**(ii) Myers was operating in joint cause with Myers (Canada), which qualifies as an enterprise within the meaning of the definition of the term "Investment"**

31. Paragraph (e) of NAFTA's Article 1139 definition of Investment includes as an investment "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise". Myers had such an interest in its operations with Myers (Canada).
32. In addition to meeting the definition of investment in paragraph (e), paragraph (h) of NAFTA's Article 1139 definition of Investment includes as an investment "interests arising from the commitment of capital and other resources in the territory of a Party to economic activity in that territory". The activity of Myers with Myers (Canada) meets this definition.
33. The term "enterprise" is defined in Article 1139. It broadly covers all economic activity undertaken within the territory of a Party. Myers operated with Myers (Canada) jointly to obtain contracts and to service clients in Canada. This joint activity was done through an implicit joint venture<sup>47</sup> as both Myers and Myers (Canada) were coventurers in a common "adventure in the nature of trade".
34. Canadian courts have defined joint venture as:

*Joint ventures may be defined as an association of two or more individuals, corporations or partnerships or some combination of these, for the purpose of carrying on a business venture. Speaking in broad general terms, much of the law of partnership is applicable to joint adventures.<sup>48</sup>*

---

<sup>46</sup> Supplementary Affidavit of Rev. Valentine, paragraph 8, set out at Schedule 1; and Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine, Schedule 1 and Affidavit of Dana Myers at paragraph 7. Schedule 2.

<sup>47</sup> Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine, at Schedule 1; and the Investor's Memorial, at paragraph 14.

<sup>48</sup> The Supreme Court of Canada endorsed this view in *Northern Electric Company v. Manufacturers Life Insurance Co.* [1977] 2 S.C.R. 762.



35. Canada has relied upon *Williston on Contracts* as a treatise on contract law. Volume II states:

*The early common law did not recognize any relationship between persons as joint venturers apart from that of partners...The courts, however, responding to the urgent problems arising from the need of applying fundamental principles of the common law to new developments in the world of business and commerce, had gradually evolved what may become a distinctive legal relationship: The joint venture. Here, parties combine their resources, usually consisting of capital, knowledge, skill and services, in the conduct of a business venture without organizing a partnership in the legal sense of the word.*<sup>49</sup>

In fact, the Supreme Court of Canada has relied on the same treatise to establish that Canadian courts look above all at the *common intention* of the co-venturers, and not at the existence of a written agreement or contract, as the overriding test for joint ventureship. In *Northern Electric Co. v. Manufacturers Life Insurance*, the Supreme Court of Canada cited with approval and relied upon the following passage from *Williston on Contracts*:

*"Whether the parties to a particular contract have thereby created as between themselves, the relation of joint adventurers or some other relation depends upon their actual intention, and such relationship arises only when they intend to associate themselves as such."*<sup>50</sup>

*Evidence that Myers and Myers (Canada) worked jointly*

36. Myers and Myers (Canada) were in association and carrying on business as a joint venture in Canada. Towards this end, both companies contributed money, property, effort, knowledge, skill and other assets.<sup>51</sup>
37. Myers and Myers (Canada) combined their resources in terms of staff. Myers (Canada) staff located PCB waste holders, determined interest in the PCB waste disposal services offered by Myers, and provided quotes. Myers employees then finalized costs and details concerning the transportation of PCB waste.<sup>52</sup> Payments by clients of the joint venture would be made to one of the venturers who would then share the revenue with the other.
38. Myers and Myers (Canada) combined their financial resources. Myers provided Myers (Canada) with significant capital so that it could carry out its operations.

---

<sup>49</sup> *Williston on Contracts*, 3<sup>rd</sup> edition, (1959) at 547 - 8.

<sup>50</sup> [1977] 2 S.C.R. 762 at 790.

<sup>51</sup> Supplementary Affidavit of Rev. Valentine, paragraphs 5-9, set out at Schedule 1.

<sup>52</sup> Correspondence between Myers (Canada), ASARCO, Inc. and Myers, dated April 25, 1995, November 1, 1995 and November 16, 1995, set out as Exhibit "E" of the Supplementary Affidavit of Rev. Valentine. Schedule 1.

39. Myers and Myers (Canada) combined their resources in terms of knowledge and skill. Myers (Canada) was free to use materials prepared by Myers. For example, in a bid submitted to Public Works and Government Services Canada, Myers (Canada) provided an Audit Information Package prepared by Myers.<sup>53</sup> These materials provided a detailed outline of Myers' history, facilities, operations and services. Another example can be seen in a package prepared for the September 24, 1994 Canadian Electricity Forum, Myers (Canada)'s materials included information about Myers.<sup>54</sup>
40. Myers and Myers (Canada) worked together with respect to presentations and participation in industry related meetings. For example, on July 26, 1994 Richard Cormier from Myers (Canada) and Rev. Mike Valentine from Myers made a joint presentation to the Environmental Cooperation Commission (NAFTA).<sup>55</sup>
41. The development of the PCB waste disposal market in Canada involved both Myers (Canada) and Myers. Reports and memos were prepared regularly by Myers (Canada) staff and sent to Myers for feedback and directions.<sup>56</sup>
42. In its dealings with potential customers, the services of Myers and Myers (Canada) were offered together. Letterhead with both US and Canadian addresses was used<sup>57</sup>, and Myers (Canada) mailed out hundreds of standard form letters<sup>58</sup> that included the following type of statements:
- The Myers Co. has been in existence in Ohio since 1965 and has been offering in Canada, through the use of an agent, its service for the chemical destruction of PCBs in transformer oils. It has been now quite a while since we have been working on offering the full spectra of services for the PCBs decontamination and elimination in Canada.<sup>59</sup>*
43. Myers and Myers (Canada) worked in concert in order to develop markets and to service clients in Canada. In all of the contractual materials, it is clear that Myers would receive

---

<sup>53</sup> Schedule 18.

<sup>54</sup> Schedule 19.

<sup>55</sup> Materials for a presentation by Richard Cormier of Myers (Canada) and Rev. Valentine to the NAFTA Environmental Cooperation Commission on July 26, 1994, set out as Exhibit "C" of the Supplementary Affidavit of Rev. Valentine. Schedule 1.

<sup>56</sup> Memos and reports prepared by Myers (Canada) staff for Dana or Scott Myers. Schedule 20.

<sup>57</sup> S.D. Myers, Inc., Fax Covers, dated March 10, 1995 and March 12, 1995. Schedule 21.

<sup>58</sup> Schedule 22.

<sup>59</sup> Schedule 22.

the revenue for the activity of the joint venture. Myers (Canada) and Myers would then share in the income and profits of this joint venture. This joint activity constitutes evidence of an investment as defined by paragraph (e) of NAFTA's Article 1139 definition of Investment.

**(iii) Myers committed capital and other resources to Canada**

44. Myers committed capital and other resources to its affiliate in Canada. This commitment constituted an investment under paragraph (h) of the definition of Investment contained in NAFTA Article 1139.
45. For example, the evidence demonstrates that Myers committed significant financial resources to Myers (Canada). The income tax returns filed by Myers Development from 1993 to 1995 and Myers (Canada) for 1996 and 1997 indicate the following net loss for each year:

**Net loss per financial statements of Myers Development and Myers (Canada)**

1993	1994	1995	1996	1997
(\$194,354)	(\$229,200)	(\$335,486)	(\$144,653)	(\$261,440) <sup>60</sup>

46. In addition, on March 18, 1993, the Board of Directors of Myers confirmed that Myers, would provide full financial support to Myers (Canada)'s operations in Canada.<sup>61</sup>
47. Myers also committed non-monetary resources to its operations in Canada. Myers committed significant personnel resources in its Tallmadge Ohio facility to support the operational and marketing activities of Myers (Canada). When it appeared that Canada was going to impose its discriminatory *PCB Waste Export Ban*, Myers supplied staff resources to assess this issue.<sup>62</sup>

**(iv) Myers is entitled to share in the assets of Myers (Canada) on its dissolution**

48. Canada has argued in its Counter-Memorial that the Investor is not entitled to share in the assets of Myers (Canada) on its dissolution. Canada makes this statement on the basis that the Investor has not proven that it was the largest creditor of Myers (Canada). This statement is incorrect.

---

<sup>60</sup> Myers (Canada) Income tax returns, 1993-1997. Schedule 16.

<sup>61</sup> Schedule 16 of the Memorial.

<sup>62</sup> Supplementary Affidavit of Rev. Valentine, paragraph 7, Schedule 1.

49. The financial statements of Myers (Canada) show that Myers was the only large creditor of this company.<sup>63</sup> As the preponderant creditor of Myers (Canada), Myers' interest constituted an investment in Canada.

**(v) Myers was operating in Canada as an enterprise of the Investor as defined by NAFTA Article 1139**

50. Under NAFTA Article 1139, an "enterprise" includes a "branch" as follows:

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

51. The term "branch" is frequently used and applied under international and municipal tax laws. The term "branch" is used generally to indicate that a non-resident corporation is doing business in a foreign company under its own auspices. The branch is not a separate legal entity and the decision to operate through a branch, rather than through a subsidiary, is based on business and tax reasons.
52. Under the *OECD Model Tax Convention* (the "*OECD Model*")<sup>64</sup> and the *UN Draft Model Taxation Convention* (the "*UN Model*")<sup>65</sup>, "branch" is included in the concept of "permanent establishment". The principal purpose of the concept of "permanent establishment" has been said to be "the determination of the right of a Contracting State to tax the profits of an enterprise of the other Contracting State."<sup>66</sup>
53. Canadian tax treaties are said to follow almost identically the first two paragraphs of Article 5 of the *OECD Model*, in particular the *Canada-US* and *Canada-Mexico Tax Treaties*.<sup>67</sup> Article 5 of the *Canada-US Tax Treaty* provides as follows:

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of a resident of a contracting state is wholly or partly carried on.

