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

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

STATEMENT OF DEFENCE

Introduction

The Government of Canada ("Canada") in answer to the Notice of Arbitration and Statement of Claim (the "Claim") delivered by S.D. Myers, Inc. ("Myers") on October 30, 1998 says as follows:

1. Canada complied fully with its obligations under Chapter 11 of the *North American Free Trade Agreement* ("*NAFTA*") and, in any event, Myers is not entitled to recover damages under the heads of damage or in the amounts claimed.

2. As a general response to the Statement of Claim, Canada says that:

   a. Myers had no "investment" in Canada.

   b. The *PCB Waste Export Interim Order*, P.C. 1995-2013 (November 28, 1995, in force November 20, 1995) (the "*Interim Order*") was not a measure "relating to" *NAFTA* "investors" or "investments".

   c. Even if Myers had an "investment" in Canada, Canada did not breach any *NAFTA*

obligation owed to Myers or to any investment Myers had in Canada.

d. The *Interim Order* did not breach any obligation under Article 1102 of the *NAFTA* (National Treatment).

e. The *Interim Order* did not breach any obligation under Article 1105 of the *NAFTA* (Minimum Standard of Treatment).

f. The *Interim Order* did not impose or enforce any prohibited performance requirement contrary to Article 1106(1)(b) or (c) of the *NAFTA*.

g. The *Interim Order* did not directly or indirectly expropriate an investment of the Claimant in Canada, or constitute a measure tantamount to an expropriation of an investment contrary to article 1110 of the *NAFTA*.

h. Myers is not entitled to the compensation or damages claimed, or any compensation or damages.

i. In any event, Myers' construction of *NAFTA* Chapter Eleven is inconsistent with Canada's other international obligations. Canada's obligations under the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal* (adopted 1989, in force May 5, 1992, ratified by Canada August 29, 1992, in force for Canada November 26, 1992) ("*Basel Convention*"), and Canada's obligations under the *Agreement of the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste* (October 26, 1986) ("*Canada-U.S. Agreement*") prevail over *NAFTA* Chapter Eleven obligations in the circumstances to the extent of the inconsistency.

j. Canada is entitled to its costs of this arbitration.

The Facts

Background

3. Canada admits the facts alleged in paragraphs 1 and 3 of the Claim.

4. Except as expressly admitted below, Canada denies the facts alleged in paragraphs 2, 4-12,

and 16-57 of the Claim and puts Myers to the strict proof of every fact alleged in those paragraphs.

5. Except as expressly admitted below, Canada has no knowledge of the facts alleged in paragraphs 13-15 of the Claim and puts Myers to the strict proof of every fact alleged in those paragraphs.

6. Canada does not accept the legal interpretations or conclusions of law pleaded in the Statement of Claim in conjunction with the allegations of fact.

7. Polychlorinated biphenyls ("PCBs") are toxic to human health and to the natural environment. Both the relevant Canadian legislation (the *Canadian Environmental Protection Act* ("*CEPA*")) and the relevant American legislation (the *Toxic Substances Control Act* ("*TSCA*")) define and treat PCBs as toxic substances because of their toxicity and their persistence in the environment.

8. The term "PCB waste" describes a wide range of equipment, liquids, solids or substances which contain 50mg or more of PCBs per kilogram of material and which are no longer used in Canada.

9. The term "PCB disposal" in a Canadian context refers to a range of activities or operations that will destroy PCB waste, whether by dechlorination, incineration or other thermal treatment, or by another method of destruction.

10. Myers has never conducted PCB disposal in Canada. At the relevant time, several Canadian companies or organizations did.

The Regulation of PCBs and PCB Waste

11. Since the 1970s, PCBs and PCB waste have been the subject of an increasingly strict regulatory regime in Canada, in the United States and elsewhere.

