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

MEMORIAL OF THE INVESTOR
INITIAL PHASE

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

v.

GOVERNMENT OF CANADA

Respondent / Party

July 20, 1999

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GENERAL INTRODUCTION

1. This is a Claim about how the Government of Canada ("Canada") designed an export ban to discriminate against an American-owned investment in favour of Canadian owned investments engaged in similar activities. Canada knowingly engaged in this activity - understanding the impact this measure would have upon the Investor and its Investment. Canada also knew that its policies were not necessary for environmental protection nor were they compatible with its obligations under the NAFTA. This is not a case about environmental protection or international environmental agreements – it is about arbitrary and discriminatory treatment applied in an unfair manner to the Investor and its Investment.

2. Canada's *PCB Waste Export Ban* resulted in four breaches of the NAFTA. These are:

   A. Canada failed to extend national treatment to the Investor and its Investment. Canada engaged in a discriminatory policy to force the Investor and the Investment out of the Canadian PCB waste remediation market so that other Canadian Investors could obtain all of the Canadian market.

   B. Canada failed to meet its obligations under international law by not engaging in a good-faith non-discriminatory and procedurally-fair promulgation of the *PCB Waste Export Ban.*

   C. Canada engaged in a policy that required any investment that wished to remain operating its lawful business to use local content and domestic goods and services.

   D. Canada's *PCB Waste Export Ban* destroyed the ongoing business operations of the Investor's Investment in Canada by making it impossible for the Investment and the Investor to operate in Canada, frustrating their contracts and business dealings and thereby nullifying their market share. Canada's failure to compensate the Investment or the Investor for this harm in the manner set out in NAFTA Article 1110 is inconsistent with Canada's NAFTA obligations.

3. Canada has raised a number of arguments about this case. These arguments deal with whether the *PCB Waste Export Ban* was directed at investors or whether the *PCB Waste Export Ban* solely was related to trade in goods. Each and every one of these arguments can and should be answered in the negative by this Tribunal.

4. Finally, Canada has argued that the *PCB Waste Export Ban* can be preserved as a NAFTA- inconsistent measure by virtue of Canada's compliance with the terms of the *Basel Convention* and the *Canada-US Transboundary Agreement on Hazardous Wastes* ("*Transboundary Agreement*"). This argument is incorrect. The NAFTA provides that its terms are superior to the terms of the *Basel Convention* at this time. In relation to the *Transboundary Agreement*, there are no provisions in that Agreement that required Canada to engage in the *PCB Waste Export Ban*. Indeed, even if Canada had to engage in the *PCB Waste Export Ban* to comply with the *Transboundary Agreement*, it was obligated to follow policy options that were the least inconsistent with the NAFTA, an obligation Canada failed to meet.

PART I THE FACTS

Who is S.D. Myers?

S.D. Myers, Inc., the Investor in this Claim, is a company originally incorporated on September 30, 1965 under the laws of the State of Ohio. Starting in 1982, the Investor engaged in the business of processing, transporting and disposing polychlorinated biphenyl ("PCB") contaminated waste. These PCB activities were performed according to the guidelines set out by the United States Environmental Protection Agency ("EPA") for PCB production and waste management.[1]

S.D. Myers, Inc. engaged in the recycling of electrical transformers that contain PCB contaminated waste. The company recycled transformers, capacitors, lighting ballasts and transformer oil. S.D. Myers, Inc. recycled the following proportions of material from PCB contaminated waste:

Transformers	95%
Capacitors	20%
Lighting Ballasts	75%
Transformer Oil	95%

Remediating PCB waste and recycling the remediated components are environmentally positive activities. All PCB contaminated wastes that cannot be recycled are destroyed through third-party EPA-approved facilities.

From 1989 to 1999, S.D. Myers, Inc. processed over 250,000,000 pounds of PCBs and PCB contaminated waste at its Tallmadge, Ohio facility without incident. Also, S.D. Myers, Inc. has been responsible for safely transporting their customers' PCB waste over 10,000,000 miles.[2]

S.D. Myers, Inc. operated in Canada on its own as a branch of its American operations and through its joint venture partner, S.D. Myers (Canada) Inc., an affiliate of the Investor. The Investor, on its own and jointly with S.D. Myers (Canada) Inc., conducted a number of business operations in Canada in the provinces of Ontario and Quebec. They engaged in:

a) marketing, advertising and market research;
b) sales;
c) site processing of PCB wastes;

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[1] Affidavit of Rev. Michael Valentine, set out in Schedule 1.

[2] Affidavit of Rev. Michael Valentine.

d) arranging for transportation of PCB wastes through their agents; and
e) waste remediation.

Investments engaged in the transborder treatment and processing of PCB waste are permitted under the terms of the *Canada-US Transboundary Agreement on Hazardous Wastes.*[3] In fact, the preambular recitals of this Agreement even make reference to the transboundary treatment of waste between Canada and the United States. It states:

> *Recognizing that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste;*

Beginning in 1991, S.D. Myers, Inc. commenced a process intended to obtain permission from the EPA to import waste from the Canadian PCB marketplace.

What are PCBs ?

PCBs are synthetic chemical compounds consisting of chlorine, carbon and hydrogen. PCBs have a unique combination of properties, namely their inert, fire-resistant, and insulating capacities, making them ideal for the task of cooling and insulating various commodities. PCBs have been used principally in electrical equipment but also in a variety of other products. PCBs biodegrade exceedingly slowly, effectively remaining in the environment over an extremely long period of time. To eliminate them from the environment, PCBs must be disposed of through either a process of thermal destruction or by chemical recycling.[4] **PCBs have never been manufactured in Canada.** Of the approximately 40,000 tonnes of PCBs in Canada, all have been imported from the United States of America. The United States and Canada banned the further production of PCBs in 1977.[5]

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[3] C.T.S. 1986 No. 39. Set out in Schedule 9.

[4] The Canadian PCB inventory refers to the total amount of PCBs in storage or in service in Canada. The publication entitled "National Inventory of PCBs In Use and PCB Wastes In Storage In Canada" (June 1990) prepared by Environment Canada summarizes the inventories of "in use" PCBs and PCB wastes, and discusses the progress of PCB destruction in Canada. The National PCB inventory includes; 'in-use' askarel (Askarel is a generic term for synthetically produced electrical insulating materials) containing equipment, such as askarel containing electrical and mechanical equipment, and PCB wastes, bulk askarel, fluorescent lamp ballasts, PCB contaminated soils, and any other PCB contaminated materials. Set out in Schedule 2.

[5] Commission for Environmental Cooperation, *Status of PCB Management in North America*, June 1996 as set out in Schedule 4.

Why are PCBs Destroyed ?

Canadian businesses need to rid themselves of PCB contaminated items. There is liability associated with holding the wastes. In fact, commercial lenders are usually concerned about extending credit and mortgage financing to businesses that hold these wastes.[6] Also, the environmental liability from inadvertent leakage or vandalism adds risk to these businesses. Thus, there is an impetus for businesses to carefully monitor and destroy their PCB holdings as quickly as possible in keeping with environmentally sound practices.

How are PCB Wastes Regulated?

The use, storage, transportation, treatment, and destruction of PCBs have been regulated in Canada since 1977. Since that time, federal and provincial governments have initiated a succession of regulations and programs designed to have Canada's PCB contaminated waste collected and securely stored. In August of 1990, Canada issued its *PCB Waste Export Regulations,*[7] which effectively banned the export of PCB waste to all countries other than the United States. Under the regulations, exports to the United States were permitted with the approval of the EPA.

In the United States, PCBs and PCB waste are primarily regulated under the federal *Toxic Substances Control Act*[8] ("TSCA"), which dictates restrictions on the manufacture, sale, use, import, export, and disposal of PCBs and PCB contaminated waste. The EPA may grant a company a one year exemption if it is satisfied that the company's activity will not result in unreasonable risk to human health or the environment, and that the applicant has made good faith efforts to develop a substitute that does not represent an unreasonable risk. In December of 1994, the EPA proposed a general rule under TSCA to allow the import and export of PCBs for disposal at concentrations of 50 parts per million (ppm) or greater where no unreasonable risk would be generated.

On October 13, 1995, S.D Myers, Inc. applied for an enforcement discretion to import PCB waste from Canada for disposal. On October 26, 1995, the EPA granted S.D. Myers, Inc. a discretionary permit for approval to export PCB waste from Canada into the United States.[9] This

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[6] Bob Glover, "Don't hold onto those PCBs: What to do when the border opens" *Hazardous Materials Management*, February/March 1997. Set out in Schedule 3.

[7] *PCB Waste Export Regulations, 1990.* SOR/90-453 set out in Schedule 5.

[8] 15 U.S.C. § 2601-2671 (1988).

[9] A copy of the Enforcement Discretion issued to S.D. Myers, Inc. is set out in Schedule 55.

enforcement discretion was to begin on November 15, 1995 and end on December 31, 1997. It was replaced by a general PCB Waste Import for Disposal Rule on February 19, 1996.

Who Destroys PCBs in Canada ?

All Canadian PCB contaminated waste has been identified. The business of disposing and remediating PCB waste is thus tied to the existing PCB inventory. As the Canadian PCB inventory diminishes, so does the Canadian PCB remediation market.

There were no PCB disposal sites in Canada in 1990. This lack of environmentally suitable treatment facilities resulted in S.D. Myers, Inc.'s perception that Canada had substantial market potential. In particular, the close proximity of the Tallmadge, Ohio facility to the PCB inventories in Ontario and Quebec (the majority of the Canadian PCB inventory) provided the Investor and its Investment with a cost advantage (in terms of transportation) as compared to many other American or Canadian-based service providers.[10]

S.D. Myers, Inc. entered the Canadian market with its Canadian affiliate (described in this Memorial as S.D. Myers (Canada) Inc.) in 1993. Its main Canadian competitor was Chem-Security located in Swan Hills, Alberta. The Investor and the Investment enjoyed a substantial competitive advantage over their Canadian-based competitors including Chem-Security. The Investment and the Investor offered potential customers an efficient and cost effective process, an unblemished safety record and years of experience in the US market. It was also situated thousands of miles closer to the large Ontario and Quebec PCB inventories than was Chem-Security. A comparison of the pricing schedules of the Investment and the main competitor, Chem-Security, as of March 1995 (approximately six months prior to the re-opening of the border) is outlined in Table 1 below:

[10] Affidavit of Rev. Michael Valentine. Set out in Schedule 1.

Table 1 - Cost Comparison between S.D. Myers, Inc. and a Major Canadian Competitor [11]

	Chem-Security	S.D. Myers, Inc.	% Price Advantage
Transformers	$46 FPG[12]	$23 FPG	50%
Capacitors	$6.34/kg	$3.73/kg	41%
Fluids	$2.98/kg	$1.86/kg	38%
Lighting Ballasts	$6.34/kg	$3.73/kg	41%
Soils	$4.77/kg	$3.97/kg	17%

Canada knew about the significant cost differences between Canadian PCB waste remediators and S.D. Myers. In a memo prepared by an Environment Canada official, Canada estimated that the transportation cost of completing a job that it was then currently tendering would be $110 million if Chem-Secuity had the contract but only $15.3 million if it was done by S.D. Myers, Inc. in Ohio.[13]

What Canada Did

On November 16, 1995 the Canadian Minister of the Environment, Sheila Copps, signed an emergency interim order banning the export of PCBs to the United States for 14 days pursuant to Section 35 of the *Canadian Environmental Protection Act*[14] ("CEPA"). Section 35 of the *Canadian Environmental Protection Act* provides:

(1) Where

(a) a substance

(i) is not specified on the List of Toxic Substances in Schedule I and the Ministers believe that it is toxic, or

(ii) is specified on that List and the Ministers believe that it is not adequately regulated, and

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[11] Affidavit of Rev. Michael Valentine. Set out in Schedule 1.

[12] FPG stands for faceplate gallon. Both Chem-Security and S.D. Myers, Inc. gave pricing discounts for volume work.

[13] John Hilborn, Officer, Hazardous Waste Branch, Environmental Protection Service, Environment Canada "Cost of Destroying PCB Wastes" Memo dated November 24, 1995 and approved by George Cornwall, Director, Hazardous Waste Branch and Vic Shantora, Director-General, set out in Schedule 46.

[14] R.S.C. 1985, c. C-15.

> *(b) the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health,*
>
> *the Minister may make an interim order in respect of the substance and the order may contain any provision that may be contained in a regulation made under subsection 34(1) or (2).*

This emergency Interim Order could only be used for specific, urgent situations and not as a general policy.

On November 20, 1995, Sheila Copps signed an identical Interim Order that prohibited PCB waste exports to the United States.[15] The public was not informed of the existence of a second order and officials originally considered denying its existence.[16] The Federal Cabinet twice approved the Interim Order, first on November 28, 1995 and then on February 26, 1996 when the amendments to the *PCB Waste Export Regulations*, banning commercial exports for disposal, were made final. Canada took the position that the ban was necessary because it was not satisfied that Canadian PCB wastes, if exported to the US, would be managed in an environmentally sound manner.

S.D. Myers, Inc. had a competitive advantage over competitors operating in Canada at the time that Canada imposed its measure. The Investment and the Investor offered potential customers an efficient and cost effective process, an unblemished safety record and years of experience in the US market.

Canada Had a Variety of Policy Options Available

Canada had a number of policy options to deal with its desire to keep all PCB waste treatment in Canada. Departmental officials advised the Minister of the Environment that other options were available as alternatives to imposing an export ban. These options included:

- ensuring that sufficient insurance was obtained for transborder shipments;
- waiting for the court action from Canadian companies or their American based supporters to close the border; or

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[15] This Interim Order of November 16, 1995 was not properly made in accordance with Canadian law and, therefore, on November 20, 1995, the Environment Minister again approved and signed the Interim Order to ban the export of PCB wastes from Canada to the United States.

[16] Victor Shantora, Director General, Hazardous Waste Branch, Environment Canada, Electronic Mail Transcript, November 23, 1995. Set out in Schedule 50.

- waiting for new technologies to develop.[17]

In another memorandum to the Assistant Deputy Minister, Tony Clarke, officials also wrote:

> *We are looking at means to at least delay * PCB exports along the lines:*
>
> - *We could ask an (independent?) consultant to assess that the disposal facilities in the U.S. would be handling/disposing of CDN PCB Wastes in an environmentally acceptable way. U.S. EPA did this before accepting Stablex (??);*
>
> - *We need to satisfy ourselves that U.S. consents are all adequate vis-a-vis our export-import of hazardous waste (EIHW) regulations;*
>
> *- the letter I drafted for your signature to U.S. EPA will help set the stage for this.*
>
> *- my office will fax to Washington when/if you sign.*
>
> ** both of these "delays" would disappear when details are resolved... thus... may only be short term.*[18]

Each and every one of these policy alternatives would have been less inconsistent with Canada's NAFTA obligations than the measure actually chosen by Canada.

Why Did Canada Really Ban PCB Waste Exports?

The editor-in-chief of a leading North American hazardous waste industry magazine, Guy Crittenden, commented on the true reasons behind Canada's *PCB Waste Export Ban*. He wrote:

> *Last November, Sheila Copps banned Canadian PCB exports under a seldom-used section of the CEPA that was clearly meant for serious disasters. Only after she made the announcement did Copps order bureaucrats to concoct a rational justification for her ploy to grab headlines. Copps, a policy featherweight with strong anti-American trade sentiments, had been lobbied for months prior to the announcement by the money-losing treatment plant in Swan Hills, Alberta which, even with a treatment monopoly, only incinerated 20 per cent of Alberta's hazardous waste in 1992 and 1993. The plant operators knew the facility couldn't withstand U.S. competition.*[19]

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[17] John Hilborn, Officer, Hazardous Waste Branch, Environmental Protection Service, Environment Canada. "Export of PCBs to the United States" Memorandum dated October 27, 1995, detailing policy considerations, options and alternatives set out as Schedule 6 ('Hilborn Memorandum 1").

[18] Handwritten Memorandum to Tony Clarke from George Cornwall detailing "Canadian policy options" November 9, 1995 set out at Schedule 58.

[19] "The Great Canadian Border Scam", Editorial by Guy Crittenden, Editor in Chief, *Hazardous Materials Management*, August/September 1996, at 6. Set out in Schedule 7.

According to this industry expert, Canada's measure was an attempt to respond to the lobbying efforts of a major money-losing Canadian competitor of the Investor and its Investment. It was clear that Canada had intended to prop up Canadian-based investments while harming the foreign Investor.

In an article nearly one year later, Mr. Crittenden examined the economic viability of Chem-Security's Swan Hills, Alberta PCB treatment facility. In this article, the editor explained the reason why Chem-Security wished to see the border closed to the export of PCB waste. He stated:

> *The Swan Hills operation was then impacted by another unforseen event: the opening of the U.S.-Canada border to the import of Canadian PCB wastes in November 1995. The plant's position as the only licensed facility to destroy Canadian PCBs (a significant short-term revenue stream) was threatened by treatment alternatives in the United States which are closer to Ontario and Quebec (home to most of Canada's stored PCB inventories). However, in the belief that Canada's nascent environmental industry needs protection, then-federal Environment Minister Sheila Copps imposed a ban on PCB export the day after the Americans announced their borders would open.*[20]

On February 7, 1997, the *PCB Waste Export Regulations* were altered to allow the export of Canadian owned PCBs to US disposal companies, subject to certain conditions.

Initially, Chem-Security was only permitted to treat local PCB waste from the province of Alberta. In 1995, Chem-Security obtained permission from the province of Alberta to treat waste from outside Alberta.[21] The opening of the cross-border business operated by the S.D. Myers, Inc. and the Investment presented a major obstacle to Chem-Security's desire to increase its share of the Canadian market.[22] This obstacle was even greater as Chem-Security was not cost-competitive due to its extreme distance from most of the commercial market.

In order to promote its own business opportunities, Chem-Security took the following steps:

> It engaged in strategic alliances with PCB waste remediation firms in Ontario and Quebec whereby it would process the PCB wastes that these agents obtained from Canadian customers; and

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[20]"PCB Update" by Guy Crittenden, *Hazardous Materials Management*, February/March 199 set out in Schedule 8.

[21] "Pleas, Fees, Trees and PCBs: The Meaning of the Swan Hills Privitization Deal" by Guy Crittenden, *Hazardous Materials Management*, October/November 1995, set out in Schedule 57.

[22]Letter from Hon. Ty Lund, Alberta Minister of Environmental Protection, to Hon. Sheila Copps dated November 9, 1995 set out in Schedule 67.