---

<sup>63</sup> Myers (Canada) Unaudited Financial Statements, set out as Exhibit "B" of the Supplementary Affidavit of Rev. Valentine, Schedule 1.

<sup>64</sup> *The OECD Model Taxation Convention - 1997 and Beyond*, Proceedings of a Seminar held in New Delhi in 1997 during the 51<sup>st</sup> Congress of the International Fiscal Association, Vol. 22a, 81.

<sup>65</sup> *UN Draft Model Taxation Convention*, Proceedings of a Seminar held in Copenhagen in 1979 during the 33<sup>rd</sup> Congress of the International Fiscal Association, 60.

<sup>66</sup> Krishna, *Canadian International Taxation*, (1995) vol. 1, 11-31.

<sup>67</sup> Article V of the *Canada - US Tax Treaty*, CTS 1984 no.15, Article V of the *Canada - Mexico Tax Treaty*, CTS 1992 no.13 Krishna, *Canadian International Taxation*, (1995) vol. 2, Chapter 22.

2. The term "permanent establishment" shall include especially:
- a) a place of management;
  - b) a branch;
  - c) an office;
  - d) a factory;
  - e) a workshop, and
  - f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

54. Article 5 of both the *OECD Model* and the *Canada-US Tax Treaty* set out the three essential characteristics of a permanent establishment:

- (i) there must be a "place of business",
- (ii) it must be "fixed", and
- (iii) the business must be "carried on through" that fixed place, in whole or part.

55. The list in Article 5(2) is meant to be illustrative, and not exhaustive. The examples in the Article 5(2) list constitute only *prima facie* evidence of a permanent establishment.<sup>68</sup> Accordingly, the concept of permanent establishment is instructive in determining the minimum characteristics of the term "branch" as provided under international tax law.

56. Myers intended that Myers (Canada)'s offices would function as branches of its US operations.<sup>69</sup> Myers, in its September 15, 1995 Audit Information Package, included the Mississauga, Ontario and Anjou, Quebec offices in its list of facilities, sales offices and international offices.<sup>70</sup> Myers (Canada) made it clear in its letters that it was part of Myers, and that it was Myers' services that were being offered.<sup>71</sup>

---

<sup>68</sup> Krishna, *Canadian International Taxation*, (1995) vol. 1, 6-6.

<sup>69</sup> Supplementary Affidavit of Rev. Valentine, paragraph 6. Schedule 1.

<sup>70</sup> Schedule 18.

<sup>71</sup> Schedule 22.

**B. The Investment was operating in Canada**

57. Canada states that Myers (Canada) was not an Investment related to the export of PCB wastes from Canada<sup>72</sup>. The Investor denies this characterization on the basis of the evidence. Canada has misstated the legal test set out in the NAFTA. The NAFTA requires that an Investment be an enterprise of the Party, and Canada has admitted that Myers (Canada) is such an enterprise.
58. Canada claims that there is little evidence to support the allegation that Myers (Canada) played a significant role in the efforts of Myers to market PCB waste services. Through this statement Canada arguably admits that Myers (Canada) engaged in the marketing of PCB services in Canada. Canada's contention that there is little evidence of Myers (Canada)'s activities disregards the evidence produced in this Claim.
59. Myers (Canada) undertook significant marketing activities in Canada. The Investor has provided to Canada several thousand pages of documents evidencing the marketing activity of Myers (Canada)<sup>73</sup>. This activity included:
- (i) locating PCB waste holders and preparing initial quotes for its removal; and
  - (ii) contracting for the transportation, processing and treatment of Canadian PCB-contaminated waste at its facilities in the United States.<sup>74</sup>
60. NAFTA Article 1139 defines an "Investor of a Party" as someone who "has made, is making or seeks to make an investment". This definition, in keeping with NAFTA's attempt to provide broad investment protections, is large in scope. By including in the definition of Investor, one who "seeks to make" an investment, the NAFTA indicates that an actual investment need not even exist before a Party has obligations under the NAFTA Investment Chapter.
61. Canada appears to allege that there is some minimum requirement regarding the size of an investment. This restriction is completely without support in the NAFTA nor is it in keeping with the intention of that agreement, which can be viewed from its objectives and its terms. The Investor made a sizable investment in Canada through its own actions, the activities of the collaborative venture with Myers (Canada) and its own investment in Myers (Canada). Under the terms of the NAFTA, apparently none of these actual investments is necessary as long as the Investor intended to make these investments.

---

<sup>72</sup> Counter-Memorial at paragraph 33.

<sup>73</sup> Examples of material sent out as part of Myers (Canada)'s "mass mailing" of letters and questionnaires. Schedule 22.

<sup>74</sup> Supplementary Affidavit of Rev. Michael Valentine at paragraph 12. Schedule 1.

62. Canada claims that Myers (Canada) cannot be an Investment because the business had an office in the province of Quebec located in a residential area<sup>75</sup>. Canada's conclusion is not rationally connected to the evidence. Nowhere does the NAFTA state that an Investment must have an office in a particular section of a city. Indeed, neither the NAFTA nor Canada's own domestic tax laws have any requirement that an enterprise have any physical office at all to constitute an investment / business. Canada's confirmation that Myers (Canada) had offices located in the province of Quebec is itself an admission that Myers (Canada) was an Investment located in Canada.

---

<sup>75</sup>

Counter-Memorial at paragraph 38.

C. Canada's Measure Relates to Investors and Their Investments

63. The Investor submits that the measure in question relates on its face to investors and their investments. Canada has proposed an interpretation of the phrase "relating to" as applied under NAFTA Article 1101(1) that is not in accordance with the ordinary meaning of the term, nor with Canada's *Statement on Implementation* nor with GATT case law.
64. Further, measures such as the *PCB Waste Export Ban* can apply to multiple NAFTA Chapters. Canada argues that its actions respecting the implementation of the *PCB Waste Export Ban* do not relate to investors and their investments but only relate to goods, namely PCB waste. Canada has not provided any support for this contention other than to argue that the alleged measures have no application to investors or investments in PCB waste treatment on its face.<sup>76</sup>
65. In fact, Canada has acknowledged on the public record that its promulgation of the *PCB Waste Export Ban* was directly targeted at the PCB waste treatment business of the Investor and its Investment. In the Regulatory Impact Analysis Statement published along with regulations, which eventually replaced the measure at issue in this Claim, Canada noted:

*On becoming aware that the United States Environmental Protection Agency (US EPA) had granted a request for "enforcement discretion" to an American company to import PCB's from Canada to the United States for the purpose of disposal, the Minister of the Environment issued the PCB Waste Export Interim Order on November 20, 1995.<sup>77</sup>*

66. On its face, the *PCB Export Waste Regulations*, as amended by the *PCB Waste Export Interim Order*, were directed at commercial operations and to persons operating those investments. Accordingly, the Measure directly relates to investors and investments.

The NAFTA Investment Chapter addresses all investors and investments broadly

67. For a government measure to come within the scope of the NAFTA Investment Chapter it must "relate to" an investment within the terms of Article 1101(1) that states:

*This Chapter applies to measures adopted or maintained by a Party relating to:*

- (a) investors of a Party;*
- (b) investments of investors of another Party in the territory of the Party; and*
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.*

---

<sup>76</sup> Paragraph 211 of Counter-Memorial.

<sup>77</sup> *PCB Waste Export Regulations, 1996, Canada Gazette Part I, October 5, 1996. Set out in Schedule 25 of the Investor's Memorial.*



68. Contrary to the position taken in Canada's Counter-Memorial, Canada has officially stated that the scope of Chapter 11 extends to all measures "that affect" investors of another Party, investments of investors of another Party and, for the purposes of NAFTA Articles 1106 and 1114, any investments in Canada. Canada stated its actual view of the proper scope of the NAFTA Chapter 11 in its *Statement on Implementation*, which was submitted to Parliament. This statement, issued on the coming into force of the NAFTA, provides:

*Article 1101 states that Section A covers measures by a Party (i.e., any level of government in Canada) that affect:*

- *investors of another Party (i.e., the Mexican or American parent company or individual Mexican or American investor)*
- *investments of investors of another Party (i.e., the subsidiary company or asset located in Canada); and*
- *for purposes of the provisions on performance requirements and environmental measures, all investments (i.e., all investments in Canada).<sup>78</sup> (Emphasis added.)*

69. Canada has argued that the term "relating to" used in NAFTA Article 1101 must be interpreted in a restricted fashion as meaning "primarily aimed at". This argument is based on GATT case law developed from panel interpretation of a specific GATT exception (Article XX(g)). The Investor submits that Canada's interpretation of the term "relating to" is taken completely out of context.
70. It is well-established that exceptions to international agreements are to be strictly interpreted. This rule is expressed in Latin as *exceptio est strictissimae applicationis*, which means exceptions to treaty obligations are construed restrictively<sup>79</sup>. Exceptions contained within the *WTO Agreement*, including the GATT, have been narrowly interpreted.<sup>80</sup> For example, in interpreting GATT Article XX(g), an environmental exception relating to exhaustible natural resources, panels have applied a strict interpretation, which would not permit all policies merely capable of protecting exhaustible natural resources to derogate from a substantive obligation. Rather, only those policies aimed primarily at exhaustible natural resources could be saved under the exception.
71. Each of Canada's examples of the use of the term "relating to" concern the interpretation of an exception to a treaty obligation. None of Canada's examples concern interpretation

---

<sup>78</sup> *Statement on Implementation, Canada Gazette Part 1, January 1, 1994, 68 at 148. Schedule 23.*

<sup>79</sup> *Interpretation of Article 79 of the 1947 Peace Treaty (French/Italian Conciliation Commission) XIII, UNRIIAA 397 and Free City of Danzig case, PCIJ Series A/B, No. 65 at 71.*

<sup>80</sup> For example, see the restrictive positions taken by GATT/WTO panels in *United States - Restrictions on Imports of Tuna DS21/R* and *United States - Standards for Reformulated and Conventional Gasoline. WT/DS9.*

of the scope of a substantive treaty obligation, such as NAFTA Articles 1102, 1105, 1106 or 1110.