12. In Canada, by 1995 and prior to the *Interim Order*, the development of that protective regime included the 1989 policy of the Canadian Council of Ministers of the Environment that PCB waste from domestic sites would be disposed of domestically, the 1989 federal policy that PCB waste from federal sites would be disposed of domestically, and the 1990 *PCB Waste Export Regulations* (SOR/90-453). The 1990 Regulations permitted the export of PCB waste to the United States where the U.S. Environmental Protection Agency ("EPA") gave prior approval. As the U.S. border was closed to imports of PCB waste, the only exports from Canada which occurred in practice prior to February 1997, were of PCB waste owned by U.S. government agencies operating in Canada, as on U.S.

military installations such as DEW Line sites. The EPA consented to the import of U.S.-owned PCB waste consistent with its policy to destroy U.S.-owned PCB waste in the United States. Consistent with Canada's policy, exports of Canadian-owned PCB waste was never permitted under the 1990 Regulations. The Canadian protective regime also included federal legislation such as the 1989 *Federal Mobile PCB Treatment Destruction Regulations* (SOR/90-5), the *Export and Import of Hazardous Waste Regulations* (SOR/92-673, made under *CEPA* and which implemented the *Basel Convention*) and the 1992 *Storage of PCB Material Regulations* (SOR/92-507) Canada closely regulated the domestic transport, domestic storage and domestic disposal of PCB waste.

13. On June 12, 1995, Canada adopted the *Toxic Substances Management Policy*. It called for the virtual elimination from the environment of toxic substances -- such as PCBs -- that result from human activity and that are persistent and bioaccumulative.

14. Internationally, the transboundary movement of hazardous waste, including PCB waste, is subject to the *Basel Convention*. This convention requires Parties to take appropriate measures to ensure the availability within the Party of adequate disposal facilities for the environmentally sound management of hazardous waste located. It also prohibits the export of hazardous waste to non-Parties, except exports covered by a bilateral agreement which is consistent with the requirements of the *Basel Convention*.

15. The United States is not a Party to the *Basel Convention*. Since 1980, the importation of PCB waste into the United States has been contrary to the *TSCA*. Before October 1995, Canada and the United States worked towards a bilateral regime for regulating the transboundary shipment of PCB waste.

The Uncertain U.S. Regulation of Transboundary Shipments of PCB Waste

16. On October 26, 1995, the EPA granted Myers' request for an "enforcement discretion". The term "enforcement discretion" is not defined in U.S. law but apparently meant that the EPA would exercise a discretion not to enforce against Myers the U.S. law banning PCB imports. The enforcement discretion was effective November 15, 1995 and valid only until December 31, 1997. *TSCA*'s import ban itself would remain in place and imports to the U.S. would be technically in contravention of the law. Unlike permits routinely issued under EPA regulations, there is no requirement for public hearings or notification for an enforcement discretion.

17. In the next few days following the decision related to Myers, the EPA granted enforcement discretions to at least nine other U.S. companies to import PCBs from Canada for storage and

disposal.[1]

18. This unilateral and extraordinary action of the United States in October 1995 to open its border to commercial transboundary shipments of PCB waste, seemingly in the face of the *TSCA*, and in the absence of a clear bilateral agreement with Canada applying to such shipments, initiated the making of the *Interim Order* and subsequent Canadian legislative initiatives to regulate such shipments of Canadian PCB waste to the United States.

The Canadian Response to the Enforcement Discretion

19. Officials within Environment Canada first learned that the EPA had granted an enforcement discretion to Myers on October 27, 1995. The EPA decision contradicted its earlier position, stated for example in the *Federal Register* of December 6, 1994, that the EPA preferred to examine the issue of the transboundary movement of PCB waste on a comprehensive basis. The enforcement discretion was also granted despite the EPA's earlier statements to Canada that its regulatory prohibition against imports of PCB waste would not be lifted until June 1996, if at all. The U.S. government never explained the EPA's change of approach.

20. The EPA decision raised substantive concerns with Canadian officials. These concerns included:

a. **Whether the enforcement discretion fully complied with U.S. law.** Canada was concerned that the enforcement discretion granted to Myers was not valid under U.S. law. The enforcement discretion may not have addressed the concerns that had led to the original 1980 U.S. import ban established by the *TSCA*. Similarly, Canada was concerned because the EPA had previously denied four petitions by Myers for an "exemption" for the U.S. import ban because, among other things, Myers had failed to establish either that there was no unreasonable risk or that the benefits of granting the petitions would outweigh the risks.

b. **Whether exports of PCB waste to the United States, a non-party, would comply**

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[1]Ultimately, the enforcement discretions were replaced by an *Import for Disposal Rule*, which from March 18, 1996 to July 1997 was the authority for PCB imports to the U.S., including shipments of Canadian PCB waste to Myers' facilities. However, the *Import for Disposal Rule* was overturned by a U.S. Court of Appeals decision on July 7, 1997 (*Sierra Club v. E.P.A.*, (U.S. Ct.App., 9th Cir.), CA 9, No. 96-70223, July 7, 1997.), and the U.S. border was closed again to imports from Canada on July 20, 1997.

