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

BETWEEN:

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

Claimant / Investor

**and**

**THE GOVERNMENT OF CANADA**

Respondent / Party

# GOVERNMENT OF CANADA

# COUNTER MEMORIAL

# CANADA — COUNTER MEMORIAL

## TABLE OF CONTENT

## PART ONE: SUMMARY OF THE CANADIAN COUNTER-MEMORIAL

1. This Counter-Memorial is the Government of Canada ("Canada") response to the claims made by S.D. Myers, Inc. ("SDMI") in its Memorial of July 20, 1999.

2. SDMI is seeking compensation as a result of Canada's imposition of the *PCB Waste Export Interim Order*, P.C. 1995-2013 (November 28, 1995, in force November 20, 1995) (the "*Interim Order*"). The *Interim Order* was made under Section 35 of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.) ("CEPA") and was in place between November 20, 1995 and February 4, 1997.

3. The *Interim Order* was triggered by the sudden opening of the U.S. border, which had been closed for over ten years, to imports of PCBs. PCBs are toxic to human health and to the natural environment and are therefore highly regulated in Canada.

4. Between 1980 and November 15, 1995, the U.S. government closed its borders to PCB waste imports from Canada. The purpose of the border closure was to encourage the development of PCB destruction facilities outside the United States. The only PCB wastes allowed into the United States during this time were PCB wastes owned by U.S. government departments or agencies and PCB wastes "stranded" in Canada following their importation from the United States without proper authority.

5. On October 27, 1995, Canada learned through unofficial channels that the U.S. Environmental Protection Service (the "EPA") had issued an enforcement discretion (the "enforcement discretion") to SDMI allowing it to import Canadian PCB wastes into the United States effective November 15, 1995. In the letter explaining the enforcement discretion, the EPA also stated that it would "give other similarly qualified companies the opportunity to apply . . . thereby ensuring equity in the marketplace". Within days, Canada began to receive evidence that other companies were seeking to export PCB waste to the U.S.

6. The enforcement discretion surprised Canadian officials. Canada lacked prior knowledge of the EPA's intention to issue the enforcement discretion and no knowledge of the terms or regulatory requirements the EPA intended to impose on SDMI or any subsequent applicant for an enforcement discretion. Canada was also uncertain of the validity of the enforcement discretion and whether agreements in place between Canada and the United States applied to PCB wastes imported into the United States under the authority of the enforcement discretion. In short, Canada did not know whether the United States would or could maintain an open border based on the enforcement discretion.

7. Canadian officials did know that the United States permitted landfilling of PCB wastes. Canadian government policy encouraged the "virtual elimination" of toxic chemicals. Landfilling PCB wastes was (and remains) inconsistent with that policy. To the extent that agreements with the United States had not addressed that issue and no special regime had been developed to ensure the handling of PCBs and PCB waste exported to the United States, Canadian officials were concerned that Canadian's health and the Canadian environment faced serious risk of harm and that the existing regulatory framework did not address those risks. The *Interim Order* addressed these concerns.

8. The *Interim Order* was made because Canada believed PCBs are a significant danger to the health and the environment when exported without appropriate assurances of safe transportation and destruction. The *Interim Order* complied with *CEPA* and 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) (the "*Basel Convention*"). SDMI alleges that in acting on its belief and in accordance with the *Basel Convention*, Canada breached its obligations under Chapter Eleven of the NAFTA.

9. When Canada made the *Interim Order,* SDMI disposed of PCB wastes in the United States and had obtained the enforcement discretion. It had not yet begun to import PCB wastes from Canada into the United States. SDMI alleges it also had an investment in Canada in the form of S.D. Myers (Canada) ("Myers Canada") that had some connection to the export of PCB wastes.

10. As the complaining party, SDMI bears the burden of proving its claim. SDMI has not met that burden. Its claims have no basis either in fact or in law.

11. In this Counter-Memorial, Canada demonstrates that it complied fully with its obligations under Chapter 11 of the NAFTA and, that in any event, SDMI is not entitled to recover damages under the heads of damage or in the amounts claimed. For SDMI to be successful would require inflating the scope and application of Chapter Eleven out of all proportion. A proper construction of the provisions in question must result in dismissal of this claim.

12. First, the *Interim Order* was not a measure "relating to" NAFTA "investors" or "investments". Therefore, Chapter Eleven did not apply. The *Interim Order* was a border measure of general application related to trade of dangerous goods and to environmental and health protection and therefore outside the scope of Chapter Eleven.

13. Second, even if the *Interim Order* does fall within Chapter Eleven, SDMI held no "investment" in Canada at the time of the *Interim Order* and presented no substantial evidence of such "investment" to the Tribunal. Whatever business Myers Canada was in, it appears not to have related to PCB waste exports from Canada.

14. Third, even if SDMI held an "investment" in Canada at the time of the *Interim Order*, Canada breached no NAFTA provision with respect to the investor or any investment it had in Canada.

15. The *Interim Order* complied with Canada's obligations under Article 1102 of the NAFTA (National Treatment). Both Myers Canada, and SDMI with respect to its alleged investment, received treatment no less favourable than Canadian investors or investments in "like circumstances". Following the imposition of the *Interim Order*, no Canadian company could export PCBs to the United States. Myers Canada did not destroy or dispose of any PCBs and cannot be compared to Canadian waste disposal companies.

16. The *Interim Order* complied with Canada's obligations under Article 1105 of the NAFTA (Minimum Standard of Treatment). In the circumstances, the *Interim Order* and the manner in which it was instituted conformed to the minimum standard of treatment obligation.

17. All parties acknowledge that the PCBs are highly toxic and harmful to human health and the environment. The sudden and surprising U.S. EPA decision to grant the enforcement discretion effectively opened the U.S. border and required prompt action on Canada's part. Given the circumstances, Canada had no duty to consult. Canada's actions were in compliance with its domestic laws and with its international obligations. These included 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*"). There was no bad faith on the part of Canada in the making or implementation of the *Interim Order*.

18. The *Interim Order* neither imposed nor enforced a prohibited performance requirement contrary to Article 1106(1)(b) or (c) of the NAFTA. The *Interim Order* imposes no requirement to buy Canadian goods or services or to achieve a certain level of Canadian content. NAFTA lists all prohibited performance requirements. Export bans are not a prohibited performance requirement.

19. Even if the *Interim Order* violated Article 1106, the Article's exception applies because it is a measure necessary to protect human, animal or plant life or health and/or necessary for the conservation of living or non living exhaustible natural resource.

20. The *Interim Order* did not expropriate an investment of SDMI in Canada, or constitute a measure tantamount to an expropriation of an investment contrary to Article 1110 of the NAFTA. Myers Canada continued operations in Canada while the *Interim Order* remained in force and afterward, so did SDMI. There is no evidence that Myers Canada or SDMI sustained any loss while the *Interim Order* remained in force. Any losses sustained thereafter occurred as a consequence of events for which Canada was not responsible. These events included, but may not be restricted to, the closing of the U.S. border to PCB waste exports by the EPA in 1997.

21. As a result, SDMI is not entitled to the compensation or damages claimed, or any compensation or damages. Moreover, the SDMI claim is grossly exaggerated.

22. Finally, if NAFTA Chapter Eleven is interpreted with the result that it was violated by the *Interim Order*, Chapter Eleven would be inconsistent with NAFTA Chapter Three (Trade in Goods) in the circumstances. In the event of inconsistency between Chapter Eleven and another Chapter of NAFTA, Article 1112 requires Chapter Eleven to give way. The claim would therefore have to be dismissed.

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

## PART TWO: THE FACTS

### A. S.D. Myers Inc.

24. SDMI is a privately held corporation headquartered in Tallmadge, Ohio[1]. The company is in the business of processing transformers, capacitors and other equipment containing or contaminated with polychlorinated biphenyls (PCBs) for disposal. This involves dismantling the equipment, salvaging the copper, steel, aluminum and ceramic included in those wastes and packaging the PCBs in drums or tanks which are then sent to incinerators in Kansas, Texas or Utah. When SDMI destroys the PCBs, it issues a certificate confirming the destruction of the PCBs in the equipment.

25. SDMI is not in the business of landfilling equipment or soils containing or contaminated with PCBs.

26. In 1995, SDMI held four PCB disposal permits valid to 1997. These permits were issued by Region V of the EPA[2] and allowed the company to:

(a) "use a proprietary wash/solvent technology to decontaminate disassembled PCB transformer parts "down to or below 10 ug/100cm2";

(b) remove PCBs from transformer parts by solvent washing, to redistill and reuse the solvent, and to recycle the metal by smelting;

(c) remove PCBs from capacitors, pumps and ballasts by solvent washing, to recycle the metal by smelting, to crush the cleaned ceramic parts, and to destroy process wastes by incineration; and,

(d) chemically destroy PCBs in mineral oil dielectric fluid by its PCB Gone process using a single proprietary reagent."

---

1 Because it is a private company, there is little publicly available information about its operations or financial performance. Canada gleaned much of the information in this Memorial about SDMI from filings with the EPA and from the company website and news releases. Filings from the EPA appear in the *Federal Register* issued by the U.S. Government or in responses to U.S. *Freedom of Information Act* requests.

2 For administrative purposes, the EPA divides the United States into several regions. Each region issues permits allowing companies to import hazardous wastes and operate hazardous waste disposal facilities under conditions prescribed by Congress and the region. They also inspect hazardous waste disposal facilities and take enforcement action where appropriate.

27. SDMI holds no permit to treat soils contaminated with PCBs or to incinerate PCBs or PCB waste.[3]

28. A series of unsuccessful applications made by the company to the EPA during the 1990's provide some insight into SDMI's capacity to process PCB waste. In those applications, SDMI sought *exemptions* under the *Toxic Substances Control Act* allowing it to import PCB wastes from Canada[4]. Canada gleaned the following information from a recent *Freedom of Information Act* request:

(a) In June 1990, the EPA advised SDMI that the U.S. would not open its borders to PCBs for disposal without granting an exemption because it lacked control over the import of PCBs into Canada from other nations. The EPA believed opening the border would make the U.S. a repository of large quantities of PCBs originating both in Canada as well as other nations.

**EPA Letter to SDMI dated June 21, 1990, Affidavit of George Michael Cornwall sworn October 4, 1999, Exhibit A-3, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

(b) In May 1991, SDMI petitioned the EPA for a five year exemption allowing it to import transformers from Canada for the purposes of disposal. At the time, the company claimed it would process 90,000 pounds of transformers per day, thus

---

[3] The term "PCB wastes" is ordinarily a term of art (see: *PCB Waste Export Regulations, 1996*, SOR/97-109, section 2). However, for the purpose of this Memorial the term refers to all liquids, soils, solids, mixtures and equipment contaminated by PCBs.

[4] Contrary to what is alleged by the Claimant at several points in it Memorial, the *Toxic Substances Control Act*, 15 USC§2605 (1994) (*TSCA*) includes no provision for the granting of enforcement discretions. The *TSCA*, enacted on October 11, 1976, provides the EPA with authority to regulate PCBs and materials containing or contaminated by PCBs ("PCB wastes"). The U.S. Congress has amended *TSCA* three times since 1976 but none of those amendments are relevant to this case. The relevant part of TSCA is "Title I: Control of Toxic Substances". Among other things, this part of *TSCA* enacts a specific legislative presumption that polychlorinated biphenyls (PCBs) pose an unreasonable risk to human health and the environment, directs the EPA to regulate them accordingly, and prohibits the manufacture, processing, use, or distribution in commerce of any PCB or PCB waste unless the activity meets criteria established by EPA regulations. For the purposes of the *TSCA*, "manufacture" includes importation.

PCBs and PCB wastes cannot be imported into the United States unless the importer complies with section 2605. Section 2605 provides that any person may petition the Administrator for an exemption from the ban on importing PCBs and PCB wastes. The Administrator may grant an exemption by rule if the Administrator finds that an unreasonable risk of injury to health or environment would not result from the exemption, and good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such PCB. Exemptions are subject to such terms and conditions as the Administrator may prescribe and shall be in effect for not more than one year from the date it is granted.

taking about 5 years to dispose of the 180 million pounds of drained transformer carcasses then thought to exist in Canada.

**SDMI Letter to EPA dated May 8, 1991, Affidavit of George Michael Cornwall sworn October 4, 1999, Exhibit A-4, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

(c) In August 1992, SDMI submitted two petitions seeking exemptions allowing it to import capacitors and PCB fluids from Canada for purposes of storage or disposal. At the time, the company estimated it would import 900,000 pounds of capacitors per month (10.8 million pounds per year) of the total Canadian inventory then estimated to be 18.6 million pounds. The company acknowledged that lacked capacity to incinerate PCBs and would simply serve as transporter and storer. SDMI estimated it would import 46,000 and 53,000 gallons of PCBs per month of the 40 million pounds of liquid PCBs then estimated to exist in Canada.

**SDMI Letter to EPA dated August 31, 1992, Affidavit of George Michael Cornwall sworn October 4, 1999, Exhibit A-9, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

(d) In October 1993, SDMI petitioned for a five year exemption allowing it to import lighting ballasts from Canada for the purpose of disposal. SDMI claimed that it would process all 60 million pounds of light ballasts then estimated to exist in Canada. .

**SDMI Letter to EPA dated October 19, 1993, Affidavit of George Michael Cornwall sworn October 4, 1999, Exhibit A-11, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

29. Apart from information derived from correspondence sent to Canada by SDMI and an unofficial tour of SDMI's headquarters in Tallmadge, Ohio, Canada had little knowledge of SDMI's business activities. Before December 1995, Canada had no knowledge whether SDMI conducted business in Canada.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 64, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 28, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

**Affidavit of Roy Hickman sworn October 4, 1999, para. 19, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

**B. SDMI's U.S. Competition**

30. In 1995, SDMI was not the only American company that disposed of PCBs or equipment containing or contaminated by PCBs. SDMI's American competition included companies that stored PCB contaminated soils, equipment and other materials in landfill sites scattered throughout the United States. These companies included: Laidlaw Environmental Services, WMX Technologies and Envirosource. The American competition also included recycling and incineration businesses including: Trans-End Technology, Rollins, Trans-Cycle Industries (transformer and capacitor recycling); Fulcircle, Salesco, (lighting ballast recycling); Laidlaw Environmental Services, Rollins, WMX Technologies (incineration); and, Dynex and AETIS (miscellaneous).

31. SDMI was fully aware of the capabilities and regulations affecting its competitors. Documents obtained from the EPA through a recent *Freedom of Information Act* request show that SDMI tried very hard in 1995 and 1996 to keep many of these companies from competing directly with it for access to the Canadian market.[5] Thus, for example, on December 4, 1995, SDMI complained to the Administrator of the EPA that all the time and effort expended by the company in securing the enforcement discretion extended on October 26, 1995, was wasted because:

> "your agency is rushing all our competitors through (even though they never followed the Congressionally mandated methods for importing by applying for exemptions) and even though it did not take them a six month wait for the people in enforcement discretion to act. . . .
>
> If it is your policy to have 'equity in the workplace,' I would like to ask you to make sure that inequities in the U.S. marketplace don't get extended to the Canadian marketplace. . .

[5] See, for example, letters to the EPA complaining about: regulatory inconsistencies (April 17 and 20, November 8 and 10, 1995); lack of enforcement (December 12, 1995); and, failure of American disposal companies about to receive enforcement discretions to meet Canadian environmental standards (January 12, 1996).

> We have been told that any U.S. permitted disposal facility will be approved. This would include landfills for transformers, which will put over 100 pounds of PCBs into the ground for every average sized 5500 pound transformer. . . .
>
> *We are losing money daily because of these inequities . . .*" (emphasis added).

**SDMI letter to EPA dated December 4, 1995, SDMI Response to Canada's First Request for Documents, Tab 35, Annexes to Canada's Counter-Memorial, Vol. 1I, Tab 25**

32. The letter refers specifically to Trans-End in Asktabula, Ohio and Rollins in Coffeyville, Kansas as competitors.

## C. SDMI's "Investment" in Canada

### *1. Generally*

33. Canada says that the evidence does not support the allegation that SDMI had an "investment" in Canada related to the export of PCB wastes from Canada to the United States or that was detrimentally affected by the *Interim Order* or that incurred loss or damage. On the evidence, Myers Canada was (and continues to be) engaged in other activities. Myers Canada was not an "enterprise" of SDMI: SDMI was not the "owner" of Myers Canada and, in any event, had no interest entitling it to a share of the assets of Myers Canada on dissolution. SDMI did not make any commitment of capital or other resources through contracts of the type recognised by NAFTA Chapter Eleven. There was no joint venture between SDMI and Myers Canada "constituted or organized under applicable law" the meet the requirements of the NAFTA definition of "enterprise". Even if Myers Canada was an "affiliate" of SDMI, there is no evidence of any loan by the latter to the former.

### *2. Myers Canada Was not An "Investment" Having to Do with PCB Waste Exports*

34. S.D. Myers (Canada) was the trade name of Myers Company for Environmental Development Inc., a privately held company incorporated under the laws of Canada having its head office in Toronto, Ontario. The four shareholders of the company are: Dana Stanley Myers, Scott David Myers, Seth James Myers and David Paul Myers "each of whom subscribed to and received an equal share" in the company.

**SDMI Memorial, Schedules 14 and 15.**

**Affidavit of Michael Valentine sworn July 19, 1999, para. 20 and Schedule 19**

35. The same four shareholders hold shares in SDMI. The evidence does not disclose whether the shareholders of SDMI hold equal shares in that company nor does it show any agreement among the shareholders of either company about the exercise of control. The companies are therefore not controlled by the same person and are not "affiliated".[6]

36. Myers Company for Environmental Development Inc. was incorporated under the *Canada Business Corporations Act* on February 2, 1993. On June 19, 1996, by Articles of Amendment, it changed its name to S.D. Myers (Canada) Inc. Various corporate transactions occurred between or involving Canadian companies in 1995 and 1996. The result was two companies in Canada (2105098 Canada Inc. and S.D. Myers (Canada) Inc.) as of June, 1996, with the same four shareholders. Unless otherwise indicated, these various corporate forms are collectively referred to as "Myers Canada".

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 35, Investor's Memorial Schedules, Tab 1**

37. There is little evidence to support the allegations that Myers Canada played a significant role in the efforts of SDMI to market its cross-border PCB waste disposal services.

38. Myers Canada never had industrial, office or other commercial space in Canada. According to its Canadian federal income tax returns, the "head office" of Myers Canada was 9290 Tourelle Street, Anjou Quebec, H1J, 2E1, for 1993, 8228 Roche-sur Yon, Anjou Quebec, H1K 1B2, for 1994, 1995 and 1996, and 9136 Descartes, St-Leonard, Quebec, H1R 3P5, for 1997. It "mailing address" and "location of books and records" was the same as the "head office" for 1993, 1994 and 1995. For 1996 and 1997, the "mailing address" and "location of books and records" was 806 Sardaige St., Repentigny, Quebec, J5Y 2W4. Investigation conducted at Canada's request shows that the "offices" of Myers Canada are residential premises leased by private individuals. None were industrial sites, office buildings or waste transfer or disposal stations.

**Affidavit of George Michael Cornwall sworn October 4, 1999, para. 9, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

39. Myers Canada did not lease any commercial office or other premises, or any commercial, industrial or other business equipment. In response to Canada's First Request for Documents (seeking copies of any equipment or real property leases of Myers Canada for

---

[6] In its Memorial, the Claimant refers to a dictionary definition of the term "affiliate" which does not accord with Canadian law: see the definitions of "affiliated" and "affiliated bodies corporate" in the *Canada Business Corporation Act*,R.S.C. 1985, c. C-44.

its business operations in Canada), the only document produced was an agreement of SDMI for ten months of "telephone answering and handling a reasonable amount of incoming mail" in Mississauga, Ontario at a rate of $178.00 a month.

**Tenancy Agreement, SDMI Response to Canada's First Request for Documents, Tab 35, Annexes to Canada's Counter-Memorial, Vol. I, Tab 12**

40. Myers Canada appears to have had virtually no personnel in Canada. In response to Canada's First Request for Documents (seeking copies of "any employment contracts between Myers Canada and individuals engaged in part or in whole in business operations in Canada), only two documents were produced. One is a letter agreement between SDMI dated May 30, 1995, and Michel Desaulniers for bookkeeping and accounting services, secretarial duties and computer related services. The second is a twelve month "business contract agreement" dated June 13, 1995, between Myers Company for Environmental Development, Inc., and Pierre Lefebvre, for "general administration", "sales and marketing procedures - feasibility and enforcement" and "coordination between sales and operation".[7] None had technical expertise.

**SDMI Response to Canada's First Request for Documents, Tab 11, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

**Affidavit of Rev. Michael Valentine sworn July 19, 1999, para. 35, Investor's Memorial Schedules, Tab 1**

41. However, notwithstanding the lack of evidence concerning hiring and payment of staff, in response to Canada's First Request for Documents (seeking a list of all staff of Myers Canada who conducted business operations in Canada and their responsibilities), a list of six names was provided. The same production includes two lists of 30 named staff of SDMI (plus "various secretarial support staff" who are not named) said to be "working with" Myers Canada though the period of the alleged joint venture (up to the present). The preponderance of personnel from SDMI emphasises that Myers Canada did not play a substantial role in the export of PCB wastes.

**SDMI Response to Canada's First Request for Documents, Tab 10, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

---

[7] On the other hand, that response to Canada's First Request for Documents did include a list of six names, including Michel Desaulniers and Pierre Lefebvre, but no contract documents for the other four, including for Richard Cormier who is described as "Consultant, sales technician, President (to May 31, 1995)", who was associated with Myers Canada as early as 1992.

42. Myers Canada played an extremely modest role compared to SDMI in providing service to Canadian companies or organisations. According to the documents it produced (in response to a request for copies of all contracts between SDMI or Myers Canada and holders of Canadian PCB wastes), SDMI did business with approximately 473 Canadian companies or organisations. Approximately 470 of those companies had contact with SDMI and/or Myers Canada for price quotes for services. Approximately 455 received price quotes from SDMI. Only 15 Canadian holders of PCB wastes received price quotes from Myers Canada.

**SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. II, Tabs 54 - 60**[8]

**Canada's Summary of SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. IV**

43. According to Rev. Michael Valentine, Myers Canada had no independent source of funds. He swears that the alleged joint venture "was a cross-border activity funded *solely* by S.D. Myers, Inc." He states that "S.D. Myers Canada would requisition funds for its continuing operations from S.D. Myers, Inc. which would then forward amounts to the operation in Canada. These funds would be used to promote and fund the daily business operations of the Canadian operations." SDMI concedes in paragraph 42 of its Memorial that SDMI provides "full financial and technical support" to Myers Canada.

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 31, Investor's Memorial Schedules, Tab 1**

44. SDMI, was responsible for Myers Canada's "technical and logistical support", for "logistical support in arranging the appropriate manifest information and government approvals necessary to transport PCB wastes across the Canada-U.S. border", and for "underwriting insurance and bonding coverage".

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, paras. 32 - 33, Investor's Memorial Schedules, Tab 1**

45. In summary: there is little evidence that Myers Canada played any meaningful role developing business opportunities for the export of PCB wastes from Canada, transporting PCB wastes from Canada to the U.S., or ever had the capacity to do so.

---

[8] This is a sample of three double bankers' boxes of documents produced to Canada by SDMI. The complete set of documents, numbering thousands of pages, has not been annexed to Canada's Counter-memorial due to their volume.