72. In the context of the interpretation of NAFTA Article 1101, the NAFTA sets out the requirements for the interpretation of the Agreement in NAFTA Article 102(2). This Article provides:

*The Parties shall interpret and apply the provisions of this Agreement in light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*

73. In its award on jurisdiction in the *Ethyl* case, the Tribunal in the NAFTA panel decision took a broad view of the objectives of NAFTA and stated the following:

*The Tribunal reads Article 102(2) [of NAFTA] as specifying that the "object and purpose" of NAFTA within the meaning of those terms in Article 31(1) of the Vienna Convention are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the Vienna Convention.<sup>81</sup>*

74. It is essential that the term "relating to" in NAFTA Article 1101(1) be interpreted in a manner consistent with the NAFTA's objectives under NAFTA Article 102(1). These objectives include:

- (a) *the elimination of barriers to trade in, and to facilitate the cross-border movement of, goods and services between the territories of the Parties;*
- (b) *the promotion of conditions of fair competition in the free trade area;*
- (c) *to increase substantially investment opportunities in the territories of the Parties;*
- (d) *the provision of adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
- (e) *the creation of effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and*
- (f) *to establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the Agreement. (Emphasis added)*

75. Canada's *Statement on Implementation* expresses the ordinary meaning of the term "relating to" as applied to NAFTA Article 1101(1). This interpretation proffered by Canada in its *Statement on Implementation* is also consistent with the interpretive objectives of the NAFTA.

---

<sup>81</sup> *Ethyl Corp and Canada* (Jurisdiction Award) at paragraph 56.

76. Thus on the basis of the natural meaning that can be ascribed to the term "relating to", the meaning proffered by Canada in its *Statement on Implementation*, and the lack of any evidence of narrow interpretation of the term by an international tribunal construing a substantive treaty obligation, Canada's proposed novel construction of "relating to" cannot apply in this case.

**D. There is no Conflict Between NAFTA and Specific Environmental Agreements**

**(i) PCB Wastes are covered by the *Transboundary Agreement***

77. Canada has argued that the *Transboundary Agreement* did not apply to PCB and PCB waste. This is not a correct statement. Article 2 of the *Transboundary Agreement* provides that the agreement applies to hazardous waste as defined by the agreement in Article 1(b). This article defines hazardous waste as meaning, with respect to the United States, hazardous waste subject to a manifest requirement in the US.
78. Canada states that the *Transboundary Agreement* did not apply during the time that Canada imposed the *PCB Waste Export Ban* for PCB waste exported from Canada to the United States<sup>82</sup>. The Investor submits that Canada is mistaken on this important question of international law.

Article 1(b) of the *Transboundary Agreement* defines "hazardous waste" as:

*with respect to Canada, hazardous waste, and*

*with respect to the United States, hazardous waste subject to a manifest requirement in the U.S.,*

*as defined by their respective national legislations and implementing regulations.* (Emphasis added)

79. The *Transboundary Agreement* does not indicate that a waste be defined as a hazardous waste by both parties for the terms of the *Transboundary Agreement* to apply. Thus, hazardous waste will be covered by the Agreement if it meets either of the definitions provided by Canada or the United States.
80. Canada has admitted that PCBs are a hazardous waste in Canada and thus the terms of the *Transboundary Agreement* will apply with respect to Canada<sup>83</sup>. With respect to the United States, Canada apparently concluded that PCBs are not a hazardous waste subject to a manifest requirement in the United States and were thus not covered by the *Transboundary Agreement*. This conclusion was clearly incorrect.
81. Canada has admitted in its Counter-Memorial that under US law, PCBs have been subject to a manifest requirement since 1990.<sup>84</sup> Thus the only question that needs be determined is whether PCBs qualified as a hazardous waste.

---

<sup>82</sup> Paragraph 111 of the Counter-Memorial.

<sup>83</sup> Paragraph 110 of the Counter-Memorial.

<sup>84</sup> Paragraph 111 of the Counter-Memorial.

82. Canada admits that it received a response from the US Department of State to Canada's Diplomatic Note No. 36 on January 24, 1996.<sup>85</sup> This response confirmed that PCB wastes are hazardous wastes subject to a manifest requirement under American law. Canada claims that it was not until this time that Canada could know that PCB wastes were covered by the *Transboundary Agreement*.<sup>86</sup> This statement by Canada is an admission that by January 26, 1996 Canada knew that its *PCB Waste Export Ban* was inconsistent with its obligations under the *Transboundary Agreement*. Thus, as of this date, Canada's has admitted that its measure was inconsistent with the *Transboundary Agreement*.
83. Canada is also mistaken when it suggests that before January 26, 1996 that it could not know that the *Transboundary Agreement* applied to PCB wastes for the following reasons:
- (i) First, the US diplomatic note did not establish a new position for the US Government. The note confirmed the existing situation between the parties to the *Transboundary Agreement* from the perspective of the United States.
  - (ii) Second, Canada was capable of looking at the two relevant pieces of American environmental legislation<sup>87</sup> to see that PCB wastes would be covered under the *Toxic Substance Control Act* (TSCA). Indeed, the Affidavit of Mr. Myslicki and of Mr. Shantora<sup>88</sup> confirmed that there were officials in the department who believed that the *Transboundary Agreement* applied before the *PCB Waste Export Ban* was imposed.<sup>89</sup>

---

<sup>85</sup> Paragraph 142 of the Counter-Memorial. The two notes are set out in Tab 61.

<sup>86</sup> Paragraph 112 of the Counter-Memorial.

<sup>87</sup> Canada has admitted that two different pieces of American legislation govern hazardous wastes at footnote 15 of its Counter-Memorial.

<sup>88</sup> At paragraph 77 Mr. Shantora states that "Whether the *Canada-US Agreement* constituted a bilateral agreement for the purposes of the *Basel Convention* in the case of PCB wastes remained a live issue."

<sup>89</sup> At paragraph 29 Mr. Myslicki states ".. I understand that other DOE officials believed that the *Canada-US Agreement* applied but I was less confident of that".

(iii) Third, as early as December 1, 1995 US officials confirmed that PCB wastes could be covered in the *Transboundary Agreement*.<sup>90</sup> Accordingly, it was impossible for Canada to be able to conclude that the *Transboundary Agreement* could not apply in 1995. This is why, as early as August 1994, Environment Canada officials believed that the *Transboundary Agreement* applied, and favoured the opening of the border for the treatment of PCB wastes.<sup>91</sup>

84. Canada suggests that the application of the treaty depended on whether Canada believed that the treaty applied.<sup>92</sup> Mr. Myslicki came to his opinion by completely ignoring the operation of TSCA,<sup>93</sup> which clearly applied to PCB wastes. However, what Canada believed at the time was simply not relevant. Whether the *Transboundary Agreement* applied is strictly a factual issue. The Investor submits that in light of the evidence, this Tribunal must conclude that at the time of the making and the enforcement of Canada's *PCB Waste Export Ban*, the terms of the *Transboundary Agreement* did apply and that there was no conclusive evidence upon which Canada can argue that the *Transboundary Agreement* did not apply.
85. The Investor set out the test that Canada must meet if it is to claim that the *Transboundary Agreement* does not apply in paragraph 57 of its Memorial. The Investor submits that Canada has not met this test.

**(ii) The *Transboundary Agreement* is an Article 11 Agreement**

86. Article 4(5) of the *Basel Convention* provides that the export and import of hazardous wastes from and to non-Parties to the *Basel Convention* is prohibited unless such movement is subject to bilateral, multilateral or regional agreements whose provisions are not less stringent than those of the *Basel Convention*.
87. Article 11 of the *Basel Convention* permits a Party to enter into an agreement with a Non-Party with regard to the transboundary movement of hazardous waste provided that the

---

<sup>90</sup> See Memo of Victor Shantora on telephone call with Lynn Goldman at EPA on December 1, 1995 set out as Exhibit Q to the Affidavit of Victor Shantora set out at Schedule 64 of the Counter-Memorial.

<sup>91</sup> John Hilborn, "Confidential: Requested Directly by Minister's Office", September 7, 1994, set out at Schedule 5 and "Memorandum to Minister", October 1, 1994, set out at Schedule 6.

<sup>92</sup> Paragraph 112 of the Counter-Memorial.

<sup>93</sup> According to the Affidavit of Victor Shantora at paragraph 77, John Myslicki only looked at the *Resource Conservation and Recovery Act (RCRA)* rather than at TSCA, even though Canada has admitted that both acts apply to hazardous wastes under the *Transboundary Agreement*.

agreement does not contain provisions that are less environmentally sound than the *Basel Convention*. The *Transboundary Agreement* covered trade in PCB wastes between Canada and the United States and constitutes a treaty under Article 11 of the *Basel Convention*. Canada has admitted that the *Transboundary Agreement* is a pre-existing bilateral agreement under Article 11 in its Counter-Memorial.<sup>94</sup>

88. As the operation of the *Transboundary Agreement* is permitted under the *Basel Convention*, it does not create a conflict between its operation and the operation of the *Basel Convention*. As bilateral trade in PCB and PCB wastes was permitted between Canada and the United States under the *Transboundary Agreement*, Canada was not obliged to prohibit such trade under its obligations under the *Basel Convention*.