with the *Basel Convention*. When Canada learned of the EPA's enforcement discretion, Canada was unable to determine whether the *Canada-U.S. Agreement* constituted an Article 11 agreement under the provisions of the *Basel Convention* so far as the export of PCB waste from Canada to the United States was concerned.[2] The U.S. could not confirm at that time that the *Canada-U.S. Agreement* covered PCBs. If that agreement did not cover PCBs, exports of PCB waste from Canada to the United States would have been in violation of the *Basel Convention* prohibition on trade with non-parties. Canada was also concerned because the enforcement discretion and the *Canada-U.S. Agreement* included incompatible provisions.[3] Even after the United States took the position that the *Canada-U.S. Agreement* applied to PCBs, approximately three months after issuing the first enforcement discretion, it was not at all clear to Canada that U.S. law complied with the *Canada-U.S. Agreement* so as to render commercial exports of PCBs from Canada to the United States consistent with the *Canada-U.S. Agreement* or the *Basel Convention*.

c. **Whether PCBs would be disposed of in the United States in an environmentally sound manner.** The *Basel Convention* commits Canada to ensuring that PCB waste exported from Canada are managed in an environmentally sound manner in the country of import. Environment Canada was not satisfied that an appropriate framework was in place in the United States to ensure that the PCBs would be so managed. For example, Canada had more stringent requirements than the United States for the decontamination of PCB-contaminated mineral oil transformers. Environment Canada lacked detailed information on the environmental performance standards and the actual performance of the U.S. facilities that would transport, receive and destroy Canadian PCBs. It could not therefore be assured that the PCBs would be managed and destroyed in an environmentally sound manner in accordance with its obligations under the *Basel Convention*. Canada required sufficient time to acquire adequate information about U.S. environmental standards in order to ensure that Canada

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[2]Article 11 permits Parties to enter into bilateral agreements regarding transboundary movement of hazardous waste with non-Parties provided that such agreements do not derogate from the environmentally sound management of hazardous waste as required by the *Basel Convention*.

[3]For example, the U.S. enforcement discretions and subsequent *Import for Disposal Rule* provided for a 45 day consent period while the *Canada-U.S. Agreement* provided for a 30 day period (Article 3(d)). This discrepancy between the *Canada-U.S. Agreement* and U.S. measures meant that an export could be permitted by Canada on the 31st day, but would be refused consent by the U.S. until the 46th day, resulting in a 15 day period in which Canadian PCBs would be stranded at the U.S. border.

complied with its obligations under the *Basel Convention*.

d. **Compliance with Canada's 1989 policy and international obligations to destroy Canadian PCBs in Canada and the long-term viability of domestic PCB disposal facilities.** The *Basel Convention* obliges Parties to develop domestic PCB waste disposal capacity.[4] Absent a bilateral and reciprocal approach between Canada and the U.S., assuring each country access to the other's waste disposal facilities, there was concern that permitting the export of PCB waste to the United States could affect the development of Canada's environmental waste destruction capacity. The unilateral U.S. action could threaten Canada's capacity to deal with the disposal of PCB waste in the long term, should access to U.S. disposal facilities subsequently be denied (as turned out to be the case due to the closing of the U.S. border on July 20, 1997).

e. **"Stranding" Canadian PCB Waste in the United States without proper treatment.** Article 6 of the *Basel Convention* requires the State of export to take back hazardous waste where a transboundary movement cannot be completed in accordance with the terms of the contract. Canada was concerned about whether Canadian PCB waste could be returned to Canada in case of facility problems in the United States since the U.S. border remained closed to exports to Canada. Canadian PCB waste could be stranded in the United States without adequate disposal and with the consequence that Canada would not be able to meet its *Basel Convention* obligations.

21. These concerns developed as Environment Canada considered the U.S. action, gathered information and analysed it, and prepared recommendations and options for the Minister of the Environment. The main focus was on the need to take immediate action so that there would be sufficient time to address Canada's concerns. As part of the process of developing Canada's response to the unilateral U.S. action, many documents, including those referred to in the claim, were developed.