46. It may be that Myers Canada was in fact dedicated to a different (even antithetical) activity: siting a waste disposal facility in Canada than with PCB waste exports. The long-term debt of Myers Canada as at the year end of December 31, 1994 was $458,206.00 (described in the unaudited statements as "S.D. Myers' advances, without repayment terms"). In American dollars, that would represent between U.S.$310,000.00 and $350,000.00, depending ton the exchange rate. According to a submission to the United States Environmental Protection Agency made by S.D. Myers, Inc. in 1995:

> "SDMI has spent 2 - 3 years and $350,000.00 trying to site a fixed-site facility in Canada."

**SDMI Response to Canada's First Request for Documents, Tab 4, "Myers Company for Environmental Development Inc., Unaudited Financial States, December 31, 1994", page 2, Annexes to Canada's Counter-Memorial, Vol. I, Tab 4**

**SDMI Response to Canada's First Request for Documents, Tab 25, "Why the EPA Should Grant S.D. Myers, Inc.'s Exemption, Requests Now", p. 1-P.1., Annexes to Canada's Counter-Memorial, Vol. I, Tab 4**

47. An earlier "Proposed Plan of Actions for S.D. Myers Canada" makes no mention of export of PCB wastes from Canada. It is concerned entirely with "getting a PCB processing plant sited" in Canada.

**SDMI Response to Canada's First Request for Documents, Tab 19, "Proposed Plan of Actions for S.D. Myers Canada", R. Cormier, July 22, 1992, Annexes to Canada's Counter-Memorial, Vol. I, Tab 22**

48. SDMI contends that beginning in 1993, it and Myers Canada participated in a joint venture. The companies allegedly marketed, advertised, conducted market research, engaged in sales and site-pre-processing of PCB wastes, arranged for transportation of PCB wastes and waste rededication. The August, 1994 Business Plan for Myers Canada describes the "electrical services" it intends to offer "including TMI, the testing, the field and the repair/rewind services" and "minor repair and sampling". It speaks of "having been on the road for two weeks, having had "meetings with 18 customers" and making "quite a few sales".

**Affidavit of Michael Valentine sworn July 19, 1999, para. 22, Investor's Memorial Schedules, Tab 1**

**SDMI Response to Canada's First Request for Documents, Tab 9, "SDMI's electrical and environmental services, business plan, V.II", dated August 15, 1994, Annexes to Canada's Counter-Memorial, Vol. I, Tab 9**

49. Another activity of Myers Canada has to do with laboratory work. Months before it was granted the enforcement discretion, SDMI also claimed to the EPA that it had spent $80,000.00 for equipment "to set up a partial laboratory in Canada" for samples from Australia and from Canada.[9]

**SDMI Letter to EPA dated April 6 1995, Annexes to Canada's Counter-Memorial, Vol. II, Tab 30**

50. The fact the SDMI alleges that the activities of Myers Canada continue to the present – long after the U.S. border was reckoned to PCB wastes – indicates the Myers Canada was always engaged in activities *different* from those alleged to have been detrimentally affected by the *Interim Order.*

51. These continuing activities suggest the reason for the SDMI funding described by Rev, Michael Valentine.

**Affidavit of Michael Valentine sworn July 19, 1999, para. 31, Investor's Memorial Schedules, Tab 1**

52. The evidence that might show that Myers Canada was an active operation before, during and after the *Interim Order*, and that its operations might have related to PCB waste exports, demonstrates if anything that the *Interim Order* did not affect its operations.

53. Some of that evidence relates to staff. In response to Canada's First Request for Documents (seeking a list of all staff of Myers Canada who conducted business operations in Canada and their responsibilities), a list of six names was provided. Of the six, four were "associated" with Myers Canada for periods starting before the *Interim Order* was made and extending until well after it was made: Tim Ashy (Inside/Outside Sales Technician) until June 21, 1996; Daniel Auxin (Sales Technician) until October 17, 1997; Michel Desaulniers (to the present time) and Pierre Lefebvre (to the present time). In other words, Myers Canada may have had more staff after the making of the *Interim Order* than before.

**SDMI Response to Canada's First Request for Documents, Tab 10, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

54. Some of the evidence suggests a marked increase in the income of Myers Canada. According to its unaudited financial statements, the income of Myers Canada increased dramatically after the *Interim Order* was made. That income was $0 for the year ending

[9] However, there is no evidence to support this assertion, such as documents evidencing that equipment or its location. None were produced in response to Canada's First Request for Documents, which sought exactly that sort of material.

December 31, 1993, $5,647.00 for the year ending December 31, 1994, $29, 301.00 for the year ending December 31, 1995, $200,140.00 for the year ending December 31, 1996, and $254,227.00 for the year ending December 31, 1997.

**SDMI Response to Canada's First Request for Documents, Tab 4, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

55. Some of the evidence suggests increases in the level of operations of Myers Canada after the *Interim Order*. According to its unaudited financial statements, the operations of Myers Canada (evidenced by its costs or expenses) increased over 2.5 times from 1993 to 1997. Those costs or expenses were $194,354.00 for the year ending December 31, 1993, $234,847.00 for the year ending December 31, 1994, $364,787.00 for the year ending December 31, 1995, $344,793.00 for the year ending December 31, 1996, and $515,667.00 for the year ending December 31, 1997.

**SDMI Response to Canada's First Request for Documents, Tab 4, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

56. SDMI appears to have continued its full range of technical, financial and other support to Myers Canada after the *Interim Order* was made. According to Rev. Michael Valentine, various corporate transactions occurred between or involving Canadian companies just at the time of and after the making of the *Interim Order*. The result was two companies in Canada (2105098 Canada Inc. and S.D. Myers (Canada) Inc.) as of June, 1996. Referring to the companies created as of June, 1996, Rev. Valentine swore the "[both companies relied on S.D. Myers, Inc. for full financial and technical support."

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 35, Investor's Memorial Schedules, Tab 1**

### *3. Whatever Its Business with Canadians, SDMI Itself Had Little or No Business Operation in Canada*

57. With respect to SDMI, the evidence of its own operations *in* Canada is virtually non-existent.

58. In the first place, there was no legal relationship between SDMI and Myers Canada. SDMI alleges that "it had business activities in Canada operating as a branch between 1992 to 1997" and that Myers Canada was an "affiliate" of SDMI. But there is no evidence supporting such allegations.

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, paras. 19 and 20,**

**Investor's Memorial Schedules, Tab 1**

59. SDMI never had any shareholding in Myers Canada. Myers Canada has always been owned directly by four individuals: Dana Stanley Myers; Scott David Myers; Seth James Myers; and David Paul Myers. Each owns a 25% share of Myers Canada. Those four are also the shareholders of SDMI.

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 35, Investor's Memorial Schedules, Tab 1**

60. Absent a shareholding, SDMI has not established that it had any other interest that would have entitled it to share in the assets of Myers Canada upon dissolution. While it claims that its "loan" to Myers Canada constitutes such an interest, no evidence has been provided to the Tribunal that such a loan did indeed occur. Indeed, there is little evidence of any assets of Myers Canada that could be shared upon dissolution.

61. There was never any joint venture agreement between SDMI and Myers Canada.

**SDMI Response to Canada's First Request for Documents, Tabs 7 and Letter from Barry Appleton dated June 15, 1999**

62. There is little evidence of any loans from SDMI to Myers Canada. In its Memorial, SDMI alleges that it made a loan to its Canadian affiliate of CDN$216,418. SDMI has failed to provide any evidence or documents providing evidence of such a loan. The unaudited financial statements of Myers Canada show an entry in that amount recorded as an "advance". There is no evidence that these "advances" were actually made except as an accounting entry. There is also no indication that SDMI expected repayment of this alleged money transfer. In fact, these advances are described in the unaudited statements as being "without repayment terms". Therefore, even if the money was actually disbursed it cannot qualify as a loan because the concept of a loan requires repayment. Finally, there is no evidence that the alleged loan made to the Canadian affiliate was used/intended for a purpose related to PCB disposal business.

**SDMI Memorial, para. 17**

**SDMI Response to Canada's First Request for Documents, Tab 4, Annexes to Canada's Counter-Memorial, Vol. I, Tabs 3 - 8**

63. SDMI alleges that it has committed capital by way of "operating loan financing" and invested capital by way of "common shares in its Canadian affiliate". It is unclear what this "operating loan" refers to; SDMI presents no supporting documentation. The unaudited statements make no mention of "operating loan". Even if such loans were made, SDMI fails to demonstrate that they were committed to economic activity in

Canada. The examples listed in NAFTA Article 1139 "investment"(h) (i.e. turnkey or construction contracts) demonstrate the type of situations that were envisaged as part of this category. This is clearly not the situation. The evidence shows no such economic activity in Canada.

**SDMI Memorial, para. 4**

**SDMI Response to Canada's First Request for Documents, Tab 4, Annexes to Canada's Counter-Memorial, Vol. I, Tab 3 - 8**

64. SDMI's business operations in Canada did not involve any established physical presence, such as business premises or leased equipment in Canada. The only evidence suggesting a physical presence in Canada dates from long *after* the *Interim Order* was made. It is a ten month lease of "telephone answering and handling a reasonable amount of incoming mail" services in Mississauga, Ontario. In response to Canada's First Request for Documents (seeking copies of any equipment or real property leases of SDMI for its business operations in Canada), the only document produced was an agreement dated August 26, 1996, between "S.D. Myers Inc." and BDO Professional Centre, for "telephone answering and handling a reasonable amount of incoming mail" at 4255 Sherwoodtowne Boulevard, Mississauga, Ontario, L4Z 1Y5. The agreement was month to month, at a rate of $178.00 a month, and terminated June 30, 1997.[10]

**SDMI Response to Canada's First Request for Documents, Tabs 12 and 14, Annexes to Canada's Counter-Memorial, Vol. I, Tab 12**

65. SDMI's business operations in Canada did not involve the physical presence of any staff of its staff. In response to Canada's First Request for Documents (seeking a list of all staff of SDMI who conducted business operations *in* Canada and their responsibilities), the only document produced was a list of 15 named individuals (and unnamed "various secretarial support staff") described in the document as "Staff of S.D. Myers, Inc. *working with* S.D. Myers (Canada) Inc....for specific periods over the period of the joint venture.", and described in the cover letter to SDMI's response to Canada's First Request as a list of "all staff of S.D. Myers (Canada) Inc. and S.D. Myers, Inc. related to the Canadian business and an indication of their responsibilities." No where in the list of responsibilities is there any indication that those individuals ever conducted an business *in* Canada.

---

[10] The agreement was signed for "S.D. Myers Inc." by Michel Desaulniers. According to the list of "Canadian Consultants and Staff" of Myers Canada produced in response to Canada's First Request for Documents, he was at the time the Comptroller of Myers Canada (and from August 1, 1997, its President). There is no evidence that he had authority to sign the agreement for SDMI, or that he was doing so for Myers Canada, albeit under an incorrect name.

**SDMI Response to Canada's First Request for Documents, Tabs 10 and 20, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

66. Similarly, the affidavit of Rev. Michael Valentine does not even claim that the staff of SDMI ever conducted business *in* Canada.

67. In paragraph 23, he claims that for that part of Ontario not serviced by Myers Canada "all sales activity, correspondence with customers and potential customers, the negotiation and execution of services contracts were *conducted by and through* the offices of S.D. Myers, Inc." In paragraph 25 he describes the hiring of staff *in* Tallmadge Ohio and the establishment of "a separate group within our Tallmadge offices to coordinate all market and order information and to communicate with any Canadian customers concerns, questions or inquiries." In paragraph 27, he states that the "coordination of information, however, was centralized in the offices of S.D. Myers, Inc." In paragraph 28, he describes the development of general promotional material and sales literature by SDMI, the preparation "in our office in Tallmadge" of responses to requests by Canadian customers for formal bid processes or formal quotes, and the development of pricing quote information "at our offices at Tallmadge".

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, paras. 23, 25, 27 and 28, Investor's Memorial Schedules, Tab 1**

68. It was common for SDMI staff in Tallmadge to use Myers Canada letterhead in their dealings with Canadian companies and organisations. Of the approximately 455 companies receiving price quotes from SDMI, approximately 317 received price quotes from SDMI in Tallmadge and on SDMI letterhead. Approximately 90 received price quotes from SDMI in Tallamdge but on Myers Canada letterhead. Approximately 40 received price quotes from SDMI in Tallmadge on a mixture of SDMI and Myers Canada letterhead.

**SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. II, Tabs 54 - 60**[11]

**Canada's Summary of SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. IV**

69. If anything, the evidence indicates that the operations of SDMI with respect to the export

[11] This is a sample of three double bankers' boxes of documents produced to Canada by SDMI. The complete set of documents, numbering thousands of pages, has not been annexed to Canada's Counter-memorial due to their volume.

of PCB wastes from Canada stayed relative constant after the *Interim Order* was made. The evidence is that twelve named staff of SDMI were working with S.D. Myers (Canada) Inc. as of November 1, 1995, seven of whom had just been hired in October, 1995. Only two stopped this work in the period immediately after the *Interim Order* was made, both of whom had been hired in October, 1995. Approximately six months after the *Interim Order* was made (in April 1996), there were ten SDMI staff working with Myers Canada. To this day, three continue to do so.

**SDMI Response to Canada's First Request for Documents, Tabs 10 and 20, Annexes to Canada's Counter-Memorial, Vol. I, Tab 15**

70. The approximate temporal distribution of price quotes from and contacts with SDMI, relative to the making and repealing of the *Interim Order*, indicates that the number of price quotes that were made *during* and *after* the *Interim Order* was in force is approximately *50% larger* than the number made before the *Interim Order* was made.

| | **First Record of Contact** | **First Record of Price Quote** |
|---|---|---|
| **Before 95/11/20** | 193 | 180 |
| **During the Interim Order** | 210 | 207 |
| **After 97/02/16** | 54 | 66 |

**SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. II, Tabs 54 - 60**[12]

**Canada's Summary of SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. IV**

71. Myers Canada never had any expectation of having a monopoly over export of PCB wastes from Canada. The Preamble to the Addendum to the 1994 Business Plan for Myers Canada states (at 1.A.(b)):

"We already explained in our Business Plan, V, II, issued August 15, 1994, the actual situation, at this point the only new element is that our petition have been turned down by USEPA. The border might be open in couple of years because of the NAFTA *but it won't be open only for us that's for sure, it will be open at large for everyone.*" (emphasis added)

This was in fact exactly what happened in late 1995 and early 1996. The document goes

[12] This is a sample of three double bankers' boxes of documents produced to Canada by SDMI. The complete set of documents, numbering thousands of pages, has not been annexed to Canada's Counter-memorial due to their volume.

on to advocate a PCB waste disposal capability located in Canada (described in 3.C(b) as a "fixed facility"), with only the decontaminated solid waste (the "carcasses") to be shipped to the United States for recycling.

**Myers' Company for Environmental Development MYERS Inc., "Addendum"; Response to Canada's First Request for Documents, Tab 9, Annexes to Canada's Counter-Memorial, Vol. I, Tab 9**

72. The nature of SDMI investment in Myers Canada is variously described in the claimant's memorial as debtor-creditor, joint venture and investment. None of the evidence adduced by SDMI supports those characterizations of the relationship. There is no evidence of a contract or agreement identifying the loan and SDMI admits there was no written joint-venture agreement. While an oral agreement has the virtue of flexibility, there is no evidence of the precise terms of such an agreement.

73. Whatever its role, Myers Canada continued operating in Canada throughout the period of the *Interim Order* and following its termination. It is not until the U.S. closed its border again to imports of PCBs that the Myers Canada and the claimant ceased operations in Canada.

74. DOE and the Government of Canada generally were unaware that SDMI had any investment in Canada and had no record of one. SDMI's nationality and status as an importer of PCB wastes was viewed as irrelevant to the issues rasised by the actions of the EPA giving rise to this claim.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 64, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of Roy Hickman sworn October 4, 1999, para. 19, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

## D. The Nature of PCBs

75. Polychlorinated biphenyls ("PCBs") are toxic to human health and to the natural environment. PCBs are non-flammable and very stable, do not conduct electricity, and have low volatility at normal temperatures. Mixtures of PCB compounds are usually viscous light coloured liquids. PCBs are soluble in most organic solvents but are almost insoluble in water.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 6 - 7, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

76. PCBs are highly toxic substances. They persist in water, air or soil over extended periods and dissolve readily in fat tissues and other organic compounds. The latter characteristic results in upward mobility within the food chain through birds and other animals and eventually to humans. Consequently, they pose significant risks of serious harm to both animals and humans (see: World Health Organization, U.N. Environment Programme and International Labour Organization (joint report), *Polychlorinated Biphenyls (PCBs) and Polychlorinated Terphenyls (PCTs) Health and Safety Guide* (1992); S. Dobson and G. J. van Esch, *Polychlorinated Biphenyls and Terphenyls* (2nd ed. 1993), Environmental Health Criteria 140, World Health Organization;; U.N. Environment Programme, *Global Environmental Issues*, *supra*; Environment Canada, Department of Fisheries and Oceans, Health and Welfare Canada, *Toxic Chemicals in the Great Lakes and Associated Effects* (1991); J. L. and S. W. Jacobson, "A 4-Year Followup Study of Children Born to Consumers of Lake Michigan Fish", *Journal of Great Lakes Research*, 19(4) (1993): 776-83; M. Gilbertson et al., "Great Lakes Embryo Mortality, Edema, and Deformities Syndrome (GLEMEDS) in Colonial Fish-eating Birds: Similarity to Chick-Edema Disease", *Journal of Toxicology and Environmental Health*, 33 (1991): 455-520; Canadian Council of Resource and Environment Ministers, *The PCB Story* (1986); Environment Canada and Health and Welfare Canada, *Background to the Regulation of Polychlorinated Biphenyls (PCB) in Canada: A report of the Task Force on PCB, April 1 1976 to the Environmental Contaminants Committee of Environment Canada and Health and Welfare Canada*; Health and Welfare Canada, *A Review of the Toxicology and Human Health Aspects of PCBs (1978-1982)* (1985); OECD, *Protection of the Environment by Control of Polychlorinated Biphenyls* (1973).)

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 7 - 8, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of Roy Hickman sworn October 4, 1999, para. 13, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

77. PCBs are extremely mobile. They evaporate from soil and water and are transported great distances through the atmosphere. High levels of PCBs have been found in a variety of arctic animals living thousands of kilometres from any major source of PCBs (R. J. Norstrom (Environment Canada) and D. C. G. Muir (Department of Fisheries and Oceans), "Chlorinated Hydrocarbon Contaminants in Arctic Marine Mammals", *The Science of the Total Environment* 154 (1994) 107-28).

**Affidavit of Victor Shantora sworn October 4, 1999, para. 9, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

78. Until the 1960s, little was known about the negative impacts of PCBs. In the late 1960s, the discovery of PCBs in birds by scientists in Sweden while searching for residues of another hazardous substance, namely DDT, and the poisoning of 1,200 people in Yusho, Japan by eating cooking oil contaminated with PCBs focused public attention on the detrimental effects of PCBs. By 1972, scientists considered that PCBs posed a serious potential hazard to the environment and human health.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 12 and Tab D, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

79. The effects of PCBs on the environment have been widely studied. PCBs accumulate in the fatty tissues of animals. Animals at the top of the food chain tend to have the highest PCB levels due to the chemical's persistence and exceedingly slow biodegradation. Studies have shown that both short-term and long-term exposure to even low levels of PCBs harm organisms in the marine environment, especially in marine environments already under environmental stress.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 7 - 13, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

80. Humans are regularly exposed to minute amounts of PCBs through food, air and water. PCBs enter the human body primarily through ingestion of food containing PCB residues. PCBs can also enter the body through inhalation or skin contact, though these two methods are usually not significant. Sustained, high level exposure to PCBs causes many adverse health effects including skin rashes, swelling of the eyelids, hyper-pigmentation (the darkening of the nails, skin and mucous membranes), headaches, vomiting, chronic bronchitis, and decreased birth weight. There is now evidence to link long term, high level PCB exposure and an increased incidence of cancer.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 12 and Tab D, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

## E. PCB Disposal

81. The term "PCB waste" is commonly used to describe a wide range of equipment, liquids, solids or substances which contain PCBs for which there is no longer any use.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 14, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

82. The term "PCB disposal" generally refers to the full range of activities associated with

getting rid of PCB waste, such as by thermal destruction (for example, incineration), chemical treatment, landfilling or direct release of PCBs into the environment. Thermal destruction and chemical treatment, properly done, can destroy PCB molecules permanently whereas landfilling and direct release into the environment leave the PCB molecules intact. Before their hazardous nature was understood, PCBs were routinely disposed of without any precautions being taken. As a result, large volumes of PCBs were introduced into the environment.

83. **Affidavit of Victor Shantora sworn October 4, 1999, paras. 14 - 19, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

84. Currently, the most widely used technique for destroying PCBs is high temperature incineration, typically at temperatures of about 1200 degrees C. Most incinerators can accept the full range of PCB wastes, including high- and low-concentration PCB liquids, PCB-contaminated soils and electrical equipment. Before incineration, electrical equipment is either shredded or pre-cleaned with heat and/or solvents to facilitate metal recycling and reduce the amount of material to be incinerated.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 15, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

85. Air pollution control equipment is used to clean the incinerator stack gases by removing hydrogen chloride gas, particulate matter, and other compounds, such as dioxins and furans (both of which are highly toxic), that can be formed as by-products of the incineration of PCBs. When properly conducted, incineration is a highly efficient means of destroying PCBs and is used in many countries throughout the world. On the other hand, a poorly operated incinerator can be a major source of air pollution.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 15, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

86. At all relevant times, two companies in Canada destroyed PCBs using high temperature incineration and another destroyed PCBs using thermal destruction in the absence of oxygen.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 16, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

87. At the time, there were numerous PCB destruction and decontamination companies across Canada. There were companies that operated fixed and mobile incinerators, and other companies decontaminated various types of PCB wastes in a variety of different processes and would then ship the PCB for destruction to companies equipped with incinerators.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 17, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

88. Companies operating fixed incinerators were located in Surrey (British Columbia) (B.C. Hydro in association with PowerTech Labs)(decontaminate contaminated mineral oil– trailers without wheels), Swan Hills (Alberta), (PPM Canada Inc.) (decontaminate contaminated mineral oil – trailers without wheels), Regina (Saskatchewan), and Chicoutimi (Quebec). The companies located in Surrey and Regina dealt with low concentration of PCB mineral oils. In Swan Hills, Chem-Security dealt with and destroyed all types of PCB contaminated materials, while Cintec Environnement Inc. (operating under Les Recyclages Larouche Inc.) in Chicoutimi decontaminated transformers and capacitors in autoclave.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 17, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

89. Fixed facilities with parent companies located in the U.S.- OH Materials of Canada Limited with a parent in Finley, Ohio (incinerator in Goose Bay) ENESCO Inc. in Smithville with a parent company on Little Rock Arkansas.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 19 and Tab E, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

90. Operating mobile incinerators was Cintec., in Baie-Comeau (Quebec), which dealt with contaminated soils, high concentration oils, and cooperated with other companies to clean transformers. This mobile incinerator was also intended to decontaminate PCB wastes in St-Basile (Quebec) and Shawinigan (Quebec).