It engaged in a significant Ottawa-based lobbying effort in order to close the border to the export of PCB waste so that its main competitor, the Investor and its Investment, would not be able to operate efficiently in the Canadian market. Through this lobbying activity, which included hiring the former policy advisor to the Environment Minister, the company met with the Minister in July 1995. Through its lobbyist, Chem-Security was able to be intimately involved with Canada's imposition of its *PCB Waste Export Ban.*

On November 7, 1995 Chem-Security (Alberta) Ltd. wrote to the Canadian Minister of the Environment informing her that Canada's entire inventory of PCB waste could be depleted within 30 days, and thanking her for her promise to support their firm made in July 1995.[23]

This lobbying plan can be clearly seen in a letter to Environment Minister Copps from Monty Davis, the President and CEO of the corporate parent of Chem-Security, shortly after the imposition of the *PCB Waste Export Ban.* In his letter to the Minister, the owner of Chem-Security states:

> *As you know, we are in the process of taking this plant private and relieving the government of Alberta of its obligations to the plant. The borders to Alberta were opened in February of this year and it was July before Ontario was able to see their way clear to issue certificates for transportation of PCB's. It was very disappointing to us to break the ground to make PCB treatment possible in the rest of Canada, only to find the EPA exercising their discretion to allow U.S. plants to rush in and grab Canadian industrial dollars to fill their current capacity shortfalls.*
>
> *We feel that the supply of waste from the rest of Canada is vital to the long term viability of the Swan Hills plant as a private corporation. To put it succinctly, the plant can no longer continue to operate in the way we are proposing with marketing systems in the rest of Canada and a comprehensive waste treatment for all Canadian industry if this critical revenue source goes south.*
>
> *... As has been previously conveyed to you by Art Mathes, it is our feeling that we should try to resolve our waste disposal problems in Canada - developing our own industry and employing our own people. This attempt at a quick grab of the highest dollar revenues by U.S. companies, thus creating jobs in the United States, would not serve Canada well in the longer term.*
>
> *Let me once again express my appreciation to you for the support you have shown BOVAR and our industry in the past and reaffirm BOVAR's commitment to enhancing the environment here in Canada.*[24]
> (Emphasis added)

Chem-Security's lobbying strategy was also followed by Cintec, another PCB remediation firm.. A draft letter prepared for the Deputy Minister to Chem-Security's lobbyist acknowledging the commitment made to the companies by the Minister. This letter was annotated by the Deputy

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[23] Letter from Art F. Mathes, General Manager, Chem-Security (Alberta) Ltd. to Sheila Copps, Minister of Environment, dated November 1, 1995. Set out in Schedule 49.

[24] Letter from Monty Davis to the Hon. Sheila Copps. November 8, 1995 set out in Schedule 48.

Minister in his own handwriting as saying, "**I don't want to put the commitment down on paper**" (Emphasis Added).[25] An e-mail message from a senior Environment Canada official to the Deputy Minister further demonstrates that these Canadian PCB remediation companies were consulted by Canada in the making of its discriminatory policy measure which were intended to deprive the Investor and its Investment of its market share.[26]

According to *Hazardous Material Management*, Canada sought to prolong the amount of time Canadian companies had exclusive rights to deal with PCB waste. This was effectively a means of subsidizing Canada's PCB waste remediation industry at the expense of the Investor and the Investment. In its April/May 1996 edition, the magazine reported:

> *Most PCB owners saw the prohibition as an economic move by Copps to protect the viability of the hazardous waste treatment plant in Swan Hills, Alberta....*
>
> *Private discussions with senior bureaucrats within Environment Canada and recent publicly disclosed documents reveal that the department formed an opinion early on that Copps' border move would be difficult to defend under the North American Free Trade Agreement (NAFTA), and could only be supported as a temporary move to review the Basel-mandated bilateral agreement. However, one Environment Canada official admitted privately that the "foot dragging" on the subject and the recent temporary extension to the export ban is not so much a scientific concern as a move to buy Canadian companies more time to exploit their protected market before the border opens.*[27]

It was no secret in Ottawa or in the hazardous waste industry that the basis for Canada's measure was not environmental protection but simply domestic market protection.

In July 1995 the Canadian Environment Minister met with representatives of Canadian PCB waste treatment companies and promised them she would protect their market by ensuring that PCB contaminated waste could not be exported for treatment outside of Canada. Environment Canada officials were well aware of the Minister's promise to the Canadian-based industry. Assistant Deputy Minister Tony Clarke referred to this promise as "the most important conclusion" from the Minister's week of meetings.[28]

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[25] This letter is set out in Schedule 56.

[26] Victor Shantora, Director General, Hazardous Waste Branch, Environment Canada, Electronic Mail Transcript, November 22, 1995 set out in Schedule 26.

[27] The PCB Border: Behind the scenes in recent Canada-U.S. PCB relations, *Hazardous Materials Management*, April/May 1996. Set out in Schedule 11.

[28] Filings under the *Lobbyist Registration Act* were made by Jeff Smith for Cintech and Chem-Security. In addition, Mr. Smith lobbied the Deputy Minister of the Environment at the time that the ban was made. Set out in Schedule 45.

In a letter dated November 1, 1995 and sent to all government entities dealing with PCB wastes, the Director of the Hazardous Waste Branch stated:

> *I would encourage you not to enter into any contractual arrangements with Myers....You should also bear in mind that, since 1989, it has been federal government policy to destroy federal PCB wastes in this country, and that will have to be factored into our deliberations.*[29]

On November 1, 1995, the Minister was advised by her officials that the imposition of an export ban would be inconsistent with Canada's NAFTA obligations and unjustifiable under CEPA. In fact, she was told permitting PCB wastes to be treated outside of Canada would be beneficial to the environment.[30] Environment Canada officials were clearly concerned that the Minister was making the wrong decision:

> *Apparently, Ellen Fry has serious legal problems with the interim order concept in this case. She signalled that when I spoke to her this morning. Would it be appropriate to ask Ellen (or Justice HQ?) to prepare a note advising Minister directly. That way, it might be easier for Minister to accept contrary advice!*[31]

Despite the warnings provided by her officials, Canadian Environment Minister Sheila Copps issued an Interim order to close the border on November 16, 1995. The Minister never provided any evidence of an environmental emergency sufficient to justify the use of this extraordinary power.

Minister Copps' action did not go without impact in Canada. An association representing PCB waste owners in the province of Quebec and a Canadian waste management company brought an application to the Federal Court of Canada (known as the *Centre Patronal* case) in 1995 to quash the Canadian Environment Minister's decision as an unlawful exercise of authority.

What Happened After the Ban?

As a result of the *PCB Waste Export Ban*, the Investor and its Investment lost the opportunity to do business in Canada. Before the ban was imposed, the Investor and the Investment engaged in

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[29]Letter to PCB Interdepartmental Committee from George Cornwall, Director, Hazardous Waste Branch dated November 1, 1995. Set out at Schedule 47.

[30] Hilborn Memorandum 1, as set out in Schedule 6; John Hilborn, "Export of PCBs to the United States" Memorandum dated November 1, 1995. Set out as Schedule 10 ("Hilborn Memorandum 2").

[31]George Cornwall Handwritten memo at Schedule 58. Ellen Fry was legal counsel for Environment Canada.

advertising in Canada, offered price quotes and solicited bids.[32] The Investor and the Investment received letters from interested customers who were unable to complete contracts because of Canada's measure. Some of these letters included Purchase Order numbers while others expressed the desire of the customer to have the Investor and the Investment process its PCB waste as soon as the border opened.

Many of these letters made reference to the fact that the customers wished to use S.D. Myers, Inc. and/or S.D. Myers (Canada) Inc. but could not because of the legal uncertainties arising from the *PCB Waste Export Ban*. For example, David Sheppard, Ph.D., Senior Specialist, Environmental and Regulatory Affairs at 3M wrote on December 6, 1995:

> Your quotation is attractive for at least two reasons. First your facilities are 1000's of miles closer to our facilities than the only approved Canadian destruction facility at Swan Hills, Alberta. All other factors being equal, given a choice I would prefer to **minimize the risk of a transportation incident** by shipping to a closer facility.
>
> Second, your quotation is approximately half of that quoted to us by the most competitive agent we have found for the Swan Hills facility. In my mind, there is absolutely **no value added** to support the **extra** cost required to deal with Swan Hills. From an environmental perspective, it would be better to invest the money saved by shipping to the US in **another** environmental protection project.
>
> At present, the border to the US is closed to shipment of PCB waste by the Canadian Federal Government. If that situation were to change, we would ship the PCB waste currently stored at the two 3M Canada sites to the US in preference to Swan Hills for the reasons stated above.[33]

In another example, Custom Environmental Services from Edmonton, Alberta sent a letter to the Investor on December 7, 1995 stating that it would have to cancel its order for $5,720,000.00 worth of work from the Investor and its Investment. In this case, the customer had even submitted notices to Environment Canada to enable it to have its waste processed in Ohio. This letter went on to state that the customer would move its business to the Investor and/or the Investment as soon as the ban was over:

> *It is our intent to pursue this disposal option should the interim order banning PCB shipment be reversed.*[34]

The Investor and its Investment were unable to conduct their ordinary and regular business. Their contracts with existing customers were frustrated. Their negotiations with new customers

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[32] Copies of advertising material and bills for advertising are set out in Schedule 74. Examples of letters quoting specific prices for specific waste remediation jobs are set out in Schedule 72.

[33] Set out in Schedule 71.

[34] Set out in Schedule 71.

were frustrated. The many new customers that were waiting for the border to open (whose existence was confirmed by the letter to Minister Copps from Chem-Security[35]), could not take advantage of the benefits of the free trade agreement.[36] In essence, S.D. Myers, Inc.'s business in Canada on its own and through its Investment stopped completely. Canada never paid any compensation to the Investor.

In February 1997, after closing the border for over 16 months, Canada changed its *PCB Waste Export Ban*. With the opening of the border, the application in the *Centre Patronal* case was abandoned.

In July of 1997, an American court struck down the EPA's general import disposal rule.[37] The court's decision did not affect the ability of the EPA to grant individual enforcement discretions to companies such as S.D. Myers, Inc. Canada's attempt to deprive the Investor of its Canadian market was conducted with an absence of good faith. Thus, the Investor, who had lost its entire Canadian PCB business through Canada's trade protectionist policy, feared that Canada would reimpose its unfair *PCB Export Waste Ban* if it re-entered the Canadian market. Given that almost two years had passed and that the Investor and Investment's market contacts were now stale, the Investor was not capable of successfully or practically re-entering the Canadian market. Its investment in Canada was lost.

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[35] Set out in Schedule 48.

[36] Examples of letters from potential customers opposed to Canada's ban are set out in Schedule 73.

[37] *Sierra Club* v. *E.P.A.*, U.S. Ct. App., (9th Cir., July 7, 1997). Set out in Schedule 51.

Table 2 - Chronology of Events

YEAR	EVENT
1965	S.D. Myers, Inc. is founded in Ohio.
1977	US Government bans further production of PCBs.
1986	Canada and the United States enter into the *Transboundary Agreement on Hazardous Wastes.*
1993	S.D. Myers (Canada) is established under the *Canada Business Corporations Act.*
January 1, 1994	The NAFTA comes into force.
July, 1995	Canadian Environment Minister promises competitors of S.D. Myers, Inc. that she will close border if the United States permits PCB waste imports from Canada.
October 26, 1995	EPA grants an enforcement discretion to S.D. Myers, Inc. to permit imports of PCB wastes from Canada to be processed in the United States.
October 27, 1995	Canadian Environment Minister advised that an immediate ban on PCB waste exports from Canada could not be justified under Canadian environmental law and would be inconsistent with Canada's NAFTA obligations.
November 16, 1995	The Minister issues an emergency order banning the export of PCB Waste under the *PCB Waste Export Interim Order.*
November 20, 1995	The Minister attempts to correct one error made in the preparation of the November 16th order and reissues the emergency export ban.
November 28, 1995	Federal Cabinet approves the Interim Order maintaining the ban in force.
February 26, 1996	Canada issues a final order banning the commercial export of PCB Waste for disposal.

MEMORIAL

PART II: THE ARGUMENT

SECTION I: THE INVESTOR HAS MET THE REQUIREMENTS OF NAFTA CHAPTER 11

S.D. Myers, Inc.

1. S.D. Myers, Inc. was founded in 1965 under the laws of the State of Ohio, with its head office in Tallmadge, Ohio.[38] The company operated in Canada through branches located in Mississauga, Ontario and Anjou, Quebec from 1993 to 1997.

2. Since 1982, S.D. Myers, Inc. has been engaged in the business of processing, transporting, and disposing PCBs. S.D. Myers, Inc. employs several different processes for disposing of PCB waste. All of S.D. Myers, Inc.'s processes adhere to the stringent guidelines set out by the EPA for PCB waste management.

S.D. Myers, Inc. is an Investor

3. To bring a claim, a claimant must be an investor of a Party. NAFTA Article 1139 defines an investor of a Party as a "*state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.*"[39]

4. The Investor operated in Canada directly and in a joint venture with S.D. Myers (Canada) Inc., a company incorporated under the laws of Canada. At all material times, the Investor also provided S.D. Myers (Canada) Inc. with a substantial operating loan that allowed S.D. Myers (Canada) Inc. to carry on its business.

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[38] Set out in Schedule 12 is a copy of the company's incorporation documents. Admitted in paragraph 4 of Canada's *Statement of Defence*.

[39] NAFTA Article 201 defines an enterprise as any *"entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."*

S.D. Myers (Canada) Inc. Operations

5. S.D. Myers (Canada) Inc. was incorporated under the federal laws of Canada in October 1986. In 1993, the Myers Company for Environmental Development (Compagnie de Developpement en Environnement Myers Inc.) ("Myers Development") was incorporated pursuant to the laws of Canada. It maintained a registered office in Anjou, Quebec.[40] It also operated under the trade name "S.D. Myers Canada".

6. In November 1995, Myers Development acquired the shares of S.D. Myers (Canada) Inc. As a result of the share transaction, S.D. Myers (Canada) Inc. became a wholly-owned subsidiary of Myers Development. In June 1996, the wholly-owned subsidiary changed its corporate name from S.D. Myers (Canada) Inc. to 2105098 Canada Inc. At the same time, Myers Development changed is corporate name to S.D. Myers (Canada) Inc. These entities together are referred to as "S.D. Myers (Canada) Inc." or the "Investment" in this Memorial.[41]

7. Myers Development and S.D. Myers (Canada) Inc. engaged in the business of offering environmental services aimed at eliminating PCBs and PCB contaminated waste. The companies relied on S.D. Myers, Inc. for full financial and technical support.[42]

S.D. Myers Inc. and S.D. Myers (Canada) Inc. are Investments

8. The NAFTA specifically defines the term "investment" under Section A of NAFTA's Chapter 11. NAFTA Article 1139 defines the term "investment" as including the following:

> *(a) an enterprise;*
> *(d) a loan to an enterprise... where the enterprise is an affiliate of the investor;*
> *(f) an interest in an enterprise that entitles the owner to share in assets of that enterprise on dissolution other than a debt security or a loan excluded from sub-paragraph (c) or (d); and*
> *(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory;*

9. The term "enterprise" is defined as:

> *"an enterprise as defined in Article 201 and a branch of an enterprise."*

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[40] Set out in Schedule 14.

[41] Set out in Schedule 15.

[42] Statement of S.D. Myers, Inc. Board of Directors, dated March 18, 1993, set out in Schedule 16.

10. The term "enterprise of a party" is defined as:

> *"An enterprise constituted or organized under the law of the Party and a branch located in the territory of a Party and carrying out business activities there."*

11. NAFTA Article 201 defines the term "enterprise" for the purposes of the Agreement as:

> *"any entity constituted or organised under applicable law... including any corporation, trust, partnership, sole proprietorship, joint venture or other association."*

In order to constitute an Investment under this NAFTA Chapter only one element of this definition need be satisfied.

An enterprise

12. In order to constitute an enterprise under Chapter 11, all that is necessary is to demonstrate that a company has carried out business activity in the territory of another NAFTA Party either as a branch or as an "enterprise" as defined by NAFTA Article 201.

13. S.D. Myers, Inc. constituted an enterprise as defined in Article 1139 as it had business activities in Canada operating as a branch between 1992 to 1997.[43] Employees from S.D. Myers, Inc. were active in Canada working out of the premises of its affiliated firm, S.D. Myers (Canada), Inc. in Ontario and Quebec.[44]

14. In addition, S.D. Myers, Inc. constituted an enterprise as defined in Article 1139 as it was operating in joint venture with its affiliated company, S.D. Myers (Canada) Inc., as co-venturers in sales, marketing, distribution and pre-processing activities for PCB waste remediation in Canada. This joint venture can be evidenced through the multiple business arrangements conducted by both co-venturers.[45]

15. S.D. Myers, Inc. was operating as a cross-border entity. It had business operations in the United States and ongoing business operations in Canada. These Canadian business operations were sufficient to qualify as an enterprise for the purposes of the definition of "investment" contained in NAFTA Article 1139.

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[43] Affidavit of Rev. Michael Valentine. Set out in Schedule 1.

[44] Affidavit of Rev. Michael Valentine. Set out in Schedule 1.

[45] Set out in Schedules 71, 72 and 74.

A loan to an affiliate

16. S.D. Myers, Inc. is owned by four shareholders: Dana Stanley Myers, Scott David Myers, Seth James Myers and David Paul Myers ("Myers Family"). These shareholders are all citizens of the United States of America.[46] Members of the Myers Family are the only shareholders of S.D. Myers (Canada) Inc.[47] Both companies have common control and accordingly are affiliates of each other.[48]

17. In 1993, S.D. Myers, Inc. made a loan to its Canadian affiliate, S.D. Myers (Canada) Inc., of CDN$216,418[49] which is recorded in the financial statements of S.D. Myers (Canada) Inc. Following from that time, S.D. Myers, Inc. made additional loans to its Canadian affiliate. These inter-affiliate loans constitute an investment as defined by paragraph (d) of the definition of Investment in NAFTA Article 1139.[50]

Interests Arising from the Commitment of Capital

18. S.D. Myers, Inc. committed capital by way of operating loan financing and invested capital by way of common shares in its Canadian affiliate, S. D. Myers (Canada) Inc. These investments constitute an "interest arising from the commitment of capital or other resources in the territory of another Party" and thus constitutes an "investment" as defined by Article 1139 of the NAFTA.

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[46] Set out in Schedule 18 is conclusive evidence of the American nationality of the shareholders.

[47] Set out in Schedule 19.