**(iii) In the case of a conflict, the NAFTA overrules the *Basel Convention***

89. The Investor submits that there is no conflict between the terms of the *Basel Convention* and the terms of the NAFTA. However, in the event that the Tribunal should determine that there is a conflict between these two international agreements, the Investor submits that the NAFTA specifically covers the eventuality of there being a conflict between the trade obligations in the *Basel Convention* and the NAFTA. In the event that there is a conflict between the provisions of the *Basel Convention* for Canada and the NAFTA, NAFTA Article 104(1)(c) states that the *Basel Convention* will prevail to the extent of any inconsistency over the NAFTA only when the *Basel Convention* comes into force for Canada, the United States and Mexico. As the *Basel Convention* has not yet come into force for the United States, NAFTA Article 103(2) prevails and states:

*In the event of any inconsistency between this agreement and such other agreements, this agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this agreement.*

90. Article 30(4) of the *Vienna Convention*<sup>95</sup> deals with the situation where more than one treaty deals with the same subject matter. It provides that:

*When the parties to the later treaty do not include all the parties to the earlier one:*

- 4) *as between States Parties to both treaties the same rule applies as in paragraph 3;*

*as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*

---

<sup>94</sup> Counter-Memorial at paragraph 110.

<sup>95</sup> At paragraph 185 of its Counter-Memorial, Canada accepts that the *Vienna Convention* reflects customary international law on treaty interpretation.

91. The United States is not a Party to the *Basel Convention* but both Canada and the United States are Parties to NAFTA. Accordingly, the NAFTA will prevail over the *Basel Convention* until such time as the United States ratifies the *Basel Convention*, when NAFTA Article 104(1)(b) will become operational.
  
92. The *Vienna Convention* establishes the rules regarding conflicts between international agreements. As a result of the operation of the *Vienna Convention* and of NAFTA Article 104, in the event of a conflict between the provisions of the *Basel Convention* and the NAFTA, the NAFTA must prevail to the extent of any inconsistency.



E. *The PCB Waste Export Ban was an Extraterritorial Act*

93. Canada's *PCB Waste Export Ban* was an attempt by Canada to impose its regulatory rules and standards upon the practices of other sovereign states. As such, Canada was attempting to impose its own laws in an extraterritorial manner, which is inconsistent with international law and the concept of comity and amity in international law.
94. Canada has argued that one reason why it imposed the *PCB Waste Export Ban* was to assess whether the United States used standards for disposal in the territory of the United States, which Canada thought appropriate in its own discretion. Canada specifically cites its concern that the Government of the United States permitted the landfilling of PCB wastes<sup>96</sup>. Canada states that Canadian government policy encouraged the "virtual elimination" of toxic chemicals, and therefore landfilling PCB wastes was (and remains) inconsistent with that policy. Canada's response to the EPA's enforcement discretion was to ban the export of PCB's from Canada to the US.
95. The Canadian government's measure was extraterritorial and inconsistent with the well-established international law principle of territorial supremacy. Territorial supremacy is a state's power to "exercise supreme authority over all persons and things" within its territory.
96. Canada's response to the EPA's decision to grant Myers a permit to import PCB's across the Canada-US border was extraterritorial in nature.
97. Canada has been well-known in the international community for its opposition to the extraterritorial operation of laws from other countries. In fact, this concern is especially evident in Canada's opposition against American domestic legislation, which effects Canadian nationals outside of the territory of the United States, such as the "*Helms-Burton* legislation". Canada's Foreign Minister Lloyd Axworthy has made the following statements about extraterritoriality:

"...it undermined the most basic premises of international law, upon which all of our international obligations and agreements are based...when the world's most powerful nation decides to *change rules governing trade unilaterally and arbitrarily*, it brings this entire regime into question."<sup>97</sup>  
(emphasis added)

---

<sup>96</sup> Counter-Memorial at paragraph 7.

<sup>97</sup> Address by the Hon. Lloyd Axworthy to the World Affairs Council, March 14, 1997 at paragraph 6, Schedule 24.

98. Canada's *PCB Waste Export Ban* was unilateral and arbitrary. It was a violation of Canada's obligations under the NAFTA and the *Canada-US Transboundary Agreement* regarding hazardous waste.

**F. Canada has Violated Four Obligations Contained in NAFTA Chapter 11**

**(i) National Treatment**

99. The *PCB Waste Export Ban* affected the management, conduct, operation, and expansion of Myers, the Myers - Myers (Canada) joint venture and Myers (Canada) in favour of similar Canadian-owned investments. The effect of the *PCB Waste Export Ban* was to favour PCB waste remediation in Canada by Canadian firms over remediation involving the United States or US-based firms.
100. There was no basis -- environmental, health or otherwise -- upon which this prohibition was founded. The only basis that is plausible from the evidence is that the *PCB Waste Export Ban* helped Canadian competitors retain market share that would have otherwise been lost to the operation of the Investor and its Investment, who were offering the same services for a much better price.
101. Canada has argued that Myers, the Myers - Myers (Canada) joint venture and Myers (Canada) were not engaged in PCB destruction in Canada as they were not "in like circumstances" to the Canadian firms who lobbied for, and benefited from, the *PCB Waste Export Ban*. It is clear that Myers (Canada), the joint venture and Myers were in the waste remediation business in Canada -- the exact same business in which its exclusively Canadian-based competitors were engaged. Canada has never adduced any evidence to show that these were not "like circumstances" other than to indicate that Myers' destruction facility was located in the US.
102. Canada has also argued that the Tribunal should not interpret "like circumstances" in Article 1102 to refer to a comparison of the business activities of the Investor and Investment in relation to their Canadian competitors.<sup>98</sup> The interpretation of Article 1102 articulated by the Investor is clear on its face.
103. Contrary to the position taken by Canada, the cases cited by the Investor<sup>99</sup> call for a broad and liberal interpretation of the terms of the NAFTA, in accordance with Article 31 of the *Vienna Convention* and the object and purposes of the NAFTA itself. The additional

---

<sup>98</sup> Counter-Memorial at paragraph 266.

<sup>99</sup> In the *Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Secretariat File No. CDA-2008-1) December 2, 1996 at 36; *Ethyl Corporation and Canada* [1999] 38 at paragraph 55.

cases cited by the Investor<sup>100</sup> demonstrate that in considering the scope and application of "national treatment" in the context of the *WTO Agreement*, the key factor is to ensure that an equality of competitive opportunities is maintained between competing goods or between competing services or service providers. The appropriate application of this jurisprudence to the present case is to ensure that an equality of competitive opportunities in Canada is provided to the Investor and its Investment, as compared to the opportunities granted by Canada to their Canadian competitors operating in the same business sector.

104. Myers, the Myers - Myers (Canada) joint venture and Myers (Canada) clearly did not receive the best treatment afforded to domestic companies in the waste remediation sector. The *PCB Waste Export Ban* was a discriminatory measure that resulted in harm to the Investor and the Investment. This was a clear violation of the National Treatment provisions of the NAFTA under Article 1102.

---

<sup>100</sup> *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, October 4, 1996 at 16; *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, January 18, 1999 at paragraph 119.

**(ii) Minimum Standard of Treatment**

105. Canada has proposed an overly narrow interpretation of its international law obligations, which must be observed under NAFTA Article 1105. Canada incorrectly asserts that Article 1105 is composed of two components: "fair and equitable treatment and full protection and security" and a "residual component".<sup>101</sup> The NAFTA text clearly requires Canada to provide investments with "treatment in accordance with international law". "Fair and equitable treatment" and "full protection and security" are two non-exhaustive examples of Canada's obligation to provide treatment in accordance with international law. These two examples stand as independent principles. There is no basis to read them in conjunction with each other, as Canada has argued.
106. Canada cites the *Neer* claim to restrict the meaning of a minimum standard of treatment to aliens and their investments in international law.<sup>102</sup> The passage cited by Canada only concerns the application of the principles of "denial of justice" within the context of a domestic court proceeding. Otherwise, the *Neer* claim confirms that conduct of states can be examined through international standards, apart from the municipal law of that state<sup>103</sup>.
107. Canada appears to be arguing that its obligation to accord a minimum standard of treatment to the Investment is restricted to according procedural fairness in relation to its domestic legal regime. There is no support to limit Canada's obligation to procedural treatment only. The inclusion of concepts such as "equity" and "full protection and security" clearly support the view that substantive as well as procedural fairness is provided under Article 1105. Even with respect to procedural fairness, Canada's failure to observe the procedural requirements of the *Regulatory Policy* and the explicit terms of the empowering statute under which the *Interim Order* was issued are evidence that it failed to provide a minimum standard of treatment in international law.
108. The principle of "good faith" obliges Canada to observe the standards it sets for itself in regulating. By publishing its *Regulatory Policy* and requiring federal government officials to abide by its terms, Canada generated a legitimate expectation on the part of those who would be affected by the regulation that officials would act in a principled manner in accordance with the *Policy*. The evidence clearly demonstrates that Myers and

---

<sup>101</sup> Counter-Memorial at paragraph 286.

<sup>102</sup> Counter-Memorial at paragraph 289.

<sup>103</sup> This point was initially referred to in paragraph 100 of the Memorial.