91. The numerous other companies which decontaminated PCB wastes were mostly located in the province of Ontario: Ecologic Inc., Ontario Hydro Technologies, PPM Canada Inc., Rondar, PCB Disposal Inc., PCB Containment Technology Inc., Fisher Associates Environmental Engineers Ltd., Octagone Environmental Services, Rededication Resources Cda Ltd., Contech Inc., and TCI . There were also other companies located outside Ontario, Triwaste in Newfoundland, and Sanexen Services Environementaux and another Cintec Environnement Inc. facility in Quebec.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 17, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

92. Chemical treatment is routinely used to destroy PCBs found at low concentrations (i.e. less than 1000 parts per million) in transformer mineral oil that may have inadvertently become contaminated through servicing of the transformers.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 17, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

93. At all material times, five companies in Canada destroyed PCBs through chemical treatment. SDMI was not one of these companies. In addition, some companies offered mobile PCB transformer cleaning services. In addition, Ontario Hydro chemically treats PCB-contaminated mineral oil and chemically destroys PCB wastes with PCB concentrations above 90%.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 17, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

## F. Canadian Regulation of PCBs and PCB Wastes

94. Since the 1970s, PCBs have been the subject of an increasingly strict regime of regulation both in Canada and internationally. From 1980 until October, 1995, the transboundary movement of PCB wastes between Canada and the United States was prevented by the closure of the American border to imports of PCB wastes, including from Canada. The Canadian regime for the export of PCB wastes, while consistent with Canada's international obligations, was academic as far as exports to the United States were concerned. Also consistent with Canada's international obligations was its policy to encourage domestic handling and disposal of domestic PCB wastes.

**Affidavit of Victor Shantora sworn October 4, 1999, Tab D, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

95. Canada and the United States had been working towards a bi-lateral regime for regulating the transboundary shipment of PCB wastes when, in October 1995, and without prior notification to Canada, the United States decided to act unilaterally and in an extraordinary fashion to open its border to the import of PCB wastes from Canada by SDMI.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 27, 51 and 59, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

96. In February 1973, the Organization for Economic Co-operation and Development (OECD), of which Canada is a member, adopted Council Decision C(73)1 (Final) urging member countries to limit the use of PCBs and to develop controls on PCBs in order to minimize risk to the environment and human health.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 21, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

97. In 1977, Canada added PCBs (and therefore PCB wastes) to the list of toxic substances under the *Environmental Contaminants Act* and prohibited the use of PCBs as a constituent in new products manufactured in or imported into Canada. The *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.) ("CEPA") replaced the *Environmental Contaminants Act* when it came into force on June 30, 1988. PCBs and PCB wastes are identified as a toxic substance under CEPA.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 21 and 30, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

98. In the U.S., facilities to dispose of PCBs must be licensed by the EPA. On May 1, 1980, the U.S. closed its border to the import and export of PCBs and PCB waste? for disposal.[13] Since then, the U.S. border has been continuously closed to exports from the U.S. to Canada, and was open to imports from Canada only from November 15, 1995 to July 20, 1997.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 19, 22 and 23, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

99. In 1985, Canada adopted regulations under the *Environmental Contaminants Act* setting strict limits on the concentrations of PCBs that could be contained in electrical and mechanical equipment and on the concentrations that could be released into the environment during certain commercial and maintenance activities: *Chlorobiphenyl Regulations No. 2 (Product)*, SOR/85-406 *and Chlorobiphenyl Regulations No. 3 (Release)*, SOR/85-407.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 24, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

---

[13] As described in a notice filed by the EPA 29 April 1980: see *Federal Register*/Vol. 45, No. 86/Thursday, May 1, 1980/Notices at 29115, announcing that the previous Open Border Policy for PCB disposal would be allowed to expire after 1 May 1980.

100. That same year, about four hundred litres of transformer oil containing fifty-six percent PCBs leaked from a transformer that was being transported on a flat-bed truck, contaminating parts of a highway, as well as vehicles travelling the highway, near Kenora, Ontario. This accidental exposure emphasised the need to reduce the risk of accidental spills of PCBs while in transit.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 25, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

101. In 1986, Canada responded by enacting amendments to the *Transportation of Dangerous Goods Regulations,* SOR/86-526 increasing the levels of control and safety in the transportation of PCBs within Canada by requiring the use of rigid, leak-proof containers to transport PCBs or articles containing PCBs.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 26, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

102. In August 1988, a fire at a warehouse containing chemical wastes, including PCBs, at St.-Basile-le-Grand, Quebec forced more than 3,000 residents to evacuate their homes due to the risk of PCB contamination. This incident illustrates the dangers that can result from the improper storage of PCBs.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 29, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

103. In September, 1988 Canada issued an *Interim Order* under section 35(1) of CEPA setting out rules governing the storage of PCB wastes in Canada. Canada eventually replaced the *Interim Order* with the *Storage of PCB Material Regulations,* SOR/92-507. The government also announced a comprehensive action plan for the destruction of all PCBs in storage and federal sites.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 30, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

## G. The *Basel Convention*

104. In March 1989, Canada and a number of other countries signed the *Basel Convention.* The *Basel Convention,* which controls international movement in PCBs and other hazardous wastes, was developed under the auspices of the United Nations Environment Programme (UNEP) and entered into force on May 5, 1992. Canada ratified the Convention on August 29, 1992 and it came into force for Canada 90 days afterwards on

November 26, 1992. The U.S. is a signatory but not yet a party to the Convention.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 31, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

105. The *Basel Convention* imposes international legal obligations on States to ensure that hazardous wastes are managed in an environmentally sound manner, and establishes rules and procedures governing the transboundary movement of hazardous wastes and their disposal.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 32, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 19 - 22, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

106. The *Basel Convention* prohibits the export and import of hazardous wastes from and to non-Parties to the *Basel Convention* (Article 4(5)), unless such movement is subject to bilateral, multilateral or regional agreements or arrangements whose provisions are not less stringent that those of the *Basel Convention* (Article 11). Transboundary movements of hazardous wastes carried out in contravention of the provisions of the *Basel Convention* are considered illegal traffic and a criminal act (Article 4(3)).

107. The *Basel Convention* requires each Party to take appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that shall be located, where possible, within it (Article 4(2)(b)). The *Basel Convention* further requires that each Party take appropriate measures to ensure that the transboundary movement of hazardous wastes is only allowed if the State of export does not have the technical capacity and the necessary facilities in order to dispose of the wastes (Article 4(9)(a)).

108. The *Basel Convention* also requires that each Party take appropriate measures to ensure that the transboundary movement of hazardous wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and is conducted in a manner which will protect human health and the environment (Article 4(2)(d)). Article 4(2)(e) requires each Party to take appropriate measures to not allow the export of hazardous waste to a State which has prohibited all imports, or if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner. Article 4(8) provides that each Party shall require that hazardous wastes to be exported are managed in an environmentally sound manner in the State of import. Article 4(10) provides that the obligation of States to require that hazardous wastes are managed in an environmentally sound manner may not under any circumstances be transferred to

the States of import or transit.

109. Article 11(1) of the *Basel Convention* allows Parties to enter into bilateral agreements with Parties or non-parties regarding the transboundary movement of hazardous waste provided that such agreements include provisions that are not less environmentally sound than those provided for by the Convention. Article 11(2) requires that Parties notify the Secretariat of such agreements, including those entered into prior to the coming into force of the *Basel Convention* for them, and that the provisions of the Convention shall not affect transboundary movements which take place pursuant to such agreements provided that such agreements are compatible with the environmentally sound management of hazardous waste required by the Convention.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 33, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

110. In 1986, Canada and the U.S. entered into the *Canada-U.S. Agreement.*[14] The U.S. negotiated the *Canada-U.S. Agreement* under the authority of the *Resource Conservation and Recovery Act.* The *Canada-U.S. Agreement* falls within the terms of Article 11(2) of the *Basel Convention.* The *Canada-U.S. Agreement* applies to hazardous waste (Article 2), which is defined in Article 1(b) to mean "with respect to Canada, hazardous waste, and with respect to the U.S., hazardous waste subject to a manifest requirement in the U.S., as defined by their respective national legislations and implementing regulations."

**Affidavit of Victor Shantora sworn October 4, 1999, para. 27, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 10 - 16, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

111. However, with respect to the United States, the Canada-U.S. Agreement did not apply to PCB wastes. PCB wastes have never been classified as a "hazardous waste" in the United States.[15] In addition, PCB wastes were not subject to a manifest requirement until Feb. 5, 1990 (the effective date of the Dec. 21, 1989 final rule establishing manifest requirements for PCB wastes). Thus, the transboundary movement of PCB wastes was not covered by the Canada-U.S. Agreement at the time it was executed.

---

14 "Canada-U.S.A. Agreement on the Transboundary Movement of Hazardous Wastes" (signed October 28, 1986, in force November 8, 1986, amended November 25, 1992), *Canada Treaty Series* CTS 1986/39 and CTS 1992/23.

15 The definition of "hazardous waste" under the U.S. *Resource Conservation and Recovery Act* ("RCRA") does not include PCB waste, although the U.S. *Toxic Substances Control Act* ("TSCA") does include PCB waste.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 77 and 95, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

112. It was not until several months after the EPA granted an "enforcement discretion" to SDMI (purporting to waive the need for compliance with U.S. law) that Canada received notification by diplomatic note of January 24, 1996 that the U.S. took the position that the *Canada-U.S. Agreement* covered PCBs. Until that time, the *Canada-U.S. Agreement* could not serve as an Article 11 agreement under the *Basel Convention* for transboundary movement of PCB wastes between Canada and the U.S., as it was not clear that it covered PCBs in the U.S. Until this date, therefore, any exports of PCB wastes to the U.S. could have been in contravention of the *Basel Convention*.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 95 – 97 and Tab Q, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 16 - 17, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

## H. Events Occurring after Canada Signed the *Basel Convention*

113. In August, 1989, following public protests in the U.K., British authorities refused to accept two shipments of PCB wastes from Quebec that were being sent to England for destruction (the "ship of death" incident). The shipment included PCB wastes from the St-Basile-le-Grand fire. The shipments were returned to Canada and placed in storage facilities. This incident illustrates the uncertainties inherent in relying on facilities in other countries for the disposal of PCBs.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 34, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

114. On October 18, 1989, the Canadian Council of Ministers of the Environment (the "CCME"), which includes the Federal and provincial Ministers responsible for the environment, agreed that the destruction of PCBs should be carried out, to the maximum extent possible, within Canadian borders. At the same time, Canada confirmed that to this end, as a matter of policy, no PCB wastes from Federal sites would be exported for disposal in other countries. In reliance on Canada's policy to dispose of Canadian PCBs in Canada pursuant to the *Basel Convention*, Canadian companies invested in developing domestic capacity to dispose of PCBs.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 35, Annexes to Canada's**

**Counter-Memorial, Vol. III, Tab 64**

115. On December 14, 1989, Canada enacted the *Federal Mobile PCB Treatment and Destruction Regulations*, SOR/90-5 under CEPA. The Regulations set limits for emissions of solid, liquid and gaseous pollutants, including PCBs, into the environment for mobile PCB treatment and destruction systems operated on federal land or anywhere in Canada under federal contract. Mobile systems must show a minimum PCB destruction and removal efficiency of 99.9999 per cent.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 36, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 24 - 25, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

116. On July 27, 1990, Canada enacted the *PCB Waste Export Regulations*, SOR/90-453 under CEPA. These regulations prohibit the export of PCBs from Canada in accordance with Canada's international obligations under the *Basel Convention* and its 1989 policy that Canadian PCBs be disposed of in Canada. The regulations permitted the export of PCB waste to the U.S. where the U.S. Environmental Protection Agency ("EPA") gave prior approval of the export (s. 4(a), as amended by SOR/94-364, s. 4).

**Affidavit of Victor Shantora sworn October 4, 1999, para. 37, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

117. As the U.S. border was closed to imports of PCBs and products containing PCBs, the only exports which occurred in practice, prior to the granting of the enforcement discretion to SDMI by the EPA, were of PCBs owned by U.S. agencies operating in Canada such as decommissioned U.S. military installations in Canada (for example, DEW Line sites). Consistent with Canada's policy, exports of Canadian PCBs were not permitted under these regulations. The "Regulatory Impact Analysis Statement" attached to these regulations stated that their purpose was to meet the Canadian environmental objective that wastes should be, to the maximum extent possible, treated or disposed of in the country where they are generated.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 38 and 39, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

118. On January 31, 1991, the OECD, in Decision C(90) 178/Final, decided that member countries must, insofar as possible and consistent with environmentally sound and efficient management practices, dispose of all hazardous wastes produced therein within their own boundaries. The Decision also called for action to reduce the transfrontier

movement to the minimum justified by environmentally sound and efficient management.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 40, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 23, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

119. In April 1991, the Canadian Council of Ministers of the Environment issued National Guidelines for the landfilling of hazardous wastes. Under these Guidelines, liquid hazardous wastes, including PCB liquid materials containing free hazardous liquids, cannot be landfilled. .

**Affidavit of Victor Shantora sworn October 4, 1999, para. 41, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

120. On November 12, 1992, Canada introduced regulations under CEPA, the *Export and Import of Hazardous Waste Regulations*, SOR/92-637 (effective November 26, 1992), in order to implement the *Basel Convention*. These regulations permit the importation of PCB wastes into Canada where Canada can ensure that such wastes are properly disposed of.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 42, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 26, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

## I. The *North American Agreement on Environmental Co-operation*

121. The *North American Agreement on Environmental Co-operation* (the "NAAEC"), the environmental side agreement to the NAFTA (signed August 1993, in force January 1, 1994), has as its key objectives the promotion of sustainable development and ensuring that the laws of each party provide for high levels of environmental protection without lowering standards to attract investment. The NAAEC, negotiated by the same Parties and in force at the same time as the NAFTA, contemplates the imposition of export bans on a toxic substance (such as PCBs) whose use is prohibited within the Party's territory. Canada prohibits the use of PCBs, with some exceptions.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 43, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

122. Under the NAAEC, Canada, the U.S., and Mexico established the Commission for Environment Co-operation to deal with environmental matters of concern to all three countries. At the October 12-13, 1995 meeting of the Council of the Commission, the Environment Ministers from the three countries agreed upon the urgent need to develop a comprehensive North American plan for the management of PCBs. The Ministers instructed their respective officials to complete the plan by December 1996. The "PCB Regional Action Plan" ("RAP"), which includes provisions relating to the transboundary movement of hazardous waste, was finalized by December 1996 and approved in 1997. The RAP is guided by several principles, including consistency with international obligations such as under the *Basel Convention*.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 44 and 46, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

## J. SDMI lobbies to open U.S. border to imports of PCBs from Canada

123. Beginning in November, 1990, Environment Canada received representations from SDMI seeking Canada's support in its efforts to obtain approval from the EPA to import into the U.S. PCB transformers from Canada for disposal via recycling. The then Minister of the Environment, Robert de Cotret, informed SDMI by letter dated January 22, 1991 that Canada was committed to destroying its PCB wastes within its own borders.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 48 and Tab F, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

124. On May 8, 1991, August 27, 1992, August 31, 1992, and October 19, 1993 SDMI formally submitted petitions to the EPA requesting five year exemptions from the ban on manufacture/import for the purpose of importing transformers, capacitors, PCB fluids, and lighting ballasts for disposal, respectively.

**SDMI Letters to EPA dated May 8, 1991, August 27, 1992, August 31, 1992, and October 19, 1993, Affidavit of George Michael Cornwall sworn October 4, 1999, Exhibits A-4, A-8, A-9 and A-11, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

125. The EPA repeatedly explained to SDMI that the U.S. was maintaining the closed border policy because the provisions of the *Basel Convention*, the need to encourage Canada to develop a domestic PCB waste disposal capacity and the need for a bilateral agreement before PCB wastes could be shipped across the border:

"The provisions of the *Basel Convention* may affect the international movements of PCBs. One of the underlying tenets of the *Basel Convention* is that each country is responsible for its own waste, developing its own waste disposal industry and minimizing transboundary shipments of waste. Among other things, the *Basel Convention* restricts the transbounday movement of hazardous wastes, including PCBs, unless there is a bilateral or regional agreement between the receiving and the exporting country (in this instance Canada)." (emphasis added)

**EPA Letter to SDMI dated December 7, 1992 (see also EPA Letter to SDMI dated February 23, 1993 and EPA Letter to SDMI dated December 30, 1994), SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Vol. 1I, Tabs 41, 40 and 35**

126. Over the next few years, Environment Canada received representations from a number of Canadian companies which had PCB wastes asking it to support SDMI' request for an EPA exemption from the U.S. import ban. Other Canadian companies and environmental groups, on the other hand, expressed to Environment Canada their opposition to the request of SDMI and argued that Environment Canada should maintain its policy of having Canadian PCBs dealt with in Canada, noting that the U.S. did not permit exports to Canada.

127. SDMI requests to the EPA for approval to import Canadian PCBs are summarized in the U.S. *Federal Register* in a Notice of Proposed Rules published December 6, 1994.[16] The Notice described SDMI' four petitions to import PCBs into the U.S. from Canada. Under the heading "Proposed decision on petitions", at page 62878, the Notice indicated that the EPA proposed to deny all four petitions because:

(a) SDMI had failed to establish that there was no unreasonable risk,

(b) SDMI had not demonstrated how the benefits accruing from granting the petitions would outweigh the risks inherent in the importation of PCB waste, and

(c) SDMI had failed to demonstrate that it had made good faith efforts to investigate and develop alternatives to import.

128. The EPA went on to state, at page 62879:

"EPA believes that opening the border to allow import for disposal may have far reaching consequences and that it is preferable to raise the issues of the transboundary movement of PCB waste generally in the proposed disposal rules

16 59 *Federal Register* 62878 and 62879, published December 6, 1994.

rather than to examine it in isolation in the context of individual company's petitions for exemption."

129. Also on December 6, 1994 and in the context of a major PCB disposal rulemaking, EPA proposed provisions that would allow the import of PCBs for disposal provided that EPA determined unilaterally or upon petition that the import did not pose an unreasonable risk and that the import was "in the interests of the United States".[17] The proposed rule contained procedures and requirements to ensure the safe management of imported PCBs. The EPA went on to state that it would not be inclined to find that import for disposal was in the interests of the U.S. solely because disposal of the PCBs in the U.S. was less expensive than elsewhere.

130. These proposed PCB Disposal Amendments (dubbed the "PCB Mega-Rule" because of its broad scope and vast implications for PCB management in the U.S.) were extremely controversial, generating hundreds of public comment letters and thousands of individual comments requiring analysis and response by EPA. It was clear immediately that the Mega-Rule would take years for EPA to finalize. (Indeed, it was not finalized until June, 1998.) Interested parties began to encourage EPA to separate out and finalize portions of the proposal while continuing to work on the more controversial and/or difficult provisions. Given the public support for allowing import for disposal, EPA decided, therefore, to separate out the PCB import provisions and to finalize them on a separate rulemaking track (the so-called "fast-track") from the rest of the rule.[18] Thus, by mid-1995 it was clear that EPA was working toward an expeditious finalization of the proposed import provisions.

131. Environment Canada informed the EPA that it also favoured a comprehensive approach to the issue of the transboundary movement of PCBs with the U.S., as it would allow Canada to assure itself that appropriate measures were in place to protect the environment before any transboundary shipments took place. Until as recently as April of 1995, officials at the Environmental Protection Branch of the EPA had informed Environment Canada officials that the rules modifying the U.S. ban on PCB imports would not be lifted before June of 1996 at the earliest, if at all.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 59, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

132. Throughout this period, SDMI made a series of submissions and organised a concerted effort to lobby the EPA to grant its exemption requests. According to SDMI's

---

17 59 *Federal Register* 62788 at 62853, published December 6, 1994.

18 61 *Federal Register* 11096, March 18, 1996.

correspondence to the EPA, the lobbying involved at least 2 mayors, 6 Congressmen, 2 Senators, a County Executive, the U.S. Chamber of Commerce, industry, citizens from the Tallmage area and Canadian PCB owners. Although there is no evidence verifying it, and Canada denies it occurred, SDMI even claimed that Environment Canada "publicly supported the S.D. Myers Inc. exemption requests".

**EPA Letters to SDMI dated February 23, 1993, EPA Letter to SDMI dated March 30, 1994, SDMI letter to EPA dated October 10, 1994, SDMI letter to EPA dated February 2, 1995 and SDMI letter to EPA dated March 22, 1995, SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Vol. 1I, Tabs 40, 38, 36, 33 and 31**

133. During this same time frame, SDMI was becoming increasingly impatient with EPA's failure to undertake final action on its four exemption requests. Beginning in April 1995, SDMI requested that the EPA consider the concept of "enforcement discretion" to allow them to import PCBs pending the finalization of the import rule -- which, as explained above, had been placed on a "fast track" by EPA.

**SDMI Letter to EPA dated April 6, 1995, SDMI Letter to EPA dated May 25, 1995, SDMI Letter to EPA dated October 13, 1995, SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Vol. 1I, Tabs 30, 28 and 27**

134. On October 26, 1995, the EPA issued an "enforcement discretion" to SDMI, effective November 15, 1995 and valid only until December 31, 1997, for the purpose of importing PCBs from Canada into the U.S. for disposal. The term "enforcement discretion" is not defined in U.S. law but apparently means that the EPA would not to enforce the U.S. regulations banning PCB import against SDMI. The import ban itself would remain in place and imports to the U.S. would be in contravention of U.S. laws. In the next few days following the decision related to SDMI, the EPA granted further enforcement discretions to at least nine other U.S. companies to import PCBs from Canada for storage and disposal.

**EPA letter to SDMI dated October 26, 1995, SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Vol. 1I, Tabs 26**

135. As stated in paragraph 16 of Canada's Statement of Defence, and contrary to what SDMI says in paragraph 8 of its Reply, there is no requirement for public hearings or notification for the issuance of an "enforcement discretion". There is for "permits" and "exemptions". By definition an enforcement discretion is extra-legal and irregular, involving a waiver of the law and not an application of it. The hearings referred to in paragraph 8 of the Reply are those described above that related to SDMI's exemption

requests which by law require hearings and notification. This hearing and notification has nothing to do with enforcement discretions as a matter of law or of fact.

**Canada's Statement of Defence, para. 16**

**SDMI's Reply, para. 8**

## K. The Making of the *Interim Order*

136. Officials within Environment Canada first learned that the EPA had granted an enforcement discretion to SDMI on October 27, 1995. The decision of the EPA to not enforce the U.S. regulations against SDMI, and later other companies on an individual basis, from the ban on imports of PCBs, was taken without prior notice to or consultation with Canada.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 60 and 61 and Tab H, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 28, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

137. An enforcement discretion has absolutely no legitimacy in U.S. law or regulation. It is an "extra-legal" concept used unofficially when EPA wishes to signal to regulated parties that their activities, though illegal, will not be enforced against by EPA. EPA has no authority to entertain requests for "enforcement discretion" and has no legal authority to grant "enforcement discretion". Therefore, any action taken by SDMI or anyone else to import PCBs for disposal without an exemption as required by law and regulation would have been illegal -- regardless of the EPA's October 26, 1995 and subsequent letters.