[48] Black's Law Dictionary, 6th Ed., defines the term "Affiliate" as "Signifies a condition of being united; being in close connection, allied, associated, or attached as a member or branch."

[49] Myers Company for Environmental Development Inc., unaudited financial statements, December 31, 1993. Set out in Schedule 20.

[50] Since S.D. Myers (Canada) Inc. is not a state enterprise, the exclusion contained in paragraph (f) of the definition of Investment in Article 1139 does not apply.

An Interest that Entitles the Owner to Share in Assets on Dissolution

19. S.D. Myers (Canada) Inc. is a corporation organized under the laws of Canada operating in the provinces of Ontario and Quebec. The definition of Investment under the NAFTA includes an interest in an enterprise that entitles the owner to share in the assets of that enterprise upon dissolution. Under the applicable insolvency laws in Canada, as the largest creditor of S.D. Myers (Canada) Inc, its American affiliate would be entitled to share in its assets of that enterprise on its dissolution.[51] S.D. Myers, Inc.'s interest in the assets of its Canadian affiliate thus qualifies as an Investment.

Measures are Broadly Defined in the NAFTA

20. The term "measure" is used throughout the NAFTA to describe governmental activity. NAFTA Article 201 provides a definition of general application for the term "measures" throughout the NAFTA. It states:

> *measure includes any law, regulation, procedure, requirement or practice.*

By its very terms, the NAFTA definition of "measures" is not exhaustive. The type of governmental activities that encompass the term "measure" includes more types of activities than those which are enumerated. The *Statement on Implementation* set out Canada's concise understanding of rights and obligations set out in the NAFTA.[52] This statement provided Canada's understanding of the term "measure."

> *The term "measure" is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions. The obligations of the Agreement apply to measures of a Party.*[53]

21. The *PCB Waste Export Ban* refers to four executive actions taken by Canada over a period of approximately three months to amend Canada's existing *PCB Waste Export Regulations*. These earlier existing regulations permitted the export of PCB wastes to the United States with prior approval from the EPA. The four actions were as follows:

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[51] Section 136, *Bankruptcy and Insolvency Act*. R.S.C., 1985 c. B-3. Since S.D. Myers (Canada) Inc. is not a state enterprise, the exclusion contained in paragraph (f) of the definition of Investment in Article 1139 does not apply.

[52] *Canada Gazette* Part I, January 1, 1994 at 80.

[53] *Statement on Implementation* at 15. The American *Statement of Administrative Action* made no similar statement on the term "measure." The broad non-exhaustive meaning of the term "measure" contained in the *Statement on Implementation* was cited with approval by the NAFTA Investor-State Tribunal in *Re: Ethyl Corporation and Government of Canada (Jurisdictional Phase)* 38 ILM 700 at para. 19, set out at Schedule 28.

a. The signing of the *Interim Order Respecting the PCB Waste Export Regulations* by the Minister of the Environment, on November 16, 1995;[54]

b. The signing of the *Interim Order Respecting the PCB Waste Export Regulations* by the Minister of the Environment, on November 20, 1995;[55]

c. The temporary approval of the *Interim Order Respecting the PCB Waste Export Regulations* by the Federal Cabinet on November 28, 1995;[56] and

d. The final approval of the *Interim Order Respecting the PCB Waste Export Regulations on* February 26, 1996.[57]

These four governmental actions constitute the measure ("Measure") in this Claim.

Canada's Measure Relates to Investors and Their Investments

23. Canada argues that the Measure at issue in this Claim does not relate to investors or investments and only affects trade in goods, namely PCB waste. Canada has not provided any support for this contention other than to argue that the measure has no application to investors or investments in PCB waste treatment on its face.[58]

24. In fact, Canada has acknowledged on the public record that its promulgation of the *PCB Waste Export Ban* was directly related to 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 PCBs 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.*[59]

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[54] Set out in Schedule 21.

[55] Set out in Schedule 22.

[56] Set out in Schedule 23.

[57] Set out in Schedule 24.

[58] *Statement of Defence* at para 38.

[59] *PCB Waste Export Regulations, 1996. Canada Gazette* Part I, October 5, 1996. Set out in Schedule 25.

25. On their 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.

26. 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) which 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.*

27. Canada made reference to its view respecting the broad scope of the NAFTA Investment Chapter in its *Statement on Implementation*. 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).*[60] (Emphasis added)

Thus, Canada has taken the position that the scope of the Investment Chapter extends to all measures "that affect" investors of another Party, investments of investors of another Party and, for the purposes of Articles 1106 and 1114, all investments.

Canada Knew That the Measures Would Affect the Investor

28. Canada knew its PCB waste export measures would contravene the NAFTA and would interfere with the business activity of the Investor and its Investment in Canada. In a November 1, 1995 briefing note prepared for Minister Copps, her officials wrote:

> *PCO, Industry Canada and Foreign Affairs see PCB export as a trade issue and will object to the border closing as an unjustifiable restriction on international trade in the absence of danger to environmental/human health.*

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[60] *Statement on Implementation* at 148.

> *If the border is closed, S.D. Myers can be expected to object formerly to any action taken under CEPA to close the border, and will certainly seek redress through NAFTA intervention, since they have invested/lobbied greatly to get the border opened.*
>
> *A legal opinion (DRAFT October 23, 1995) indicates that closing the Canadian border would likely be found by a NAFTA panel to be a restriction on trade.*[61]

29. Canada sought to aid domestically-owned PCB remediators at the expense of the Investment of the Investor. In the November 1, 1995 briefing note, Departmental officials wrote:

> *During Business Week, the Minister told Chem-Security (Alberta) Ltd. and CINTEC Environment Inc., two Canadian companies that provide PCB destruction services in Canada, that she would regulate closure of Canada's borders to PCB waste exports to the U.S., if the U.S. opens its borders*[62].

30. Concerning instructions issued by Mel Cappe, then the Deputy Minister of Environment Canada, a departmental official wrote on November 22, 1995:

> *RE: Mel's request re: Canadian PCB related jobs: I've found out that Chem-Security estimates their direct and indirect jobs are around 400 and that it might double if the border were to remain closed. I think we have to take that with a grain of salt but it is a "first guess". We have no info on Cintec but as a first guess I would say that it is not likely to be any more than 400...*
>
> *I received a call from Ecologic in Guelph who have a "made in Canada" PCB destructor. They indicated that they employ 80 people in their company. Again if the border is closed they believe that the opportunities would increase.* [63]

There is No Conflict Between the Provisions in NAFTA's Chapters 3 and 11

31. In paragraph 38 of its *Statement of Defence*, Canada asserts that there is a conflict between Chapters 3 and 11 of the NAFTA and that, as a consequence, Chapter 3 applies to the settlement of this dispute. The Investor submits that there is no conflict between Chapters 3 and 11. The NAFTA contains 22 chapters covering a range of topics. Sometimes these chapters contain obligations that are contradictory. In the event of a conflict, one chapter must prevail. The Investment Chapter states that in the event of any

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[61] Hilborn Memorandum 2, attached as Schedule 10.

[62] Hilborn Memorandum 2, attached as Schedule 10.

[63] Victor Shantora, Director General, Hazardous Waste Branch, Environment Canada, Electronic Mail Transcript, November 22, 1995. Set out in Schedule 26. See also Examination of Victor Shantora in *Centre Patronal* v. *The Minister of the Environment and the Attorney General* at para 637-640. Set out at Schedule 33.

inconsistency between Chapter 11 and any other chapter, the other chapter will prevail.[64] However, this rule only applies in the event of an inconsistency.

32. There is no inconsistency between NAFTA Chapters 3 and 11. NAFTA Chapter 3 prohibits export restrictions such as the PCB Waste Export Ban.[65] NAFTA Chapter 11 does not prevent a Party from taking such action but it requires a Party to compensate harmed investors if such action occurs in a way that violates an Investment Chapter obligation. Thus the two chapters are complimentary to each other rather than inconsistent. Simply put, Canada's argument on this point fails.

Measures Can Apply to Multiple NAFTA Chapters

33. In paragraph 38 of its *Statement of Defence*, Canada has stated that the *PCB Waste Export Regulations* constitutes a measure that relates to trade in goods and that only Chapter 3 of the NAFTA should apply.

34. Even if this Tribunal concludes that Canada's measures respecting PCB waste exports apply to trade in goods, Canada is not relieved of its obligations respecting the treatment of investors. It is possible for an overlap of treaty obligations to exist. Where there is an overlap between treaty obligations, there is a requirement to comply with both obligations.

35. The issue of overlapping treaty obligations was explored by the WTO Appellate Body in its decision in *EC-Regime for the Importation, Sale and Distribution of Bananas* ("*EC-Bananas*").[66] In the *EC-Bananas* case, the Appellate Body had to determine the legal consequences of an overlap between obligations contained in the General Agreement on Trade and Tarriffs (GATT) of 1994 and the General Agreement on Trade in Services (GATS). The Appellate Body concluded that the obligations in both treaties were broadly worded and it was likely that some overlap would occur. The Appellate Body stated:

> *There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. [. . .] Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can*

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[64] NAFTA Article 1112.

[65] NAFTA Article 309.

[66] AB-1997-3, WT/DS27/AB/R, 9 September 1997.

> *only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in Canada - Periodicals.*[67]

36. This approach has also been followed by a WTO panel investigating Indonesia's National Car Programme, where provisions of the GATT, the WTO *Subsidies and Countervailing Measures* ("SCM") *Agreement* and the WTO *Agreement on Trade Related Investment Measures* ("TRIMs"). In that case, the Panel stated:

> *We consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different foci, and they impose different types of obligations.*
>
> *In support of this finding, we agree with the principles developed in the Periodicals and Bananas III cases concerning the relationship between the WTO agreements at the same level within the structure of WTO agreements. It was made clear that, while the same measure could be scrutinized both under GATT and under GATS, the specific aspects of that measure to be examined under each agreement would be different. In the present case, there are in fact two different, albeit linked, aspects of the car programmes for which the complainants have raised claims. Some claims relate to the existence of local content requirements, alleged to be in violation of the TRIMs Agreement, and the other claims relate to the existence of subsidies, alleged to cause serious prejudice within the meaning of the SCM Agreement.*[68]

37. Thus, measures affecting goods and investment are capable of attracting obligations under both NAFTA Chapters 3 and 11.

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[67] *EC-Bananas*, para. 221. Referring to *Canada - Certain Measures Concerning Periodicals*, Appellate Body Report, WT/DS31/AB/R adopted July 30, 1997 at 19.

[68] *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55R, WT/DS59/R, WT/DS64/R, July 2, 1998 at para's. 14.52 -53.

SECTION II: INTERPRETATION OF THE NAFTA

38. The NAFTA contains its own rules of interpretation that require taking note of its objectives in light of the applicable rules of international law.

39. On December 2, 1996, the first NAFTA interpretive panel of the Chapter 20 decision was rendered. In the *Canadian Marketing Practices* case, there was a specific commentary on the principles to be applied in the interpretation of the NAFTA. Paragraph 122 states:

> *The Panel also attaches importance to the trade liberalization background against which the agreements under consideration must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favoured nation treatment and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit the NAFTA's objectives.*[69]

40. A broad interpretation of the scope and coverage provisions of the Investment Chapter is consistent with the interpretive principles of the NAFTA. As NAFTA Article 102 reads:

> *Objectives*
>
> *1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:*
>
> *(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;*
> *(b) promote conditions of fair competition in the free trade area;*
> *(c) increase substantially investment opportunities in the territories of the Parties;*
> *(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
> *(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and*
> *(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.*
>
> *2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*

41. The NAFTA includes an objective of investment protection that holds the same level of protection under the NAFTA as the objective of trade liberalization referred to in the

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[69] NAFTA Arbitration Panel Established Pursuant to Article 2008. *In the Matter of Tariffs Applied by Canada to Certain U.S. - Origin Agricultural Products* (Secretariat File No. CDA-95-2008-01). Final Report of the Panel, December 2, 1996 at 36.

Canadian Marketing Practices decision. Any interpretation of the NAFTA must promote rather than inhibit these stated objectives. Therefore, a broad interpretation of the scope and coverage of the NAFTA Investment Chapter is warranted. Such an interpretation would accord with the principle that treaties must be interpreted in good faith.[70]

42. It is a generally accepted rule of international treaty interpretation that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[71]

43. Article 31 (4) of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*")[72] provides that "a special meaning shall be given to a term if it is established that the Parties so intended." In the event that a specific term in a treaty remains ambiguous, the Investor submits that it is appropriate to apply the interpretative principle of *contra proferentem.* As stated by Lord McNair in his treatise, *The Law of Treaties*, this principle states:

> *. . . that in case of ambiguity a provision must be construed against the Party which drafted or proposed that provision which appears to mean that in case of doubt the other Party should have the benefit of the doubt.*[73]

Where ambiguity exists in the terms of a treaty, this ambiguity should be resolved against the drafting Party. In accordance with this long-established principle, since Canada was a drafter of the NAFTA, any ambiguity in the terms of the treaty should be resolved against the drafter and in favour of the Investor.

44. It is a well-established interpretative principle that the expression of one thing means the exclusion of another. This principle is often referred to by its Latin expression "*Expressio unius est exclusio alterius*". *Blacks Law Dictionary* states:

> *Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.*

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[70] McNair, A.D. *The Law of Treaties* (Oxford: Clarendon Press, 1986) at 465.

[71] This obligation is codified in Article 31(1) of the *Vienna Convention.*

[72] 1155 U.N.T.S. 331; 8 *ILM 679* (1969).

[73] McNair, A.D. *The Law of Treaties* (Oxford: Clarendon Press, 1986) at 464. Other cases which support this principle include, *Brazilian Federal Loans*, P.C.I.J., Ser. A, Nos. 20/21, at 93 and 114; *Lusitania Claim*, United States-Germany Mixed Claims Commission, A.D. 1923-4, No. 198; 18 A.J. (1924), R.I.A.A., Volume 7, 32 at 43.

45. The Permanent Court of International Justice adopted the *expressio unius* rule in its decision on *Railway Traffic between Lithuania and Poland.* In this case, the International Court found that the specific exclusion of freedom of transit by water contained in the treaty meant that freedom of transit by other means, such as railroad were permitted[74]. This interpretative rule has had widespread support by international tribunals as well as in domestic law. For example, the German-US Mixed Claims Commission stated on this rule that it is a:

> *Rule of both law and logic, and is applicable to the construction of treaties as well as to municipal statutes and contracts.*[75]

The Relationship Between NAFTA and International Environmental Agreements

46. This Claim is not about the protection of the Canadian environment. It is about measures taken by Canada to harm a foreign-owned investment in order to assist Canadian investments operating in the same sector.

47. NAFTA Article 104 sets out a specific hierarchy in the case of a conflict between the trade obligations of the NAFTA and a number of specified international environmental agreements. This Article states:

> *1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:*
>
> *(a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,*
>
> *(b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,*
>
> *(c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or*
>
> *(d) the agreements set out in Annex 104.1,*
>
> *such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.*

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[74] *PCIJ Reports*, Ser. A/B 42 at 121. This principle was also followed by the Permanent Court in its decision in the *Wimbledon* case *PCIJ Reports* Ser. A 1 at 222 *et seq.*

[75] *Re: Life Insurance Claims* (1924), 35 AJIL 593 (1925) at 602-603.

Annex 104.1 lists the *Transboundary Agreement*, signed at Ottawa, October 28, 1986.

48. The NAFTA is quite specific about the types of obligations that will be able to overrule NAFTA obligations:

a. Only trade obligations contained in the specified international environmental agreements will be capable of trumping NAFTA obligations;

b. There must be an inconsistency between the NAFTA and the specified international environmental agreement trade provision;

c. The specified international environmental agreement trade obligation will only prevail to the extent of the inconsistency; and

d. The Party must prove that it took the least NAFTA-inconsistent policy option if there was a choice between equally effective and reasonably available means of complying with the terms of its obligations under the international environmental agreement.

Only a trade obligation in a specified international environmental agreement that meets these four requirements would be capable of prevailing over an inconsistent NAFTA obligation, and then only to the extent of the inconsistency.

47. The NAFTA is an agreement whose terms take precedence over other international trade agreements. This is confirmed by NAFTA Article 103 that states:

1. *The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party.*

2. *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.*

48. NAFTA Article 103 only deals with the relationship between treaties that were in force when the NAFTA Agreement was signed and only with treaties that have been ratified by the three NAFTA Parties: Canada, the United States and Mexico.

49. The *Vienna Convention* provides that where a treaty specifies that it is "subject to, or that it is not to be considered incompatible with an earlier or later treaty," the earlier treaty will prevail.

50. Because of the specific wording of Article 103, the NAFTA takes precedence over conflicting obligations in other international agreements. Paragraph (3) of Article 30 of the *Vienna Convention* addresses this situation:

> (3) When all parties to the earlier treaty are parties to the later treaty, but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

If all the NAFTA Parties are not parties to subsequent environmental agreements, Article 30 once again provides:

> (4) When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
> (b) 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.

The Basel Convention

51. The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* ("*Basel Convention*") is a multilateral treaty signed by 105 countries in 1989. The Convention entered into force in May 1992 once 20 countries had ratified it.[76] The United States is a NAFTA Party that did not ratify the *Basel Convention.*

52. As a result of the specific terms of NAFTA Article 104, an inconsistent NAFTA obligation is not modified by the *Basel Convention* until such time as the *Basel Convention* has been ratified by all three NAFTA Parties. Canada has admitted in its *Statement of Defence,* in paragraph 15, that the United States is not a party to the *Basel Convention.* Thus, it is impossible for Canada to rely in good faith on a NAFTA Article that does not apply.

53. It was clear that the three NAFTA Parties took into account the obligations contained in the *Basel Convention* in the drafting of the NAFTA. For all other enumerated environmental agreements, the NAFTA stated that the environmental agreements overruled the NAFTA in the case of an inconsistency of a trade obligation. For the *Basel Convention,* the NAFTA provided that the *Basel Convention* would only overrule the NAFTA after American ratification of the Basel Convention. Canada's argument on this point fails.

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[76] Set out in Schedule 27.

Canada-US Hazardous Waste Agreement

54. The *Transboundary Agreement* is a bilateral treaty between Canada and the United States covering the movement of hazardous waste between the two countries. Pursuant to NAFTA Article 104 and annex 104.1, the *Transboundary Agreement* takes precedence over inconsistent NAFTA trade obligations.