Myers (Canada) believed that Canada would offer meaningful consultation with them, be prepared to consider less trade-inconsistent alternatives, and Canada would act in accordance with its own laws before imposing a measure that would effectively destroy the business of the Investment.

109. Canada went beyond merely failing to accord procedural fairness in the drafting and imposition of the *PCB Waste Export Ban*, by specifically addressing itself to how the measure would directly harm the Investment. This means that Canada's breach of the obligation of good faith is more grievous because it embarked on a course of willful or reckless conduct designed to cause injury to an alien or foreign investment.<sup>104</sup>
110. Canada claims that the plain meaning of the text of NAFTA Article 1105 can somehow be narrowed by considering other provisions of the NAFTA.<sup>105</sup> This argument is clearly unsupported. For purposes of construing Article 1105, Article 1102 is not relevant. Article 1105 generates a positive obligation on the part of NAFTA Parties that would not otherwise be owed to investors or investments in international law. It requires Parties to accord treatment in accordance with obligations that already exist under international law.
111. In essence, Article 1105 ensures that investors will be able to seek damages for treatment of their investments that violate "international law". But for the existence of Article 1105, a NAFTA Party could breach its international obligations in respect of an investment from another Party and have only that Party to answer to, in the dispute settlement forum chosen by these Parties by way of treaty or through *ad hoc* arbitration. By virtue of Article 1105, the NAFTA Parties have agreed to investor-state arbitration as an alternative for the settlement of such disputes.
112. NAFTA Article 1110(1)(c) merely clarifies that expropriation will not only be compensable where it is executed without due process of law, but also if it is executed in violation of any other breach of international law, as mentioned in Article 1105. Absent specific language, this provision cannot possibly be construed as somehow limiting the scope and function of Article 1105.
113. NAFTA Chapter 18 delineates a limited number of specific procedural obligations that the Parties have agreed to observe. These obligations are of no direct relation to the systemic failure of Canada to accord substantive or procedural fairness in this case and do not provide the slightest indication that they are meant to represent a complete code

---

<sup>104</sup> Bin Cheng, *General Principles of International Law* (1953) at 122; *Fur Seal Arbitration* (1893) G.B./U.S., 1 *Int'l Arb.* 755 at 889-890.

<sup>105</sup> Counter-Memorial at paragraphs 296 -302.

concerning the manner in which Parties administer their laws or their obligations under the NAFTA.

114. Canada incorrectly assumes that the Investor's allegations concerning Canada's failure to act in accordance with international law are limited to the issuance of the *PCB Waste Export Ban* in November 1995. For example, in paragraphs 117 to 119 of its Memorial, the Investor's allegations concerning the applicability of the *Regulatory Policy* distinguish between the version of that *Policy* applicable before the *Interim Order* was formulated in October and November 1995 (the "*1992 Regulatory Policy*")<sup>106</sup> and the version in effect by the time it was approved for an indefinite period by Cabinet in early 1996 (the "*1995 Regulatory Policy*").<sup>107</sup>
115. Canada argues that the *1995 Regulatory Policy* did not apply to the development of the *PCB Waste Export Ban* because, under the provisions of the *Policy*, it was made under "exceptional circumstances", i.e. it was an emergency. This version of the *Policy* permits lapses in enforcement of its terms under "exceptional circumstances" if such circumstances are justified and documented, similar to what must have been in the minds of those who drafted s.35 of the *Canadian Environmental Protection Act* ("CEPA"). It is doubtful that "political emergency" is what the drafters of the *1995 Regulatory Policy* had in mind when they conceived of this exemption from the normal obligations of regulators.
116. There is no evidence on the record that regulators did justify the "exceptional circumstances" for imposing the *PCB Waste Export Ban* at any time, as required under the *1995 Regulatory Policy*. Moreover, the *PCB Waste Export Ban* was imposed prior to the date upon which the "exceptional circumstances" provision came into being.<sup>108</sup> Mr. Richard Fosbrooke, a Treasury Board Secretariat Official who was involved in the review of the implementation of the *PCB Waste Export Ban*, confirms that his duty was to "advise departments and agencies with respect to expectations under the government's *Regulatory Policy 1992*" (emphasis added).<sup>109</sup>

---

<sup>106</sup> Set out as Schedule 25.

<sup>107</sup> Set out as Schedule 32 of the Memorial.

<sup>108</sup> The Treasury Board decided to update the *Policy*, and add the provision, on November 9, 1995. However, all Treasury Board decisions are communicated to departments by way of a "decision letter", which historically takes weeks to transmit. Canada has provided no evidence to indicate that Environment Canada received the decision letter concerning the *1995 Regulatory Policy* prior to imposing the *PCB Waste Export Ban* on November 16, 1995.

<sup>109</sup> Witness Statement of Richard Fosbrooke, Treasury Board Secretariat of Canada, Answer 4, as set out at Schedule 26.

117. Accordingly, even if Canada had documented the existence of “exceptional circumstances”, it could not claim that the requirements of the *Regulatory Policy* were justifiably ignored in development of the *PCB Waste Export Ban* in October and November 1995. Canada has failed to produce any evidence that “exceptional circumstances” were documented at any time prior to Cabinet amending the *PCB Waste Export Regulations* in 1996 to permanently implement the *PCB Waste Export Ban*.
118. It is clear that alternatives were not considered by Canadian officials before the *PCB Waste Export Ban* was initially imposed,<sup>110</sup> despite Requirement No. 1 of the *Regulatory Policy* that “when regulating, regulatory authorities must ensure that they can demonstrate that a problem or risk exists, federal government intervention is justified and regulation is the best alternative” (emphasis added).<sup>111</sup> Meaningful consultation was not offered to the Investment, even though “a key element of the Policy and process was consideration of views of all interested stakeholders in the making of any [regulatory] changes.”<sup>112</sup> Even after several provinces informed the Minister of their concerns about the lack of any real risk, the need for meaningful consultation, and the alternative of finding a mutual solution through working with the US EPA, Canada maintained the *PCB Waste Export Ban* in force.<sup>113</sup>
119. Canada appears to be arguing that its failure to observe its international obligation to act in good faith in relation to the investment, by maintaining the *PCB Waste Export Ban* in effect, did not expire in November 1995. This is not so. Canada’s obligation continued, as its duty to meaningfully consult; consider more efficient alternatives; and ensure that the *PCB Waste Export Ban* was justified under CEPA s. 35 continued. Similarly, Canada’s duty not to continue on a course of conduct, which it knew to violate its municipal and international law obligations, in order to harm one particular investor or group of investors in favour of a domestic competitor, continued.<sup>114</sup>

---

<sup>110</sup> Reg Plummer, at Answer 31, Schedule 11.

<sup>111</sup> Regulatory Policy 1995, set out at Schedule 32 of the Memorial.

<sup>112</sup> Richard Fosbrooke, at Answer 31, Schedule 26.

<sup>113</sup> Letters from provinces set out at Schedule 27.

<sup>114</sup> Bin Cheng, at 137 and 139 to 140 of *General Principles of International Law*, writes that “the protection of good faith extends equally to the confidence and relevance that can reasonably be placed not only in agreements but also in communications or other conclusive acts from another State... Indeed, it is one of the most important aspects of the principle of good faith that promises and assurances should be faithfully adhered to so that the trust that others may reasonably place in them shall not be betrayed. This is probably the most prominent feature of the Germanic conception of good faith: *Treu and Glauben*”.



120. Canada claims that there is no duty to consult in international law. The Investor submits that the Tribunal does not need to make such a determination. Canada has obligated itself to accord consultation under its *Regulatory Policy*. Regardless of whether the obligation to consult represents a maturing norm in customary international law, demonstrated through its widespread use in conventions such as the NAFTA and *WTO Agreement*, or Ministerial Declarations emanating from the OECD or APEC, Canada's failure to consult is also evidence of its failure to observe the international principle of good faith. Having promulgated the *Regulatory Policy*, in order to implement the terms of an OECD Ministerial Declaration on regulatory reform,<sup>115</sup> Canada can certainly be held liable for failing to observe it.
121. Canada claims that the Investor could have hired lobbyists<sup>116</sup>. It is submitted that the best available lobbyist, who had been working for the Minister personally on this file a very short time earlier, was already taken. The evidence of this lobbyist's effectiveness is set out in paragraphs 123-124 of the Memorial<sup>117</sup>. Canada's conduct in allowing this lobbyist such privileged access to assist in the drafting of a measure specifically designed to harm the Investment is a failure to treat the Investment fairly or equitably. This failure constitutes a breach of Article 1105 that stands apart from either its breach of the good faith obligation to honour the terms of its *Regulatory Policy* or its good faith obligation not to violate the provisions of its own legislation, the CEPA, in order to harm the Investment.
122. It also does not assist Canada to note that section 35 of CEPA permits derogation from certain procedural requirements when an environmental emergency exists<sup>118</sup> because the evidence on the record clearly demonstrates that Canadian officials, including legal advisors, did not themselves believe that there was ever an environmental emergency that could justify issuing the *Interim Order* under section 35. Moreover, the procedural requirements in question concern publication and notification obligations under the *Statutory Instruments Act*, which are distinct from the obligations contained within the *Regulatory Policy*.

---

<sup>115</sup> *Recommendation of the Council of the OECD Concerning Application of the Reference checklist for Regulatory Decision-making*, October 27, 1994. This Council Recommendation cites Article 5(b) of the *Convention on the Organisation for Economic Co-operation and Development*, dated December 14, 1960, which generates a positive obligation on the part of all OECD members including Canada, to implement Council recommendations.

<sup>116</sup> Counter-Memorial at paragraph 311.

<sup>117</sup> Additional evidence of Mr. Smith's activities on behalf of his clients are set out in Schedule 28.