138. Canada was not aware that such a mechanism existed whereby a U.S. agency would undertake not to enforce the law. The EPA decision also contradicted its earlier statement in the Federal Register of December 6, 1994 that it 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 statements to Canada that its regulatory prohibition would not be lifted until June, 1996, if at all. The U.S. government provided no explanation of the change in the EPA's approach to Canada.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 61 and 73, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 28, Annexes to Canada's**

**Counter-Memorial, Vol. III, Tab 63**

139. Within a week after the U.S. EPA issued the enforcement discretion, Michael Cole of Chemical Waste Management, Inc. one of SDMI competitors applied to the EPA for similar relief. In his letter, Mr. Cole noted that his company and associated companies had four chemical waste landfills and one incinerator with PCB disposal approvals, along with the number of commercial storage approvals. He therefore sought enforcement discretion for those companies on the same terms and conditions as SDMI. The Department of the Environment received a copy of the letter from Mr. Cole to the EPA on November 8, 1995. On November 13, 1995, the Department of the Environment received six notices from Custom Environmental for exports of large quantities of PCB wastes to the U.S.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 67, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 32, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

140. The EPA decision raised a number of concerns with Canadian officials. These concerns included:

(a) whether the enforcement discretion fully complied with U.S. law;

(b) whether exports of PCB wastes to the U.S., a non-party, would comply with the *Basel Convention*;

(c) whether PCBs would be disposed of in the U.S. in an environmentally sound manner;

(d) compliance with Canada's 1989 policy to destroy Canadian PCBs in Canada;

(e) the long-term viability of domestic PCB disposal facilities; and

(f) what would happen in the event that U.S. disposal facilities subsequently became unavailable, or if the U.S. border was closed again, as eventually happened.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 72, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 29, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

141. When Canada learned of the EPA's enforcement discretion, Canada was not certain if the *Canada-U.S. Agreement* covered wastes controlled in the U.S. under TSCA as well as those covered under RCRA. This information was crucial in order to determine whether or not the *Canada-U.S. Agreement* constituted an Article 11 agreement under the provisions of the *Basel Convention* so far as the export of PCB wastes from Canada to the U.S. was concerned. The U.S. position at that time was that the *Canada-U.S. Agreement* did not cover PCBs. Exports of PCB waste from Canada to the U.S. would therefore have been in violation of the *Basel Convention*'s prohibition on trade with non-parties.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 77, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 29 - 30, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

142. Canada formally posed the question of whether the *Canada-U.S. Agreement* covered PCBs to the U.S. on December 6, 1995. A response was not received until January 24, 1996, when the U.S. advised by way of diplomatic note that it had finally concluded that PCB wastes were, in fact, covered by the *Canada-U.S. Agreement.*

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 95 – 97 and Tab Q, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 29 - 30, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

143. Canada was also ~~concerned~~ because U.S. ~~regulations~~ and the *Canada-U.S. Agreement* included incompatible provisions. For example, U.S. regulations for PCB wastes under TSCA 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. regulations 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 PCBs would be stranded at the U.S. border. Thus, even after the U.S. took the position that the *Canada-U.S. Agreement* applied to PCBs, it was not at all clear to Canada that U.S. PCB regulations complied with the *Canada-U.S. Agreement* so as to render exports of PCBs from Canada to the U.S. consistent with the *Canada-U.S. Agreement* or the *Basel Convention.*

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 78 - 80 and Tab M, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

144. The *Basel Convention* commits Canada to ensuring that if PCB wastes are exported, they 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 U.S. to ensure that the PCBs would be so managed. For example, Canada has more stringent requirements than the U.S. for the decontamination of PCB-contaminated mineral oil transformers. In Canada, the guidelines developed by the CCME for PCB Transformer Decontamination require that the dielectric fluids of drained transformers must contain less than 200 parts per million PCB to be disposed of in landfills, and the guidelines recommend that the metal components be recycled. U.S. law permits landfilling of drained PCB-contaminated mineral oil transformers if the transformer dielectric fluid contains less than 500 parts per million PCB.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 78 - 80 and Tab M, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

145. In addition, Canada was also concerned that the EPA permitted disposal operations to treat PCB waste using methods inconsistent with the Technical Guidelines for the environmentally sound management of PCB wastes issued under the *Basel Convention*, for example in allowing the landfilling of PCB wastes. In a letter dated January 12, 1995 (sic. 1996) to the EPA, SDMI admitted that some of the companies seeking enforcement discretion from the EPA to import PCBs did not meet Canadian standards for PCB disposal as they used landfills.

**SDMI Letter to EPA dated Janaury 12, 1995 (sic. 1996), SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Vol. II, Tabs 34**

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 78 - 80 and Tab M, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

146. In fact, prior to the granting of the enforcement discretion, SDMI had repeatedly raised exactly the same concern with the EPA and urged that it not take action favouring SDMI's competitors but leading to the landfilling of Canadian PCB wastes in the U.S.

**SDMI letter to EPA dated March 28, 1991, SDMI letter to EPA dated December 17, 1993, SDMI letter to EPA dated October 10, 1994, SDMI Letter to EPA dated January 12, 1995 (sic. 1996), SDMI Response to Canada's First Request for Documents, Tab 30, Annexes to Canada's Counter-Memorial, Vol. II, Tabs 46, 39, 36 and 34**

147. Further, the December 6, 1994 notice in the U.S. *Federal Register* discussing SDMI request for exemptions indicated that SDMI did not propose to dispose of all the PCB

wastes imported from Canada at its Tallmadge, Ohio facility. Some of the waste would have to be disposed of at other facilities elsewhere in the U.S. If not managed and destroyed properly, the PCBs could find their way into the atmosphere and be transported back to Canada as airborne pollutants, as well as cause environmental harm and create health risks in the U.S.[19]

148. At the time of the EPA's decision, 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, and 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 it complied with its obligations under the *Basel Convention*.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 79 - 82, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of Roy Hickman sworn October 4, 1999, paras. 14 and 15, Annexes to Canada's Counter-Memorial, Vol. III, Tab 62**

149. Environment Canada had not conducted a formal inspection of the SDMI facility at Tallmadge, Ohio nor for that matter of any U.S. facility to which Canadian PCBs imported by SDMI might ultimately be sent for disposal. While officials from Environment Canada had toured the SDMI facility at Tallmadge, they did so as a matter of courtesy while on visits to the facility and not with a view to determining whether the facility met Canadian or U.S. legal requirements for the disposal of PCBs.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 64, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, para. 28, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

150. Canada was also concerned that the enforcement discretion granted to SDMI 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. Ultimately, the Import for Disposal Rule, which from March 18, 1996 to July 1997 was the authority for PCB imports to the U.S., was overturned by a U.S. Court of Appeals decision on July 7, 1997, and the U.S. border was closed again to imports from Canada on July 20, 1997.

---

19 59 *Federal Register* 62868, published December 6, 1994.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 76, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

151. Environment Canada was also concerned over the uncertainty of long term access to U.S. waste disposal facilities. In its letter granting enforcement discretion to SDMI, the EPA stated that the enforcement discretion would be in effect until new U.S. rules regarding imports were in place or until December 31, 1997. There was therefore no assurance that the U.S. border would remain open. These concerns were allayed only in part on March 18, 1996, when the U.S. adopted the Import for Disposal Rule under TSCA, which was a rule of general application which allowed imports of PCB waste into the U.S. for disposal, but which was also subject to concerns regarding its legality under U.S. law, concerns which were highlighted by the legal challenge to this measure launched by the Sierra Club in the U.S in June, 1996.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 65, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

152. In addition, Canada was concerned about whether or not Canadian PCB waste could be returned to Canada in case of facility problems in the U.S. since the U.S. border remained closed to exports to Canada. Article 8 of the *Basel Convention* requires the State of export to take back wastes where a transboundary movement of hazardous waste cannot be completed in accordance with the terms of the contract. Special storage provisions were included in the *PCB Waste Export Regulations (1996)* to address this concern.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 64, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

153. 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 wastes to the U.S. could affect the development of Canada's environmental waste destruction capacity and hence Canada's capacity to deal with the disposal of PCB wastes in the long term, should access to U.S. disposal facilities subsequently be denied. The closing of the U.S. border on July 20, 1997 validates that concern.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 66, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

154. Further, once these concerns were addressed and an assessment made as to what Canada's long term response to the EPA decision would be, time would be needed to consult with stakeholders and to design an appropriate regulatory regime. The regulatory process typically takes two years to complete.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 100, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of John Myslicki sworn October 4, 1999, paras. 34 - 43, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

155. Environment Canada considered the different actions which could be taken to prevent the export of Canadian PCBs to the U.S. until such time as its concerns could be addressed. Given that the enforcement discretion for SDMI was to commence on November 15, 1995, and given the significant danger that PCBs pose to the environment, consideration was given to the issuance of an *Interim Order* under section 35(1) of the CEPA to prevent the export of PCB waste until its concerns could be satisfied.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 83, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of Roy Hickman sworn October 4, 1999, paras. 14 - 15, Annexes to Canada's Counter-Memorial, Vol. III, Tab 62**

156. Section 35(1) of CEPA provides that where the Ministers of the Environment and Health believe that a toxic substance is not adequately regulated, and that immediate action is required to deal with a significant danger to the environment or to human life or health, the Minister of the Environment may make an *Interim Order* which, *inter alia*, may limit import or export, specify conditions on import or export, or impose a total, partial or conditional prohibition of the import or export of the toxic substance. An *Interim Order* is a temporary measure, and ceases to have effect when a regulation replacing it is made or two years after the order was made, whichever is the earlier (s. 35(8)).

**Affidavit of Roy Hickman sworn October 4, 1999, paras. 14 - 15, Annexes to Canada's Counter-Memorial, Vol. III, Tab 62**

157. On November 16, 1995, with materials before her concerning the various factors, including the need for more time to satisfy Canada's concerns regarding compliance with its obligations under the *Basel Convention* and regarding U.S. PCB disposal standards, and to design an appropriate regulatory regime, the Minister of the Environment decided to issue an *Interim Order* under section 35(1) of CEPA.

**Affidavit of George Michael Cornwall sworn October 4, 1999, para. 14 and Tab C, Annexes to Canada's Counter-Memorial, Vol. III, Tab 65**

**Affidavit of Victor Shantora sworn October 4, 1999, para. 86, Annexes to Canada's**

**Counter-Memorial, Vol. III, Tab 64**

158. Steps were taken to obtain the concurrence of the Minister of National Health and Welfare with the issuance of an *Interim Order*, as required by section 35(1)(b) of CEPA. On November 16, 1995, Environment Canada received a letter from the Department of National Health and Welfare indicating that the Minister of National Health and Welfare concurred with the issuance of an *Interim Order* under section 35(1) of CEPA banning the export of PCB waste from Canada.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 86 – 88 and Tab O, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

**Affidavit of Roy Hickman sworn October 4, 1999, paras. 16 - 24, Annexes to Canada's Counter-Memorial, Vol. III, Tab 62**

159. On November 16, 1995, the Minister of the Environment, having obtained the concurrence of the Minister of National Health and Welfare, signed an *Interim Order* under section 35(1) of CEPA prohibiting the export of PCB wastes to the U.S. with the exception of PCB wastes in Canada that were owned by U.S. agencies operating in Canada.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 89 and Tab O, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

160. In a press release issued November 16, 1995, Minister Copps is quoted as justifying the *Interim Order* on the grounds of the *Basel Convention*: "We are confirming Canada's policy and meeting our obligation under the *Basel Convention* to dispose of our own PCBs". The press release further noted that the *Interim Order* was consistent with Canada's 1989 policy and would ensure sound environmental management while amendment to the regulation, following consultations, took place. Minister Copps reiterated this justification for the *Interim Order* in a speech to the Environmental Section of the Canadian Bar Association (Ontario) that she made that day in Toronto: "We are meeting our obligations under the *Basel Convention* to dispose of our own PCBs."

**SDMI Statement of Claim, Schedules 10 and 11**

161. However, as the Minister did not, within 24 hours of signing the order, offer to consult with the governments of all the affected provinces, as required by section 35(4) of CEPA, steps were taken to have the Minister sign a second *Interim Order* having the same effect as the first. The Minister of National Health and Welfare had already agreed to the issuance of an *Interim Order* on November 16, 1995. The Minister of the Environment signed a second *Interim Order* under section 35(l) of CEPA on November 20, 1995. As

required by subsection 35(1) of CEPA, the Minister of the Environment and the Minister of Health stated their belief that PCBs were not adequately regulated and that immediate action was required to deal with a significant danger to the environment or to human life and health.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 89 and 90, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

162. On November 20, 1995, the Minister of the Environment wrote to provincial and territorial Ministers responsible for the Environment informing them of the issuance of the *Interim Order* and asking them to consult with their respective governments to determine if they would be prepared to take sufficient action to deal with the issue covered by the *Interim Order*.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 91, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

163. On November 20, 1995, the Minister of the Environment 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. In these letters, the Minister of the Environment explained that the decision to issue the *Interim Order*, taken that day, was prompted by the EPA decision on the import of PCBs, and "will ensure their sound environmental management while the process of regulatory amendment takes place."

**Affidavit of Victor Shantora sworn October 4, 1999, para. 92, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

164. On November 28, 1995, the Governor-in-Council approved the *Interim Order*, as required by section 35(3) of CEPA. The *PCB Waste Export Interim Order*, P.C. 1995-2013 (the "*Interim Order*") (November 28, 1995, in force November 20, 1995) amended section 4 of the *PCB Waste Export Regulations*, SOR/90-453, so as to only permit exports to the U.S. of PCB waste from U.S. agencies operating in Canada, where the U.S. EPA has given prior consent to the export.[20] The *Interim Order* was published in the *Canada Gazette* Part I on December 9, 1995.

**Affidavit of Victor Shantora sworn October 4, 1999, para. 93, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

---

[20] 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.

165. The *Interim Order* merely codified existing practice, and closed the loophole for exports to the U.S. of PCB waste not owned by U.S. agencies in Canada that was created by the decision of the U.S. EPA not to enforce the U.S. import ban against SDMI and several other U.S. companies.

166. Paragraphs 117-119 of the Memorial refers to Canada's federal *Regulatory Policy*[21] and the obligation it conveys to consult with interested parties. The policy, which is not legally binding, was effective as of November 9, 1995. The policy envisages exceptions to its application. Further, and most importantly, section 35 of CEPA contains the requirements relating to the making of an *Interim Order*. The *Interim Order* process outlined in CEPA is designed to allow "immediate action" to deal with a "significant danger". In such a situation involving a temporary measure designed to deal with an immediate problem, it would be impractical to engage in prior consultation with all interested parties or to pre-publish the proposed regulatory measure in the *Canada Gazette* before it takes effect. The *Regulatory Policy* imposes no requirement of consultation for emergency measures such as an *Interim Order*.

167. Both prior to and subsequent to the issuance of the *Interim Order*, officials of Environment Canada attempted to consult with the EPA both on the issue of the enforcement discretion for SDMI and the environmentally sound management of PCB wastes. Unfortunately, a combination of disputes between the U.S. Congress and the Administration coupled with a series of winter storms made those discussions almost impossible. The U.S. Congress refused to pass EPA's appropriations bills in its disputes over environmental issues with the administration. EPA employees were twice sent home on furlough leave: (i) November 13-17, 1995 and (ii) December 18, 1995 - January 6, 1996. In addition, a series of severe winter storms paralysed Washington, D.C. in late November and during December 1995 keeping key EPA officials from their offices and making contact difficult.

**Affidavit of Victor Shantora sworn October 4, 1999, paras. 94 – 98 and Tab Q, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

## L. The New Regulations

168. Canada's concerns regarding the regulation of PCB disposal in the U.S. 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

---

21 "Regulatory Policy", issued by Regulatory Affairs Division, Program Branch, Treasury Board Secretariat, Nov. 9, 1995.

allow the export of Canadian PCB wastes to the U.S. for thermal or chemical destruction.

**Affidavit of John Myslicki sworn October 4, 1999, paras. 34 - 43, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

169. The process of preparing the regulations that would replace the *Interim Order* and open the Canadian border began in March 1996. The requirements of the *Regulatory Policy* were followed with the regulations which were developed to replace the *Interim Order.* 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 Part I of the Canada Gazette for public review and comment. In addition, the proposed regulations were described in October 1996 in a special edition of *Resilog*[22], a newsletter serving the hazardous waste industry.

**Affidavit of John Myslicki sworn October 4, 1999, paras. 34 - 43, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

170. Canada consulted the EPA about different aspects of the proposed regulations throughout the process through telephone calls, the exchange of advance copies of regulations, and in other discussions. SDMI, Inc. was well aware of the proposed and wrote letters to Environment Canada during the consultation period in support of the proposed regulations. SDMI sought the help of Environment Canada in understanding the notification process, the timing of various steps and the documents required to secure approval of shipments. Environment Canada was happy to assist and worked with SDMI even in advance of the coming into force of the new regulations. Environment Canada cooperated by reviewing notices and checking documentation prior to the effective date of the regulations.

**Affidavit of John Myslicki sworn October 4, 1999, paras. 34 - 43, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

171. As required by section 35(5)(a) of CEPA, the *Interim Order* was 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.* On the same day, these regulations were replaced by the *PCB Waste Export Regulations (1996)*, SOR/97-109 (in force February 4, 1997). The new regulations were made and came into force on 4 February 1997, and effectively repealed the *Interim Order.*[23]

---

22 *Resilog*, Environment Canada, ISSN 0-225-5804, October 1996, Special Issue.

23 Order in Council P.C. 1997-154, 4 February 1997; 1997 *Canada Gazette*, Part II, Extra No. 1, Vol. 131, 7 February 1997.

**Affidavit of John Myslicki sworn October 4, 1999, para. 44, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

172. The new regulations replaced the *PCB Waste Export Regulations*, SOR/90-453, and opened the Canadian border for exports of Canadian PCB wastes to the U.S. for disposal provided that the wastes 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 rule which permitted import of PCBs to the U.S. A summary of this assessment is contained in the "Regulatory Impact Analysis Statement", published with the regulations (*Canada Gazette Part II*, Vol. 131 Extra, at p. 14). The Canadian border was closed for exports to the U.S. for less than 14 ½ months during the tenure of the *Interim Order*.

**Affidavit of John Myslicki sworn October 4, 1999, paras. 44, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

173. Beginning from February 4, 1997, when the new regulations were adopted by Canada, SDMI received some 7 shipments of PCB wastes for disposal prior to the closing of the U.S. border by the U.S. EPA on July 20, 1997.

**Affidavit of John Myslicki sworn October 4, 1999, paras. 48, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

174. The Canadian border remains open to exports of PCB waste to the U.S. for appropriate disposal. However, the closing of the U.S. border has prevented SDMI from continuing to import PCB waste from Canada.

**Affidavit of John Myslicki sworn October 4, 1999, paras. 46 - 47, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

175. The inventory of PCB wastes in Canada was not reduced substantially over the period in question. From January, 1995, to January, 1998, the inventory of PCB wastes in Canada (excluding soil) decreased less than 15%.

**Affidavit of Victor Shantora sworn October 4, 1999, paras 104 and 105 and Tab R, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

176. As of January, 1995, there was a total of 41233.2 tonnes of PCBs in use in Canada. Excluding soils (104,552.6 tonnes), there were 28952.4 tonnes of PCB wastes in Canada. Excluding soils (109,264.1 tonnes), there were 29458.5 tonnes of PCB wastes in Canada.

As of January, 1997, there was a total of 35,589.8 tonnes of PCBs in use in Canada. Excluding soils (105,710.7 tonnes), there were 29165.4 tonnes of PCB wastes in Canada. As of January, 1998, there was a total of 31.695.8 tonnes of PCBs in use in Canada. Excluding soils (98,200.3 tonnes), there were 25640.7 tonnes of PCB wastes in Canada.

**Affidavit of Victor Shantora sworn October 4, 1999, paras 104 and 105 and Tab R, Annexes to Canada's Counter-Memorial, Vol. III, Tab 64**

## M. The Closing of the U.S. Border

177. The U.S border was open to imports of PCB waste from November 15, 1995 to July 20, 1997 only. From November 15, 1995 to March 1996 the U.S. allowed imports through the enforcement discretion granted initially to SDMI and subsequently granted to several other companies treating or disposing of PCB wastes in the U.S.

178. From March 18, 1996 to July 1997, the U.S. allowed imports by virtue of the Import for Disposal Rule issued by the EPA under TSCA March 18, 1996, which reversed the ban on importing PCB's into the U.S. which had been in place since 1980.

179. On July 7, 1997 the U.S. Court of Appeals for the 9th Circuit overturned the EPA's Import for Disposal Rule in *Sierra Club* v. *E.P.A.*[24]. SDMI intervened in this case, which was commenced in June 1996. The ruling essentially negates the Import for Disposal Rule and recognized the continued effect of the 1980 ban on the import of PCBs into the U.S. 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.

**Affidavit of John Myslicki sworn October 4, 1999, para. 47, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

180. 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. Entry of PCB wastes into the U.S. under PCB Waste Export Permits issued under the Canadian *PCB Waste Export Regulations* have not been allowed since this date.

**Affidavit of John Myslicki sworn October 4, 1999, para. 47, Annexes to Canada's Counter-Memorial, Vol. III, Tab 63**

181. SDMI says that the court's decision did not affect the ability of the EPA to grant

---

24 *Sierra Club* v. *E.P.A.*, (U.S. Ct.App., 9th Cir.), CA 9, No. 96-70223, July 7, 1997.

individual enforcement discretions to companies such as SDMI. Even if that is a correct statement of law, and Canada says it is not, the facts are that SDMI never sought another enforcement discretion and the EPA never issued another one related to PCB waste exports from Canada.

**SDMI Memorial, page 15, last paragraph**

182. The documents provided by SDMI indicate that shipments of PCB wastes from Canada to SDMI in Tallmadge for approximately 16 clients may have been prevented by the U.S. closure of its border. SDMI did not secure further enforcement discretions to those 16 or any other Canadian customers, notwithstanding SDMI's position that the U.S. Court of Appeals decision did not affect the ability of the EPA to grant further enforcement discretions.

**SDMI Response to Canada's First Request for Documents, Tab 28, Sample Documents, Annexes to Canada's Counter-Memorial, Vol. II, Tabs 54 - 60**

**Canada's Summary of SDMI Response to Canada's First Request for Documents, Tab 28, Annexes to Canada's Counter-Memorial, Vol. IV**

# PART THREE: THE ARGUMENT

183. Canada's argument is three-fold. First: because it was not a measure "relating to" NAFTA "investors" or "investments", it was not within the scope and application of Chapter Eleven. The Claim ought to be dismissed on that basis. Second: even if the *Interim Order* was covered by Chapter Eleven, it did not breach any of the four provisions in issue. SDMI has not discharged its burden of proof. Its claim would have to fail on that basis. Third: if Chapter Eleven did apply, the finding of a breach of Chapter Eleven would create an inconsistency between Chapter Eleven and Chapter Three. This result should and can be avoided. The *Interim Order* was a Chapter Three (Trade in Goods) measure, and was necessary to protect the environment. In the event of any inconsistency with Chapter Eleven, Article 1112 requires that Chapter Three prevail. Again, the Claim would have to be denied. Pursuant to Procedural Order No. 1, Canada also sets out a number of principles that ought to govern the quantification of damages if that is required.

## A. Interpreting the NAFTA: Applicable Principles

### *1. Article 102 of the NAFTA*

184. The starting point in the interpretation of the NAFTA is Article 102 paragraph 2 which provides that "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".

### *2. The Vienna Convention*

185. The applicable rules of international law include the *Vienna Convention on the Law of Treaties* ("The Vienna Convention") which is generally accepted as reflecting customary international law.