55. It is clear in its very terms that the *Transboundary Agreement* contemplates the import and export of hazardous waste. Its preamble includes:

> *Recognizing that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste;*

Article 3 of the *Transboundary Agreement* contemplates a situation where a country may impose an import prohibition on hazardous waste:

> *(a) The designated authority of the country of export shall notify the designated authority of the country of import of proposed transboundary shipments of hazardous waste. ....*
>
> *(f) The consent of the country of import, whether express, tacit or conditional, provided pursuant to paragraphs (c) and (d) of this article, may be withdrawn or modified for good cause. The Parties will withdraw or modify such consent insofar as possible at the most appropriate time for the persons concerned.*

Nowhere does the *Transboundary Agreement* permit a government to impose an export ban such as Canada did with the *PCB Waste Export Ban.*

56. Canada has not alleged that the *PCB Waste Export Ban* was imposed pursuant to any obligations contained within the *Transboundary Agreement.* In fact, Canada admits at the time the ban was put into place, it could not ascertain from the EPA that the *Transboundary Agreement* actually applied to exports of PCB waste from Canada[77]. Moreover, in advising the Minister of the Environment, Canadian officials admitted that export of PCB waste from Canada to the United States would be consistent with the *Transboundary Agreement.*[78]

57. For Canada to be able to impose an export ban, it must demonstrate that it did so:

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[77] Paragraph 20(b) of the *Statement of Defence.*

[78] Hilborn Memorandum 2. Set out as Schedule 10.

1. pursuant to a trade obligation contained in the *Transboundary Agreement;*
2. that such a ban was consistent with its NAFTA obligations; and
3. that it could prove that making such a ban was the least NAFTA-inconsistent policy option.

Canada would need to meet all three conditions. Canada has not made any such specific argument in its *Statement of Defence* and it failed to establish this in fact.

The NAFTA Environmental Side Agreement

58. On September 13, 1993, the Governments of Canada, United States and Mexico signed an agreement entitled *The North American Agreement on Environmental Cooperation* ("*NAFTA Environmental Side Agreement*")[79]. The *NAFTA Environmental Side Agreement* sets out the commitments of the three NAFTA governments with respect to the enforcement of their own environmental laws within their own jurisdictions. The side agreement does not have any interpretive or substantive impact, in any way upon the obligations contained in the NAFTA.

59. At paragraph 40 of the *Statement of Defence*, Canada pleaded that if the *PCB Waste Export Regulations* were to be ruled inconsistent with its NAFTA Investment Chapter obligations by this Tribunal, such a ruling would be inconsistent with the intent of the NAFTA as expressed by the NAFTA *Environmental Side Agreement*. Canada failed to cite any specific support for this general allegation.

60. The NAFTA *Environmental Side Agreement* is a separate treaty from the NAFTA whose terms do not expand, enhance or affect in any way the NAFTA. The NAFTA is to be interpreted pursuant to NAFTA Articles 102 through 104. Canada's argument on this point fails.

CONCLUSIONS

61. Because the United States failed to ratify the *Basel Convention,* its terms are not relevant to the issues in this claim. Since there are no inconsistencies between the trade obligations of the *Transboundary Agreement* and NAFTA Chapter 11, the terms of the NAFTA need not be interpreted in light of this Agreement. Finally, even if Canada could show that there was some inconsistency between the trade obligations of the *Transboundary Agreement* and the NAFTA, Canada would need to demonstrate that its *PCB Waste Export Ban* constituted the least NAFTA-inconsistent measure available.

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[79] C.T.S. 1994 No. 3.

Since other policy options were proposed by the government, which were more NAFTA-consistent, Canada can not meet the requirements of this stringent NAFTA exception.

62. The NAFTA *Environmental Side Agreement* has no formal relationship to the NAFTA and therefore its provisions are irrelevant to Canada's NAFTA obligations.

PART THREE: NATIONAL TREATMENT

SECTION I: THE INTERNATIONAL LAW OF NATIONAL TREATMENT

The NAFTA and National Treatment

63. Canada's decision to impose its *PCB Waste Export Ban* constituted a discriminatory and arbitrary policy intended to harm the Investor and its Investment, while benefiting their Canadian competitors. This unfair measure violated Canada's national treatment obligation under NAFTA Article 1102, which states:

> *1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

64. NAFTA Article 102 (1) states that national treatment is one of three interpretive principles of the entire agreement. The concept of "national treatment" is a "term of trade." It is used in a number of different places in the NAFTA without any further definition.[79] In order to understand the meaning of the term "national treatment" it is necessary to examine international jurisprudence of the term.

The International Trade Agreements and National Treatment

65. The meaning of the term "national treatment" has been canvassed in a number of international trade panel decisions. These GATT and WTO panel decisions provided a general meaning, which can be applied to NAFTA's Investment Chapter national treatment obligation, with appropriate changes depending on its context.

66. In the Canadian *Statement of Implementation*, Canada acknowledged the relationship between the WTO Agreement and the NAFTA. It states:

> *The NAFTA and the Uruguay Round agreements cover much of the same ground and the two sets of rules are largely complementary and mutually reinforcing. In many respects, the*

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[79] For example, there is a national treatment obligation for goods (Article 301), for energy (Article 602), for services (Article 1202) and for financial services (Article 1405). In addition, national treatment is a general "principle" of the NAFTA through which all its provisions should be interpreted (Article 103(2)).

> *NAFTA built on progress that had been made in the Uruguay Round while the Round in turn profited from the experience of Canada, the United States and Mexico in negotiating the NAFTA.*[80]

67. The concept of national treatment is contained in the GATT. For example, the national treatment obligation in Article III:4 reads:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*

68. The national treatment obligation is also contained within Article XVII of the GATS:

> *... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers...*
>
> *Formerly identical or formerly different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other Member.*

69. The GATT obligation only applies to measures affecting trade in goods, whereas the GATS obligation applies to measures affecting trade in services. The NAFTA's Article 1102 national treatment obligation deals with measures relating to investors and their investments. However, the basic obligation under each Agreement is similar and therefore the interpretation given to the national treatment provision under the GATT or GATS should be applicable *mutadis mutandis* to the NAFTA national treatment provision, except where expanded by the NAFTA. The national treatment obligation ensures all companies, whether domestic or foreign, are treated equally and without discrimination.

70. The phrase "treatment no less favourable" is a common GATT concept that has been interpreted to require countries to allow equal competition between goods in a country. As stated in the GATT panel decision in *United States - Section 337 of the Tariff Act of 1930*:

> *The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis... the purpose*

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[80] *Statement of Implementation* at 75.

> *of the Article III:2, dealing with internal taxes and other internal charges, is to protect "expectation on the competitive relationship between imported and domestic products."*[81]

71. To grant an investment treatment no less favourable under NAFTA Article 1102, means the foreign investment must be allowed to operate in the country just as other similar domestic investments operate in that country. A foreign investor and its investments are entitled to the best treatment provided to a domestic investor and its investments in like circumstances by the government imposing the measure. Any government measure that has a disproportionate or discriminatory effect on foreign investors and their investments is a violation of the NAFTA Article 1102 obligation.

72. In the GATT Panel decision in *Canada - Certain Alcoholic Drinks*, Canada argued that, even though its measure had a discriminatory effect on imported products, it was nonetheless consistent with Canada's national treatment obligation because the measure was applied equally to both domestic and imported products. In the present case, Canada has also argued that if a measure is only discriminatory in effect, rather than form, the national treatment obligation under Article 1102 is not breached. However, as the panel in *Canada - Certain Alcoholic Drinks* stated, a Party fails to accord national treatment where its measures have the discriminatory effect of according more favourable treatment to domestic businesses over those from another country:

> *The Panel noted that minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer. Whenever they prevented imported beer from being supplied at a price below that of domestic beer, they accorded in fact treatment to imported beer less favourable than that accorded to domestic beer: when they were set at the level at which domestic brewers supplied beer - as was presently the case in New Brunswick and Newfoundland - they did not change the competitive opportunities accorded to domestic beer but did affect the competitive opportunities of imported beer which could otherwise be supplied below the minimum price. The Panel noted, moreover, that one of the basic purposes of Article III was to ensure that the contracting parties' internal charges and regulations were not such as to frustrate the effect of tariff concessions granted under Article II and that a previous Panel had found that*
>
> > *"the main value of the tariff concession is that it provides an assurance of better market access through improved price competition".*[82]

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[81] *United States - Section 337 of the Tariff Act of 1930*, 36 B.I.S.D. (1989) 345 at para.'s 5.11-5.13.

[82] (DS17/R - 39S/27), 18 February 1992, at para. 5.30.

In like circumstances

73. The text of NAFTA Article 1102 calls for a comparison of "treatment" accorded to investors or to investments, from the perspective of the investor or investment. The text further indicates that such comparisons should be limited to consideration of treatment of investors or investments operating "in like circumstances". In other words, the treatment received by a foreign investor its investment is only comparable to treatment received by a domestic investor or investment if the foreigner operates in like circumstances with the domestic entity. The focus of comparison is clearly upon the investor and the investment, rather than on the mechanism used by the government.

74. The wording of the NAFTA Chapter 11 national treatment obligation is similar to that found in the OECD *Declaration on International Investment and Multinational Enterprises* ("*OECD Declaration*"), issued on June 21, 1976. The *OECD Declaration* deals with national treatment with respect to investments. Paragraph II.1 of the *OECD Declaration* says the standard of treatment owed to investors and their investments is that which is "no less favourable than that accorded in like situations to domestic enterprises."

In 1993, the OECD clarified this national treatment obligation by noting:

> *As regards the expression "in like situations", the comparison between foreign-controlled enterprises established in a Member country and domestic enterprises in that Member country is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy objectives of Member countries could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment.*[83]

75. The three NAFTA Parties are all members of the OECD. As members, each NAFTA Party is obligated to adhere to OECD statements such as the OECD Declaration.[84] Accordingly, these OECD statements concerning the scope of the national treatment obligation in relation to investors and investments provide some indication of Canada's understanding of the meaning of Article 1102 of the NAFTA.

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[83] Organization for Economic Co-operation and Development, *National Treatment for Foreign-controlled Enterprises* (1993: OECD, Paris) at 22.

[84] This obligation is contained in Article 5(b) of the 1960 *Convention on the Organization for Economic Co-operation and Development.*

A sectoral-based theory

76. The focus of a comparison required under NAFTA Article 1102 concerns an investor or its investment and how they are affected by NAFTA Parties. If that treatment is less favourable to investors from other NAFTA Parties, or their investments, which operate in like circumstances to domestic investors or investments (i.e. those operating in the same sector), there is a breach of the national treatment obligation. In considering whether foreign and domestic investors and investments are operating in like circumstances, it is permissible to consider the policy objectives behind the measure that constitutes treatment less favourable. However, if those objectives are *prima facie* arbitrary or discriminatory, they cannot assist in defining the comparison.

77. This sectoral-based interpretation of Article 1102 is in keeping with the approach followed by tribunals in the *Ethyl Award on Jurisdiction* and the NAFTA Panel decision in *Certain U.S. - Origin Agricultural Products.*[85] In both cases, the panels broadly interpreted the NAFTA Parties' obligations. Accordingly, in interpreting the scope of the "like circumstances" definition, a panel should consider a least-trade-restrictive approach in accordance with the investment-liberalising objective of the NAFTA.

78. The sectoral-based approach to the national treatment obligation has also been consistently adopted by the WTO Appellate Body, which has stated:

> *The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures.... Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.... Moreover, it is irrelevant that the "trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.*[86]

79. Any interpretation of the concept "like circumstances" begins with an analysis of the meaning of the term "like." The concept "like circumstances" is an adoption of the term

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[85] NAFTA Arbitration Panel Established Pursuant to Article 2008. *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Secretariat File No. CDA-95-2008-01) Final Report of the Panel, December 2, 1996 at 36. In its award on jurisdiction, the *Ethyl* Claim Tribunal ruled that these NAFTA objectives must be used to interpret the investment provisions of NAFTA (at para's. 56 & 83). Set out as Schedule 28.

[86] *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, October 4, 1996 at 16; Cited in *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, Appellate Body Report, January 18, 1999 at para. 119.

"like products" used in the GATT. As stated in *Japan-Taxes on Alcoholic Beverages* when looking at the term "like products":

> *... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": [1] the product's end-uses in a given market; [2] consumers' tastes and habits, which change from country to country; [3] the product's properties, nature and quality.*[87]

80. A recent example of the application of a sectoral-based approach to national treatment can be found in the WTO Appellate Body's *Periodicals* decision.[88] In that case, the WTO Appellate Body dismissed Canada's argument that a sectoral approach should not be used to compare treatment of Canadian periodicals with Canadian editions of periodicals originating from the United States. Canada had argued for a far more narrow comparison that would permit it to protect Canadian-originating periodicals from foreign competition. The Appellate Body using a broad sectoral interpretation held that a Canadian tax on Canadian editions of American-originating periodicals impeded market access and thus violated Canada's national treatment obligation under Article III of the GATT.

Expansion, management, conduct or operation of an investment

81. Parties must accord equal treatment to foreign and domestic investors and their investments. When equal competitive opportunities are not granted on a sectoral basis, a violation of the national treatment obligation is created whenever there is an impact on the expansion, management, conduct and operation of an investment.

SECTION II: THE INTERNATIONAL LAW OF NATIONAL TREATMENT APPLIED TO THE FACTS OF THIS CLAIM

Canada Has Denied National Treatment to the Investor

82. The *PCB Waste Export Ban* does not prohibit the destruction of PCB Contaminated waste. It only requires that all PCB waste in Canada must be destroyed by Canadian-based disposers. This is a completely arbitrary measure aimed at harming the Investor and favouring Canadian-based PCB waste disposers. John Hilborn, Officer, Hazardous Waste Branch, Environmental Protection Service, Environment Canada, admitted Canada's discriminatory strategy:

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[87] *Japan - Taxes on Alcoholic Beverages* at 20-21.

[88] *Canada - Periodicals*, Appellate Body Report, WT/DS31/AB/R adopted July 30, 1997.

> *There was no expectation that the U.S. would resolve Canada's PCB problem, nor is the U.S. or any other country obliged to accept Canada's PCB wastes for destruction. In fact, since 1980, the U.S. EPA has had a closed border policy on PCB imports and exports, providing impetus for the development of domestic facilities in Canada. Now that the facilities have been developed in Alberta and Quebec, it is essential to ensure their viability.*[90] (Emphasis added)
>
> *During Business Week (July 4-7, 1995), the Minister told Chem-Security (Alberta) Ltd. and CINTEC Environnement Inc., two Canadian companies that provide PCB destruction services in Canada, that she would regulate closure of Canada's borders to PCB waste exports to the U.S., if the U.S. opens its borders.*[91]
>
> *The Minister told Chem Security, in the spring, that she would close border if the U.S. side opened.*[92]

83. Canada's policy is based on the distinction between foreign and domestic PCB remediators. There is no justification for this distinction. The GATT Panel decision in *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes* case,[93] lays out this lack of justification. In that case, the Thai government explained its prohibition on the importation of cigarettes was for the good of the health of the population. However, Thailand continued production of domestic cigarettes. The panel held that if the true concern was the health of the population, the Thai government would have prohibited both foreign and domestic cigarette production.

84. Canadian representatives visited the S.D. Myers, Inc.'s Tallmadge facility. This facility was approved by the EPA for the remediation of PCB waste and remains certified to this day. These officials indicated at the time that they found no deficiencies with respect to the Tallmadge site.[94]

85. S.D. Myers, Inc. and S.D. Myers (Canada) Inc. were engaged in the PCB waste disposal business in Canada at the time that Canada imposed the *PCB Waste Export Ban* in order

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[90] John Hilborn, "Justification for Interim Order" Memorandum published by Environment Canada on November 16, 1995 approved by Gerry Andrews, A/Director, Hazardous Waste Branch, attached as Schedule 29.

[91] John Hilborn, "Export of PCBs to the United States" Memorandum dated November 16, 1995. Set out as Schedule 30 ("Hilborn Memorandum 4").

[92] Unauthored Memorandum, "Export of PCBs to the United States" dated October 31, 1995, set out as Schedule 52.

[93] (*United States* v. *Thailand*) (1990), GATT Doc. DS10/R, 37 B.I.S.D. (1983) 107.

[94] Details of the visits by Environment Canada officials and the over 500 audits that have been passed successfully by S.D. Myers, Inc. are contained within the affidavit of Rev. Michael Valentine set out in Schedule 1.

to protect Canadian-based participants in the same sector. S.D. Myers, Inc. and S.D. Myers (Canada) Inc. were fully capable of meeting all Canadian standards for the destruction of PCB wastes.

86. The only difference between the Investor and the Investment and the Canadian competitors was in price. S.D. Myers, Inc. and S.D. Myers (Canada) Inc. offered a far more competitive price than offered by the Canadian competition.[95] The NAFTA does not permit the government to arbitrarily discriminate against producers in the same market sector.

87. There was no difference between the operations of the Investment in Canada and domestic investments in the same sector – except that S.D. Myers, Inc. and S.D. Myers (Canada) offered more competitive prices.

S.D. Myers, Inc. was treated less favourably than other processors

88. When preparing the *PCB Export Waste Ban*, Canada was well aware that S.D. Myers, Inc. was the only US-based PCB waste disposer actively operating in Canada. It was clear that a measure to block the export of PCB wastes would discriminate against any existing American-based Canadian market participant, while assisting competing domestically-based processors. In their advice to Minister Copps, Environment Canada department official, John Hilborn, weighed the costs and benefits of the proposed ban. He wrote:

> *PROS: The Canadian environmental industry investment, i.e. Chem-Security is protected by a secure supply of PCBs for their facility in Swan Hills.*
>
> *CONS: Interim Orders are design [sic.] to provide immediate action to resolve "significant danger" to the environment and/or human health. It can be argued that the opening of the U.S. border poses no such significant danger.*
>
> *S.D. Myers will certainly seek redress through NAFTA intervention, since they have invested/lobbied greatly to get the border opened. The company can be expected to object formally to any action taken under CEPA to close the border.*[96]

89. There is no reasonable or plausible explanation why PCB contaminated waste should be permitted to be disposed of exclusively in Canada, rather than using a disposal process

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[95] A price comparison table, based on a March 1995 competition for disposal of Canadian federal government PCB wastes appears above.