<sup>118</sup> Counter-Memorial at paragraph 313.

123. Canada cites the *Elettronica Sicula* case (generally referred to as the ELSI case) to argue that an international tribunal may choose to overlook violations of domestic law, and avoid "second-guessing" government decision-making, in consideration of the content of the minimum standard of treatment.<sup>119</sup> The ELSI case concerned a claim made on behalf of an insolvent enterprise that allegedly incurred damages as a result of an expropriation suffered 20 years earlier. There was no provision in the relevant treaty to provide treatment in accordance with international law, including fair and equitable treatment. The case primarily turned on whether the enterprise, due to its insolvency, was even capable of exercising rights of control and management that could have been deprived by the expropriation.<sup>120</sup>
124. Moreover, application of the treaty provision containing reference to "full protection and security" only involved allegations concerning a short occupation of the plant by workers about to lose their jobs and an 18 month delay in the hearing of the enterprise's appeal of the expropriation order. The Court found that the spontaneous occupation could be expected under the circumstances, and that it was the enterprise's insolvency that caused the delay (which also could have been complained of under the treaty's "denial of justice" clause but was not). Clearly, this case is not instructive concerning the content of Canada's obligation to observe minimum international standards.
125. Nonetheless, it may be useful for the Tribunal to consider the portions of the paragraph cited but not included by Canada in paragraph 319 of its Counter-Memorial (concerning whether the expropriation decision was "arbitrary" as prohibited under the treaty):
- A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right.<sup>121</sup>*
126. The message imparted by the Court in this passage is simply that an international Tribunal must be responsible for making its own findings based on international standards, rather than relying exclusively on the findings of a lower-level domestic tribunal, which interprets and applies only municipal standards.
127. In this Claim, the allegations are far more comprehensive than that Canada has acted arbitrarily. However, even if Article 1105 only prohibited "arbitrary" conduct in relation

---

<sup>119</sup> Counter-Memorial at paragraphs 292 and 319.

<sup>120</sup> *Case Concerning Elettronica Sicula S.p.A., (U.S.A. v. Italy)*, [1989] I.C.J. Rep. at 62, 71.

<sup>121</sup> *ELSI Case* at 74.

- to an investment – which itself is prohibited under international law – it is submitted that there is much "more" evidence that Canada acted arbitrarily in promulgating the *PCB Waste Export Ban* than existed in the ELSI case.
128. Canada did not act arbitrarily merely because it failed to comply with CEPA s. 35 in promulgating the *PCB Waste Export Ban*. It failed to consult; it failed to consider less-restrictive alternatives; and it failed to conduct a proper cost-benefit analysis. As suggested by the WTO Appellate Body in *United States – Reformulated Gasoline* and in *United States – Shrimp and Shrimp Products*, this litany of failures contributed to the arbitrariness of Canada's conduct.<sup>122</sup> Such arbitrariness is clearly prohibited under international law.
129. For example, in the *Shrimp Turtle* case, both the WTO Panel and the Appellate Body found that the United States acted in an arbitrary and unjustifiable manner by acting unilaterally to enforce an environmental measure.<sup>123</sup> In this NAFTA Claim, Canada acted unilaterally in imposing the *PCB Waste Export Ban*, despite the fact that Environment Canada officials were told by their counterparts in other departments that "Canadian officials should begin discussions with the US rather than preemptively banning [the export of PCB wastes]."<sup>124</sup>
130. It is an established principle of international environmental law to seek international consensus whenever possible, before acting unilaterally to address a transboundary environmental issue.<sup>125</sup> This is why Canada and the United States concluded the

---

<sup>122</sup> *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, May 20, 1996 at 22; *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/0558/AB/R, November 6, 1998 at paragraphs 177-184.

<sup>123</sup> *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS58/R, Panel Report, May 15, 1998 at paragraphs 7.50-7.61.

<sup>124</sup> Reg Plummer, Answers 27 & 31, Schedule 11.

<sup>125</sup> See the *US - Gasoline* Panel Report at paragraph 7.50 and the Appellate Body Report at paragraph 168, citing, for example, Paragraph 2.22(i) of *Agenda 21*, adopted by the United Nations Conference on Environment and Development, June 14, 1992, UN Doc. A/CONF. 151/26/Rev.1, which provides that "Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus" or *Principle 12 of the Rio Declaration on Environment and Development*, UN Doc. A/CONF. 151/5/Rev.1, June 13, 1992, 31 ILM 874, which states that: "Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus." While the obligations contained within these conventions obviously cannot overrule the terms of the NAFTA, unless the NAFTA explicitly provides as such, Canada's failure to honour them is further evidence that Canada's intentions in imposing the *PCB Waste Export Ban* were not to act in accordance with its international environmental obligations.

*Transboundary Agreement on the Movement of Hazardous Wastes* – to govern the environmentally sound trade in hazardous wastes such as PCB's. Inexplicably, Canada ignored the terms of the *Transboundary Agreement*, and the need to seek international consensus, in its rush to impose the *PCB Waste Export Ban* before Myers and Myers (Canada) could take advantage of their years of work in developing a market for their services in Canada.

131. In summary, there are numerous ways to find that Canada has failed to provide to the Investment treatment in accordance with international law:
- (i) By failing to accord fair and equitable treatment, in providing privileged access to a competitor, and by designing a measure intended to harm the Investment.
  - (ii) By failing to abide by the terms of its own *Regulatory Policy*. This failure harmed the Investment, which held a reasonable expectation that these terms would be honoured, in observance of the principle of good faith.
  - (iii) By knowingly acting beyond the scope of s. 35 of the CEPA, and its international obligations, to harm the Investment in favour of a domestic competitor, not in accordance with the principle of good faith.
  - (iv) By arbitrarily discriminating against the Investment, in failing to conduct a cost-benefit analysis, offer meaningful consultation or consider more efficient alternatives, including standards harmonisation, and in issuing and then maintaining the *PCB Waste Export Ban*.

**(iii) Performance Requirements**

132. Canada has argued that a prohibited performance requirement can only be a specific mandatory requirement.<sup>126</sup> The Investor does not agree with Canada's characterization. For the NAFTA to be interpreted "to increase substantially investment opportunities",<sup>127</sup> the performance requirement provisions must apply to *de facto* and *de jure* requirements, which meet the terms of the enumerated activities. By covering *de facto* and *de jure* actions, the NAFTA performance requirement obligations will cover situations where governments characterize a measure as being NAFTA-consistent in form, while using it as a colourable means for circumventing the performance requirement obligations.
133. As a result of Canada's measure, Myers and its Investment were obliged to comply with Canadian requirements to locate their production in Canada and to consume Canadian goods and services if they were to continue in business. These requirements were contrary to Canada's obligations under NAFTA Article 1106, which prohibits a number of specific governmental activities designed to favour domestic goods, services or investments. Canada argues in its Counter-Memorial that the *Interim Order* did not impose any obligations on Myers (Canada) to construct a PCB disposal facility or to use a certain level of domestic goods and services. This is not correct.
134. Canada's measure imposed indirect performance requirements upon Myers and its Investment which had the effect of according an advantage to domestic over foreign interests. Canada's measure clearly violated Article 1106 of the NAFTA.

**Canada's measure is not consistent with the Performance Requirement Exception**

135. Article 1106(6) allows a Party to maintain a performance requirement if they meet certain criteria. For the exception to apply, all of the criteria must be met. These criteria are that the measure must:
- i. comply with the *chapeau* of Article 1106(6), that is the measure must not be applied in an arbitrary or unjustified manner and it must not be a disguised restriction on international trade or investment; and
  - ii. be necessary:
    - (a) to protect human, animal or plant life or health; or
    - (b) for the conservation of living or non-living exhaustible natural resources.

---

<sup>126</sup> Counter-Memorial at paragraphs 341-342.

<sup>127</sup> NAFTA Article 102.

136. For a measure to comply with the exception, the measure must be necessary to protect human, animal or plant life or health, or conserve exhaustible natural resources. Canada cannot establish that the *PCB Waste Export Ban* meets this stringent standard.
137. The *PCB Waste Export Ban* cannot be a necessary measure as it was not the least inconsistent policy alternative available to Canada. Canada has argued that its *PCB Waste Export Ban* was the least trade inconsistent possible as it provided it with time to deal with issues<sup>128</sup>. This is not a correct statement of Canada's obligation. Canada's obligation, when dealing with a "necessity test" is to select the least trade restrictive option available. A number of options could have been followed by Canada, rather than unilaterally imposing an immediate and absolute ban, including:
- (a) ensuring that sufficient insurance was obtained for all transborder shipments;
  - (b) doing nothing, as Environment Canada official clearly believed free trade was the best option<sup>129</sup>;
  - (c) permitting exports, but only upon demonstration of compliance with Canadian standards; or
  - (d) consulting with the United States about harmonization of PCB waste disposal standards before acting unilaterally.
138. Canada has not produced any evidence to prove that the *PCB Waste Export Ban* was actually necessary. Indeed, Canada knew that its measure was not necessary, nor even related to the conservation of natural resources or the protection of human, animal or plant life or health. In a memo from George Cornwall to Minister Coppins on October 30, 1995, Mr. Cornwall even confirms that there was no significant danger in permitting PCB wastes to be exported to the United States for disposal<sup>130</sup>.
139. Furthermore, Canada cannot meet the requirement of NAFTA Article 1106(6) that its measure not be applied in an arbitrary or discriminatory fashion. For the reasons cited in relation to the Investor's argument about Articles 1102 and 1105, Canada's *PCB Waste Export Ban* constituted an arbitrary and unjustifiably discriminatory measure aimed at harming the Investor and the Investment in Canada.
140. As the party relying upon an exception to an international agreement, Canada has the burden to establish that the exception applies.<sup>131</sup> Canada has not and cannot meet this

---

<sup>128</sup> Counter-Memorial at paragraph 367.