186. The first general rule of interpretation under Article 31 of the *Vienna Convention* is 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 the light of its object and purpose"[25]. Article 31(2) provides that the context for the purpose of the interpretation of a treaty includes the preamble of the treaty and any agreement relating to the treaty which was made between the parties in connection with the conclusion of the treaty. In the case

---

25 Article 31(1).

of *In the Matter of Tariffs Applied by Canada to Certain U.S. - Origin Agricultural Products,* the NAFTA Panel examined this requirement and interpreted it to mean that it should look first to the "plain and ordinary meaning of the words used" in the Agreement and consider "the meaning actually to be attributed to words and phrases looking at the text as a whole and examining the context in which the words appear"[26].

## A. CONTEXT OF NAFTA CHAPTER ELEVEN

187. In the context of this dispute, this means that the provisions of Chapter Eleven must not be examined in isolation but rather in the light of the entirety of the Agreement[27]. Chapter Eleven is not the only chapter in the NAFTA. The NAFTA also contains substantial chapters dealing with trade in goods (Chapter Three) and with cross-border services (Chapter Twelve) that are relevant to the facts of this case and must be read together with Chapter Eleven. Chapter Eleven can not be interpreted in a way that would render meaningless the provisions of Chapter Three and Chapter Twelve.

188. As part of the context of the Chapter Eleven provisions one must also look at the Preamble of the NAFTA in interpreting its provisions[28]. Preambular statements are important to determine the object and purpose of the agreement. With respect to investment the Preamble to the NAFTA provides that the Parties have resolved to:

> "**ENSURE** a predictable commercial framework for business planning and investment"

189. The Preamble elaborates that the Parties have resolved to do this "in a manner consistent with environmental protection and conservation".

190. The Preamble also provides that the Parties are resolved to:

> "**PROMOTE** sustainable development"

---

[26] *In the Matter of Tariffs Applied by Canada to Certain U.S. - Origin Agricultural Products*, 1 T.T.R. (2d) 975 at paragraph 119 (CDA-95-2008-01).

[27] Sir. Ian Sinclair, *The Vienna Convention of the Law of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984) at 127: "One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part."

[28] This is also a well-established practice for WTO Panels and the WTO Appellate Body to rely on the preamble or objectives provision of an agreement to interpret the meaning of a provision of the agreement. For example, *United States - Standards for Reformulated and Conventional Gasoline*, April 29, 1996, WT/DS2/AB/R, at page 30 [hereinafter *Reformulated Gasoline*]. See also I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition (Manchester: Manchester University Press, 1984) at pages 127-128.

and to:

"**STRENGTHEN** the development and enforcement of environmental laws and regulations"

191. These statements show that the environment was a key consideration of the Parties to the NAFTA[29]. The Parties intended to ensure a predictable commercial framework for business planning and investment but only in a manner consistent with environmental protection and conservation and while strengthening the development and enforcement of environmental laws and regulations and promoting sustainable development.

192. The Parties also saw it important to note in the Preamble of the NAFTA that they were also resolved to "PRESERVE their flexibility to safeguard the public welfare". This was an important consideration to the Parties at the time of the conclusion of the NAFTA and continues to be of crucial importance to the Parties. The Chapter Eleven obligations should in no way be read to unduly restrict the Parties' ability to legislate for the public good as, for example, where the environment or the health of their citizens is concerned.

193. The fact that NAFTA provisions should be read to give proper consideration to environmental issues is reinforced by the existence and provisions of the *North American Agreement on Environmental Cooperation* (the "NAAEC"). The *Vienna Convention* (Article 31:2(b)) provides that other agreements that were made in connection with the conclusion of the Agreement are to be considered as part of the context.

194. The NAAEC was negotiated in connection with the conclusion of the NAFTA to reflect the Parties' insistence that trade liberalization go hand in hand with environmental protection[30]. The NAAEC entered into force immediately after the entry into force of the NAFTA. All three NAFTA countries are Parties to that agreement. The Preamble of the NAAEC reconfirms "the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection". Article 3 of the NAAEC recognises the right of each Party to establish its own levels of domestic

---

29 In its report on the case of *United States –Import Prohibition of Certain Shrimp and Shrimp Products,* 12 October 1998, WT/DS58/AB/R (Appelate Body) [hereinafter the *Shrimp Turtle Case*], in interpreting the rights and obligations of the WTO members under the *General Agreement of Tariffs and Trade*, 30 octobre 1947, 58 U.N.T.S. 187 [hereinafter the GATT], the Appellate Body took the Preamble of GATT into account and noted : "the preamble attached to the GATT shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy." At para. 129. Clearly, this was the case in the context of the NAFTA.

30 The conclusion of the NAAEC was a condition to the ratification by the U.S. and Canada of the NAFTA. See P.M. Johnson and A. Beaulieu, *The Environment and the NAFTA: Understanding and Implementing the New Continental* Law (Island Press, 1996).

environmental protection and environmental development policies and priorities. It is also worth noting a specific reference in Article 2(3) of the NAAEC for Parties to consider " prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory...". In the case of PCBs, since Canada prohibits the use of PCBs (with some exceptions), this would mean that Canada should consider prohibiting the export of PCBs to the United States.

195. The importance the NAFTA Parties attached to environmental considerations should be taken into account when interpreting the scope of Chapter Eleven and the obligations under it.

## B. THE OBJECTIVES OF THE NAFTA AND THE INTENT OF THE PARTIES

196. As set out in Article 102 one must also look at the objectives of the NAFTA in interpreting its provisions. In paragraph 1 of Article 102, one of the six stated objectives of the NAFTA is to "increase substantially investment opportunities in the territories of the Parties"[31].

197. The NAFTA reflects a delicate and carefully achieved balance of rights and obligations. Therefore though one of its' objective is increasing investment opportunities it is not the only objective nor does it follow that the rights of investors are therefore absolute,

---

[31] And not as stated by SDMI in para. 41 of its Memorial "investment protection" or "trade liberalization". Article 102 of the NAFTA reads: "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."

overriding all other considerations.

198. Given that international agreements express the common intention of the Parties, agreements must be interpreted in a manner that reflects and gives effect to that common intention of the Parties[32]. The intention of Chapter Eleven was to provide some protection to the investor when investing in a foreign country and to its investment in that foreign country. It is clear from the context of the Chapter Eleven provisions that Governments agreed to provide these protections in a manner that does not hamper the protection of the environment and that preserves their ability to legislate for environmental and health purposes. Contrarily to what SDMI asserts in its Memorial, the Chapter Eleven provisions should not be given a broad interpretation but rather one that reflects the intent of the Parties[33] and that does not lead to results that are manifestly absurd or unreasonable[34].

199. Throughout the Memorial SDMI misconstrues the intent and purpose of Chapter Eleven and the extent of the obligations under Chapter Eleven in a way that leads to unreasonable results which clearly do not reflect the intention of the NAFTA Parties. There is no indication that the investment promotion objective of the Parties should conflict with sound regulatory activity by governments. In fact, a sound regulatory environment tends to promote investment in a country. The interpretation that is proposed by SDMI is not conducive to this sound environment for investment. It cannot be the case that every time a product is banned, for whatever reason, or that a regulation is promulgated, investment rights are affected in a way that should give rise to an arbitration procedure. If that were the case, this would lead either to innumerable procedures against governments or to a "regulatory freeze".

### *3. Canada's International Obligations Should Be Read to Be Consistent with Each Other*

200. Under Article 4.5 of the *Basel Convention*, transboundary movements of hazardous wastes with non-Parties to that Treaty (like the United States) are prohibited. Article 11 of the *Basel Convention* creates an exception to this rule, by allowing Parties to maintain bilateral agreements which pre-date the entry into force of the Convention, as long as such agreements are compatible with the environmentally sound management of

---

32 Lord McNair, *The Law of Treaties,* (Oxford: Clarendon Press, 1961) at page 365.

33 As a general rule, international tribunals have interpreted narrowly limitations to the sovereignty of states. See for example, the *Nuclear Test Case,* ICJ Rep (1974), p. 267; The *Free Zone Case* (1932), Series A/B, no 46, p.167. Also in Oppenheim, at p.1278.

34 Article 32 of the *Vienna Concention.*

hazardous wastes as required by the Convention. At the time of the *Interim Order* the transboundary movement of PCB wastes was not covered by the *Canada-U.S. Agreement*. Therefore Canada's obligations under the *Basel Convention* prevented it from shipping PCB wastes to the United States. The *Interim Order* was consistent with Canada's commitments under the *Basel Convention.*

201. In interpreting the provisions of the NAFTA this must be taken into account. The WTO Appellate Body in its decision in the *Shrimp Turtle Case*[35] noted the following remarks from the WTO Members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference[36]:

> "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAS) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due *respect must be afforded to both.*" (emphasis added)

This certainly applies in the context of the NAFTA. As stated above, there are various indications throughout the NAFTA and particularly in its Preamble that the Parties wanted to pursue their trade liberalization goals in a way compatible with environmental protection.

202. Furthermore, the fact that the NAFTA Parties specifically included Article 104(c)[37] is an indication that the Parties intended to comply both with the NAFTA and with their obligations under the *Basel Convention*[38].

---

35 At para. 168.

36 Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report to the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996.

37 Article 104 provides that: "In the event of any inconsistency between the NAFTA and the specific trade obligations set out in: [...] (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 [...] such obligations should prevail to the extent of the inconsistency, provided that where a Party has a choice between 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."

38 In this regard, the tribunal should also note the comments in the United States' *Statement of Administrative Action*: "The Administration does not foresee any conflict between the requirements of the NAFTA and the trade obligations imposed by environmental agreements mentioned above [i.e. the Basel Convention] or other agreements that are not currently included in Article 104". Also: "the Administration does not consider there are any inconsistencies between the supplemental labour and environmental agreements and the NAFTA", p. 3-4. Paul

203. Therefore, to the extent possible, the Tribunal should interpret the scope and coverage of the NAFTA Chapter Eleven provisions in a manner consistent with Canada's obligations under the *Basel Convention*[39].

---

Reuter points out that compatibility should be gauged by reference to the Parties intention. *Introduction to the Law of Treaties*, (London: Pinter Publishers, 1989) at 102.

[39] Jenks refers to a "general presumption against conflict", "The Conflict of Law-Making Treaties" (1953), 30 British Y.B.I.L. at 427.

## B. The *Interim Order* Was Not A Measure "Relating To" NAFTA "Investors" or "Investments"

204. As noted above, Article 1101 limits the coverage of Chapter Eleven to measures adopted or maintained by a Party relating to: (a) investors of another Party (b) investments of investors of another Party in the territory of the Party...".

205. Canada does not question that the *Interim Order* was a "measure" in the sense of Article 201 but submits that this measure did not "relate" to, in this case, SDMI or its investment in Canada as required by Article 1101, and is, therefore, beyond the scope and coverage of NAFTA Chapter Eleven.

206. SDMI argues that *any* measure that merely affects an investor or an investment falls within the scope of Chapter Eleven. Canada submits this very broad interpretation cannot be supported by either the terms or the context or Article 1101 or by the object and purpose of the NAFTA and of Chapter Eleven.

207. Article 1101 provides that the measure should *"relate"* to an investor or an investment and not merely *affect* it. If the Parties to the NAFTA had intended Chapter Eleven to cover any measure that "affects" investors or their investment they would have so stated. Such examples can be found in various articles dealing with the coverage of certain Chapters of the NAFTA such as: Article 709 of Section B of Chapter 7 which provides, *inter alia* that: "... this Section applies to any [sanitary and phytosanitary] measure of a Party that may, directly or indirectly, affect trade between the Parties"; Article 901 of Chapter Nine which provides, *inter alia*: "This Chapter applies to standard-related measures...that may directly or indirectly, affect trade in goods or services between the Parties...". These examples demonstrate that when the Parties wanted a broad scope of application they expressly provided for it. Therefore, "relating to" when considered in the context of NAFTA as a whole and the specific examples cited above must be interpreted to mean something less than "directly or indirectly affects".

208. In this regard, the decisions of the WTO Panels and Appellate Bodies confirm this conclusion.[59] They looked for a "substantial relationship", more than "merely incidentally or inadvertently aimed at" of inadvertent when the expression "relating to" of the Article XX (g) of the GATT was interpreted.

209. It cannot be that the Parties to the NAFTA intended that every regulatory measure of general application that has a minimal or incidental effect on an investor or its investment

---

[59] Several WTO decisions have confirmed this interpretation when examining the term "relating to" found in Article XX(g) of the GATT. See *Reformulated Gasoline* at p.18; Also, in the *Shrimp Turtle Case*, paras. 136-37.

give rise to a claim under Chapter Eleven. If that were the case, Governments could be inundated with such claims as any regulatory measure is likely to affect investors or their investments as it affects Canadians and Canadian companies. This would be contrary to the intention of the Parties, as expressed in the Preamble, to preserve their flexibility to safeguard the public welfare, promote sustainable development and ensure a predictable commercial framework for investment in a manner consistent with environmental protection and conservation.

210. Moreover, the very broad interpretation of what constitutes a measure "relating to" investors or investments proposed by SDMI would lead to absurd results. If the tribunal were to accept this interpretation, then all measures relating to goods and to services would also constitute measures "relating to" investors or investments. Even tariff measures, such as the imposition of anti-dumping duties, would be subject to challenge under Chapter Eleven provided that some investor or investment was merely *affected* by the measure.

211. In this case, the *Interim Order* was clearly a border measure related to trade in a good, namely PCBs, in that it prohibited the export of PCBs from Canada. On its face, the *Interim Order* clearly has no application to investors or investments. The fact that they it may have had an incidental effect on SDMI and its alleged investment, which is unproven, does not give rise to a claim under Chapter Eleven.

212. SDMI alleges that Canada has acknowledged in its Regulatory Impact Analysis Statement published along with the Regulations that the promulgation of the PCB Waste Export Ban was directly related to the Investor and its Investment. Although the U.S. EPA's granting of enforcement discretion to companies in the United States (which allowed imports of PCBs from Canada into the United States) was the triggering factor in the Canadian decision to make an *Interim Order*, the measure was designed to address problems related to the movement of PCBs across the Canada-U.S. border and was taken in accordance to Canada's obligation under the *Basel Convention.* The measure had nothing to do *per se* with the SDMI or its alleged investment in Canada.

213. In summary as the measure at issue does not "relate to" an investment or an investor, it does not fall within the scope of Chapter Eleven.

## C. Preliminary Issues

### *1. Burden of Proof*

214. It is a well-established rule in international trade law that the claimant bears the burden of proving its claim.[40] Article 24 (1) of the UNCITRAL Rules also stipulates that each party has the burden of proving the facts relied on to support its position. In order to meet this burden, Myers must put forward sufficient evidence and legal arguments to demonstrate that Canada's action were inconsistent with its NAFTA Chapter Eleven obligations.

215. SDMI has failed to meet this burden. As Canada, will demonstrate SDMI has failed to demonstrate that either: (1) Chapter Eleven provisions applied; or (2) that there was a violation of the Chapter Eleven obligations and that damage resulted from this violation.

216. Apart from vague allegations regarding the nature of the investment in Canada and unsubstantiated allegations of discrimination, little evidence has been presented by SDMI on key points relating to existence of the investment and damages suffered in Canada. The Memorial presented by SDMI has virtually no supporting documents and relies heavily on the affidavit of Michael Valentine who was the "Director of Development/International Sales" at Myers U.S. at the time. SDMI attempts to compensate for this lack of evidence by relying on newspaper articles. This can in no way constitute sufficient evidence. As a result of this lack of evidence, SDMI improperly attempts throughout its Memorial to shift the burden of proof to Canada.[41]

217. Chapter Eleven of the NAFTA grants special access to dispute settlement provisions where it is alleged that a Party has violated a provision of the investment chapter and an investor has incurred losses. But the Article 1122 consent to arbitration of the NAFTA Parties is not a license to investors to pursue vexatious claims. The rights of responding parties must not be abused by claims which there is little evidentiary foundation. Canada says this is one.

### *2. The Basic Requirements of NAFTA Chapter 11 Have Not Been Met*

#### A. Myers Had No "Investment" In Canada Within the Meaning of the NAFTA

---

[40] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, p.12 and p. 14. Also in the NAFTA context see *In the Matter of Tariffs Applied by Canada to Certain U.S. - Origin Agricultural Products*, 1 T.T.R. (2d) 975 at paragraph 125 (CDA-95-2008-01).

[41] For example: para. 88, 134 and 138 of the Memorial.

***I. SDMI has not established that it was an "investor of another Party" that was seeking to make, was making or had made an "investment", as defined by Article 1139***

218. Whether SDMI was an "investor of a Party", which requires it to have an "investment", is fundamental to the right of SDMI to properly bring this claim. If SDMI is not an "investor of a Party", it does not fall within the scope and coverage of Chapter Eleven as determined by Article 1101.

219. Canada says that the evidence does not support any of the possibilities SDMI posits to bring itself within Chapter Eleven.

**SDMI Memorial, paragraphs 8 - 18**

a. The NAFTA Definitions

220. According to Articles 1101(1) and 1139 "investor of a Party", the mere fact of being an "enterprise" is not enough to qualify as an "investor of a Party" and fit within the scope and application of Chapter Eleven. There is the additional requirement of the definition of "investor of a Party": "[one] that seeks to make, is making or has made an investment". Contrary to the assertions of SDMI, neither Myers Canada nor the so-called joint venture was its "investment" according to any of the four elements of the definition of "investment" that SDMI pleads.

**SDMI Memorial, paragraph 8**

221. To understand the application of NAFTA Chapter Eleven, a number of related definitions and provisions have to be taken into account.

222. Article 1101 establishes the scope and coverage of Chapter Eleven:

"This Chapter applies to measures adopted or maintained by a Party relating to:
(a) investors of another Party;
(b) investments of investors of another Party in the territory of the Party; [...]"

223. Article 1139 defines an "investor of a Party" to include "...an enterprise of such Party, that seeks to make, is making or has made an investment".

224. Article 1139 defines an "investment". SDMI asserts that the following sections of the definition of investment apply in this case:

"investment means:

(a) an enterprise; ...

(d) a loan to an enterprise; ...

(i) where the enterprise is an affiliate of the investor, ...

(f) an interest in an enterprise that entitles the owner to share the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); ...

(h) interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in such a territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; ..."

225. For the purposes of Chapter Eleven "enterprise" means an "enterprise as defined in Article 201 (Definitions of General Application), and a branch of an enterprise". Article 201 defines "enterprise":

"**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or government-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;"

226. Article 1139 defines an "investment of an investor of a Party" to mean "an investment owned or controlled directly or indirectly by an investor".

227. Article 1116 provides that an Investor can bring a claim to arbitration on his own behalf.

228. In summary, based on Articles 1101 and 1116 and the definitions in Articles 201 and 1139, to make a successful claim under NAFTA Chapter Eleven, SDMI must meet the substantive requirements of Chapter Eleven, and must establish each of two basic requirements:

229. SDMI was an "investor of another Party" (Article 1101(1)) that was seeking to make, was making or had made an "investment" (Article 1139 "investor of a Party"); and the "investment" met the definition of the term (Article 1139 "investment"), including the definition of "enterprise" (Article 1139 "enterprise" and Article 201 "enterprise")), if relevant.

b. Myers Canada was not an "enterprise" of SDMI

230. In the first place, SDMI did not own or control Myers Canada; it was not even a partial shareholder. Four individuals owned equal shares in Myers Canada (all with the surname Myers). Therefore, Myers Canada could not be an "enterprise" of SDMI. Element (a) of Article 1139 "investment" does not assist SDMI.

**Shareholders of Myers Canada, SDMI response to Canada's First Request for Documents, Tab 1**

c. SDMI did not make a "loan to an enterprise"

231. Since Myers Canada is not an "investment" of SDMI by virtue of being its "enterprise", element (d) of the definition of "investment" ("a loan to an enterprise") cannot apply unless one of two conditions are met. Either the "enterprise is an "affiliate" of the putative investor ((b)(i)), or "the original maturity of the loan is at least three years" ((b)(ii)).

232. SDMI has presented no evidence of any loan to Myers Canada with an "original maturity of at least three years". The Affidavit of Rev. Michael Valentine does not even use the word "loan", let alone swear to any arrangement with an original maturity of at least three years. In any event, SDMI does not rely on this part of the definition.

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999.**

**SDMI Memorial, paragraph 8**

233. Myers Canada is not an "affiliate" of SDMI. Myers Canada was incorporated as Myers Company for Environmental Development Inc. under the *Canada Business Corporations Act* on February 2, 1993. That legislation continues to govern Myers Canada's existence. On June 19, 1996, by Articles of Amendment, it changed its name to S.D. Myers (Canada) Inc. Various corporate transactions occurred between or involving Canadian companies in 1995 and 1996. The result was two companies in Canada (2105098 Canada Inc. and S.D. Myers (Canada) Inc.) as of June, 1996, with the same four shareholders.

**SDMI Response to Canada's First Request for Documents, Tab 3**

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 35**

234. The same four shareholders hold shares in SDMI. The evidence does not disclose whether the shareholders of SDMI hold equal shares in that company nor does it show

any agreement among the shareholders of either company about the exercise of control. The companies are therefore not controlled by the same person and are not "affiliated" as defined by the constituting law.[55]

235. Therefore, neither part of element (d) of the definition of "investment" applies.

d. SDMI is not a "creditor" entitled to a share of the Assets of Myers Canada on Dissolution

236. SDMI also relies on element (f) of the definition ("an interest in an enterprise that entitles the owner to a share of the assets of that enterprise on dissolution..."). SDMI alleges that as Myers Canada's "largest creditor", it would be entitled to a share in the assets on dissolution. Again, there is no evidence in the Affidavit of Rev. Michael Valentine to support this contention. He alludes vaguely to the forwarding by SDMI of unspecified "funds" requisitioned by Myers Canada. Nothing on that record establishes SDMI as a "creditor" of Myers Canada in any legal or factual sense. The balance sheet of the audited financial statement referred to in paragraph 17 (and footnote 49) of the SDMI Memorial makes reference to "long term debt" of $216,418.00 as "S.D. Myers' advances, without interest and repayment terms", and in the accounting notes as "Advances by way of transfers from S.D. Myers Inc." In the absence of interest and repayment terms, it is difficult to divine what the real arrangement is between SDMI and Myers Canada and whether the latter is in fact a creditor of the former.

**SDMI Memorial, paragraphs 8 and 17**

**Myers Company for Environmental Development Inc., Unaudited Financial Statements as at December 31, 1993, SDMI Memorial Schedule 20.**

---

55 In its Memorial, the Claimant refers to a dictionary definition of the term "affiliate" which does not accord with Canadian law. See the definitions of "affiliated" and "affiliated bodies corporate" in the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44, s. 2:

> "affiliate" means an affiliated body corporate within the meaning of subsection (2)
> ...
>
> (2) For the purpose of this Act,
>
> (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other of both are subsidiaries of the same body corporate or each is controlled by the same person; and
>
> (b) if the two bodies corporate are affiliated with the same body corporate a the same time, they are deemed to be affiliated with each either.

237. In any event, from the date and the amount of that book entry, long before the *Interim Order* was made, it would appear most likely that the "loan" pleaded was for the unrelated purpose of finding a plant site in Canada, which SDMI appears to have abandoned by 1995. According to a submission to the United States Environmental Protection Agency made by S.D. Myers, Inc. in 1995:

"SDMI has spent 2 - 3 years and $350,000.00 trying to site a fixed-site facility in Canada."

**SDMI Response to Canada's First Request for Documents, Tab 25, "Why the EPA Should Grant S.D. Myers, Inc.'s Exemption, Requests Now", p. 1-P.1, "3**

e. SDMI Did Not Commit Capital

238. Finally, SDMI relies on element (h) of the Article 1139 definition of "investment" and says that it has "committed capital by way of operating loan financing and invested capital by way of common shares in its Canadian affiliate". The full definition reads:

"(h) interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in such a territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; ..."