[96] G. Cornwall, "Possible Immediate Action The Minister Could Take re PCB Export" Memorandum dated October 30, 1995. Set out in Schedule 31.

involving facilities in the United States. The S.D. Myers, Inc. facility was significantly closer to the majority of Canada's PCB contaminated waste. Moreover, S.D. Myers, Inc. provided a significant price advantage in disposal. In October 1995 Canadian officials explained to Minister Copps the environmental benefits of allowing the export of PCB wastes to the United States by the Investor and its Investment:

> *3. Status quo - do nothing now.*
>
> *PROS: PCBs destroyed in either country is positive for the environment.*
>
> *PCB owners may have lower destruction costs due to competition and more incentive to destroy PCBs, but offset by liability insurance costs if U.S. option selected.*
>
> *CONS: Criticism from Canadian PCB service industry, and likely from ENGOs for not banning export.*[97]

Apparently, the goal of environmental policy is to destroy the PCB wastes as quickly as possible at the nearest environmentally-sensitive facility. The nationality of the disposal company should not be relevant. This environmental goal is not furthered by protectionist measures that subsidize domestic remediation thousands of kilometers away by making nearby safe remediation illegal.

CONCLUSIONS

90. Canada adopted a policy that assisted Canadian-based PCB waste disposers at the expense of American-based PCB waste disposers. This was not a question of differences in practice or of business operations. The key determination was where the investment was located. If an investment used Canadian facilities to process waste, it was assisted. If an investment used American services, it was punished.

91. The *PCB Waste Export Ban* harmed the expansion, management, conduct and operation of the Investor and its Investment by not providing national treatment to them. As a result of this unfair and discriminatory measure, the Investor and the Investment were unable to continue their business operations in Canada.

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[97] Hilborn Memorandum 1. Set out in Schedule 6.

PART FOUR: MINIMUM STANDARD OF TREATMENT

SECTION I: THE INTERNATIONAL LAW ON MINIMUM STANDARD OF TREATMENT

92. Canada's decision to impose its *PCB Waste Export Ban* constituted an unfair and discriminatory measure that failed to meet basic norms of procedural or substantive fairness. The policy was intended to harm the Investor and its Investment so as to benefit Canadian companies who hired the Minister's former policy advisor as a lobbyist. The Minister and her officials worked covertly with the lobbyist and his clients to make the measure, even though its promulgation was unfair and not proper under Canada's own regulatory policy and domestic laws.

The NAFTA and Minimum Standard of Treatment

94. Under the NAFTA, Canada is obligated to grant an investor from the United States or Mexico treatment according to international law. This obligation is contained in Article 1105 of the NAFTA that reads:

> *1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

95. The NAFTA does not define the extent of treatment required to be given to the foreign investor other than to state that it must be in accordance with international law.

96. Article 1105 refers to the concept of "fair and equitable treatment" and "full protection and security." Full protection and security refers to rights of individuals under international law. Fair and equitable treatment refers to a number of issues, principally, the right not to be denied justice and the right to equitable treatment and procedural fairness. The purpose of this Article is to grant a standard of treatment to investments that can differ from those provided under domestic law.

97. Treaty law is a prime source of international law. The NAFTA is a wide-ranging trade agreement covering goods, services and investment between Canada, the United States and Mexico. It came into force on January 1, 1994. NAFTA Article 102 sets out this agreement's objectives. These include the following:

> *(a) Eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;*
>
> *(b) Promote conditions of fair competition in the free trade area;*

(c) Increase substantially investment opportunities in the territories of the Parties;

98. NAFTA Article 102 provides that any interpretation of the NAFTA must promote rather than inhibit the NAFTA's objectives.[98] NAFTA Article 1105 establishes that NAFTA Parties must provide treatment in accordance with international law to the investments of NAFTA Party investors. The only other mention of the obligation to observe international law in Chapter 11 is in Article 1110's discussion of the payment upon an expropriation. Article 1110 (1)(c) requires that payment be made "in accordance with due process of law and with Article 1105(1)".

99. State practice and international courts have established that there is a customary international law standard of treatment that must be given to foreigners and their investments.[99] For example, the US-Mexican Claims Commission held in the *Hopkins* case:

> *... it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws....The citizens of a nation may enjoy many rights which are withheld from aliens, and conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.*[100]

100. NAFTA Article 1105 can be described as importing the principles of international responsibility of States for the injury to the investments of investors of other Parties operating in a State's territory. This concept of the minimum standard of international law was endorsed in the *Neer* Case (1927), where the General Claims Commission stated:

> *The propriety of governmental acts should be put to the test of international standards.*[101]

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[98] NAFTA Arbitration Panel Established Pursuant to Article 2008. *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Secretariat File No. CDA-95-2008-01) Final Report of the Panel, December 2, 1996 at 36. In its award on jurisdiction, the *Ethyl* Claim Tribunal ruled that these NAFTA objectives must be used to interpret the investment provisions of NAFTA (at para's. 56 & 83). Set out in Schedule 28.

[99] Brierly, *The Law of Nations*, 2ed.,172 (1936), I Hyde, *International Laws* 266-267 (1922), Hall, *International Law*, 8th ed., by Higgins, at 59-60.

[100] *The United States of America On Behalf of George W. Hopkins*, v. *The United Mexican States* (Docket No. 39) 21 Am. J. Intl. Law 160, at 166-167 (1926).

[101] IV RIAA at 61.

101. The term "minimum standard of treatment" used in NAFTA Article 1105 imports, at a minimum, due process and natural justice requirements into the NAFTA. The terms "fair and equitable treatment" and "full protection and security"used in this NAFTA Article have been frequently used in international bilateral investment treaties ("BITs") over the past 40 years and the use of these terms in the NAFTA is a reflection of a long process of development and use.[101]

102. The importance of BITs lie "in the contribution they make to the development of customary international law, in their being a source of law." For example, Dr. F.A. Mann, an important writer on this topic, particularly emphasises the importance of the standard of fair and equitable treatment when he concludes that:

> *The paramount duty of States imposed by international law is to observe and act in accordance with the requirements of good faith. From this point of view it follows that, where these treaties express a duty which customary international law imposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the Contracting States from denying its existence.*
>
> *These remarks apply, in particular, to the overriding effect of the standard of fair and equitable treatment, to the duty not to expropriate except on certain terms and to the duty to observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment'. The cold print of these treaties is a more reliable source of law than the rhetorics in the United Nations.*[102]

103. Although the terms "fair and equitable treatment" and "full protection and security" are frequently used terms, especially in BITs, it is acknowledged that they have "hardly ever been judicially considered".[103] Although little considered, publicists such as Dr. Mann have placed the fair and equitable treatment standard as the pre-eminent substantive standard in investment-type treaties. Dr. Mann states:

> *... it is submitted that the right to fair and equitable treatment goes much further than the right to most-favoured-nation and to national treatment .... So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the*

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[101] F.A. Mann, "British Treaties for the promotion and protection of Investments" (1981) 52 Brit. Y.B. Int'l Law 241; Dolzer and Stevens, *Bilateral Investment Treaties* (1995), at 58-60.

[102] Mann at 249-250.

[103] Mann at 243.

> *Agreements affording substantive protection are no more than examples of specific instances of this overriding duty.*[104]

104. The principles of fair and equitable treatment have been considered recently by both the Appellate Body of the World Trade Organization – considering application of Article X of the GATT– and the United Nations Human Rights Committee – considering application of the *International Covenant on Civil and Political Rights*. For example, the U.N. Human Rights Committee found that in order for a regulatory scheme not to be considered arbitrarily imposed, it should be specific, fair and reasonable, and its application should be transparent.[105]

105. In the *Shrimp - Turtle* case, the WTO Appellate Body decided:

> *It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.*[106]

The Appellate Body further indicated that if a regulatory measure is applied too rigidly or inflexibly it may constitute "arbitrary discrimination".[107]

106. The Appellate Body made a similar finding in *Standards for Reformulated and Conventional Gasoline*, where the United States' failure to offer consultation to member countries on the harmonization of standards which were discriminating against their gasoline refiners was found to constitute arbitrary and discriminatory conduct.[108] A

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[104] Mann at 243-244; also see Brownlie at 524-528 for his discussion of the minimum standard and national standard debate.

[105] United Nations, Human Rights Committee, *Communication No. 633/1995: Canada 05/05/99*, CCPR/C/65/D/633/1995 at para. 13.6.

[106] *US - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12, 1998 at para. 183.

[107] At para. 177-180

[108] *United States - Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R at 27-29.

measure that is not transparent and predictable, or that fails to provide affected parties with sufficient notice, an opportunity to be heard or a formal procedure for review or appeal may be arbitrary or discriminatory.

107. The United States – Panama Claims Commission in the *De Sabla* case held that a country fails to accord a minimum standard of treatment to a foreign national where it imposes a measure affecting private interests that is not transparent or properly administered.[109] Arbitrariness, either by design or in application, is a hallmark of a violation of the minimum standard of treatment owed by countries to foreign nationals operating within their territory.

108. The *Statement on Implementation* states that Article 1105 is "intended to assure a minimum standard of treatment of investments of NAFTA investors." It is generally accepted that the broad purpose of this type of clause is "to provide a basic and general standard which is detached from the host State's domestic law".[110]

109. In comparison with national treatment, the *Statement on Implementation* provides that national treatment provides a relative standard of treatment whereas Article 1105 provides "a minimum absolute standard of treatment, based on the long-standing principles of customary international law."[111] The Canadian Statement does not elaborate as to what these "longstanding principles" are in fact.

110. The *North Atlantic Coast Fisheries Case (1910)*, a case before the Permanent Court of Arbitration, is helpful in determining the extent to which such longstanding principles can be applied to state action. Essentially, while a state is free to regulate as it sees fit, its actions must conform to its treaty obligations and to the norms of international law. The Court determined that the obligation of good faith requires a line to be drawn between legitimate state action and action which breaches a treaty right . It held:

> *The line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject-matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty.*[112]

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[109] *De Sabla (United States)* v. *Panama*, [1955] 6 *R.I.A.A.* 358 at 362-363.

[110] Dolzer and Stevens at 58.

[111] At 149.

[112] *North Atlantic Coast Fisheries Case (1910)* 1 H.C.R., p.141 at p.169.

111. The obligation of good faith is a fundamental principle of international law which requires a state to act in a manner that is in accordance with its treaty obligations. In the present case, Canada is obliged to regulate in accordance with its obligation, under Article 1105, to accord a minimum standard of treatment to investments, including treatment that is fair and equitable. As Professor Bin Cheng has noted:

> *The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or general international law.*[113]

112. At paragraph 46 of its *Statement of Defence*, Canada acknowledges at least that the minimum standard of treatment includes an obligation to act in good faith, and to implement measures in accordance with the regulatory process and domestic law of Canada. It does so by denying that such breaches have occurred in this case, although the facts speak for themselves.

113. In addition to requiring Canada to treat investments in a fair and equitable manner, the obligation of good faith further ensures that Canada must not exercise its sovereign power to maliciously harm or injure an investment. The decision of the Arbitrary Tribunal in the *Fur Seal Arbitration* (1892) embodies this traditional element of the principle of good faith. In that case, the Tribunal was asked to determine whether the US had a right to complain about the hunting of pelagic seals by British fishermen in the waters off the American Pribilof Islands. The Tribunal held that the US did have such a right, in stating:

> *Sir Charles Russell: Where is the right that is invaded by that pelagic sealing?... It is not enough to prove that their industry may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them - that may be what lawyers call a damnum, but it is not an injuria... ; but a damnum does not give a legal right of action...*
>
> *The President: Unless done maliciously...*
>
> *Sir Charles Russell: ... They would have a right to complain... if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands and not in regard to their own profit and interest and in the exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands, I agree that they would probably have a cause of action; and, therefore, they have the further (what I might call the negative right) of being protected against malicious injury ...*[114]

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[113] Bin Cheng, *General Principles of Law* (1953) at 131-132.

[114] *Fur Seal Arbitration (1893)* G.B./U.S., 1 Int.Arb., p.755, at pp.889-890.

114. Bin Cheng has summarised the prohibition of malicious injury as an element of the principle of good faith in his treatise on the general principles of international law:

> *The exercise of a right - or a supposed right, since the right no longer exists - for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law.*[115]

[115] Bin Cheng, *General Principles of Law* (1953) at 122.

II. THE INTERNATIONAL LAW OF MINIMUM STANDARD OF TREATMENT APPLIED TO THE FACTS OF THIS CLAIM

115. Canada has breached its obligations to meet international minimum standards as set out in NAFTA Article 1105 by, among other things:

(a) Failing to provide S.D. Myers, Inc. with an opportunity to be consulted before the implementation of the *PCB Waste Export Ban*, while providing its competitors with the opportunity to assist in its drafting and design;

(b) Failing to adhere to the domestic law and established regulatory policy in implementing a discriminatory measure (i.e. the *PCB Waste Export Ban*); and

(c) Failing to act in good faith to the Investor and its Investment by implementing a measure with an intent to discriminate and knowledge of the unlawfulness of such implementation.

The Making and Application of the PCB Waste Disposal Ban Violated the Minimum Standard of Treatment

116. The Minister was informed that there was no lawful option available for an immediate ban on PCB waste exports, which was what she had promised Cintec and Chem-Security. Environment Canada officials advised:

> *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.*
>
> *If the normal regulatory amendment/notification/consultation (public and provinces) process is followed, the PCB Waste Export Regulations could be amended in 180 days or so. The process could be fast-tracked to 60-90 days. Some other federal departments as well as some provinces may oppose a closed border.*[116]
>
> *I must emphasize that Step 1 is still crucial and problematic. We have not been able to come up with any persuasive rationale to cover "significant danger to the environment or to human health".*[117]

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[116] Hilborn Memorandum 1, set out in Schedule 6.

[117] George Cornwall, Director Hazardous Waste Branch, "Interim Order" Memorandum to Tony Clarke dated November 10, 1995, attached as Schedule 53.

117. The Canadian regulatory policy, which must be applied by all federal regulators, provides that:

> *When regulating, regulatory authorities must ensure that*
>
> *i. they can demonstrate that a problem or risk exists, federal government intervention is justified and regulation is the best alternative.*
>
> *ii. Canadians are consulted, and that they have an opportunity to participate in developing or modifying regulations and regulatory programs.*[118]

118. The Canadian regulatory policy was adopted in February, 1992, and revised on November 9, 1995, by the Treasury Board, a federal cabinet body. The regulatory policy applies to all regulatory authorities when regulating, and applied to Environment Canada officials on October 27, 1995, when they were asked by their Minister to consider a regulatory response to the granting of an enforcement discretion to the Investor.

119. The revised regulatory policy, which came into effect after Environment Canada had determined to have the Minister issue an Interim Order, also required regulatory authorities to justify and document where "exceptional circumstances" affected their ability to fulfil a policy requirement. Exceptional circumstances are not defined in the policy, but in light of the broad language of the policy, it clearly must relate to a legitimate emergency (e.g. when there is insufficient time, or sufficient danger, to justify failure to observe all of the requirements of the regulatory policy).

120. Environment Canada received notice that the EPA was contemplating issuing an exemption to the Investor in late 1994 or early 1995.[119] When the Minister met with Cintec and Chem-Security in July, 1995, she was warned that the EPA may soon grant the Investor's request.[120] There is no evidence that Canada took the proper steps to address these possible developments in a manner consistent with the *Regulatory Policy* until October 27, 1995, a day after the exemptions were finally granted.

121. Accordingly, after S.D. Myers, Inc. was granted permission by the EPA to import PCB contaminated waste from Canada, it is submitted that no exceptional circumstances existed in November 1995 based on a shortage of time to respond to the border opening.

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[118] *Canadian Regulatory Policy* set out in Schedule 32.

[119] Examination of Victor Shantora in *Centre Patronal* v. *The Minister of the Environment and the Attorney General* at para. 174 set out in Schedule 33.

[120] Examination of Robert Glover in *Centre Patronal* v. *The Minister of the Environment and the Attorney General* at 31-33. Set out in Schedule 34.

Moreover, it is clear that Environment Canada officials knew that there was no immediate danger to the environment or to human life or health.[121]

122. Neither the Investor nor the Investment were consulted by Canada on whether the ban should be imposed. Moreover, neither the Investor or Investment were ever provided with Access to the Minister or her staff to discuss this issue.[122] Consultation by affected Canadians, such as the Investment, is a requirement under the regulatory policy.

123. In contrast, Chem-Security and Cintec were provided with access to the Minister on more than one occasion to request that a ban be imposed if the border was ever opened.[123] Moreover, a lobbyist for Chem-Security actually participated in the drafting and design of the ban. On November 10, 1995, six days before the ban was imposed, this lobbyist wrote a fax instructing officials as follows:

> *In developing the justification, this letter makes some interesting arguments which could be used as the basis for the Minister's justification.*[124]

124. The author of this facsimile was Jeff Smith, who had been a member of the Minister's staff earlier that same year, and had even corresponded with S.D. Myers, Inc., on behalf of the Minister, in 1994.[125] His facsimile was addressed to the Assistant Deputy Minister responsible for the Environmental Protection Service, Tony Clarke. Tony Clarke added a note on the fax to Victor Shantora, the Director General responsible for closing the border, which instructed:

> *Victor S. - this is a priority - please attend to it ASAP.*

125. It is clearly neither equitable nor fair for one competitor to have such privileged access to government decision-makers, in order to shape laws to be applied against the other. At a minimum, Canada was obligated to offer a similar level of consultation and participation to the Investor or the Investment as it did to Cintec and Chem-Security.

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[121] Hilborn Memorandum I, set out in Schedule 6

[122] Affidavit of Rev. Michael Valentine set out in Schedule 1.

[123] Examination of Art Mathes, General Manager, Chem-Security in *Centre Patronal* v. *Canada*, T-3092-92, September 19, 1996, at 61-75. Set out in Schedule 39.

[124] Fax cover - from Jeff Smith (Hill & Knowlton) to Tony Clarke (ADM, Environment Canada) -dated November 10, 1995. Set out in Schedule 35.

[125] Examination of Victor Shantora in *Centre Patronal* v. *The Minister of the Environment and the Attorney General.* at 161-162. Set out in Schedule 33.

126. The Canadian regulatory policy also provides that:

> *When regulating, regulatory authorities must ensure that:*
>
> *4. adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed. In particular, regulatory authorities must ensure that... parties proposing equivalent means to conform with regulatory requirements are given positive consideration.*

127. In a letter to Sheila Copps dated December 1, 1995, the Investor offered to ensure that its processes for PCB disposal met with all Canadian standards. The Investor offered as an alternative to an absolute *PCB Waste Export Ban*, that exports could be allowed only in cases where the importer could demonstrate that the PCB waste would be disposed of in compliance with Canadian standards.[126]

128. There is no evidence that this alternative was given positive consideration by Canada, as required under the *Regulatory Policy*, on November 28, 1995 or February 16, 1996, when the Interim Order was reviewed and approved by the Canadian Federal Cabinet. Given that time was even less of the essence and that no threat to the environment or to human life and health existed when cabinet approved the Order, there were no "exceptional circumstances" that could justify failure to observe the requirement of the regulatory policy to consider the Investor's proposed alternative.