22. On November 16, 1995, the Minister of the Environment issued an interim order under section 35(1) of *CEPA*. The concurrence of the Minister of National Health and Welfare with the issuance of

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[4]Article 4(2)(b) requires parties to take appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous waste that "shall be located, to the extent possible, within it, whatever the place of their disposal". Article 4(2)(d) requires parties to ensure that the transboundary movement of hazardous waste is reduced to the minimum consistent with the environmentally sound and efficient management of such waste, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement.

an interim order, as required by section 35(1)(b) of *CEPA*, was obtained. The interim order prohibited the export of PCB waste to the United States with the exception of PCB waste in Canada that were owned by U.S. government agencies operating in Canada. The Minister of the Environment took this step after weighing several factors, including the need for more time to satisfy Canada's concerns regarding compliance with its obligations under the Basel Convention, to satisfy Canada's concerns regarding U.S. PCB disposal standards and to design an appropriate regulatory regime,

23. However, as the Minister of the Environment did not, within 24 hours of signing the interim order, offer to consult with the governments of all the affected provinces, as required by section 35(4) of *CEPA*, the Minister signed a second interim order on November 20, 1995, having the same effect as the first.

24. On November 20, 1995, the requirements of section 35(4) of *CEPA* were met. The Minister of the Environment offered to consult with the governments of affected provinces to determine whether they were prepared to take sufficient action to deal with the matter. She also wrote to other federal Ministers informing them of the issuance of the *Interim Order* and asking them to indicate whether any action could be taken under any other Act of Parliament to deal with the issue. No steps were identified under other federal legislation.

25. On November 28, 1995, the Governor-in-Council approved the *Interim Order*, as required by section 35(3) of *CEPA*.[5] The *Interim Order* amended section 4 of the 1990 *PCB Waste Export Regulations*, so as to permit only exports to the United States of PCB waste from U.S. government agencies operating in Canada, where the U.S. EPA has given prior consent to the export. The *Interim Order* was published in the *Canada Gazette* Part I on December 9, 1995.

26. The *Interim Order* was consistent with the 1990 *PCB Waste Export Regulations*.

27. Contrary to what is alleged in paragraph 27 of the Statement of Claim, the *Interim Order* was a measure of general application and did not target any specific investor.

28. Canada's *Regulatory Policy*, referred to in paragraph 32 of the Statement of Claim, did not apply to Environment Canada or the Department of National Health and Welfare at any time relevant to the claim. Furthermore, the *Regulatory Policy* was not legally binding nor did it require consultations on temporary measures such as the *Interim Order*.

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[5]Approved by Order in Council P.C. 1995-2013 of 28 November 1995, 1995 *Canada Gazette, Part I*, p. 4228. The *Interim Order* was in force from 20 November 1995 to 4 February 1997.

29. In the absence of the *Interim Order*, the 1990 *PCB Waste Export Regulations* would have applied to Myers and to Canadian owners of PCB waste. The 1992 *Export and Import of Hazardous Waste Regulations* would have applied to all exports of PCB waste from Canada. The former measure was intended to prohibit all shipments of Canadian PCB waste to the United States except those which would repatriate U.S. government-owned PCBs from sites in Canada (such as abandoned military bases). Contrary to what is suggested by paragraph 16 of the Statement of Claim, it is not clear that the commercial shipments Myers sought to make would have been permitted. Even i it had, the latter measure required a PCB waste exporter (who had to be a Canadian resident and an owner of PCB waste, which Myers was not) to meet various notification, insurance, and informational requirements before authorization to export would be granted by Environment Canada. At that time, no Canadian PCB waste owner ever sought such an authorization, let alone one for a shipment to Myers' American facilities.

Development of Canada's New Regulations

30. Canada's concerns regarding the regulation of PCB disposal in the United States justified at least a temporary export ban in order to provide time to assess U.S. regulation of PCBs. Once Canada completed this assessment, it decided to develop a regulatory regime that would allow the export of Canadian PCB waste to the United States for thermal or chemical destruction.

31. The process replacing the *Interim Order* with regulations that would allow the export of PCB waste from Canada began in March 1996. The process complied with the requirements of the *Regulatory Policy*. Under *CEPA*, a period of 60 days is allowed for public review and comment after pre-publication in the *Canada Gazette, Part 1*. On October 5, 1996, Environment Canada published the proposed regulations in the *Canada Gazette, Part I* for public review and comment. In addition, the proposed regulations were described in October 1996 in a special edition of *Resilog*[6], a newsletter serving the hazardous waste industry.

32. On February 4, 1997, Canada enacted the *PCB Waste Export Regulations (1996)*, SOR/97-109 ("New Regulations"). They effectively repealed the *Interim Order*.[7]

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[6]*Resilog*, Environment Canada, ISSN 0-225-5804, October 1996, Special Issue.