**SDMI Memorial, paragraphs 8 and 18**

239. There is no evidence of any "invested capitals by way of common shares" of SDMI. Its documents make it clear that SDMI never had any shareholding in Myers Canada. That company was owned by four individuals, all with the surname Myers.

**Shareholders of Myers Canada, SDMI response to Canada's First Request for Documents, Tab 1**

240. The alleged "commitment of capital by way of operating loan financing" may or may not be the same money that is said to constitute SDMI as Myers Canada's creditor. If so, SDMI has failed to prove that this was more than some sort of accounting entry as opposed to a real investment in Canada. If it is something different, again there is no

evidence as to how much it was, when it was made and how it was made. In any event, there is no evidence that the funds were actually disbursed in Canada. There is no evidence that the commitment was analogous to the contracts described in the definition as examples of what is covered by the definition. It is telling that, as mentioned above, the affidavit of Rev. Michael Valentine never mentions any "loan".

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999.**

***II. SDMI Has Not Established that the Alleged "Investment"Otherwise Met the Definition of the Term in Article 1139, Including the Definition of "Enterprise" in Articles 1139 and 201***

241. Another possibility that seems to be relied on by SDMI in a general way is the so-called joint venture between it and Myers Canada. SDMI alleges that it operated in Canada "in a joint venture with S.D. Myers (Canada) Inc." and as a "co-venturer". As such, it is suggested, SDMI had an "investment" in Canada that brings it within the scope and coverage of Chapter Eleven.

**SDMI Memorial, paragraphs 4 and 14**

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 35**

242. There are both legal and factual difficulties with the allegation of a joint venture. The arrangement did not have the degree of formality necessary to constitute a "joint venture" as contemplated by the relevant Article 1139 and 201 definitions. There is little evidence to support the allegations that Myers Canada played more than an insignificant role in the efforts of SDMI to market its cross-border PCB waste disposal services in Canada.

243. According to Articles 1139 and 201, an "investment" can be an "enterprise" that is a "joint venture" where it is an "entity constituted or organized under applicable law" (Article 201). The question here is whether the arrangement between SDMI and Myers Canada is such an "entity". Canada says it is not.

244. Since the "joint venture" is said to have operated in Canada, its status ought to be judged according to Canadian law. According to Canadian law, a joint venture is:

> "[A]n association of persons ..., who agree by contract to engage in some common, usually *ad hoc* undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense ...

or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control."[56]

245. Courts have also set down additional conditions to the existence of a joint venture, in surplus to its contractual basis. Ward and Jenner noted also that the courts added other conditions than the conclusion of a contract before deciding that a joint venture exists. These are:

(a) a contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking;
(b) a joint property interest in the matter of the venture;
(c) a right of mutual control or management of the enterprise;
(d) expectation of profit, or the presence of "adventure", as it is sometimes called;
(e) a right to participate in the profits;
(f) most usually, limitation of the objective to a single undertaking or ad hoc enterprise.[57]

246. SDMI admits that there has never been any written joint venture agreement between SDMI and Myers Canada. In fact there is little evidence of the arrangements between the co-venturers except for the vague assertions of Rev. Michael Valentine of some collaborative between the two related to various activities, including the export of PCB wastes from Canada.

**Myers Response to Canada's First Request for Documents, Tabs 7;**

**Letter from Barry Appleton dated June 15, 1999**

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, para. 35**

247. The evidence demonstrates that the role Myers Canada played with respect to the export of PCB wastes was minimal. As set out in the Statement of Facts, above, it never had industrial, office or other commercial space in Canada. It did not lease any commercial office or other premises, or any commercial, industrial or other business equipment. It appears to have had few personnel in Canada. On its own documents, SDMI had five

---

[56] *Williston on Contracts*, vol. 5 at 554, as quoted in K. Ward & C. Jenner, "Establishing a Business Enterprise in Canada" in H. Stikeman *et al.*, ed., *Doing Business in Canada*, looseleaf (New York: Matthew Bender, 1999) at para. 14.04.

[57] See *ibid.*, also quoting *Williston on Contracts*, vol. 5 at 563

times as many staff over the years (thirty compared to six) serving the Canadian market as Myers Canada. Myers Canada had no independent source of funds. In summary: there is little evidence that Myers Canada played a meaningful role developing business opportunities for the export of PCB wastes from Canada, or ever had the capacity to do so.

248. At the same time, although SDMI may have been actively pursuing potential Canadian customers *from* Tallmadge, Ohio, it had little of its own operations *in* Canada. SDMI's business operations in Canada did not involve any established physical presence, such as business premises or leased equipment in Canada. SDMI's business operations in Canada did not involve the physical presence of any staff of its staff. The affidavit of Rev. Michael Valentine goes into some detail as to the multiplicity of activities that were conducted by and from SDMI's U.S. facility. In fact, he does *not* swear that the staff of SDMI ever conducted business *in* Canada at all.

**SDMI Response to Canada's First Request for Documents, Tabs 12 and 14**

**Affidavit of Rev. Michael Valentine, sworn July 19, 1999, paras. 23, 25, 27 and 28.**

249. SDMI also characterises Myers Canada as its "branch", relying on the definition of "enterprise of a Party" in Article 1139. SDMI alleges that it "had business activities in Canada operating as a branch between 1992 and 1997." It also says that employees of SDMI worked at its Canada offices.

**SDMI Memorial, paragraphs 4, 13 and 14**

250. According to the *Black's Law Dictionary*, "branch" means:

> "Division, office or other unit of business located at a different location from the main office or headquarter".

The term "Branch bank" is used as an application of the word "branch" and is defined as being:

> "An office of a bank physically separated from its main office, with common services and functions, and corporately part of the bank." [58]

251. To meet the ordinary meaning of the term "branch", therefore, SDMI itself would have to have an office geographically separated from its head office, no more, and located in

---

58 *Black's Law Dictionary*, 6th, 1990 at 188.

Canada. As set out in detail in the Statement of Facts, above, the evidence indicates the contrary. There was no such "branch" office . Myers Canada was a separate corporate entity, incorporated under the laws of a foreign jurisdiction. It has separate financial statements and tax filings. It allegedly receives loans from SDMI, a transaction which seems inconsistent with a true "branch". There is no evidence to support the allegations that SDMI's staff worked *in* Canada as part of the "branch". Canada's First Request for Documents specifically sought "a list of all staff of S.D. Myers, who conducted business operations in Canada and their responsibilities." The response was lists of staff of SDMI "working with [Myers Canada] for specific periods over the period of the joint venture". This is an admission that *no* staff of SDMI worked *in* Canada through the period of the alleged joint venture, at a "branch" or elsewhere.

**Myers Response to Canada's First Request for Documents, Tabs 10 and 20**

**Letter from Barry Appleton dated June 15, 1999**

***III. SDMI Has Not Established that It Owned or Controlled Directly or Indirectly the Alleged "Investment" According to the Definition of "Investment of an Investor of a Party" in Article 1139***

252. Since it does not meet the strict requirements of "investor of a Party" for the purposes of Article 1101(1), and in any event cannot show that it had an "investment" as defined by Articles 1139 and 201, SDMI cannot demonstrate that the definition of "investment of an investor of a Party" set out in Article 1139 is also met. SDMI does not even attempt to do so. It is therefore unnecessary to consider the control test that is part of that definition.

***IV. Even If SDMI Had an Investment in Canada, the Respondent Did Not Breach Any NAFTA Obligation Owed to the Investor or Its Investment in Canada***

253. SDMI's Memorial is based upon four specific set of claims:

A. the allegation that Canada failed to extend national treatment to the Investor and its Investment in violation of article 1102

B. the allegation that Canada engaged in a "discriminatory" and procedurally unfair promulgation of the PCB Waste Export Ban in contravention of the minimum standard of treatment of article 1105

C. the allegation that Canada engaged in a policy that required the investment to use local content and domestic goods and services contrary to article 1106

D. the allegation that Canada expropriated the investment in the sense of article 1110

254. Canada will demonstrate that it complied with all of the Chapter Eleven obligations it owed to Myers U.S. with respect to its investment in Canada and to the investment in Canada.

## D. The *Interim Order* Did Not Breach Any Obligation Under Article 1102 of the NAFTA (National Treatment)

### *1. The NAFTA and National Treatment*

255. Article 1102 defines the national treatment obligation with respect to investments and investors. It 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 or investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition *of investments*.

256. The purpose of the national treatment obligation is to prohibit discrimination on the basis of nationality (of the investor) and/or ownership (of the investment).

257. Although the national treatment obligation can be found in several provisions of the NAFTA, no cases have been decided under NAFTA which have shed light on its interpretation. Accordingly, it must be interpreted in light of the ordinary meaning of the words in their context and in accordance with the intention of the Parties.

258. Canada proposes that the following test should be applied in examining whether there was a violation of Article 1102: (1) Is there an investment and an investor of another party, an of what nature; (2) What or who are the Canadian investments in the like circumstances; and (3) Did the measure accord less favourable treatment to the investment or to the investor with respect to the establishment, acquisition expansion, management, conduct, operation, and sale or other disposition of investments.

### *2. Application to the Facts*

#### A. Defining the Investment and the Investor with Respect to His Investment

259. The terms of Article 1102 provide that the national treatment guaranty is extended to both the investment (Article 1102.2) and the investor *with respect to the investment* (Article 1102.1). The latter obligation does not mean that the national treatment obligation applies to the investor's activities in its home country. The obligation only applies to the investor with respect to its investment in the foreign country, in this case Canada[42].

260. In examining whether in this case national treatment was extended to the investment or to

---

42 See the NAFTA definitions of investors and investments and earlier comment on the matter.

the Claimant with respect and to his investment in Canada, it is important to keep in mind what constituted SMDI's investment in Canada.

261. If the Tribunal accepts that Myers Canada constituted the "investment" of SDMI in Canada, it should recall that, if anything, this investment was little more than a shell. In this regard, the Tribunal should refer to the description of Myers Canada's activities and comments made earlier. Myers Canada was essentially a "convenience" address for SDMI. It had no industrial, commercial or office space and virtually no personnel in Canada. By SDMI's own admission the investor's activities in Canada were limited to: "sales, marketing, distribution and pre-processing activities for PCB waste remediation in Canada"[43]. At best it was engaged in solicitation and making quotes on behalf of SDMI. Myers Canada was at no time engaged in PCB destruction and had no PCB destruction facilities or equipment in Canada.

262. If on other hand the Tribunal finds that the investment of Myers U.S. in Canada is limited to the alleged loan to Myers Canada, then the national treatment obligation should be examined in that light. Clearly, the complained measures had no effect whatsoever on the loan or on Myers U.S. ability to expand, manage, conduct, operate or sell this loan.

### C. "IN LIKE CIRCUMSTANCES"

263. The national treatment obligation in the NAFTA, as in other trade agreements, is comparative. Activities of domestic and foreign investor *in the territory of the Party* are compared[44] - only if the investments or the investors are truly comparable ("in like circumstances") is the "treatment no less favourable" or "national treatment" required.

264. According to the plain meaning of the words, "like circumstances" can be read as "similar circumstances". These circumstances in the context of investment certainly include the type of business activities and operations conducted *in the territory of the other Party.* This interpretation is confirmed by the object and purpose of the NAFTA and its investment provision which is to promote investment in the territory of the NAFTA Parties and therefore to provide some protections to investors and their activities in the territory of other NAFTA Parties.

265. While expressions that may seem at first glance similar can be found both in the GATT at

---

43 At par.14 of the Claimant's Memorial

44 As the Claimant puts it in para. 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 similar domestic investment operate in that country" (Emphasis added).

Article III:4 and III:2, first sentence (i.e. "like product") and in the GATS at Article XVII (i.e. "like services" and "like service suppliers") the criteria are different. Article 1102 has its own standard of what constitutes national treatment with respect to investments[45]. In light of this, the main interpretation instrument for Article 1102 should be its terms taken in their context and in light of its objectives as stated in the section above.

266. The Claimant alleges that "like circumstances" should be interpreted as all investors or investments operating in the same sector. Neither of the cases referred to by SMDI[46] allow for this extremely broad interpretation of "like circumstances".

267. In this regard, the WTO Appellate body's decision in *Canada - Certain Measures Concerning Periodicals* can be of no use to the Claimant in supporting this "sectoral theory" for the interpretation of "like circumstances". SMDI claims that the decisions relative to "like products" can be relevant for the purposes of interpreting the "like circumstances" criteria in Article 1102. However, in that decision, the Appellate body was examining whether the products in question were "directly competitive or substitutable" and not if they were "like products". It should also be noted that in rendering its decision, the Appellate body reversed the panel findings on the question of "like products" and stated that the determination of likeness is "particularly delicate, since "likeness" must be construed narrowly and on a case-by-case basis".

268. As support for its "sectoral theory", SDMI also refers to the following clarification issued by the Organisation for Economic Co-operation and Development ("OECD") in its 1993 report with respect to the concept of "like situations" in its "Declaration on International Investment and Multinational Enterprises"[47]:

> "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 valid only if it is made between firms operating in the

---

45 Article 1102 is derived from completely different sources than GATT Article III and GATS Article XVII. Its origin can be traced to the Model Bilateral Investment Treaty developed by the Office of the United States Trade Representative . Given these different antecedents, the decisions respecting Article III of the GATT 1994 and its predecessor has, at best, very limited application to the provisions of Chapter Eleven and certainly cannot be applied *mutatis mutandis*. Jurisprudence relating to the U.S. bilateral investment treaties would have been more useful, however, we are not aware of any cases that would have examined the meaning and scope of the national treatment obligation in these treaties.

46 Para. 77 and 78 of the Claimant's Memorial

47 The Declaration was issued on 21 June 1976. In setting out the treatment guideline, referred to "treatment ...no less favourable than that accorded **in like situations** to domestic enterprises..." (Declaration on International Investment and Multinational Enterprises, 21 June 1976, Paragraph II.1.)

same sector. More general considerations such as the policy objectives of Member countries could be taken into account to define the circumstances in which comparisons between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of National Treatment."

The comments made by the OECD regarding "like situations" should not be read (as the Claimant suggests) as indicating that the comparison should be between foreign and domestic firms operating in the same sector.

269. The "same sector" criteria may only be a *sine qua non* condition to further examination of whether the situations of foreign and domestic firms are similar. Once this criteria is met, the Tribunal must also take into consideration other elements such as the activities and operations of the firm, the nature of the goods involved and the services provided.

270. It is difficult to identify companies that were engaged in the same activities as Myers Canada because of the undefined nature of their activities.

271. Canada has established above that Myers Canada was not engaged in PCB destruction. If Myers Canada was engaged in PCB destruction it would have been "in like circumstances" with Canadian investors for those activities. This was not the case: SDMI's investment in Canada was not "in like circumstances" to the companies it compares itself to. S.D. Myers Canada and Canadian PCB waste disposal companies such as Chem Security and Cintec were not engaged in the same type of business activities and operations.

272. There were a number of Canadian companies engaged in packaging, transport of PCBs, pre-processing activities, site inspections, and sale of PCB destruction services such as Customs Environmental Services, Sani-Mobile, Greenport Environmental Services and Proeco. These were companies engaged in "handling" PCBs but not destruction per se. Many of these companies then shipped their PCBs for destruction at disposal facilities. Myers Canada was not even conducting this type of activity: it had no facilities and no specialized personnel. In fact, in order to fulfil its contracts for disposal and site inspections Myers Canada contracted with some of these companies to perform these PCB related services. For example, Myers Canada invoiced Borden Catelli on December 19, 1997 for incineration and transport services. An invoice from Proeco to Myers Canada dated January 31, 1998 shows that the services were actually performed by Proeco.

**Myers Response to Canada's First Request for Documents, tab 28**

273. Myers Canada's operations should only be compared to those of other brokers or marketing companies.

## D. "TREATMENT NO LESS FAVOURABLE"

274. For the Tribunal to conclude that there was less favourable treatment it must find either 1) that there was less favorable regulatory treatment (i.e. *de jure*) or 2) that the measure resulted in less favorable treatment with respect to the investor or investment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition *of investments* (i.e. *de facto*).

275. In examining whether less favourable treatment was granted, the Tribunal should examine first if the measure on its face provided for less favourable treatment between foreign investors or investments and domestic ones.

276. The *Interim Order* was a regulation of general application to all companies exporting PCBs without distinction in particular with regard to nationality or ownership. The measure therefore does not contain any *de jure* discrimination against foreigners. Under the terms of the law, foreign investors and domestic investors receive exactly the same treatment for the same activities.

277. Second, the Tribunal should examine if the *Interim Order* resulted in *de facto* discrimination.

278. The proper test in examining whether Canada's action resulted in *de facto* discrimination is to examine (i) how the measure affects SDMI as an investor with respect to the management, conduct, operation and expansion of its investment in Canada, compared to Canadian investors of similar investments; (ii) how the measure affects SDMI's investment in Canada compared to similar Canadian investments. In each instance, the investments would need to be in like circumstances.

### *I. The measure did not result in less favourable treatment to S.D. Myers U.S. as an investor with respect to the management, conduct, operation and expansion of Myers Canada compared to Canadian investors of similar investments*

279. The Claimant has failed to establish that the *Interim Order* had any effect whatsoever on Myers U.S.'s ability to expand, manage, conduct, operate or sell Myers Canada. Myers U.S. continued to conduct, operate and manage Myers Canada as it had previously done throughout the period where the *Interim Order* was in effect.

280. SDMI actually bases its claim on an incorrect interpretation of Article 1102.1. Throughout its Memorial, SMDI does not argue any discrimination against Myers U.S. with respect to the management, conduct, operation and expansion of its investment in

Canada but rather that the national treatment obligation also applied to Myers U.S. activities in the United States. The interpretation proposed by SDMI of the national treatment obligation would amount to extending extra-territorially the national treatment obligation to the activities and operations of investors in their home country which is manifestly not the purpose of the investment provisions. Article 1102.1 is intended to ensure that a foreign country not interfere in investors' conduct and management of their investment in its territory.

***II. The measure did not result in less favourable treatment to Myers Canada compared to similar Canadian investments.***

281. Again, SDMI has failed to establish that the *Interim Order* had any effect whatsoever on Myers Canada. Not only did Myers Canada continue its business during the period where the *Interim Order* was in place but its income increased during that period. SDMI also failed to present any evidence that other similar Canadian investments had been treated more favorably. SDMI has failed to establish that the *Interim Order* benefited to similar Canadian investments.

282. Again, the comparison must be with investments "in like circumstances". Canada has shown that the effect of the measure on Myers Canada would therefore need to be compared with Canadian-owned firms performing similar activities in Canada and not with firms engaged in PCBs destruction.

283. At paragraph 88 of its Memotial[48], SDMI argues that since it operates a PCB recycling facility in the United States, it should be compared with treatment granted to PCB destroyers operating in Canada. Canada says that this is an incorrect interpretation of the national treatment obligation: the obligation for National Treatment does not depend on a comparison of the domestic activities of investors in their respective home countries.

284. In summary, foreign investments in Canada and domestic firms received exactly the same treatment for the same activities.

---

[48] The paragrapg reads: "When preparing the PCB Export Waste Ban, Canada was well aware that S.D. Myers, Inc. was the only U.S.-based PCB waste disposer actively operating in Canada. It was clear that a measure to block the export of PCB waste would discriminate against any existing American-based Canadian market participant"

### *3. Conclusion*

285. The Respondent complied with its obligations under Article 1102. Myers Canada and SDMI with respect to its investment in Canada was not treated differently or less favourably then domestic investments or investors in like circumstances.

## E. The *Interim Order* Did Not Breach Any Obligation Under Article 1105 of the NAFTA (Minimum Standard of Treatment)

### *1. The Law*

#### A. THE NAFTA AND MINIMUM STANDARD OF TREATMENT

286. 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". There are two components to this article: the first " fair and equitable treatment and full protection and security" and a second residual component which relates to other standards of treatment required by international law.

287. Given that the phrase "fair and equitable treatment" is not defined in the NAFTA, according to the *Vienna Convention on the Law of Treaties*,[49] it must be interpreted in good faith in accordance with its ordinary meaning in its context and in the light of its object and purpose. The ordinary meaning of the word "fair" is "just, unbiased, equitable, in accordance with the rules" and the ordinary meaning of the word "equitable" is "fair and just".[50] The phrase "full protection and security" should be read in conjunction with the "fair and equitable treatment".

288. In addition, Article 1105 provides this minimum standard of treatment should be given "in accordance with international law".

#### B. THE MINIMUM STANDARD OF TREATMENT UNDER INTERNATIONAL LAW

289. There is no agreed definition of what constitutes the minimum standard of treatment in international law.[51] However, several commentators, judges and arbitrators have attempted to circumscribe this notion. At an early stage in the development of the concept, the *General Claims Commission Mexico – United States* enunciated the

---

49 (1969) 1155 U.N.T.S. 331 (in force in 1980).

50 *Concise Oxford Dictionary of Current English*, 8th ed.

51 See I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon, 1990) at 528, that mentions that "there is no single standard but different standards relating to different situations." In A.H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden: A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949), there is a lengthy discussion on the subject. It is said, at p. 87, that: "The minimum standard is the expression of the common standard of conduct which civilized States have observed and still are willing to observe with regard to aliens."

following, which reflects the type of breach that would constitute a violation of the minimum standard of treatment :

> [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[52]

290. While it was first developed for the protection of foreign nationals in newly independent states and covered mainly fundamental human rights of aliens such as the recognition of the juridical personality, the inviolability of the person, personal freedom, and other economic rights, the concept of minimum standard of treatment has been extended to foreign investors and corporations and now covers substantial and procedural fairness such as free access to court, the right to have a fair hearing and that the administration of the justice is not unduly delayed.[53]

291. When rights other than fundamental human rights are at stake, only few international tribunals have examined the question of the violation of the minimum standard of treatment. In those instances, the source of the minimum standard of treatment was either a part of the customary international law[54] or integrated in treaties such as bilateral investment treaties.[55] The facts of those cases generally involve a foreign-controlled corporation that had been caught in an insurrection or a civil strife. There are very few cases where this question has been examined outside these situations.

292. The *Case Concerning Elettronica Sicula S.p.A. (ELSI)*[56] sheds some useful light on the concept of the minimum standard of treatment because it did not emerge from a context of war. Article five of the investment treaty between Italy and the United States provides for the "most constant protection and security" and the enjoyment of the "full protection and security" as required by international law for the nationals of the other Party.[57] The

---

52 *Neer (U.S.A.)* v. *Mexico* (1926), 4 R.I.A.A. 60 at 61-62.

53 See Roth, *supra* for an analysis of the content of the "Minimum Standard of Treatment".

54 See, for example, the first award on the merit in the case of *Amco Asian Corporations* v. *Republic of Indonesia* (1984), 1 ICSID Rep. 377.

55 See, for example, *Asian Agricultural Products Limited* v. *Republic of Sri Lanka* (1990), 4 ICSID Rep. 245 where the "fair and equitable treatment" and the enjoyment of "full protecion and security" were integrated within a treaty for the promotion and protection of investment.

56 (*United States* v. *Italy)*, [1989] I.C.J. Rep. 15 [hereinafter the *ELSI Case*].