129. It was not until February 1997 that Canada finally adopted the Investor's proposed alternative to an absolute export ban. By that time, the Investor's and the Investment's markets were irretrievably damaged.

130. Officials had also advised the Minister early in the process that options were available to imposing an export ban. These options appear to have been ignored by the Minister and cabinet. In addition to being advised that a ban could not be justified under section 35 of the CEPA, the Minister was also advised that the *PCB Waste Export Ban* would violate Canada's NAFTA obligations.

131. The Minister was advised that both she and the Minister of Health would need to form the requisite opinion that there was an immediate danger to the environment and/or to human life or health that required the ban to be imposed:

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[126] Letter from Dana Myers to the Hon. Sheila Copps outlining policy alternatives for Canada dated December 1, 1995, set out in Schedule 36.

> *STEP 1. DEVELOP JUSTIFICATION FOR THE INTERIM ORDER (1-2 DAYS)*
>
> *Ministers (DOE and HC) must believe that PCBs (on CEPA Schedule 1 list) are not adequately regulated (CEPA 35.1(a)(ii)), and*
>
> *Ministers (DOE and HC) must believe that immediate action is required to deal with a significant danger to the environment or to human life or health CEPA 35(1)(b).*
>
> *Ministerial staff need to consult HC [Health Canada]. DOE staff will work with counterparts...*[127]

132. There is no evidence that either Minister ever held the requisite opinion. In fact, it appears that the Minister of Health did not even decide to approve the *PCB Waste Export Ban*. Rather, it appears that one of her officials purported to decide on her behalf:

> *On November 16, 1995, I signed a letter to Mr. Clarke, on behalf of the Minister of National Health and Welfare that the Minister agreed to the issuance of an interim order. Attached hereto and marked as Exhibit "B" to this my affidavit is a true copy of the letter from Mr. Foster signed by me.*[128]

133. At no time between November 16, 1995 and February 4, 1997 was there any evidence that a significant danger to the environment or to human life or health in Canada was posed by the opening of the United States border to imports of PCB wastes from Canada.

134. In fact, at all material times Canadian officials believed that PCB's and PCB waste were adequately regulated in Canada.[129] As a prerequisite to any order issued under section 35 of CEPA, both the Minister of Health and the Minister of the Environment had to personally believe that PCBs and PCB waste were not adequately regulated in Canada. There is no evidence that either Minister held such a belief.

135. Without legal authority, and with knowledge that her actions would violate Canada's obligations under the NAFTA, the Minister imposed the *PCB Waste Export Ban*. She

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[127] John Hilborn, "Process/Timing for Interim Order" Memorandum attached to Memorandum from George Cornwall to Ellen Fry and others, November 10, 1995, margin notes, attached as Schedule 54.

[128] Affidavit of J.R. Hickman, Director General, Environmental Health Directorate, Health Protection Branch, Health Canada, dated February 2, 1996, with attachment B in *Centre Patronal* v. *The Minister of the Environment and the Attorney General*. Set out in Schedule 37.

[129] Examination of Shantora.in *Centre Patronal* v. *The Minister of the Environment and the Attorney General* Set out in Schedule 33. Examination of Hickman in *Centre Patronal* v. *The Minister of the Environment and the Attorney General*. Set out in Schedule 38.

was aware that the ban would seriously affect S.D. Myers, Inc.'s Investment in Canada, but imposed it anyway, because she had promised Canadian competitors that she would protect their markets.[130]

136. Canada failed to meet international law obligations of fairness and transparency in the making and application of the measure. Canada failed to follow its own natural justice and procedural fairness rules in the making of its measure.

137. The Minister failed to meet the legal requirements necessary to impose the PCB Waste Export Ban. These requirements were set out in advice given to the Minister, but she apparently ignored it. The legislation required:

i. Both the Minister of Health and the Minister of Environment had to personally believe that PCB wastes were not adequately regulated in Canada before issuing an interim order;

ii. Both the Minister of Health and the Minister of the Environment had to personally believe that the opening of the border to PCB waste exports represented a significant danger to the environment or to human life or health;[131]

138. Environment Canada officials clearly believed, and repeatedly advised their Minister, that opening the border to PCB waste exports did not represent a significant danger to the environment or to human life or health:

> *Apparently, Ellen Fry [Counsel for Environment Canada] has serious legal problems with interim order concept in this case. She signalled that when I spoke to her this morning. Would it be appropriate to ask Ellen (or Justice HQ?) To prepare a note advising Minister directly. That way, it might be easier for Minister to accept contrary advice!*[132]

It is inconceivable how the Minister could have held a good faith opinion which differed from that of her expert advisers. In any event, there is no evidence that the Minister had any good faith opinion in this case.

139. As the Minister of Health did not even give her personal consent for an *Interim Order* to be issued, it is clear that she did not hold the opinions required of her under the

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[130] This knowledge is clearly indicated in the"Background Note" attached to "Justification for Interim Order" Memorandum published by Environment Canada on November 16, 1995. Set out in Schedule 29.

[131] Transcripts of examination of Victor Shantora in *Centre Patronal* v. *The Minister of the Environment and the Attorney General.* Set out in Schedule 33.

[132] "Re: PCB Exports" Memorandum to Tony Clarke, November 9, 1995, attached as Schedule 58.

legislation at the requisite time. The Minister of health was not informed about the order until November 24, 1995.[133] Moreover, the official who purported to act in her stead has admitted under oath that he believed that PCB waste was adequately regulated in Canada.[134]

CONCLUSION

140. Canada's failure to observe the conditions of its own regulatory policy is evidence of its failure to accord the minimum standard of treatment in international law to the Investment of S.D. Myers, Inc. The *PCB Waste Export Ban* was clearly arbitrary and discriminatory in its application to U.S.-based disposal firms such as S.D. Myers, Inc. and its Investment. The manner in which the ban was imposed was arbitrary and discriminatory, and thus violated the minimum standard of treatment owed by Canada under Article 1105(1).

141. The process which led to the imposition of the *PCB Waste Export Ban* was biased, discriminatory and abusive. Canada chose not to consult the Investment or Investor while providing direct access to their competitors in the design and implementation of a measure for which many less restrictive alternatives had been identified. This conduct is clearly not in accordance with the principles of fairness and equity required under Article 1105(1).

142. Moreover, the evidence conclusively shows that the *PCB Waste Export Ban* was designed and imposed by the Minister and her staff in order to harm S.D. Myers, Inc. and its Investment in favour of its Canadian-based competitors. This deliberate and domestically unlawful attempt to cause injury violated the obligation of good faith owed by Canada at international law. Accordingly, Canada has failed to accord the minimum standard of treatment required under Article 1105(1).

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[133] Michele S. Jean "Memorandum to Minister" November 24, 1995 set out as Schedule 63.

[134] Affidavit of J.R. Hickman - in *Centre Patronal* v. *The Minister of the Environment and the Attorney General* at paragraph 13. Set out in Schedule 37.

PART FIVE: PERFORMANCE REQUIREMENTS

SECTION I: THE INTERNATIONAL LAW OF PERFORMANCE REQUIREMENTS

The NAFTA and Performance Requirements

143. S.D. Myers, Inc. and its Investment were obliged to comply with Canadian requirements to locate their production and to consume Canadian goods and services if they were to continue in business as a result of Canada's measure. Canada's measure was inconsistent with Canada's obligations under NAFTA Article 1106, which prohibits a number of specific governmental activities designed to favour domestic goods, services or investments. The relevant portions of Article 1106 read:

> *1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:*
>
> *2. to achieve a given level or percentage of domestic content;*
>
> *(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.*

144. No NAFTA Party may impose or enforce a requirement, or enforce a commitment or undertaking in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor.

145. Performance requirements can be imposed either directly or indirectly. Indirect performance requirements are imposed whenever a measure has the effect of according an advantage to domestic over foreign interests. In *Canada - Foreign Investment Review Act*, the panel found that undertakings to purchase goods manufactured in Canada, given to gain governmental approval for an investment, constituted requirements which gave less favourable treatment to imported products.[135]

146. Under Article 1106(1)(b), Parties cannot require investors to include in their products or services any amount of goods or services that originate within the Party. Under Article 1106(1)(c), Parties cannot require investors to purchase, use or accord preferential treatment to any products or services made domestically.

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[135] (L/5504 - 30S/140) 7 February 1984, at para. 5.13.

147. These NAFTA obligations are very broad as they apply not only to the investments of investors from other NAFTA Parties, but to all investments within the territory of a NAFTA Party. Thus, Canada has agreed through this obligation never to engage in these proscribed activities for investments of any foreign or domestic investor, whether they come from a NAFTA Party or not.

The NAFTA Performance Requirement Exception

148. Article 1106(6) allows a Party to maintain a performance requirement only if it meets 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:

to secure compliance with laws and regulations that are not inconsistent with the provisions of the NAFTA:

(b) to protect human, animal or plant life or health; or

(c) for the conservation of living or non-living exhaustible natural resources.

149. Measures may only qualify for an exception to the general prohibitions against performance requirements if both conditions of exception are met. The burden is on the Party attempting to invoke an exception to prove that the conditions of the exception are met in order to justify the measure.[136]

The chapeau of Article 1106(6)

150. The *chapeau* of the performance requirement exception is intended to prevent an abuse of the exceptions provided in the NAFTA. The WTO Appellate Body recently commented upon the function of a similar *chapeau* in *Reformulated and Conventional Gasoline*, where it stated:

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[136] *Canada - Administration of the Foreign Investment Review Act*, L/5004, adopted February 7, 1984, 30S/140, 64, paragraph 5.20. *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, Appellate Body Report, at 22.

> *The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of [what was later to become] Article [XX]." This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. [...]*
>
> *"Arbitrary Discrimination," "unjustifiable discrimination" and "disguised restriction" on international trade may .... be read side-by-side; they impart meaning to one another. ... [C]oncealed and unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction," ... may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. ... The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."*[138] (Emphasis added.)

151. A measure must equally affect all market participants before its imposition will not be considered arbitrary or unjustified. *De facto* inequality arising from the application of an obstensively trade- or investment-neutral measure is not permitted. As stated in the Panel decision on *Certain Automotive Springs Assemblies*, it is "the application of the measure and not the measure itself that needs to examined" in order to find arbitrariness and a lack of justification for the measure.[139]

152. In *Reformulated and Conventional Gasoline*, the United States imposed different standards for gasoline made by domestic refiners versus foreign refiners. The United States argued, unsuccessfully, that it had imposed different standards because of its concern about the ability to ensure compliance with domestic standards by foreign refiners. In rejecting the United States argument, the WTO Appellate Body held:

> *We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions*

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[138] *United States - Standards for Reformulated and Conventional Gasoline* at 22 & 24-5.

[139] *United States - Imports of Certain Automotive Spring Assemblies* at B.I.S.D. 305/107; adopted on May 26, 1983 at para. 56.

> *had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute "unjustifiable discrimination" and a "disguised restriction on international trade." We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.*[139]

153. Accordingly, where a measure is applied in a manner so egregious as to constitute unjustifiable discrimination or a disguised restriction on international trade or investment, it cannot be saved by an exception for measures ostensibly intended to protect human, animal or plant life or health, or to conserve the environment.

The measure must be necessary

154. For a measure to comply with the exception, the measure must be **necessary** to secure compliance with measures that are themselves not inconsistent with the NAFTA, to protect human, animal or plant life or health, or to conserve exhaustible natural resources.

155. The term "necessary" has been given important consideration by GATT panels that have established that governments must prove the necessity of a measure. This term was examined in some detail during the GATT Panel on *Section 337 of the U.S. Tariff Act*. The Panel held:

> *... that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.*[140]

156. In essence, there are three elements of the necessity test. First, the objective of the measure must comply with the objective provided in the exemption. Second, there must be a rational connection between the chosen objective and the measure as applied. Finally, the measure as applied must be the least trade-restrictive alternative available.

157. GATT Panels have determined that for a measure to be necessary there cannot be any other less-trade inconsistent alternative available. The Panel in the *Thai Cigarette* case decided that:

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[139] *United States - Standards for Reformulated and Conventional Gasoline*, at 28-29.

[140] *United States - Section 337 of Tariff Act of 1930* at para. 5.26.

> *The import restrictions by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.*[141]

Thus it is clear that where other alternative policies can be made, they will be reviewed by international tribunals to see if there could have been alternative measures taken which would have been more consistent with that Party's international law obligations.

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[141] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* at para. 75.

SECTION II: THE INTERNATIONAL LAW OF PERFORMANCE REQUIREMENTS APPLIED TO THE FACTS OF THIS CLAIM

Canada Has Imposed Several Performance Requirements on the Investor in Contravention of the NAFTA

158. The *PCB Waste Export Ban* is inconsistent with Canada's NAFTA obligations regarding performance requirements in two ways:

(i) The *PCB Waste Export Ban* imposed on investors the requirement to only dispose of PCBs at Canadian-based facilities. This resulted in a requirement that all waste be remediated by 100% Canadian based service providers;

(ii) The *PCB Waste Export Ban* imposed on investors the *de facto* requirement to use domestic facilities, supplies and labour to dispose of PCBs if they were to continue in business in Canada.

Canada has imposed on all investors a requirement of domestic PCB disposal

159. As a result of the *PCB Waste Export Ban*, all PCB waste stored n Canada must be disposed of in Canada. The *PCB Waste Export Ban* violates Article 1106(1)(c) by according a preference to domestic PCB waste disposal over disposal processing involving facilities in the United States. As indicated in the following statements by Canada, the dispose-in-Canada-by-Canadians requirement was a primary objective of the measure:

> *It is still the position of the government that the handling of PCBs should be done in Canada by Canadians.*[142]
>
> *The purpose of the Interim Order is to ensure that Canadian PCB Wastes are managed in Canada.*[143]

160. While there is no explicit requirement for investors to use the services of Canadian-based PCB waste disposers over those with facilities outside of Canada, there is an effective requirement to purchase such services if the Investor wished to continue to conduct its business in Canada.

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[142] Statement by Sheila Copps, Minister of the Environment, Debates of the House of Commons, June 9, 1995 at 1155 set out in Schedule 17.

[143] Canada, "Explanatory Note" attached to the *Interim Order* signed on November 16, 1995. Set out in Schedule 21.

Canada has imposed on the Investor a requirement to build a Canadian facility and purchase Canadian supplies and labour

161. By banning the export of PCB waste, Canada has required that all waste processed in Canada use investments that are 100% located in Canada. To maintain its position as a viable PCB waste remediator in the Canadian market, the Investor and/or the Investment was effectively required to build a remediation facility in Canada. This measure is in violation of Article 1106(1)(b).

162. As a result of the requirement to build a facility in Canada, the Investor or the Investment would be required to use domestic construction goods and services. This requirement represents a distinct performance requirement, in violation of subparagraph (1)(c) of NAFTA Article 1106, since it would be necessary to purchase and use domestic supplies and services to complete construction of the new facility.

Canada Cannot Comply With the Performance Requirement Exception

163. A measure may be justified under the exception so long as it is not arbitrary or unjustifiable or a disguised restriction on international trade or investment. The means adopted by the Canadian government to prevent the export of PCB waste from Canada does not satisfy this requirement.

The PCB Waste Export Ban is a disguised restriction on international trade and investment

164. The *PCB Waste Export Ban* does not ban the treatment of PCB waste, but only the cross-border trade in PCB waste. The real intent of the *PCB Waste Export Ban* is promotion of domestic Canadian PCB waste disposal firms.

165. At the time that it imposed the *PCB Waste Export Ban*, Canada was aware that the only investment adversely impacted by the *PCB Waste Export Ban* would be one particular American-owned investment. The *PCB Waste Export Ban* was specifically targeted at restricting the conduct, operation and management of this American investment.

166. In the *Reformulated Gasoline* case, the WTO Appellate body found that the discrimination caused by failure to consider the costs to be borne by foreign producers and failure to attempt to find a way to ensure that foreign producers could meet domestic standards was clearly foreseeable and not justifiable. In this case, Canada clearly understood that its measure would discriminate against the Investor and the Investment and made no effort to consider alternatives to an outright ban on PCB waste. Accordingly, the *PCB Waste Export Ban* constitutes unjustifiable discrimination and a disguised restriction on trade and investment.

The *PCB Waste Export Ban is not a necessary measure*

167. Canada's *PCB Waste Export Ban* cannot be justified as a necessary measure under Article 1106(8) both because it was not intended to protect human life or health, or the environment, and because there were less trade-restrictive alternatives to an outright ban available.

168. Canada has argued that the *PCB Waste Export Ban* was necessary to observe provisions of the *Basel Convention*. It is clear that the *Basel Convention* does not apply in this case. Even if *arguendo* it was relevant, paragraph (a) of NAFTA Article 1106(6) refers only to compliance with domestic laws that are not otherwise inconsistent with the NAFTA, not compliance with international agreements.

169. In their preparation of the *PCB Waste Export Ban*, Canadian officials repeatedly advised the Minister that the *PCB Waste Export Ban* could not be justified under section 35 of the *Canadian Environmental Protection Act* because the prospect of the border opening did not constitute an immediate environmental or health risk. The Advisors thought:

> *An Interim Order cannot be justified. Interim Orders are designed to provide immediate action to resolve "significant danger" to the environment and/or human health. It can be argued that the opening of the U.S. border poses no such significant danger. It will be difficult to argue that the transportation of PCBs to the U.S.A. poses a greater danger than transporting PCBs to Swan Hills Alberta....*
>
> *PCBs destroyed in either country is positive for the environment and offers greater cost-effective choice of PCB destruction for PCB owners.*[144]

170. As the opening of the border did not pose a health or safety risk, closing the border using the *PCB Waste Export Ban* cannot be justified under paragraphs (b) and (c) of Article 1106(8), which require that for a measure to be justified, it must be necessary to protect human, animal or plant life or health or be necessary for the conservation of living or non-living exhaustible resources.

171. To qualify under the exemption, the ostensible objective of Canada's response to the EPA's granting permission to S.D. Myers, Inc. to import PCB waste from Canada for disposal would have to be either the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. There is no rational connection between an outright ban on the export of PCB waste for final disposal in the United States and either of these objectives. An outright ban had the obvious effect of restricting the availability of a cost-effective and environmentally friendly disposal option in favour

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[144] Hilborn memo 1. Set out in Schedule 6.

of indefinite storage at thousands of different locations across Canada, or shipment over a much longer distance in Canada, of PCB waste.