[7]Order in Council P.C. 1997-154, 4 February 1997; 1997 *Canada Gazette*, Part II, Extra No. 1, Vol. 131, 7 February 1997. As required by section 35(5)(a) of *CEPA*, the *Interim Order* were replaced by the *Regulations Amending the PCB Waste Export Regulations*, SOR/97-108 (February 4, 1997), which had the same effect as the *Interim Order*. (This replacement measure is referred to in paragraph 27 of the Statement of Claim as the "*Formal Order*".) The New Regulations

33. The New Regulations opened the Canadian border for exports of Canadian PCB waste to the U.S. for disposal provided that the waste are disposed of in U.S. EPA approved facilities (excluding landfilling), in accordance with *CEPA* regulations which reflect Canada's obligations under the *Basel Convention*. These regulations followed an assessment of the U.S. *Import for Disposal Rule*[8] which permitted import of PCBs to the United States. A summary of this assessment is contained in the "Regulatory Impact Analysis Statement", published with the New Regulations.[9]

Myers' Activities Following the New Regulations

34. Beginning from February 4, 1997, when the New Regulations were adopted by Canada, Myers' American facilities received some 7 shipments of Canadian PCB waste for disposal prior to the closing of the U.S. border by the U.S. EPA on July 20, 1997.

35. On July 7, 1997, in *Sierra Club v. E.P.A.*, the U.S. Court of Appeals for the 9th Circuit overturned the EPA's *Import for Disposal Rule*. Myers intervened in this case, which was commenced in June 1996. The Appeals Court ruling essentially negated the *Import for Disposal Rule* and recognized the continued effect of the 1980 ban on the import of PCBs into the United States. The Court of Appeals decided that the opening of the U.S. border by the EPA to imports of PCB waste contravened U.S. law and was invalid.

36. Following the decision of the Court of Appeals, the EPA closed the border to PCB waste imports to the U.S. as of 12:01 am local time Sunday, July 20, 1997. Under the New Regulations, the Canadian border remains open to exports of PCB waste to the United States for appropriate disposal. However, the resumption of full application and effect of the U.S. prohibition against imports of PCB waste has prevented Myers from continuing to import PCB waste from Canada.

Points in Issue

Myers does not have an "Investment" in Canada

37. Canada says that neither the operations of Myers "in Canada alone" nor the alleged "joint venture" satisfy the *NAFTA* requirement for an "investment".

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[8]See footnote 1, page 4 above.

[9]*Canada Gazette, Part II*, Vol. 131 Extra, at p. 14

The *Interim Order* was not a Measure "Relating to" *NAFTA* "Investors" or "Investments"

38. The *Interim Order* adopted or maintained by Canada was not a measure "relating to" *NAFTA* "investors" or "investments" and is, therefore, beyond the scope and coverage of *NAFTA* Chapter Eleven. If a *NAFTA* "measure", the *Interim Order* is an export restriction that relates to trade in goods within the meaning of *NAFTA* Chapter Three. The substantive obligations of *NAFTA* Chapter Three are different from those in *NAFTA* Chapter Eleven. For example: the National Treatment obligations are different; as a trade in goods measure, the *Interim Order* is properly subject to and within the scope of the general exceptions provided by *NAFTA* Article 2101 while the general exceptions of *NAFTA* Article 2101 do not apply to *NAFTA* Chapter Eleven obligations; and, the dispute settlement regimes relating to *NAFTA* Chapters Three and Eleven (especially the parties to whom they are available) are entirely different. In view of the inconsistencies, according to *NAFTA* Article 1112, *NAFTA* Chapter Eleven must give way and cannot be applied in this case.

NAFTA Chapter Eleven must be Constructed to be Consistent with other International Obligations or Give Way to those Obligations

39. The obligations in *NAFTA* Chapter Eleven should be interpreted so that they are consistent with international environmental obligations, and so that the construction adopted permits measures required by or in accordance with such obligations to be valid under Chapter Eleven. The *Interim Order* is entirely consistent with the trade obligations set out in the *Basel Convention* and with the *Canada-U.S. Agreement*. A finding that the *Interim Order* was contrary to any *NAFTA* Chapter Eleven obligation would require those obligations to be interpreted inconsistently with the obligations of the *Basel Convention*. This would be contrary to the intent of *NAFTA* as expressed, for example, in the Preamble, in Articles 104(1)(c) and (d), in Articles 1101(4) and 1114(1) and in the *North American Agreement on Environmental Cooperation* (the so-called *NAFTA* environment "side agreement").