<sup>129</sup> John Hilborn, Dave Campbell and Hugh Dibbs, PCB Export Briefing Note, August 2, 1994, set out at Schedule 12.

<sup>130</sup> Schedule 31 of the Memorial.

<sup>131</sup> Memorial at paragraph 149.

burden. Thus Canada cannot justify the imposition of its prohibited Performance Requirements on the Investor and its Investment.

141. In summary, Canada's *PCB Waste Export Ban* imposed performance requirements on Myers, Myers-Myers (Canada) joint venture and Myers (Canada) in violation of Article 1106 of the NAFTA. The evidence clearly shows that Canada's *PCB Waste Export Ban* was arbitrary and discriminatory and Canada is not capable of relying on any exception to justify this action.

**(iv) Expropriation**

142. The NAFTA provides broad protections for the investments of foreign investors who have suffered a measure tantamount to expropriation by Canada. Canada's argument in its Counter-Memorial attempts to seriously circumscribe the meaning of these protections in a manner that is inconsistent with the NAFTA and international law.
143. The NAFTA provides that a Party must provide immediate fair market compensation if that Party expropriates the investments of an investor of another NAFTA Party. Expropriation is a well-known term in international law and has been used by tribunals in hundreds of cases. Canada has argued in its Counter-Memorial that the term "expropriation" is somehow unknown in the NAFTA and thus it should be defined solely by the dictionary definition provided by Canada<sup>132</sup>. The Investor cannot agree with this misleading conclusion advanced by Canada.
144. The NAFTA expropriation provisions establish a situation that creates an obligation to pay compensation at the time an expropriatory event occurs. This event, termed the "date of expropriation", crystallizes the damage to the investments of an Investor and occurs when a Party takes an action tantamount to an expropriation.

*Interpreting the term "Expropriation"*

145. The term "expropriation" is a term of art in international law. It has been used in numerous international agreements without definition, including Bilateral Investment Agreements and the *Canada-US Free Trade Agreement*<sup>133</sup>, which was a predecessor to the NAFTA.
146. The NAFTA makes clear that this Tribunal should give a broad and liberal meaning to provisions that protect Investment and Investors. NAFTA Article 102, which contains the interpretive principles for this agreement, includes in its objectives:

*Increase substantially investment opportunities in the territories of the parties; and*

*Provide adequate and effective protection and enforcement of intellectual property rules in e*

---

<sup>132</sup> Counter-Memorial at paragraphs 384 and 385.

<sup>133</sup> For example see Article G-10 of the *Canada-Chile Free Trade Agreement* or Article 1605 of the *Canada-US Free Trade Agreement* which are identical to the NAFTA Article 1110(1).



In addition to these objectives, which support a broad reading of investment protection rights in the NAFTA, this same interpretive article articulates the three principles through which the NAFTA must be interpreted, namely: national treatment, most-favoured nation treatment and transparency.<sup>134</sup> Thus in order to give effect to these principles, a broad level of property protection must be provided.

147. The NAFTA is capable of clear meaning and its terms assist this Tribunal in developing a broad definition of investment, which protects the investment opportunities and existing property investments of foreign investors in each NAFTA country.

Canada's Expropriatory Actions

148. Canada has suggested that the definition of expropriation is limited to a narrow list of actions<sup>135</sup>. This position cannot be correct.
149. Canada argues that because it later changed its *PCB Waste Export Ban*, some 18 months after it destroyed the Investment's business in Canada, that it is entitled to claim that it did not expropriate the investment. This is not correct. Canada is liable for its acts at the time of the expropriation. At that time, NAFTA Article 1110(2) required Canada to immediately pay compensation to the Investor.
150. The terminology used by Canada is irrelevant as to whether an expropriation took place. A government could expropriate an investment but refer to its action as a public custody event. Certainly, an international tribunal will look at what the government did and how it affected an investment rather than merely look at the form and description of what occurred.<sup>136</sup>
151. Furthermore while Canada claims that the *PCB Waste Export Ban* was an interim measure and only temporary, it has admitted in its Counter-Memorial that the *PCB Waste Export Ban* codified Canada's existing practices.<sup>137</sup>

---

<sup>134</sup> The NAFTA Tribunal in the *Ethyl* case concluded that the NAFTA must be interpreted through the objectives set out in NAFTA Article 102.

<sup>135</sup> Counter-Memorial at paragraph 404.

<sup>136</sup> As mentioned previously in the Memorial at paragraph 197, in *Revere Copper v. OPIC*, a domestic US court concluded that the actions of the Government of Jamaica in increasing a royalty rate on bauxite, while appearing to be a non-discriminatory measure of general regulation, actually targeted one single company- a foreign-owned aluminum smelter. The court determined this was obviously targeted discrimination of a foreign company over domestic counterparts.

<sup>137</sup> Counter-Memorial at paragraph 115.

152. In its Counter-Memorial, Canada claims that the *PCB Waste Export Ban* did not directly or indirectly expropriate the Investor's Investment in Canada or constitute a measure tantamount to an expropriation of an Investment contrary to NAFTA Article 1110<sup>138</sup>. Canada reaches this conclusion based on the fact that Myers and Myers(Canada) continued to receive revenue in other areas after the *PCB Waste Export Ban* was implemented. This is a faulty conclusion, which assumes that because Myers and Myers (Canada) continued to stay in corporate existence, they were not harmed by Canada's actions.
153. Canada argues that the Investor should not have expected Canada to have an open border with the United States due to Canada's international law obligations.<sup>139</sup> Indeed, the Investor expected Canada to abide by the terms of the *Canada-US Transboundary Agreement*, which compelled Canada to permit PCB waste to be exported if the appropriate US environmental approvals were given. The Investor obtained the required US approvals in the full expectation that Canada would comply in good faith with its international obligations.<sup>140</sup>
154. Canada has alleged that the Investor's business operations in Canada were speculative or illegitimate.<sup>141</sup> This statement is inflammatory and false. The Investor was entitled to rely on Canada's good faith obligation to comply with its own international agreements with the Government of the United States<sup>142</sup>. Under the *Canada-US Transboundary Agreement*, Canada should have permitted the Investor and its Investment to conduct its business<sup>143</sup>. Furthermore, under the terms of the *Basel Convention*, Canada's obligations under the *Canada-US Transboundary Agreement* still survived. The only speculative act engaged in by the Investor was to expect that Canada would act in good faith and in accordance with international law.
155. Canada is mistaken about the meaning of expropriation. Canada has relied upon out of date international legal precedent to indicate that only an absolute taking by a government for its own use will constitute an expropriation. This is simply no longer correct. The term expropriation in international law already covers "creeping expropriation". International Tribunals have concluded that there is no longer any distinction between

---

<sup>138</sup> Counter-Memorial at paragraph 381.

<sup>139</sup> Counter-Memorial at paragraph 397.

<sup>140</sup> Supplementary Affidavit of Rev. Mike Valentine, paragraph 16. Schedule 1.

<sup>141</sup> Counter-Memorial at paragraph 398.

<sup>142</sup> Bin Cheng, *Principles of International Law* at 105.

<sup>143</sup> See discussion in Paragraph 55 of the Memorial.

direct, indirect or creeping expropriations.<sup>144</sup> Section 712 of the American Law Institute's *Third Restatement on the Foreign Relation of the United States* provides that the term "expropriation"

*... applies not only to avowed expropriation in which the government formally takes title to property, but also to the other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriations").*<sup>145</sup>

In an unreported case under UNCITRAL Rules, an International Tribunal determined that no distinction should be drawn between direct and creeping expropriations.<sup>146</sup>

156. The NAFTA must have been intended to cover situations that were broader than creeping expropriations by its use of the new term "measures tantamount to expropriation".
157. In their study of Bilateral Investment Treaties, Dolzer and Stevens suggest that expropriation provisions are general and broadly defined with a focus on the effect of the measure rather than its form or intent. Examples of this broad interpretation can be seen in comparisons of US model bilateral investment treaties. Dolzer and Stevens state:

*Whereas the U.S. model treaty only mentions "measures tantamount to expropriation or nationalization("expropriation") several of the U.S. treaties exemplify what such measures might include:*

*any measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value)...*

*The latter provision represents possibly the broadest scope in investment treaties with respect to indirect expropriation insofar as the inclusion of measures that cause the 'impairment...of [the] economic value' of an investment, equates expropriation with a host of measures which might not otherwise be considered as such under general international law, let alone under liberal systems of domestic law.*<sup>147</sup> (Emphasis added)

---

<sup>144</sup> *Harza Engineering Co. v. Iran* (1982) I Iran-U.S. CTR, 499 at 504. *ITT Industries Inc. v. Iran 2* Iran-U.S. CTR at 349. *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFIA Consulting Engineering of Iran* (1984), 6 Iran-U.S. CTR 219 at 225.

<sup>145</sup> *The Third Restatement on the Foreign Relation Law of the United States* at 712(g).

<sup>146</sup> *Biloume v. Ghana Investment Centre* (1990) as cited by M. Sornarajah in *The International Law on Foreign Investment*, Cambridge University Press, 1994 at 283.

<sup>147</sup> Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*. Martinus Nijhoff Publishers. 1995. at 102.

Thus, the NAFTA's expropriation obligations should also be viewed in a similarly broad fashion.