172. The evidence clearly indicates that the overriding objective of Canadian officials in imposing this ban was to adhere with the Minister's "policy" that Canadian-held PCB waste was to be treated in Canada by Canadians. This objective is clearly not listed under Article 1106(8). For the sake of argument, even if the ban was imposed to conserve the environment or protect human, plant or animal life or health, its imposition lacks any rational connection to the objectives. As the Minister's own officials told her, the availability of more cost-effective options for PCB waste disposal would have been good for the environment. If Canada's objective had really been to help the environment and protect human, plant or animal life and health, the border would have never been closed.

173. Moreover, Canada had many policy alternatives open to it, including employing a certification measure ensuring equivalence of standards between Canadian and American waste disposers. In a letter to Sheila Copps dated November 30, 1995, S.D. Myers, Inc. actually recommended such an alternative.[145] The Minister also received advice on other alternatives before imposing the Ban.

174. Clearly, the *PCB Waste Export Ban* was not necessary because other less trade restrictive alternatives existed which could have satisfied any legitimate environmental, health or safety concerns that Canada may actually have had.

175. Moreover, Canada was aware of the likelihood of the border opening over a year before it happened.[146] There was ample time to consider less trade restrictive alternatives to any legitimate health or safety concerns it may have had concerning the border opening.

CONCLUSIONS

176. The *PCB Waste Export Ban* was clearly designed to impose a 100% Canadian content requirement for the disposal of Canadian-held PCB wastes. It effectively required any NAFTA investor considering entry into the Canadian PCB waste disposal sector to locate its facilities in Canada, and in so doing require it to use Canadian goods and services. The *PCB Waste Export Ban* is absolutely unjustifiable as a legitimate environmental measure because it was clearly designed to discriminate against a specific American-owned investment in the Canadian PCB waste disposal sector.

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[145] Set out as Schedule 36.

[146] Reg Plummer, Department of Finance, Memo to file dated November 24, 1995, about a meeting held at the Privy Council Office concerning whether the Interim Order should be approved by Cabinet, set out as Schedule 40.

PART SIX: EXPROPRIATION

SECTION I: THE NAFTA AND EXPROPRIATION

177. The NAFTA Investment Chapter protects the investments of investors from other NAFTA Parties from uncompensated expropriations or measures tantamount to expropriation. This obligation recognizes the importance now given to the protection of international investment flows. At the same time, the NAFTA does not restrict the ability of governments to engage in regulatory acts which could deprive investors of their investments. The NAFTA does not restrict expropriatory behaviour -- all that it requires is compensation under its terms to be paid to the affected investors. NAFTA Article 1110 states:

> *1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*
>
> *(a) for a public purpose;*
>
> *(b) on a non-discriminatory basis;*
>
> *(c) in accordance with due process of law and Article 1105(1); and*
>
> *(d) on payment of compensation in accordance with paragraphs 2 through 6.*
>
> *2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*

178. The goal of the NAFTA was to ensure that governments compensated investors for the harm done to their property while at the same time permitting governments to maintain their freedom of action. The NAFTA does not restrict the sovereign power of a government to engage in policy making. It only requires the payment of compensation if such a policy is an expropriation or a measure tantamount to an expropriation of the investment of an investor from another NAFTA Party.

179. The NAFTA was carefully drafted to ensure that there were no exceptions from the compensation rule. No "standard" GATT Article XX exceptions apply to the

requirement to pay compensation.[147] Canada has reserved thousands of existing non-conforming measures from the operation of the NAFTA Investment Chapter through Annexes I, II, III and VII of the NAFTA. The NAFTA did not permit governments to make any reservations to the obligation of compensation (or to the obligation to meet minimum standards of treatment) due to their special status as objectives and obligations, which all NAFTA Parties are obliged to always meet.

"Expropriation" is Broadly Defined in the NAFTA

180. The NAFTA term "expropriation" covers "expropriation," "nationalization" and "measures tantamount to expropriation." The NAFTA does not actually define the term expropriation, but by its terms it protects against direct and indirect measures of expropriation and extends its coverage to "measures tantamount to expropriation."

181. International law imposes standards on governments when public treatment affects private property rights. In particular, the NAFTA deals with the obligations when governments expropriate an investment of an investor from another NAFTA party. Article 1110(1)(d) of the NAFTA does not limit the range of government regulatory actions. It merely obliges governments to compensate investors for interfering with their property rights.

182. International tribunals have provided some general guidelines as to what types of governmental action constitute an expropriation. In the *Sola Tiles* case,[148] the Iran-US Claims Tribunal gave the following definition of expropriation:

> *It is well settled in the practice of the Tribunal, as elsewhere, that property may be taken under international law through interference by a State in the use of that property or the enjoyment of its benefits amounting to a deprivation of the fundamental rights of ownership.*[149]

183. In essence, for there to be an expropriation under international law it is necessary to establish that a government has interfered unreasonably with the use of private property. In the *Harza Engineering* case, the Tribunal stated:

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[147]These standard public policy exceptions were permitted for some NAFTA Chapters but not for the Investment, Services or Financial Services Chapter obligations.

[148] *Sola Tiles Inc.* v. *Iran (1987)*, 14 Iran-US C.T.R. 223 at 231-232, para. 29.

[149] *Sola Tiles* at 231-232, para. 29. The Tribunal goes on to cite the following cases as support for this proposition: *Foremost Tehran. Inc* v. *Islamic Republic of Iran*; *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA, Phelps Dodge Corp* v. *Iran*; and *Thomas Earl Payne* v. *Iran.*

The Claimant is correct in asserting that a taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of the property.[150]

The US-Iran Claims Tribunal provided a useful definition of expropriation in the *TAMS-AFFA* case where it stated that it preferred:

> *...the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required.*[151]

184. The NAFTA is intended to provide effective protection for the foreign investments of NAFTA Party investors in the territory of another NAFTA Party. Article 102(c) states one of the objectives of the NAFTA is to: "increase substantially investment opportunities in the territories of the Parties". The goal is that of investor protection, not state protection. Thus, it is irrelevant to look at what the purported intention of the government was. International Tribunals have generally found the *ex-post facto* explanations by governments of their "motivations" for a measure to be a less satisfactory test than looking at the impact of the measure. Thus, in its consideration of this issue in its decision in *TAMS-AFFA*, the US-Iran Claims Tribunal stated:

> *The intent of the government is less important than the effects of the measures on the owner and the form of the measures of control or interference is less important than the reality of their impact.* [152]

185. The US-Iran Claims Tribunal looked at the issue of indirect expropriation in the *Starrett Housing* case. In this case, the Tribunal found that:

> *It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.*[153]

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[150] *Harza Engineering Co.* v. *Iran*, (1982) 1 Iran-US C.T.R. 499 at 504.

[151] *Tippets, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran* (1984), 6 Iran-U.S. C.T.R. 219 at 225. *Motorola, Inc.* v. *Iran National Airlines Corporation* (1988), 19 Iran-US C.T.R. 73 at 95.

[152] *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* at 225-226.

[153] *Starrett Housing Corp.* v. *Iran* (1983), 4 Iran-U.S. C.T.R. 123 at 154.

186. Expropriation refers to an act by which governmental authority is used to deny some benefit of property. Professor M. Sornarajah has examined the international decisions regarding expropriation in his treatise *The International Law on Foreign Investment.* He states:

> *Though it is clear that there are categories of takings outside the outright acts of nationalization, the problem lies in formulating a single general principle that identifies all these takings. If one general criteria [sic] is to be attempted, it will have to involve some broad notion of governmental interference with the peaceful enjoyment of the rights of use, enjoyment and control of the property by the alien.*[154]

187. This principle of unreasonable interference was recognized in the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, which states:

> *3(a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.*[155]

188. The terms of the NAFTA have broadened the type of activities considered to be expropriation by including in Section 1110(1) the words *a measure tantamount to nationalization or expropriation.* Any substantial interference with a property right is likely an activity in the nature of expropriation and almost certainly a measure tantamount to expropriation.

189. Section 712(g) of the American Law Institute's *Third Restatement on the Foreign Relations Law of the United States* on "State Responsibility for Economic Injury to Nationals of Other States" contains wording similar to Article 1110 in its statement of state responsibility for a taking by a state. When commenting on this rule, the *Restatement* provides:

> *Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or*

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[154] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994) c. 6, 7 at 282.

[155] *"Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens"* (1961) 55 A.J.I.L. (1961) 545 at 553.

> *that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory.*

190. An expropriation will take place whenever there is a substantial and unreasonable interference with the enjoyment of a property right. Canada prepared a paper for discussion with the other NAFTA Parties on the subject of expropriation on November 13, 1998 entitled *Chapter Eleven: Operational Review- Issues Paper on Expropriation* ("*Expropriation Paper*").[156] In this paper, Canada unsuccessfully attempted to convince the other NAFTA parties to engage in a *de facto* amendment of the NAFTA expropriation provisions.[157] This attempt would have purported to remove or restrict the ability of this NAFTA Investor-State Arbitration Tribunal to decide many of the issues raised by the Claimant in this Claim without permitting the Claimant or the Tribunal any opportunity to be heard.[158]

191. Canada has said at paragraph 58 of its *Statement of Defence* that S.D. Myers, Inc. had no right to export PCB waste from Canada and thus could not have been the subject of an expropriation, Canada's own paper on expropriation demonstrates it is generally accepted that failure to issue approvals necessary for an enterprise to operate is a taking.

192. The *Expropriation Paper* also provides some understanding as to whether regulatory takings are compensable under the NAFTA. In this paper Canada states:

> *Furthermore, the NAFTA use of "measures tantamount to expropriation" is explicitly qualified with respect to certain intellectual property matters subject to NAFTA Chapter Seventeen and with respect to debt securities. While this may lessen some uncertainty about the scope NAFTA Parties accorded to an application of "tantamount to expropriation", it may give rise to the argument that these words are otherwise to be given a full and limited interpretation.*[159]

193. Professor Rosalyn Higgins (as she then was) examined the question of whether regulatory takings needed to be compensated in her lectures at the Hague Academy in 1982. Professor Higgins looked at the doctrine that required just compensation be paid when private property was diverted to public use, but that there be no compensation when the "police power" was used to allow for a "regulatory taking". On this point, she wrote:

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[156] Prepared by John Gero, Director General Trade Policy Bureau II, NAFTA Coordinator for the Department of Foreign Affairs and International Trade attached at Schedule 41.

[157] "NAFTA trade meeting fails to yield results" Heather Scoffield, *The Globe and Mail*, April 23, 1999 at A1, set out in Schedule 13.

[158] Canada's attempt to circumvent this fair and impartial NAFTA process proved to be unsuccessful. Canada was unable to obtain agreement from the other NAFTA Parties.

[159] Set out in Schedule 41.

> *It would seem to be the case that while it is acknowledged that property may be indirectly "taken" through regulation, this does not attract the duty to compensate. The position seems to be (and the present writer finds the underlying policy difference hard to appreciate) that a taking for public use requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the purposes of the taking.*
>
> *... Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of sense in the general, rather than for a private, interest). And just compensation would be due.*[160]

194. The terms of the NAFTA as reinforced by Canada's own statements in the *Expropriation Paper* itself make it clear that the obligation to pay compensation for a regulatory taking exists. Article 1110 states that it applies to all expropriations. However, Article 1110(8) specifically addresses the situation of a regulatory taking and exempts the circumstances mentioned therein from the application of the expropriation provisions. It states:

> *For purposes of this Article, and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.*

This NAFTA provision clearly envisioned the situation that the effect of a government measure could result in an expropriation. This clause is a specific clarification on the customary law in this area. Further, by specifically exempting one instance of a regulatory taking from the application of this NAFTA Article, the *expressio unius* rule requires that the NAFTA to be interpreted as applying to all other regulatory takings.[161]

195. At paragraph 55 of the *Statement of Defence*, Canada argues the *PCB Waste Export Ban* is an exercise of its "police power" in accordance with Articles 1101(4) and 1114. It then makes the leap to suggest that since it is a use of the "police power," it is not required under the NAFTA to pay compensation. This is an inaccurate and incorrect interpretation of the NAFTA. Canada's argument fails for the following reasons:

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[160] R. Higgins, "The Taking of Property by the State" (1982) Receuil des Cours 267 at 330-331.

[161] It is a well established interpretive principle that the specific exclusion of one element means that the others are included (see the discussion *supra* on the *expressio unius* interpretive rule). In addition, the International Court of Justice and the US-Iran Claims Tribunal have both recognized that a special provision overrides a general one (*specialia derogant generalibus*) (see Case A/2, Iran-US C.T.R. 101 at 104).

a) NAFTA does not exempt a government from paying compensation for a regulatory taking. In fact, Canada's *Expropriation Paper* and NAFTA Articles 1110(7) and (8) clearly demonstrate that a regulatory taking of anything other than a debt security is compensable;

b) Canada has suggested NAFTA Article 1104(1) and Article 1114 permit it to take away the Investor's property without compensation. Neither of these provisions permit a government to take actions otherwise inconsistent with the NAFTA. Within this claim the Investor had demonstrated Canada's measure is inconsistent with other provisions of the NAFTA and thus neither of these provisions can apply.

Thus, even if *arguendo*, Canada's measure was an incident of "police power," and under the terms of the NAFTA, compensation must be paid.

Compensation for discriminatory expropriation

196. Article 1110(1)(b) provides that expropriation cannot be justified where it was imposed on a discriminatory basis. Customary international law has focussed on situations where a non-discriminatory measure of general applications has been held to not be an expropriation. However, in situations where the measure is explicitly or implicitly discriminatory, compensation must be paid.

197. In the *Revere Copper* v. *OPIC* case,[162] 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 were targeted at only one investment - a foreign-owned aluminum smelter. Thus, the regulation was discriminatory.

198. In paragraph 58 of Canada's *Statement of Defence,* Canada has argued its measure was temporary. Canada's measure had the impact of depriving the Investor of the Investment of the benefits of its Investment. Canada's measure was not a temporary ban, but a final measure, as evidenced in the final approval of the Interim Order by Canada on February 26, 1996. Regardless of whether it was temporary or final, the measure had the same detrimental effect on the Investment of the Investor. The measure made the operation of the Investor's Investment impossible in Canada and that was Canada's planned intent. NAFTA Article 1110(2) requires compensation to be paid at the fair market value of the expropriated Investment immediately before the expropriation took place. Canada has acknowledged in paragraphs 59 and 60 of its *Statement of Defence* that a closing of the border could constitute on expropriation and could cause loss to the Investor.

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[162] *Revere Copper v. OPIC (1978),* 56 *Int. Leg. Mat.* Part V at 256.

SECTION II: THE INTERNATIONAL LAW OF EXPROPRIATION APPLIED TO THE FACTS OF THIS CLAIM.

The PCB Waste Export Ban Expropriates S.D. Myers, Inc.'s Investment in Canada

199. The *PCB Waste Export Ban* terminated the Investment's ability to participate in the Canadian PCB waste disposal market as it did not conduct all of its disposal operations exclusively in Canada. As a result of the ban, the Investor could no longer reasonably operate its business in Canada. The date of the expropriation was November 16, 1995.

200. Canada's unreasonable interference in the PCB waste export sector, through the imposition of an unjustifiable and unlawful ban, has deprived S.D. Myers, Inc. of its ability to enjoy the benefits of its Investment. Canadian officials even warned the Minister that this would happen if she imposed an immediate and total ban on exports:

> *If [the] border is closed, S.D. Myers can be expected to object formally to any action taken under CEPA to close the border, and will certainly seek redress through NAFTA intervention, since they have invested/lobbied greatly to get the border opened.*[164]

201. Canada has failed to compensate the Investor as required under NAFTA Article 1110(2). Canada's ban was unreasonable because it was imposed in an arbitrary, discriminatory and unfair manner, despite the fact that more reasonable alternatives, such as a certification process for all disposal firms to meet Canadian standards, existed.

202. Although it is not important whether Canada actually intended to expropriate the Investment, it is clear that Canada knew its measure would have such an effect. The dispositive factor in determining whether or not an indirect expropriation has occurred is the effect, not the intent.

203. Canada knew that the only American-based PCB waste disposer actively developing a market in Canada was the Investor and its Investment. Ending the export trade in PCB's would result in the specific and immediate deprivation of the Investor's longstanding business contacts and its contracts with Canadians. Canada's immediate and unconditional ban on PCB waste exports unreasonably interfered with the effective enjoyment of the Investor's property, thus constituting a measure tantamount to expropriation under the NAFTA.

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[164] John Hilborn, Officer, Hazardous Waste Branch, Environmental Protection Service, Environment Canada. "Export of PCBs to the United States" Memorandum dated November 15, 1995. Set out in Schedule 42. ("Hilborn Memorandum 3").

204. Taken in their entirety, the executive actions of Canada, which imposed the *PCB Waste Export Ban,* indicate a systemic practice to discriminate against American-based PCB waste disposal businesses while favouring domestic Canadian waste disposers. Whenever an expropriatory measure is imposed on a discriminatory basis, the obligation to pay compensation is triggered under Article 1110(1)(b).

CONCLUSIONS

205. The *PCB Waste Export Ban* deprived S.D. Myers, Inc. of the benefits of its Investment and thus constituted a measure tantamount to expropriation, if not an act of indirect expropriation. The ban was imposed in a discriminatory manner and not in accordance with the due process of law. Accordingly, Canada is obligated to pay compensation for damages suffered by the Investor to its Investment as a result of the expropriation.

PART SEVEN: THE APPLICABLE LAW OF DAMAGES

206. International law has established that a breach of treaty obligation can be answerable through financial compensation. For example, the Permanent Court of International Justice stated in the leading case on general damages in international law, the *Chorzow Factory* Case:

> *It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligations to make reparation.*[165]

The NAFTA provides a number of legal rights that must be extended to investments of other NAFTA Party investors operating within the territory of a Party but the agreement does not provide full guidance on the remedies for their breach. The violation or denial of an obligation is an unlawful act in international law that implies the remedy of compensation. The calculation of damages is the legal determination of compensation for a right or obligation denied or violated. This compensation must suit the injury suffered from the harm done.