40. If the *Interim Order* does give rise to such inconsistency, Canada's obligations under the *Basel Convention* and Canada's obligations under the *Canada-U.S. Agreement* would prevail over *NAFTA* Chapter Eleven obligations in the circumstances to the extent of the inconsistency, and the *Interim Order* could not be found contrary to the *NAFTA*.

No Chapter Eleven Obligation has been Breached

Article 1102 (National Treatment)

41. Article 1102 provides that each Party shall accord to investors and investments of another Party no less favourable treatment than it accords, in like circumstances, to its own investors.

42. Canada complied with Article 1102. The *Interim Order* was neither disguised nor discriminatory. The *Interim Order* applied without distinction to anyone wishing to export PCB waste to the U.S., in particular without regard to nationality. Myers was not treated any less favourably than any Canadian investors in like circumstances. Myers and any investment that it might have had in Canada could have operated in Canada in the same fashion as Canadian PCB disposal companies. No Canadian or foreign company could export Canadian PCB waste to the U.S. during the period in which the *Interim Order* was in force. Foreign investors and domestic investors received exactly the same treatment for the same activities.

43. In fact, Myers and Canadian PCB waste disposal companies were not "in like circumstances". In Canada, Myers and any investment it might have had were engaged in arranging for the import of PCB waste to the U.S. for disposal. Canadian companies were not; they were engaged in PCB disposal in Canada. Myers did not seek to dispose of PCB waste in Canada. The obligation for National Treatment does not depend on a comparison of the domestic activities of investors in their respective home countries. If Myers did have PCB processing facilities in Canada, it would have been "in like circumstances" with Canadian investors for those activities. But in that case, it would have received National Treatment by being subject to the *Interim Order* in the same way as Canadian companies.

Article 1105 (Minimum Standard of Treatment)

44. Article 1105 provides that 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.

45. Canada has not breached Article 1105. Myers has presented no facts from which it could be inferred that Canada has not treated it in accordance with international law.

46. The *Interim Order* was properly made in good faith under section 35(1) of *CEPA* and in accordance with the regulatory process in Canada. All domestic legislative requirements were met.

Myers does not allege that those requirements were themselves inadequate.

47. The *Interim Order* was promulgated, and was applied equally to all persons in Canada, without discrimination as alleged in paragraph 42 of the Statement of Claim, and without unfairness. Therefore, Myers received fair and equitable treatment.

48. Myers was not denied access to justice by Canada and had access to the same domestic administrative law remedies with respect to the *Interim Order* as any other person in the same position. Myers pursued no domestic remedy with respect to any allegations of discrimination, unfairness, denial of justice or lack of good faith.

Article 1106(1)(b) and (c) (Performance Requirements)

49. Article 1106(1)(b) and (c) provide that a Party may not impose certain requirements in connection with an investment to achieve a given level of domestic content or accord a preference to domestic goods or services.

50. Canada has not breached Article 1106(1)(b) and (c). The *Interim Order* imposed no requirement to achieve a given level or percentage of domestic content. The *Interim Order* did not require Myers to achieve any level of domestic content at all. Myers was under no obligation by way of the *Interim Order* to do anything in Canada.

51. Nor did the *Interim Order* impose any requirement 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 in connection with any investment by Myers in Canada. The *Interim Order* imposed no requirement on Myers to buy or use goods or services in Canada, or to do anything in Canada at all. The *Interim Order* was a temporary prohibition on export, and imposed no positive requirements or obligations.

52. Even if the *Interim Order* were constituted a proscribed performance requirement, it would still be justified under at least one of the exceptions in Article 1106(6) as an environmental measure necessary to ensure compliance with Canada's domestic law and international obligations, necessary to protect human, animal or plant life or health, or necessary for the conservation of living or non-living exhaustible natural resources. The *Interim Order* was not applied in an arbitrary or unjustifiable manner, and did not constitute a disguised restriction on international trade or investment. The *Interim Order* was applied in a fair and equal manner, and its purpose to prohibit exports of PCB waste was made publicly known. The *Interim Order* was necessary for Canada to comply with its obligations under the *Basel Convention* to ensure that its PCB waste was managed in an environmentally sound

manner, and to allow time for Canada to ensure that the procedures for disposal of PCB waste in the United States were no less environmentally sound than was required by the *Basel Convention*.