*Impairing the Investor's economic value in its Investment*

158. Canada's measure removed the Investor's ability to perform its primary business function. Canada developed this measure in a discriminatory manner specifically to deprive the Investor of its access to market. The taking of the Investor's market was tantamount to a taking of the Investor by Canada. In essence, Canada targeted the Investor to deprive it of the essential elements of its primary business function. This measure impaired the Investor's economic value in its Investment.

*The Police Power*

159. Canada argues that it should be entitled under international law to be able to take expropriatory acts without the need to pay compensation. Whether or not this is an accurate description of customary international law is irrelevant, as the NAFTA specifically requires that compensation be paid in every case of expropriation.
160. In addition to the specific requirement that compensation be paid in every circumstance of expropriation contained in paragraphs (1)(d) and (2) of NAFTA Article 1110, this Agreement also goes further than customary international law on the issue of regulatory takings. NAFTA Article 1110(8) indicates that general regulatory takings other than loans and debt securities constitute expropriations and are covered by the compensation provisions of NAFTA Article 1110. Thus, the NAFTA makes clear in two places within Article 1110 that compensation is the general rule in all expropriations, irrespective of the reason for the expropriation.
161. The NAFTA does not impair in any way the ability of Canada to act or to expropriate. The only requirement is that Canada pay compensation.
162. Canada claims that it need not compensate the Investor as its action was *bona fide* and not discriminatory for the following purposes:
1. To carry out its international treaty obligations under the *Basel Convention*;
  2. For environmental reasons; and
  3. For health protection.

Unfortunately, the evidence in this claim cannot support Canada's argument. Canada's action was not a measure of *bona fide* regulation. Canada imposed a measure with the intent to harm Myers and its Investment in order to help Canadian companies such as

- Chem-Security.<sup>148</sup> This discriminatory intent violates paragraphs (b), (c)<sup>149</sup> and even (a) of NAFTA Article 1110(1). Since Canada did not pay compensation to the Investor, it has also violated its obligations under NAFTA Article 1110(1)(d). Accordingly, Canada cannot rely on any argument that its *PCB Waste Export Ban* constituted a measure of *bona fide* public regulation or a *bona fide* exercise of the police power as the evidence cannot support these assertions.
163. For the reasons set out in the Investor's Memorial and in this Supplementary Memorial<sup>150</sup>, Canada's *PCB Waste Export Ban* was a form of discrimination against American Investors and their investments.
164. For the reasons set out in the Investor's Memorial and in this Supplementary Memorial<sup>151</sup>, Canada's *PCB Waste Export Ban* was not consistent with Canada's international law obligations under the *Basel Convention*.
165. Canada's *PCB Waste Export Policy* was not a *bona fide* policy taken for environmental or health protection reasons<sup>152</sup>.
166. Thus, this honourable Tribunal need not consider Canada's argument that its *PCB Waste Export Ban* policy constituted an expression of its police or general regulatory power, as the evidence discloses that the measure was not taken for either of these purposes.
167. In summary, the *PCB Waste Export Ban* violated Canada's obligations under Article 1110 of the NAFTA and international law as follows:
- (i) Canada's ban constituted a measure "tantamount to expropriation" under Article 1110 of the NAFTA.
  - (ii) Canada is required to pay compensation to the Investor at the time the *PCB Waste Export Ban* came into force as required by Article 110(2) of the NAFTA. The reversal of the *PCB Waste Export Ban* by Canada 18 months later is irrelevant.

---

<sup>148</sup> See Schedule 56 of the Memorial which indicates that the Deputy Minister of the Environment, Mel Cappe, participated in activities to assist Chem-Security by closing the border and destroying the Investor's and its Investments' market in Canada.

<sup>149</sup> This action violates Canada's NAFTA Article 1105 obligations by harming one company in order to assist another one. See the Investor's argument at paragraphs 113 - 114 of its Memorial.

<sup>150</sup> See pages 9-13 of the Memorial and paragraph 77 of this Supplementary Memorial.

<sup>151</sup> See paragraphs 52-53 of the Memorial and paragraphs 66-68 of this Supplementary Memorial.

<sup>152</sup> See pages 9 to 13 of the Memorial and paragraphs 2 to 3 of this Supplemental Memorial.

Canada is required to pay compensation irrespective of the Investor's continuing operations after the *PCB Waste Export Ban*.

- (iii) The *PCB Waste Export Ban* was a discriminatory measure targeted at the Investor and its Investment and cannot be justified as a *bona fide* policy for environmental or health protection reasons. Indeed, Canada's obligation is to pay compensation for all expropriations irrespective of the reason for the expropriation.

**G. The Damages are Appropriate**

168. The Investor cannot agree with Canada's arguments with respect to the law on damages applicable to this arbitration. The arguments made by Canada are speculative and are not based upon international legal precedent nor on the arguments and facts raised in this Claim.
169. Contrary to the position advanced by Canada, the NAFTA does not impose any territorial limitation on the damages that an Investor can claim under NAFTA Articles 1102 (national treatment) and 1105 (minimum standard of treatment)<sup>153</sup>. Other NAFTA Articles impose an express territorial limitation which binds this Tribunal however no such express limitation exists for these two obligations. Accordingly, the Investor is entitled to claim for damage caused to it by Canada's discriminatory measure which has proximately affected it in the United States and in Canada.
170. The Investor submits that in this phase of this Claim, all that this Tribunal need establish is the general framework for the calculation of damages. This framework has been set out by the Investor in its Memorial. All other questions are most properly reserved for the Damages Phase of this Claim, if one is so ordered.

---

<sup>153</sup>

Counter-Memorial at paragraph 459.

#### H. NAFTA Chapters 3 and 11 are Consistent

171. The Investor has already demonstrated in its Memorial that there is no conflict between the provisions of Chapters 3 and 11 of the NAFTA.<sup>154</sup> Canada has not demonstrated that there is any conflict between the obligations contained in these Chapters.
172. Canada has argued that there is an inconsistency between NAFTA Chapters 3 and 11 by virtue of the application of the GATT Article XX exemption included in NAFTA Article 2101. In making this argument, Canada is attempting to re-write the NAFTA. If the drafters of the NAFTA had intended for the GATT Article XX exemption to apply broadly to Chapter 11, it is submitted that they would have explicitly provided as such. They were very particular in selecting exactly which parts of the NAFTA would be affected. The drafters included specific exemptions for issues such as health and the environment in Chapter 11, including NAFTA Articles 1106(6) and 1114. Therefore, Canada's argument cannot succeed. Otherwise, the NAFTA exemptions are either redundant or of no use.
173. Alternatively, if the Tribunal determines that a conflict could arise between chapters 3 and 11 through the application of Article 2101, Canada's argument would still fail because it has been unable to demonstrate that the *PCB Waste Export Ban* falls within the provisions of GATT Article XX.
174. The *PCB Waste Export Ban* does not fall within the ambit of either paragraphs (b) or (g) of GATT Article XX. For the reasons provided above in relation to Article 1106(6) and in paragraphs 148-157 and 167-175 of the Memorial, the *PCB Waste Export Ban* is clearly not necessary to protect human, animal or plant life or health. Canada imposed the *PCB Waste Export Ban* in order to maintain the Minister's policy of having PCB wastes treated "in Canada by Canadians". As such, the *PCB Waste Export Ban* obviously does not bear a "substantial relationship" or can be "directly related" to the conservation of natural resources.<sup>155</sup> Accordingly, the *PCB Waste Export Ban* cannot be brought within the protection of paragraph (g).
175. Even if the *PCB Waste Export Ban* could be brought within the substantive provisions of paragraphs (b) or (g), it clearly falls beyond the ambit of the chapeau of Article XX as it constitutes both "arbitrary" and "unjustifiable discrimination" for the reasons provided above in relation to Article 1105 and in the Memorial at paragraphs 105-107 and 115-142. The *PCB Waste Export Ban* constitutes "arbitrary" and "unjustifiable discrimination"

---

<sup>154</sup> Memorial at 24 to 26.

<sup>155</sup> *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (1988), WTO Doc. L/6268-35S/98 at para's. 4.5-4.6; *United States - Shrimp*, Appellate Body, at para's. 136-13; *United States - Reformulated Gasoline*, at para's 14-19.



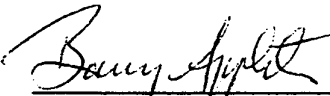
because it was unilaterally applied for a colourable purpose and without proper consultation or exploration of alternatives (including cooperation with the US concerning harmonisation of standards). Accordingly, as Canada cannot bring its measure within the ambit of GATT Article XX, as incorporated by NAFTA Article 2101, it cannot suggest that there may be an inconsistency between Chapters 3 and 11.

**PART THREE: SUBMISSIONS**

In view of the facts and arguments set out in this Supplemental Memorial and in the Investor's Reply and Memorial, may it please the Tribunal to declare and adjudge the following:

- a) Through the introduction and implementation of the *PCB Waste Export Ban*, Canada has violated Articles 1102, 1105 and 1106 of the North American Free Trade Agreement;
- b) Due to Canada's breach of the North American Free Trade Agreement, Canada is liable to pay compensation to the Investor, in such amount as will be determined in the Damages Phase of this proceeding;
- c) An adverse inference should be taken for the documents requested by the Investor from Canada, which have not been produced without just cause; and
- d) The Investor requests an order that Canada pay all the costs of these proceedings, including all fees and expenses incurred by the Investor.

Submitted this 15<sup>th</sup> day of December, 1999 at Toronto, Canada.



Barry Appleton  
for APPLETON & ASSOCIATES INTERNATIONAL LAWYERS

1140 Bay Street, Suite 300  
Toronto, Ontario M5S 2B4

Counsel for the Investor, S.D. Myers, Inc.