207. Through customary law and international practice, international tribunals have been able to make awards ordering monetary compensation, specific performance, satisfaction[166] and other injunctive relief and declaratory relief.[167] As a result, international tribunals always have the ability to make financial awards for wrongs. For example, the German-United States Mixed Claims Commission stated in the *Lusitania Cases (1923)*:

> *It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as 'compensation', 'reparation', 'indemnity', 'recompense' and is measured by pecuniary standards, because , says Grotius, 'money is the common measure of valuable things'.*[168]

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[165] (*Germany* v. *Poland*) (1928), 17 P.C.I.J., Ser. A No. 17, 3 at 29.

[166] Satisfaction refers to a measure ordered other than restitution or compensation such as an order that the Party make an apology.

[167] For example, the International Court has made declaratory or injunctive awards in a number of cases.

[168] Dec. & Op., p. 17.

208. The specific terms of the NAFTA still permits a Tribunal to make awards for these types of relief in most circumstances as interim awards,[169] but not as final awards. NAFTA Article 1135 provides that a Tribunal is restricted in its final award only to ordering monetary damages not including punitive damages or restitution which may be converted by the Party into monetary compensation at its sole discretion. This Article reads:

> *1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:*
>
> *(a) monetary damages and any applicable interest;*
>
> *(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.*
>
> *A Tribunal may also award costs in accordance with the applicable arbitration rules.*
>
> *2. A Tribunal may not order a Party to pay punitive damages.*

209. The process set out at Section B of NAFTA Chapter 11 does not ask a Tribunal to find fault or any aspect of blameworthiness for the establishment of a measure that violates a Party's NAFTA obligations. All that it requires is the awarding of compensation or restitution as set out in Article 1135 in the event of a Tribunal finding an inconsistency between the Party's measure and its NAFTA Investment Chapter obligations.

210. The NAFTA does not provide a complete guide to a Tribunal for assessing compensation for a claimant that has suffered loss or harm arising from a breach of a NAFTA Investment Chapter obligation. Only the expropriation provisions of the NAFTA Investment Chapter specifically set out how compensation for a NAFTA breach causing harm will be calculated. For breaches of other provisions of Section A of the Investment Chapter, the NAFTA Party will be ordered to pay compensation according to standards established under international law.

211. The international law standard for compensation requires that parties be compensated for their entire loss for a breach of an international legal obligation. While no jurisprudence has yet emerged under the NAFTA Investment Chapter, it is likely that a similar standard of compensation will be awarded for breaches of the national treatment and performance requirements obligations as would be given for breaches of the expropriation obligation.

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[169]NAFTA Article 1134 sets out the powers of a Tribunal to bestow interim relief for the Parties.

General Considerations on Compensation

212. In the *Chorzow Factory Case*, the Permanent Court of International Justice stated that any award must make the Claimant whole as if it had suffered no loss. The Court held that:

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

213. International tribunals had grappled for many years with the question of whether a particular act was lawful or unlawful. If a government act was lawful, then the measure of damages was held to be lower than if the act was unlawful. This determination is not necessary in this Claim. The NAFTA sets out a *lex specialis* upon which a government measure can be assessed. If a measure violates a NAFTA obligation, then it is *ipso facto* an unlawful act and thus the highest level of damages, *restitutio in integrum*, will apply. If the measure is consistent with the NAFTA,[170] it would be a lawful act and no compensation would apply.

214. In its decision in *Amoco International Finance Corporation*, a chamber of the US-Iran Claims Tribunal had to deal with the same issue before this Tribunal, namely how to value an investment that had been harmed by government conduct. In that case, the Tribunal found that market value was the correct measure of loss. They came to this conclusion on the basis that:

> *Market value, apparently, is the most commendable standard, since it is also most objective and the most easily ascertainable when a market exists for identical or similar assets.*[171]

215. The conclusion of another chamber of the same Tribunal in *Starrett Housing Corporation* agreed with the expert's "theoretical concept of fair market value" which was based as:

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[170] For example if a government were to take an act tantamount to expropriation of the investment of a foreign investor and were to meet the compensation requirements set out in Article 1110, such an act would be NAFTA-consistent and thus lawful.

[171] 15 Iran-U.S. C.T.R. 189 at 255.

> *... the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.*[172]

Similarly, in *INA Corporation* v. *Iran* the Tribunal concluded that:

> *Fair market value may be stated as the amount which a willing buyer would have paid a willing seller for the shares of a going concern.*[173]

216. The appropriate framework for quantifying compensation depends on the nature of the harmful act and the claimant's available avenues of claim for compensation. In this case, the *PCB Waste Export Ban* breaches four sections of Chapter 11 of NAFTA. Given that each of these provisions deals with different obligations on the part of Canada, the Investor's claim for compensation may differ among the various claims.

217. Pursuant to *Article 1110 – Expropriation*, the Canada's refusal to permit the Investor and the Investment to conduct its business is an act tantamount to expropriation. In matters of expropriation, the property is considered to have been taken from the claimant. While the expropriating authority may not derive economic benefit from the expropriated property, it is clear that the expropriation results in the cessation of economic benefits that had flowed to the injured party as a result of its ownership of the property in the period prior to the expropriation.

218. For tangible property, the expropriating authority may take physical possession whereas in the case of intangible property, the expropriation is effected through the claimant's diminished access to its market or potential market. NAFTA requires in the case of an expropriation that the Party compensate the Investor for the fair market value of the property at the date of expropriation.

219. Pursuant to *Article1102 - National Treatment, Article 1105 - Minimum Standards of Treatment, and Article 1106 - National Treatment*, the actions of Canada result in damage to the property owned by the Investor. In this circumstance the damage is measured as the loss of income that has been incurred to the present, and the present value of the loss that will continue to be incurred in the future.

220. The fair market value of the expropriated property may include both tangible and intangible property. Through the expropriation, the claimant is deemed to be selling its right to all economic benefits attached to the expropriated property. As the property is a going concern as at the date of the expropriation, the economic benefits expropriated by

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[172] At 122.

[173] 8 Iran-U.S. C.T.R. 373 at 380.

Canada is appropriately measured as the cash flow that would have been received by the claimant but for the expropriation less economic benefits received from the expropriated property subsequent to the expropriation. Subsequent economic benefits would typically include compensation received from Canada, or economic benefits received as a result of the claimants ability to mitigate its losses through other means. The claimant has not received economic benefit from the property subsequent to the expropriation and has been unable to mitigate its losses.

Valuation

221. Valuations must look at more than the net book value of the company. They must look at those aspects of a going concern such as goodwill and future profitability.[174] This concept was followed by the US-Iran Claims Tribunal in its decision in *Amoco International Finance Corporation* where it stated:

> *Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights (supply and delivery contracts, patent licenses and so on), as well as goodwill and commercial prospects.*[175]

222. The assessment of fair market value of the property (i.e. based on prospective cash flow) is governed by several valuation principles, outlined below:

Value is determined at a specific point in time;

- Value is prospective – only future economic benefits (i.e. those available subsequent to the valuation date) are relevant to the analysis;
- Only economic benefits that are transferable to third parties are relevant to the analysis;
- Facts and assumptions based on events occurring subsequent to the valuation date are generally excluded from consideration;
- The discount rate used to determine the present value of prospective cash flows (i.e. as at the date of valuation) is determined based on the market rate given the perceived risks of realization of the economic benefits (i.e. determined by the market);

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[174] *American International Group*, at 109.

[175] At 270.

- Special purchasers (those potential purchasers that can derive incremental economic benefit from acquisition of the property) will pay a higher price than would a purchaser that is unable to realize these incremental economic benefits.

223. The definition of fair market value employed in the valuation of the tangible and intangible property contemplates a notional marketplace which includes all potential purchasers. By considering all potential purchasers, the analysis ensures that the fair market value is determined based on the *highest price available* (refer to the definition of fair market value, above). Given the high degree of specialization and expertise required to operate and effectively compete in the PCB waste disposal industry, the notional market of potential purchasers includes *special purchasers* that can achieve synergies through the ownership of the property. These synergies may include, among other things, elimination of a competitor and economies of scale.

Lost Profits and Consequential Losses

224. Where the loss is quantifiable, any award should ensure that the Claimant is compensated for the entire amount of the loss. Thus an investor should be able to recover all damages caused to it by the government's wrongful conduct. These damages would extend to all proximate damages, including consequential damages.

225. In the *Chorzow Factory Case*, the Permanent Court held that an award must make the Claimant whole as if it had suffered no loss.[176] Thus, consequential losses must also be included. These consequential losses will also include harm to the investment within the territory of the NAFTA Party and harm to the investor caused as a result of the NAFTA breach.

226. It is well-settled by international law and practice that an international tribunal may award damages for lost profits. As long ago as 1842, arbitrators have permitted claims for lost profits.[177]

227. International tribunals have often used the guide of awarding "just compensation" for harms caused by the acts of governments to foreign nationals. For example, In finding the American government liable for compensation in the 1922 *Norwegian Shipowners'*

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[176] (*Germany* v. *Poland*) (1928), 17 P.C.I.J., Ser. A No. 17, 3 at 46.

[177] *Kingdom of the Two Sicilies (The)* v. *Britain*, 30 Brit. & For. State Pap. (1841-42) 111.

Claims,[178] the Tribunal held that:

> *[j]ust compensation implies a complete restitution of the status quo ante, based ... upon the loss of profits of the Norwegian owners as compared with other owners of similar property.*[179]

Lost profits were calculated based on the increased market value during the war rather than on the deflated market value existing immediately after the war in order to better represent the actual losses sustained.[180] That lost profits must be compensated has been established by other cases.[181]

Calculation of lost profits

228. The US - Iran Claims Tribunal established a useful repository of international case law dealing with the calculation of lost profits. In the case of an operating company, damages for lost profits had been awarded through the application of the "discounted cash-flow method." The clearest statement of the discounted cash-flow method by an international tribunal is that of the ICSID Arbitration Tribunal in *Amco Asia Corporation* v. *Indonesia.*[182] Without referring to the discounted cash-flow method by name, the Tribunal held that the appropriate method of valuating a going concern is to calculate

> *the net present value of [a] business based on a reasonable projection of the foreseeable net cash flow during the period to be considered, said net cash flow then [being] discounted in order to take into account the assessment of the damages at the date of the prejudice.*[183]

In *American International Group, Inc.* v. *Iran,*[184] the US-Iran Claims Tribunal took into

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[178] (*Norway* v. *United States*), 1 RIAA 302. American shipbuilders had contracted to provide ships to Norwegian subjects. When the United States declared war on Germany, the shipping yards were commandeered and the ships and related contracts requisitioned.

[179] At 338.

[180] At 340.

[181] *May* v. *Guatemala* (1900), 15 RIAA 55 at 72; *Affaire des Biens Britanniqes au Maroc Espagnol* (1923), 2 RIAA 615 at 647 & *passim*; *Deutz & Deutz* v. *Mexico*, [1929-1930] ILR 202 at 203, 4 RIAA 472 at 473; *Shufeldt* v. *Guatemala*, [1929-1930] ILR 179 at 181-82; *The Kate*, [1919-1922] ILR 188 at 188-89; and *Antippa* v. *Germany*, [1925-1926] ILR 248 at 248.

[182] (1984), 24 I.L.M. 1022.

[183] At 1037. See also *Starrett Housing Corp.* at 157.

[184] (1983), 4 Iran-US C.T.R. 96 at 109.

account:

> *not only the net book value of [the expropriated investment's] assets, but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management.*

Lost Market Share Calculations

229. The essential nature of the loss experienced by S.D. Myers, Inc. and its investment as a result of the imposition of the *PCB Waste Export Ban* was the loss of opportunity to participate in a market for which a significant presence had been established. Under Article 1116, S.D. Myers, Inc. is entitled to compensation for the incremental economic benefits that would have been derived from the development of this market presence had the *PCB Waste Export Ban* not have been imposed.

230. The market for PCB waste disposal was finite and subject to a rapid rate of decline. The potential for such a rapid rate of decline of PCB wastes available for disposal was due to a desire, on the part of PCB waste holders, to dispose of their holdings in as quick, environmentally sound and cost-effective a manner as possible.[185] S.D. Myers, Inc. had developed relationships with all of the major PCB waste-holders in the Canadian market as part of its plan to service the Canadian market. It was known, even to Canadian officials, that S.D. Myers, Inc. offered a far more cost-effective, environmentally friendly option for PCB waste disposal than existed in Canada without its participation.[186]

231. Accordingly, the approximately 15 months delay on S.D. Myers, Inc.'s ability to participate in the Canadian market, imposed by way of the *PCB Waste Export Ban*, was lethal to its well-planned and executed strategy to take immediate advantage of the border-opening in November, 1995.

232. The event of the United States border being closed in July 1997 as a result of a United States Court decision mentioned at paragraph 35 of Canada's *Statement of Defence* is not relevant for the determination of damages. The decision related to the EPA's authority to issue a *Final Import for Disposal Rule*, not its ability to grant individual enforcement discretions to PCB waste disposers such as S.D. Myers, Inc.

233. The Court's decision was not appealed. The Investor did not return to the Canadian market because its participation in the Canadian market had been so damaged by the *PCB*

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[185] Affidavit of R. Cloughesy in *Centre Patronal* v. *The Minister of the Environment and the Attorney General*. Set out in Schedule 43.

[186] Affidavit of R. Cloughesy. Set out in Schedule 43.

Waste Export Ban and its appreciation of the risks associated with the Canadian market had been irrevocably altered by Canada's unfair and specifically-targeted measure against it and its Investment during the prior two years.[187]

Fair Market Value

234. The Investor had a reasonable expectation of conducting business in Canada. It expanded resources in order to obtain customers and sales. Because the investment was not exposed for sale in the marketplace at the relevant time, assessment of its appropriate value is based on the intrinsic nature of the loss of economic benefits to S.D. Myers, Inc. and/or its Investment within the context of a notional marketplace, which includes all potential purchasers. This analysis includes an assessment of the operations of the Investment, as well as an assessment of internal and external factors that affect fair market value, and prevailing industry and economic conditions on the relevant date.

235. The definition of fair market value generally contemplates a notional marketplace that includes all potential purchasers to ensure that fair market value is based on the "highest price payable." In some cases, however, the range of potential purchasers include "special purchasers" who could achieve particularised benefits through acquisition of the investment in question . Those benefits may include, *inter alia*, elimination of a competitor, economies of scale, vertical integration, and technical know-how. In such cases, fair market value will be greater than the intrinsic value of the investment determined without reference to special purchasers.

Costs

236. The NAFTA provides that a Tribunal may "award costs in accordance with the applicable arbitration rules".[188] Both the UNCITRAL Arbitration Rules and the ICSID Additional Facility Rules allow the Tribunal to award the costs and fees incurred by a disputing party, which has had success at the arbitration.[189]

Interest

237. The NAFTA provides in Article 1135(1) that the Tribunal may as part of a final order award interest. Furthermore, in Article 1110(4), with respect to compensation for an

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[187] Affidavit of M. Valentine, set out at Schedule 1.

[188] NAFTA Article 1135(1).

[189] Article 40 of the UNCITRAL Arbitration rules permits the Tribunal to award costs both of the parties and of the hearings.

expropriation, the NAFTA states that interest at a commercially reasonable rate will be paid from the date of the expropriation to the date of payment.

Limits on Claims for Damages under the NAFTA

238. Pursuant to NAFTA Article 1116, an investor is entitled to make a claim based on the "loss or damage by reason of, or arising out of" a breach of the NAFTA Investment Chapter by the government of another NAFTA Party.

239. Canada has stated at paragraph 62 of its *Statement of Defence* that the Investor is only entitled to damages incurred in Canada. This statement contains an overstatement of the terms of the NAFTA. The Investor will be restricted to receiving compensation for damages caused to its investment in Canada for the breach of certain obligations but not for all of them. Table 3 sets out a summary of the territorial limits of recovery for each of the NAFTA Investment Chapter obligations raised in this Claim.

Table 3 - Permitted NAFTA Recovery

Obligation	Recovery
National Treatment	Harm to the investor of another NAFTA Party and to its investments .
Minimum Standard	Harm to the investment of investors of other NAFTA Parties.
Performance Requirements	Harm to the investment of investors of other NAFTA Parties in its territory.
Expropriation	Harm to the investment of investors of other NAFTA Parties in its territory.

For the purposes of expropriation and performance requirements, compensation will be limited to harm done within the territory of Canada to the Investments of the Investor. For the purposes of minimum standards of treatment, compensation will speak to harm to the Investment of the Investor wherever that damage may be. Finally, for the purposes of national treatment, compensation will speak to the harm caused to the Investor and to the harm caused to the Investments of the Investor wherever the damage may be.

The Specific Types of Compensation Sought in this Claim

240. The Investor will present to the Tribunal, in a later phase of this Claim and if so ordered,

an expert report detailing the actual quantum of damage as a result of Canada's NAFTA inconsistent measures. Within this Memorial, the Investor will provide evidence regarding the types of compensation sought in this Claim.

241. The Investor, S.D. Myers, Inc. suffered lost profits on its own and for its Investment as a result of Canada's imposition of the *PCB Waste Export Ban*. The Investor had already negotiated a number of contracts with PCB waste holders in Canada to process, transport away and remediate their PCB wastes. These contracts were frustrated as a result of the effects of Canada's measure.

242. The Investor suffered harm to its rapidly expanding market share in Canada as a result of the imposition of the *PCB Waste Export Ban*. The Investor had already established itself as a major market player in the Canadian PCB remediation sector. It had been involved in extensive contractual negotiations with a number of Canadian companies to process, transport away and remediate their PCB waste. These future contracts were frustrated as a result of the effects of Canada's measure.

243. The Investor suffered harm to its future profits as a result of the imposition of the *PCB Waste Export Ban*. The Investor had invested in advertising and marketing in Canada on its own and with its joint venture partner/affiliate S.D. Myers (Canada) Inc. The company's investment in this marketing was completely lost as were the expected profits arising from its significant position in the Canadian PCB remediation market.

244. The Investor suffered harm to the value of its Canadian Investment on account of the operation of the Canadian measure.

245. The Investor suffered harm to its own operations in the United States as result of the NAFTA-inconsistent measures taken by Canada.

CONCLUSIONS

246. Thus, on the basis of the international law of damages and NAFTA Articles 1116 and 1135, the Investor's compensable losses include, but are not limited to:

(i) General and specific damages suffered by S.D. Myers, Inc. since the imposition of the *PCB Waste Export Ban* and interest thereupon;

(ii) Restructuring costs caused by the effect of the *PCB Waste Export Ban* and interest thereupon;

(iii) Reduced profits after the *PCB Waste Export Ban* came into effect and interest thereupon;

(iv) Losses arising from the operation of the *PCB Waste Export Ban*;

(v) Interest and costs of this Claim.