53. Acceptance of Myers' contention that an export ban is the equivalent of a prohibited performance requirement would lead to the absurd result that every border measure is a performance requirement. *NAFTA* Chapter Eleven does not apply to these kinds of measures.

Article 1110 (Expropriation)

54. Article 1110 provides that 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 except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and Article 1105(1), and on payment of compensation.

55. The *Interim Order* was a proper exercise of Canada's sovereign power under international law (the "police power") to regulate in the public interest, based on legitimate concerns, for the preservation or protection of the environment, public health and safety, in accordance with Canada's international obligations and Articles 1101(4) and 1114 of *NAFTA*, and thus non-compensable. This is particularly so in the circumstances of a highly regulated activity such as the transportation and disposal of PCB waste, where the investor's expectation of substantial government activity and control must be high.

56. The objectives of the *Interim Order* were fully consistent with international standards as codified by the *Basel Convention*. The means to achieve the objective, a ban on exports, was also consistent with the *Basel Convention*.

57. Therefore, Canada has not breached Article 1110. Canada has not directly or indirectly expropriated or taken any measure tantamount to expropriation of any investment Myers might have had in Canada.

58. The *Interim Order* temporarily prohibited the export of Canadian PCBs to the United States. The *Interim Order* did not acquire either directly or indirectly any property Myers might have had in Canada. Myers has not alleged any facts in support of its claim that it had any property in Canada capable of being taken or that it has been deprived of any such property by virtue of the *Interim Order*. The *Interim Order* did not deprive Myers of any benefit of any property rights it might have had in Canada. The Claimant had no right to export PCB waste from Canada. PCBs are subject to stringent Government regulation and control in the public interest due to their extremely hazardous nature. Permits and the consent of the importing country were required for their export. Further, Myers was aware that, consistent with its international obligations, Canada's policy was not to permit

the export of Canadian PCBs. Myers could have had no reasonable expectation that it could export Canadian PCBs as of right.

59. Moreover, at all material times the import of PCB waste to the United States was prohibited. The EPA's action regarding imports of PCB waste to the United States was ultimately found invalid. Any activities pursued to import PCB waste into the United States by Myers before the granting of the enforcement discretion to Myers by the EPA, and thereafter, were in pursuit of an illegitimate or speculative business prospect.

60. Any property rights Myers might have had in Canada by virtue of any business activities here were ultimately affected by re-closure of the U.S. border (through reinstatement of full application and enforcement of the U.S. import prohibition as of July 20, 1997). It was only then that Myers might be said to have suffered "losses", if any.

Damages

61. Canada submits that Myers has not incurred any compensable loss or damage incurred by reason of, or arising out of, any breach of Canada's Chapter Eleven obligations.

62. Moreover, to the extent that it was suffered outside of Canada, the loss and damage alleged by Myers does not fall within the scope of Chapter Eleven as provided for in *NAFTA* Article 1101.

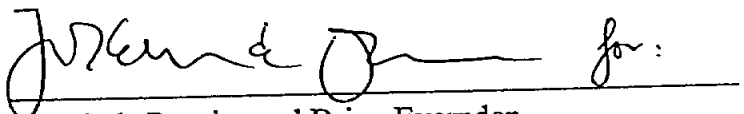
63. Even if Myers is found to have incurred any compensable loss or damage incurred by reason of, or arising out of, any breach of Canada's Chapter Eleven obligations that is recoverable under Chapter Eleven, the amount claimed is grossly exaggerated, excessive, unreasonable and too remote to be recovered.

64. Further, if Myers has incurred any compensable loss or damage incurred by reason of, or arising out of, any breach of Canada's Chapter Eleven obligations that is recoverable under Chapter Eleven, Myers should be barred from recovering damages because of its failure to mitigate its loss.

Relief Claimed

65. Canada respectfully requests that this honourable Tribunal dismiss this claim and order Myers to pay all costs, disbursements and expenses incurred by Canada in the defence of this claim including, but not restricted to, legal, consulting, and witness fees and expenses, and travel and administrative expenses, as well as the costs of the Tribunal.

Submitted this 18th day of June, 1999, Ottawa, Canada.



Joseph de Pencier and Brian Evernden
Counsel for Canada

TO: The Tribunal

AND TO: Barry Appleton, Counsel for S.D. Myers, Inc.