57 See the *Treaty of Friendship, Commerce and Navigation Between the United States of America and the*

facts involve an American corporation that saw its Italian plant "requisitioned" for a period of six months. This action was in response to the imminent liquidation of the plant, which would have left many workers unemployed and would have greatly undermined the social tissue of the region where the plant was. The United States brought a claim to the International Court of Justice saying, amongst other things, that Italy breached its obligation of "most constant protection and security" and "full protection and security" toward the Americans, as required by the treaty and international law. The Court refused to second-guess the finding of the Italian government officials that the situation amounted to "great public necessity" and held that no breached of the minimum standard of treatment occurred.

293. It is also important to note, at the outset, that the content of the Minimum Standard of Treatment will vary depending on the circumstances and facts at issue. As Lauterpacht puts it: "Everybody appreciates that there is no intrinsic or objective concept of equity applicable in those circumstances [where the fair and equitable treatment must be awarded], but that we are there dealing with a concept the content of which is closely related to the specific facts of any given case."[58] In a situation where immediate action is required, the standard of treatment will be less stringent than otherwise.[59] The content of the obligation will also vary in light of the measure at issue. For example the procedural guaranties will not be the same whether the measure at issue is a regulatory act or an administrative action affecting directly the rights and interests of a particular individual.[60]

294. There is general agreement that the protection of aliens likely meets the requirement of the minimum standard of treatment when the treatment given to foreigners coincides with the treatment accorded to the own nationals of a given State. Sacerdoti in his review of bilateral investment treaties has remarked:

> "National Treatment should be considered to satisfy prima facie the requirements of the international minimum standard. Invocation of the

---

*Italian Republic*, 2 February 1948, 63 U.S. Stat. 2255, and the *Supplemental Agreement* of 1951.

58 E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Grotius Publications, 1991) at 122.

59 For example, in the *ELSI Case*, the International Court of Justice recognized that every system of law must provide for interference with the normal exercise of rights during public emergencies and the like. See para. 74 of the decision.

60 This is also the case in domestic law. Note, for example, the strictness of the right to be heard when a decision affecting a particular individual is taken (see R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, 2nd ed., vol. 4 (Toronto: Carswell, 1990) at 256ff in comparison with the much more flexible and consultation that usually takes place before the enactment of a regulation and that gives an opportunity for individuals to be heard (see the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 and Dussault & Borgeat, vol 1., *ibid.* at 380ff).

> latter can be still considered relevant whenever national law does not provide generally shared values of substantial and procedural fairness and justice in respect of the enjoyment of property and the normal conduct of business operations."[61]

In this regard, it is interesting to note Jon Johnson's view in his guide to the NAFTA:

> "It is difficult to define with precision what is meant by the NAFTA obligation to accord treatment "in accordance with international law". However, the standard is fairly basic and presumably one which a country with a "major legal system" like Canada should have no difficulty in satisfying."[62]

295. The international standard may however be more stringent where the national law or national administrative practice falls short of the "minimum standard" required by international law[63] or more indulgent where the domestic law is well-rounded.[64] Therefore a violation of domestic law does not necessarily amount to a breach of the international standard of treatment.

## C. THE CONTEXT OF ARTICLE 1105

296. Article 1105 must be read in its context and in light of the entire NAFTA and other provisions of Chapter Eleven.

297. First, Chapter Eighteen, which is entitled "Publication, Notification and Administration of Laws", provides that to the extent possible, the interested persons are given a reasonable opportunity to comment on measures like regulations.[65]

---

61 G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" in Hague Academy of International Law, ed., *Collected Course of the Hague Academy of International Law: 1997* (Boston: Martinus Nijhoff, 1998) 251 at 342.

62 J.R. Johnson, *The North American Free Trade Agreement* (Aurora: Canada Law Book: 1994) at 287.

63 See, for example of a case where the treatment given to foreigners did not meet the minimum standard of treatment: *Asian Agricultural Products Limited* v. *Republic of Sri Lanka* (1990), 4 ICSID Rep. 245 (this was in the context of an insurrection and a counter-insurrection).

64 See, the *ELSI Case*, for an example where the minimum standard of treatment was more lenient than the municipal law was.

65 See NAFTA, Article 1802 (2)(b).

298. Second, in Chapter 11, Article 1102 describes the duty to treat no less favourably foreign investors and their investments than nationals and specifies the circumstances and scope of this obligation. Third, Article 1110 refers directly to Article 1105 (1). It forbids any expropriation unless: (a) for a public purpose; (b) on a non-discriminatory basis; (3) in accordance with due process of law and Article 1105 (1); and (d) on payment of a proper compensation.

299. This suggests that Article 1105 must be somewhat more restricted than it might be in the context of the customary international law or when it is incorporated in investment treaties that are typically less detailed than the NAFTA.

300. As Chapter Eighteen incorporates, in a quite detailed fashion, the procedural obligations of the Parties. This serves as an example that, when the Parties wished to impose a precise procedural obligations to themselves, they did so specifically.

301. It would be an over-statement that the first paragraph of Article 1105 covers all the forms of discrimination possible since it would leave the Article 1102, which focuses on discrimination based on the nationality, a dead letter. Finally, as Sub-paragraph 1110 (1)(c) separates the obligation of due process and those encompassed in Article 1105.

302. The above analysis would suggest that Article 1105 cannot go as far as muting other obligations that are found in the NAFTA. Article 1105 would then apply to very serious cases of denial of justice, gross negligence or bad faith on the part of a government in the treatment of an investment.

***2. Application to the Facts of the Case***

303. SDMI alleges that the Respondent breached its obligations under article 1105 by:

> "(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 draping 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."[66]

304. As a preliminary comment, it should be noted that the Minimum Standard of Treatment

---

[66] See the Memorial at para. 115.

obligation is owed to the investment of the investor not to the investor.[67] In this context, depending on the conclusions that the Tribunal reaches with respect to the nature of the investment, the obligation is owed either 1) to Myers Canada or 2) to some other form of investment SDMI might have *in* Canada.

305. SDMI claims broadly that in making and implementing the "*PCB Waste Export Ban*", Canada has violated the Minimum Standard of Treatment it owed to Myers Canada. SDMI presents the *PCB Waste Export Ban* as the four executive actions taken by Canada. These 4 actions are: (1) the *Interim Order* of the Minister dated November 16, 1995; (2) the *Interim Order* of the Minister dated November 20, 1995; (3) the Order in Council dated November 28, 1995; and (4) the *Regulations Amending the PCB Waste Export Regulations*. However, SDMI's allegations seem to relate to the making and application of the *Interim Order* of the Minister dated November 16, 1995 and the *Interim Order* of the Minister dated November 20, 1995. The Order in Council dated November 28, 1995 only confirmed the *Interim Order*[68]. With respect to the *Regulations Amending the PCB Waste Export Regulations*, it was developed during the period of the *Interim Order* and ultimately allowed exports of PCBs to the United States. SDMI has not made any allegations of breach of NAFTA obligations with respect to this regulation. Therefore the Tribunal should limit its examination to the making and implementation of the *Interim Order* of the Minister dated November 16, 1995 and the *Interim Order* of the Minister dated November 20, 1995.

306. The minimum standard of treatment should be examined in the light of the peculiar facts of each case. It should be recalled that this is a situation where immediate action was required in order to address the problem of the management of toxic substances and that the domain was heavily regulated.

### A. CANADA HAD NO DUTY TO CONSULT MYERS CANADA IN THE MAKING OF THE *INTERIM ORDER*

307. The power of the Minister of the Environment to issue the *Interim Order* is established by section 35 (4) of the CEPA. Those *Interim Order*s are of a regulatory nature: the CEPA itself says that an *Interim Order* "has effect ... as if it were a regulation".[69]

---

67 See NAFTA, Article 1105, *in limine*: "Each Party shall accord to investment of investor of another Party ...".

68 The approval by the Governor in Council (the Cabinet), mandated under paragraph 35(3) of the CEPA, was provided by the Order in Council dated November 28, 1995.

69 CEPA, para. 35 (2)(b). Also, the definition of "regulations" in the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, includes: "any instrument described as a regulation in any the Act of Parliament".

308. The Minimum Standard of Treatment under international law certainly does not provide that states have a duty to consult all interested parties when regulating. At the most, there may be a general notion among a majority of States that consultation is desirable to the extent possible and when the circumstances permit it.[70]

309. The decisions cited by SDMI to support its claim that Canada had a duty to consult him in the making of the *Interim Order* cannot have any application in the circumstances. In the *Shrimp Turtle Case*, the panel was examining whether the procedures specified in GATT Article X (the equivalent of NAFTA Chapter XVIII) had been met by the United States Office for Marine Conservation in the administration of the applications of various countries through the certification process. The measures in question were administrative actions in the nature of decisions and not regulatory measures as is the case here. Considering that difference, Canada is of the opinion that this case is irrelevant here. The findings in the *Reformulated Gasoline* case are of no use either to SDMI as they deal with the duty of a State to consult with other Member States where their interests are substantially affected. These obligations between States cannot be assimilated to the obligations that exist between States and their nationals or with foreigners.

310. The procedural obligations contained in the Minimum Standard of Treatment with respect to a State's regulatory making powers are certainly less stringent than those provided by domestic Canadian law. Therefore, given that the procedures set under Canadian law, in this case, section 35 of the CEPA, have been followed, it necessary means that there was no violation of Article 1105. More particularly, consultation has been conducted here as mandated by Canadian law.

311. The Claimant's main complaint seems to be related to the fact that S.D. Myers Inc.'s "competitors" in Canada were lobbying the federal government before the entry into force of the *Interim Order*.[71] The fact that the federal government was being lobbied does not constitute a violation of the minimum standard of treatment. Lobbying is a normal part of the law-making process in Canada and in the United States. S.D. Myers could have also hired lobbyists if it wished to. In fact, S.D. Myers Inc. itself was conducting its own campaign directly to the Minister and her department and indirectly by encouraging others to support it.

---

70 See NAFTA, Article 1802 for example.

71 See the Memorial at 53.

## B. CANADA ADOPTED THE *INTERIM ORDER* CONSISTENTLY WITH ITS DOMESTIC LAW

312. As a general rule, the administrative law of the United-States[72] a well as of Canada requires the Administration "to observe a minimum of formality in exercising its regulatory-making power"[73] both in the enactment and in the implementation of any regulations. It is highly uncertain that the exact detailed obligations of administrative law would be contemplated by Article 1105. Moreover, it is doubtful that the obligations created by Article 1105 would have the same complexity and stringency as in a well-developed domestic system of administrative law.

313. The *Interim Order* process outlined in Section 35 of the CEPA is designed to allow immediate action to deal with a significant danger to the environment or to human life or health when a toxic substance is not adequately regulated.[74] Accordingly, the process is much less formal than for "regular" regulations.[75] Paragraph 35 (6)(a) of CEPA exempts *Interim Order*s from certain procedural requirements that are otherwise imposed when an administrative agency enacts regulations. Given the purpose of such orders which are temporary measures designed to deal with an immediate problem, it would be impractical to impose an obligation to engage in prior consultation with all interested parties or to pre-publish the proposed regulatory measure in the *Canada Gazette* before it takes effect.

314. Accordingly, the CEPA does not provide for consultations with affected or interested Canadians but it provides that in order for the Governor in Council to approve the *Interim Order*, the Minister must have proposed within 24 hours of the *Interim Order* to consult with "affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger" and have consulted with "other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger".[76]

315. Given that the Minister had not proposed consultations to the provinces within 24 hours of the first *Interim Order*, a second order was re-issued on the 20 of November to allow for these consultations to take place and in order to meet the conditions for Cabinet approval. There were therefore no procedural irregularities in the enactment of the *Interim Order*.

---

72 See the *Administrative Procedure Act*, 5 U.S.C., c. 5.

73 Dussault & Borgeat, vol.1, ~~*supra*~~ at 376.

74 Article 35(1)(a)(i) and (b)

75 This ligthening of the obligations was approved by the International Court of Justice in the *ELSI Case*.

76 See CEPA, s. 35(4).

316. SDMI alleges that Canada's federal *Regulatory Policy*[77] imposes an obligation to consult with interested parties.[78] SDMI also alleges that the Minister of the Environment should have abided by another provision of the policy that requires her to consider alternatives to the regulation that would be proposed to her.[79]

317. The *Regulatory Policy* is a general statement of policy by the Canadian Government on the general regulatory process that should be followed in Canada. As every other policies of the executive branch of any government, it is not binding in a court of law[80] and certainly does not prevail over a legislation that provides specific procedures.

318. Even if the policy did apply, it does not deal with measures such as *Interim Order*s that are enacted in particular circumstances[81].

319. Furthermore, Canada says that non-respect of domestic procedures should not be conclusive in finding that there was a breach of the minimum standard of treatment obligation. For example, in the *ELSI Case*, the International Court of Justice had to decide if a certain decision taken by an agent of a state was discriminatory or arbitrary. Despite the fact that domestic courts found so according to the Italian law, the International Court hold differently. In the reasons, the Court said:

> Yet, it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. ...
> Nor does it follow from a finding by a municipal court that an act was unjustified , or unseasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[82]

320. This allowance for a certain disparity between international law and a given municipal

---

77 *Regulatory Policy*, issued by Regulatory Affairs Division, Program Branch, Treasury Board Secretariat, Nov. 9, 1995.

78 See the Memorial at para. 118, 119, 122.

79 See the Memorial at 54~~, para~~ 126ff.

80 See Dussault & Borgeat, vol. 1 at 329ff.

81 The policy specifically foresees the possibility of a departure from the policy in some circumstances.

82 *Supra* at 74.

legal order makes sense when the diversity of the states that must live up to the standard of treatment of international law is considered. In international law, the standard is much less stringent than in general in domestic law of states with a relatively articulated governmental system.

321. Canada says that, given that immediate action was required to deal with a significant risk to the health and environment, given that the international minimum standard of treatment is likely to be met when domestic law is respected (as was the case here) and given that the international standard of treatment is not as stringent as domestic laws are in general, this demonstration should satisfy the Tribunal that the Minimum Standard of Treatment has been respected as far as any consultation duty there may have been.

### C. CANADA ACTED AT ALL TIMES IN GOOD FAITH

322. SDMI's allegations that Canada did not act in good faith in making the *Interim Order* are based on two broad assertions: (1) that Canada had a malicious discriminatory intent; and (2) that Canada made the *Interim Order* while knowing that this was contrary to Canadian law.

323. Bad faith is a state of mind prohibited by domestic law when regulations are made. In international law, when deciding whether there has been bad faith, it must be remembered that bad faith should not be presumed.[83] The more so in a context where immediate action is required.[84] A prima facie case that Canada had legitimate concerns and reasonable grounds for making the *Interim Order* (irrespective of whether other decisions could have been made) should suffice for the Tribunal to conclude that there was no bad faith.

324. Canada has put forward numerous legitimate concerns that were raised by the EPA's decision to grant enforcement discretion and that ultimately led to the making of the *Interim Order*. These include:

(a) whether the enforcement discretion complied with U.S. law;

(b) whether exports of PCB wastes to the U.S., a non-party, would comply with the *Basel Convention*;

---

[83] See the separate opinion of Judge Tanaka in the *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, [1970] I.C.J. Rep. 4 at page 160, where he simply writes: "Bad faith cannot be presumed."; Cheng, *supra.*

[84] See the *Elsi Case, supra* at para. 74 where the Court said that considerable interest much be attached to the reason given by the public official himself when he or she acts in a situation of emergency and the like.

(c) whether PCBs would be disposed of in the U.S. in an environmentally sound manner;

(d) compliance with Canada's 1989 policy to destroy Canadian PCBs in Canada;

(e) the long-term viability of domestic PCB disposal facilities in light of the *Basel Convention*; and

(f) what would happen in the event that U.S. disposal facilities subsequently became unavailable, or if the U.S. border was closed again, as eventually happened.

325. The Supreme Court of Canada recently acknowledged the legitimacy of similar concerns when it scrutinized them in the context of another *Interim Order* that affect PCB waste. Before upholding the validity of the impugned *Interim Order*, the majority said that an allegation that PCBs did not pose "a significant danger to the environment or to human life or health" in the challenging of an *Interim Order* is "a tall order".[85] It then went on to demonstrate that, given the wealth of scientific opinions to the effect that PCBs are very dangerous substances, the appropriateness of the *Interim Order* was almost self-evident.

326. Subsequent events, such as the decision of the U.S. court case, showed that a number of these concerns were justified. Several EPA documents also show that Canada's concerns had some basis. In fact, SDMI's own submissions to the EPA regarding applications for enforcement discretion by its competitor, state some of the same concerns.[86]

327. The policy rationale for the ban was to protect living things in Canada and in the United States from harmful PCBs by ensuring the availability of PCB destruction facilities in Canada (in accordance with Canada's Basel obligations), by reducing the movement of PCBs from Canada to the United States to a minimum, and by ensuring that any PCB exports are managed in an environmentally sound manner. The fact that a consideration in the decision was to ensure the viability of Canadian PCB destruction facilities cannot be seen as arbitrary in light of the obligations in *Basel Convention* to which Canada is a Party.

328. All actions of Canada in this matter, when examined in light of the relevant circumstances (including the sudden EPA decision to grant enforcement discretion) were taken in good faith and reasonable, without abuse, arbitrariness or discrimination. The fact that the decision was taken quickly and took effect immediately cannot be seen as an

---

85 *R.* c. *Hydro-Québec*, [1997] 3 S.C.R. 213 at para. 157.

86 See the Part two: The Facts, above.

indication of arbitrariness in this case because of the very nature of the products involved and the risk of significant danger for the health and environment.

329. As well, the fact that the Government chose a temporary measure while other options were being assessed demonstrates the Government's good faith and the reasonableness of the decision. Canada used the period of the *Interim Order* to assess the various considerations and develop appropriate regulation which ultimately allowed exports of PCBs from Canada to the United States.

330. The Claimant's allegations that Canada violated its good faith obligation are based on the fact that the Minister of Environment did not hold the belief required by section 35 of the CEPA and therefore that she knew her actions were unlawful. The requirements of Section 35 of CEPA were met. First, the Minister of the Environment and of Health held a belief that PCB wastes were not appropriately regulated in Canada,[87] as evidenced by the issuance of the *Interim Order*. Second, both the Ministers of Environment and Health[88] believed there was a significant danger to the environment or to human life or health.[89] The requirement is merely that the Minister~~(s)~~ hold a belief. The evidence presented by Canada show conclusively that there were many elements that could reasonably have led to such a belief. SDMI has the burden of proof of showing the intent of the Ministers. SDMI has not, on the basis of its evidence, rebutted the presumption in favour of good faith.

331. In the Memorial, it is alleged that the Minister of Health did not himself belief that immediate action was required,[90] and that this is evidence of bad faith.[91] Canada is rather of the view that the Minister did not have to personally meet the requirements of section 35 of the CEPA.[92]

332. Canada submits that the Tribunal should be satisfied with this evidence that the requirements under Canadian law were met. Chapter Eleven does not provide for a judicial review mechanism and SDMI did not allege any denial of justice. Furthermore, domestic remedies were available to the Claimant if it wished to contest the validity of

---

87 See CEPA, s. 35 (1)(a)(i).

88 With respect to the Minister of Health, through appropriate delegated authority.

89 See CEPA, s. 35 (1)(a)(ii).

90 Condition of CEPA, s. 35.

91 See the Memorial at 54, para. 131ff.

92 "Ministers have an implied power to delegate their powers to Deputy Ministers and to the officials in their Ministry."S. Blake, *Administrative Law in Canada*, 2d ed. (Toronto: Butterworth, 1997) at 129.

the *Interim Order*. SDMI's president sworn an affidavit in support of the Centre Patronal Federal Court challenge.

333. With respect to SDMI's allegations that the Minister of the Environment had a malicious intent to harm and discriminate against Myers Canada, this is completely unfounded.

334. The Claimant does not suggest that any difference in treatment would amount to a breach of Article 1105. Nor would this be correct. Article 1102 defines the standard of treatment and the scope of the obligation in that regard[93]. SDMI is actually making a very serious allegation to the effect that the measure was intended to cause harm to its investment[94]. Not only has SDMI presented no evidence to that effect, but Canada has shown that it has legitimate concerns (such as its Basel obligations) which motivated its actions. In addition there are two other reasons why this cannot be the case. Simply put: 1) because Canada did not know about Myers Canada or its activities 2) because the *Interim Order* was consistent with the long-standing Canadian government policy against exports of PCBs which predates any enforcement discretion granted to SDMI.

### *3. Conclusion*

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

336. There was no duty to consult Myers Canada in the circumstances.

337. The *Interim Order* was properly made under section 35(1) of *CEPA*. All domestic legislative requirements were met.

338. The *Interim Order* was made in good faith in response to legitimate concerns that Canada had. There was no malicious intent.

339. In conclusion, Myers Canada received fair and equitable treatment in accordance with international law.

---

93 For a full discussion on the topic, Canada refers the Tribunal to the section in its Counter-Memorial on National Treatment, where Canada has shown that Myers Canada was treated exactly the same way as Canadian companies were.

94 It is important to remember that the obligation under Article 1105 is to the investment.

## F. The *Interim Order* Did Not Impose Any Performance Requirements Contrary to Article 1106 of the NAFTA

### *1. The NAFTA and Performance Requirements*

340. Article 1106(1) provides that "no Party may impose or enforce 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:[...]

(b) to achieve a given level or percentage of domestic content

(c) to purchase, use or accord a preference to domestic goods produced or services provided in its territory, or to purchase goods or services from persons in its territory[...]"(emphasis added)

341. On the one hand, according to the ordinary meaning of the words "requirements", "commitment" and "undertaking", what this article prohibits is the imposition or enforcement of a positive requirement or commitment, in the sense of an express obligation in connection with an investment of an investor, to achieve a given level or percentage of domestic content or accord a preference to domestic goods produced or services or to do any of the other enumerated things.

342. On the other hand, a plain and ordinary meaning of the words "in connection with" is "with reference to" or "in relation with". Canada, says, therefore, that for NAFTA Article 1106 performance requirements to be proscribed, they must refer or relate to the establishment, acquisition, expansion, management, conduct or operation of the investment.

343. The Claimant refers to the measures examined in *Canada- Administration of the Foreign Investment Review Act*[95] as support for its contention that performance requirements can be imposed indirectly. In that case, specific undertakings to purchase goods manufactured in Canada were required to gain governmental approval for an investment. The Act itself referred to the use of local goods and services amongst others. No inference can therefore be made from this case to the effect that performance requirements can be imposed indirectly.

344. In total seven prohibited performance requirements are listed in Article 1106(1). The scope of Article 1106(1) does not extend to export prohibitions or the Parties would have

---

95 *Canada- Administration of the Foreign Investment Review Act*, (L/5504 -30S/140, February 7, 1984)

said so. Article 1106(5) states that: "Paragraph 1 and 3 do not apply to any requirement other than the requirements set in those paragraph". This paragraph is a clear indication that the Parties intended a limited application/interpretation to article 1106.

345. In addition, Article 1106(1) must be read in the context of the entire NAFTA text. Chapter Three of the NAFTA sets out rules respecting export prohibitions. The fact that there is a specific article in the NAFTA that deals with export prohibitions, that is Article 309, confirms that the Parties did not intend Article 1106(1) to cover such measures.

346. This interpretation can also be supported when one looks at the origin of prohibitions against performance requirements. These prohibitions originate in U.S. BITS were they were introduced because performance requirements became a growing concern for U.S. investor as many host states (mostly developing countries) were beginning to impose conditions on the investor or investment (mostly not to screen out investments but to ensure additional benefits to the host state such as the use of local resource). These requirements resulted in reduced profitability for the foreign investor.[96] Mostly the concerns related to performance requirements were related to their distortive trade effects[97]. As the three NAFTA governments recognized they were undesirable and distorted the market a prohibition against performance requirement was included in the NAFTA.

### *2. The* Interim Order *Cannot Be Considered as Imposing a Performance Requirement*

347. The Claimant alleges that the Respondent breached its obligations regarding performance Requirements in two ways:

> "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;
>
> 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."

---

96 Generally on performance requirements in U.S. BITS see *United States Investment Treaties: Policy and Practice*, K. Vandevelde, (Kluwer:1992).

97 Extract from Sacerdoti, *Bilateral Treaties and Multilateral Instruments*, at p.367: "By artificially promoting exports or restricting the demand for imports through local content requirements, such provisions may be considered equivalent to export subsidies or import restrictions, deemed incompatible with the spirit if not always with the letter of GATT".

348. First, these allegations by the Claimant are vague and unsubstantiated. The Claimant does not explain in what the *Interim Order* imposed an obligation on Myers U.S. to do anything in connection to its investment in Canada or what this requirement was.

349. Second, the *Interim Order* by preventing the temporary export of Canadian PCBs to the United States in no way imposed the type of requirement that was intended to be prohibited by Article 1106. 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. What Article 1106 contemplates is a direct requirement or commitment in the sense of an express obligation, not something incidental to a measure prohibiting an activity. The ban imposed no such positive requirement.

350. More specifically, the ban imposed no level of domestic content with respect to Myers Canada's operation. In support of its assertion that there was a domestic content requirement the Claimant states the following at para. 162 of its Memorial:

> "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."

351. The *Interim Order* imposed no obligation on Myers Canada regarding construction of a PCB disposal facility in Canada or the use of certain level of domestic construction goods and services in the construction of this facility. The Claimant has provided no evidence to support this claim.

352. With respect to the contention that the effect of the *Interim Order* was to force all investors to use Canadian PCB disposal services, the Claimant has failed to show in what this relates to the Claimant with respect to its investment in Canada given that the investor had no PCBs to dispose of. In addition, the ban was temporary and there was no obligation for companies to dispose of their PCBs. As the evidence shows, S.D. Myers Canada continued its activities during the period of the ban without being required to use Canadian disposal services.

353. Furthermore, the allegations made by the Claimant in this section of its Memorial seem to be in contradiction with its contentions dealing with the national treatment obligation (with respect to the nature of the investment in Canada) and in the expropriation section (to the extent the Claimant recognises that its investment could have continued to operate

in Canada by buying Canadian services)[98].

354. In any case, there was no violation of the NAFTA because the *Interim Order* was an environmental measure of general application necessary for the protection of human, animal or plant life or health and for the conservation of living and non-living exhaustible natural resources.

### *3. Performance Requirement Exceptions*

355. Article 1106(6) provides for exceptions to the prohibition on performance requirements:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:
>
> (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
>
> (b) necessary to protect human, animal or plant life or health; or
>
> (c) necessary for the conservation of living or non-living exhaustible natural resources"[99]

356. Even if the *Interim Order* were found to be a prescribed performance requirement, it is justifiable as necessary for the conservation of living and non-living exhaustible natural resources and for the protection of human, animal or plant life or health. As such, we will limit our analysis to Article 1106(6)(b) and (c).

357. The exceptions in Article 1106(6)(b) and (c) are similar to those found in Article XX(b), and (g) respectively, of the GATT. We may therefore draw some guidance from existing

---

[98] See for example at para. 160 of the Claimant's Memorial where it is alleged that: "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."

[99] It is important to note that paragraphs 148 and 154 of the claimant's Memorial misconstrues Article 1106(6) to contain only two exceptions. More specifically, paragraph (a) appears to have become an additional requirement to satisfy for the application of the remaining two exceptions. This interpretation of Article 1106(6) is clearly not supported from a plain reading of this provision which provides for three exceptions similar to those found in Article XX(b),(d) and (g) of the GATT.

GATT and WTO panel and Appellate Body decisions in interpreting these exceptions.

## A. THE *INTERIM ORDER* WAS AN ENVIRONMENTAL MEASURE OF GENERAL APPLICATION COMING WITHIN THE SCOPE OF BOTH ARTICLE 1106(6)(B) AND (C)

### *I. Article 1106(6)(b): Measures "Necessary to Protect Human, Animal or Plant Life or Health"*

358. To successfully invoke this exception all of the following elements must be satisfied:[100]

(a) the policy in respect of the measures for which the provision is invoked falls within the range of policies designed to protect human, animal or plant life or health;
(b) the inconsistent measures for which the exception is being invoked were necessary to fulfill the policy objective; and
(c) the measures are applied in conformity with the requirements of the introductory clause.

a. Protection of Human, Animal or Plant Life or Health

359. PCBs are highly toxic, persistent and biocumulative and travel considerable distances through the atmosphere. They also persist in water, air or soil over extended periods and dissolve readily in fat tissues and other organic compounds. The latter characteristic results in upward mobility within the food chain through birds and other animals and eventually to humans. Consequently, they pose significant risks of serious harm to both animals and humans. Seasonal wind patterns indicate that the U.S. is the likely source of airborne PCB pollutants falling in Canada during the summer season. As a result, PCBs handled in an environmentally unsound manner in the U.S., including those exported from Canada may well make their way back to Canada. For example, though there is no production or use of PCBs in northern Canada PCBs have made their way into the water, seals and human population of that area in high concentrations.

360. The EPA's sudden and unexpected decision to grant SDMI an enforcement discretion raised a number of serious concerns with Canadian officials, including whether the *Canada U.S. Agreement* constituted an Article 11 agreement under the provisions of the *Basel Convention*, whether the PCB waste would be managed in an environmentally sound manner and what effect, if any, would it have on the availability of adequate disposal facilities in Canada. For example, the U.S. permitted landfilling and had less

[100]See *United-States – Standard for Reformulated and Conventional Gasoline*,17 January 1996 at para 6 (Panel Report). Although this Panel Report was appealed to the WTO Appelate Body, nothing in the Appelate Body Report changed the analysis of the Panel on this point. See *United-States – Standard for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R.

stringent requirements than Canada for the decontamination of PCB-contaminated mineral oil transformers. Potentially, the management of PCB wastes in an environmentally unsound manner in the U.S. could lead to PCBs returning to Canada and contaminating our water, air and animals and ultimately humans with a highly toxic substance.

361. The *Interim Order*, a temporary measure, addressed these concerns through the imposition of an export ban. This enabled Canada to ensure that PCBs would be handled in an environmentally sound manner and in full compliance with its international obligations under the *Basel Convention*.

362. The *Basel Convention*, reflects a broad multilateral consensus: ninety-nine States plus the European Union are Parties. The Convention obliges all its Parties to take appropriate measures not to allow exports of hazardous wastes where they have reason to believe that the wastes in question will not be managed in an environmentally sound manner, and to require that hazardous wastes, to be exported, are managed in an environmentally sound manner in the State of import. That the *Interim Order* was applied to ensure compliance with the *Basel Convention* is further confirmation that the policy underlying the Interim Order falls within the range of policies designed to protect human, animal or plant life or health.

b. Measure "Necessary" to Protect Human, Animal or Plant Life or Health

363. In determining whether the measure is "necessary" to protect human, animal or plant life or health dispute settlement panels have applied a two-part test: (1) are alternative consistent measures available to attain the policy goal, and if not, (2) is the measure in question the least trade-restrictive measure available to achieve the policy objective?[101]

364. The *Interim Order* was the least trade restrictive and only course of action available to Canada, at the time, that would have achieved the policy objective of protecting human and animal life and health and ensuring that Canada was complying with its obligation under the *Basel Convention*. The *Interim Order*, a temporary measure, gave Canada the opportunity to assess the situation and address all the risks identified.

365. For example, this course of action permitted Canada to address the issue of Article 11 of the *Basel Convention* by obtaining confirmation from the U.S. that the Canada U.S.

[101] Panel on *United States - Section 337 of the Tariff Act of 1930,* adopted November 7, 1989, U6439, 36S/345, para. 5.26. Panel on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes,* adopted November 7, 1990 (*"Thai Cigarettes"),* DS10/R, 37S/200, para. 76; this test was also adopted in *Tuna II,* at para. 5.35, and by the Panel in *United-States – Standard for Reformulated and Conventional Gasoline*, 17 January 1996 at para 6.20 at para. 6.24 (Panel Report).

Agreement covered PCBs. It permitted Canada to ensure that Canadian PCB waste would not be landfilled thus avoiding a violation of its Basel obligations and preventing their migration back into Canada.

366. With respect to the availability of adequate disposal facilities in Canada, the *Interim Order* provided Canada with the opportunity to properly assess the situation and take appropriate action without putting available facilities at risk. Canada could not rely upon the United States to accept Canada's PCB waste for destruction considering the long closed border policy and the uncertainties regarding the legality of the import discretion and import for disposal rule. Therefore, Canada was required to take immediate action to ensure that its capacity to destroy waste would not be compromised should the U.S. border close once again. This would potential have very serious repercussions in that Canada would find itself without the ability to destroy its own PCBs. These concerns were justified in that shortly after opening its border, the U.S. once again closed it to Canadian PCBs.

367. No other less inconsistent measure would have provided Canada with the time it needed to deal with these issues in an appropriate and considered manner while avoiding any potential risk to human and animal life and health and any violation of its obligations under the *Basel Convention*. The measure was therefore necessary for Canada to achieve its policy objective.

c. The Introductory Clause

368. There are two requirements contained in the introductory clause to Article 1106(6): (1) the measure must not applied in an arbitrary or unjustifiable manner; and (2) the measure must not constitute a disguised restriction on international trade or investment.[102]

369. Canada has met the requirements of the introductory clause. The *Interim Order* was not applied in an arbitrary or unjustifiable manner. The *Interim Order* was a temporary measure of general application applied specifically to address concerns regarding the environmentally sound management of PCB waste, including the serious implications to human, animal life or health, and to ensure that Canada complied with its international obligations under the *Basel Convention*. Furthermore, the *Interim Order* was not a disguised restriction on international trade. To the extent that the *Interim Order* applies to investors and investments it did so regardless of national origin.

370. Accordingly, the *Interim Order* is justified under Article 1106(6)(b) as it is a measure

---

[102] See *United-States – Standard for Reformulated and Conventional Gasoline*, 17 January 1996 at para 6.20 (Panel Report).

necessary to protect human, animal or plant life or health and has satisfied the requirements of the introductory clause.

### *II. Article 1106(6)(c): Measures "Necessary for the Conservation of Living or Non-living Exhaustible Natural Resources"*

371. The requirements for this exception are the same as those set out for Article 1106(6)(b) except that the policy or purpose behind the measure in this case must be for the conservation of living or non-living exhaustible natural resources.

#### a. Conservation of Exhaustible Natural Resources

372. In addition to protecting human and animal life and health, the policy objective behind the measure was the conservation of exhaustible natural resources such as clean water, clean air and animal life. To date trade panels have found "clean air", "fish" and "sea turtles" to be exhaustible natural resources.[103] PCBs are highly toxic, persistent and biocumulative and travel considerable distances through the atmosphere. As a result, PCB waste handled in an environmentally unsound manner in the U.S., including those exported from Canada may well make their way back to Canada and find their way into the air, water, and consequently animals, including those hunted and eaten by humans.

373. The *Interim Order*, a temporary measure, addressed these concerns through the imposition of an export ban which enalbed Canada to ensure that PCB waste would be handled in an environmentally sound manner and in accordance with Canada's international obligations under the *Basel Convention*.

374. The fact that the *Interim Order* was intended to ensure that Canada's obligations under the *Basel Convention* were respected is further evidence that the policy objective or purpose behind the measure was concerned with the conservation of living or non-living "exhaustible natural resources" within the meaning of Article 1106(6).

#### b. Measure "Necessary" for the Conservation of Living or Non-living Exhaustible Natural Resources

375. The necessity test in this context is the same as that discussed with respect to Article 1106(6)(b), except that in this case the measure must be "necessary" for the conservation

---

[103] See the *Shrimp Turtle Case* and *United-States – Standard for Reformulated and Conventional Gasoline*, 17 January 1996 at para 6.20 (Panel Report).

of living and non-living exhaustible natural resources.

376. Therefore, the rationale applied to demonstrate that the necessity test had been satisfied with regard to Article 1106(6)(b) applies equally to this exception. In short for the reasons stated above the *Interim Order* was necessary in that it was the least trade restrictive and only measure available which permitted immediate action to ensure that PCB waste would be managed in an environmentally sound manner and in compliance with Canada's international obligations under the *Basel Convention*. To have done otherwise would have put at risk Canada's exhaustible natural resources of clean air, water and animal and human life and health from contamination of PCBs, persistent organic pollutants of a highly toxic nature.

c. The Introductory Clause

377. The requirements of the introductory clause in the context of this exception are the same as those set out in Canada's submission relating to Article 1106(6)(b). As such, the rationale applied to demonstrate that the requirements of the introductory clause have been satisfied in Article 1106(6)(b) also applies to this exception.

## B. CONCLUSIONS

378. 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 or to purchase any Canadian goods or services with respect to the operation of Myers Canada. Myers U.S. was under no obligation by way of the *Interim Order* to do anything in Canada in connection with its investment. The *Interim Order* was a temporary prohibition on export, and imposed no positive requirements or obligations on the investment.

379. 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 for the protection of human, animal or plant life or health and for the conservation of living and non-living exhaustible natural resources.

## 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

### *1. On the Facts, There Was No Expropriation*

#### A. INTRODUCTION

380. According to SDMI,

> "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."
>
> **SDMI Memorial, para. 199**

381. It is abundantly clear on the evidence that the *Interim Order* did not expropriate any investment of SDMI in Canada, either directly or indirectly or as a measure "tantamount to expropriation". The evidence demonstrates that if there was in fact an investment in Canada, its operations continued long after the *Interim Order* was made (in fact, SDMI continues its Canadian operations to this day). Moreover, since the time the *Interim Order* was made, Myers Canada has generated increased revenue as compared to before the *Interim Order* was made.

#### B. NAFTA ARTICLE 1110

382. 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.

383. Therefore, to obtain damages under Article 1110 the Claimant must establish that the Respondent directly or indirectly expropriated its investment, or took a measure tantamount to expropriation.

384. The term "expropriation" is not defined in detail in the NAFTA. Consistent with Article 31(1) of the *Vienna Convention*[104], a treaty shall be interpreted in good faith in accordance

---

[104] March 21, 1986, *Vienna Convention on the Law of Treaties Between States and International*

with the ordinary meaning to be given to the terms of the treaty in its context and in the light of the treaty's object and purpose.

385. The dictionary definition of expropriation is "to take away (property) from its owner" or to "deprive of ownership"[105].

386. The inclusion of the terms "indirect" and "measures tantamount to" was designed to expand the scope of article 1110 to include measures that have the same effect as direct expropriation but differ as to their form. The literature refers to disguised and "creeping" expropriation in discussing the variety of means by which expropriation may occur.

387. Regardless of the category of expropriation said to apply, it is clear from the facts that *Interim Order* did not expropriate the property of SDMI.

### C. THE ACTIVITIES OF THE ALLEGED INVESTMENT CONTINUED AND EVEN INCREASED AFTER THE INTERIM ORDER WAS MADE

388. SDMI asserts that it is the effect of the *Interim Order* and not its intent that is dispositive in this regard. Canada agrees with this. By any objective measure, the *Interim Order* had little or no effect on S.D. Myers, Inc.'s alleged investment in Canada.

**SDMI Memorial, paras. 184 and 202**

389. As set out in Part 2: The Facts, above, the evidence does not support the allegation that SDMI had an investment in Canada relating to the export of PCB wastes from Canada to the United States. Nor does the evidence support the assertion that the alleged investment was detrimentally affected by the *Interim Order*, or that it incurred loss or damage. On the evidence, Myers Canada was (and continues to be) engaged in *other* activities. The evidence that Myers Canada was an active operation before, during and after the *Interim Order*, and that its operations may even have related to PCB waste exports, demonstrates that the *Interim Order* did not affect its operations.

390. Some of that evidence relates to staff. In response to Canada's First Request for Documents (seeking a list of all staff of Myers Canada who conducted business operations in Canada and their responsibilities), a list of six names was provided. Of the six, four were "associated" with Myers Canada for periods starting before the *Interim*

---

*Organizations*, 25 *International Law Materials* 543

105 *Webster's New World Dictionary of the American League Language,* Guralnik, D.B. Second College Edition. The Oxford definition of expropriation is "to take property away from its owner" or "to dispossess", *The Concise Oxford Dictionary*, 8th ed., 1990.

*Order* was made and extending until well after it was made: Tim Ashy (Inside/Outside Sales Technician) until June 21, 1996; Daniel Auxin (Sales Technician) until October 17, 1997; Michel Desaulniers (to the present time) and Pierre Lefebvre (to the present time).

**SDMI Response to Canada's First Request for Documents, Tab 11**

391. The activities that Myers Canada did conduct in Canada apparently were not detrimentally affected, let alone expropriated, by the *Interim Order*. For example, in its Reply, SDMI alleges that: "the Investor conducted PCB waste disposal in Canada as early as 1986". The *Interim Order* did not address PCB waste disposal in Canada. Whatever waste disposal SDMI conducted in Canada prior to the opening of the U.S. border, if any, could have continued notwithstanding the *Interim Order*. In other words, the *Interim Order* did not affect operations in Canada that were carried on before and without the benefit of the EPA's enforcement discretion. SDMI fails to show any evidence of any interference with the continuing activities of Myers Canada.

**SDMI Reply, para. 3**

392. Indeed, SDMI conducted far more business from Tallmage, Ohio, in the name of Myers Canada than Myers Canada conducted itself.

## D. THERE WAS NO PERMANENT INTERFERENCE OR DEPRIVATION

393. At para. 198 of its Memorial, SDMI argues: "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."

**SDMI Memorial, para. 198**

394. The export ban was temporary. This was clear from nature of an "interim" order. SDMI became aware in 1996 of Canada's intention to remove the export ban and put in place regulations that would allow the export of PCB wastes. SDMI continued its activities and actively solicited contracts during the temporary period of the *Interim Order*. As the SDMI Memorial admits: "it had business activities in Canada operating as a branch between 1992 to 1997".

**SDMI Memorial, para. 13**

395. While the *Interim Order* was in force, less than 15% of the Canadian inventory of PCB waste was destroyed. Whatever market existed for SDMI's U.S. services was available when the *Interim Order* was repealed. For that reason, SDMI was able to receive

shipments of Canadian PCB wastes after the *Interim Order*.

396. Any property rights Myers may 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. Therefore the Canadian measure cannot be found to have caused any expropriatory effects.

397. 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 have always been required for their export. Further, SDMI was aware that, consistent with its international obligations, Canada's policy did not permit the export of Canadian PCBs. Therefore, SDMI could have had no reasonable expectation that it would have a right to export Canadian PCB wastes.

398. 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 SDMI before the granting of the enforcement discretion to SDMI by the EPA, and thereafter, were in pursuit of an illegitimate or at best a speculative business opportunity.

## *2. The Interim Order Did Not Constitute an "Expropriation" According to NAFTA Article 1110*

399. SDMI does not allege that the expropriation was "direct" or even "indirect". In its Statement of Claim and in its Memorial, SDMI asserts that the *Interim Order* was a measure "tantamount to" expropriation.

**SDMI Statement of Claim, para. 48**

**SDMI Memorial, para. 203**

400. Even if the *Interim Order* had some detrimental effect on the alleged investment in Canada, which Canada disputes, the authorities are clear: that effect could not be "tantamount to" expropriation.

### A. THE INTERNATIONAL LAW OF EXPROPRIATION

401. Article 1110 reflects the traditional view of customary international law respecting

expropriation[106]. In the absence of decisions under NAFTA Chapter Eleven that have interpreted the scope of Article 1110, it is useful to examine other sources of international law, including the decisions of international tribunals on cases of alleged expropriation.

402. There is general consensus that expropriation occurs when a host state "takes" property owned by a foreign investor located in the host state for a public purpose.

403. Direct expropriation is understood to involve a formal government measure that transfers ownership of the property to the state.

404. Indirect expropriation does not involve such a transfer of title. Rather, an indirect expropriation can take an infinite number of forms, it can be essentially any action/omission/measure attributable to a government that interferes with the rights flowing from the foreign-owned property to an extent that the property has been functionally expropriated. Examples of measures that can become an indirect expropriation include:

> "unreasonable taxation; discriminatory legislation and administrative decrees; certain cases of zoning; the granting, in certain cases, of a monopoly by a government; prolonged 'temporary seizure'; unreasonable price ceilings which are not allowed to keep pace with inflationary trends; the rendering useless of property by the expropriation of other property so intimately connected with the first that it ceases to have any further value or function; the forced sale of alien property at a price which falls far short of the actual value of the property or its real worth had its use not been interfered with by the state; the setting of local wages at prohibitively high rates; the appointment of custodians, managers or inspectors who substantially impair the free use by the alien of his premises, and facilities; the appointment of a receiver to liquidate a commercial enterprise or other property; unreasonable contract negotiation or discriminatory contract termination; prohibition of gainful activity previously engaged in; and any other means of such unreasonable interference with the property rights of the alien owner that he is effectively deprived of the use and beneficial enjoyment of his holdings."[107]

405. There is no one authoritative codification of the law concerning expropriation under public international law.

406. The *Harvard Draft* defined the standard to be "unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will

---

[106] Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, Canada Law Book, 1994, at page 289

[107] C.D. Wallace. Legal Controls of Multinational Enterprise. (1982, Netherlands) at 277.

not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of the interference."[108]

407. The jurisprudence on expropriation indicates that there are at least three fundamental elements that are required for a finding of expropriation:

(a) that the action at issue results in fundamental interference with or deprivation of SDMI's property or property rights;

(b) such interference or deprivation is not temporary;[109] and

(c) the expropriatory effects are attributable to the state.

408. Temporary measures can ripen into an expropriation over time. There is no specific defined amount of time after which this will happen. Rather, a temporary measure will ripen into an expropriation only at the point where there has been a definitive assumption of control on the part of the government.[110]

409. Because the *Interim Order* was a reasonable regulatory measure, was temporary, did not affect control and was incidental with respect to the development of Canadian business by SDMI, it cannot be characterized as "tantamount to" expropriation.

### B. SDMI DOES NOT STATE THE CORRECT TEST FOR EXPROPRIATION

410. SDMI characterises the effect of the *Interim Order* on its alleged "investment" in a number of ways: "unreasonable interference in the PCB waste export sector"; deprivation of SDMI's "ability to enjoy the benefits" of its alleged "investment"; and, "unreasonable interference with the effective enjoyment of the Investor's property". Assuming for the sake of argument that it could prove any of this, which Canada emphatically denies,

---

[108] Article 10(3) of *The Draft Convention on the International Responsibility of States for Injuries to Aliens* [hereinafter the "Harvard Draft"] as cited in L.B.Sohn and R.R. Baxter. "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) 55 A.J.I.L. 545 at 553-4.

[109] Sohn and Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 the *American Journal of International Law* 545 (1961), at page 559.

[110] See *Sedco* v. *NIOC*, 7 Iran –U.S. CTR 119 (1984) where the Tribunal was asked to rule on at what date the expropriation took place, as there were a number of measures taken on the part of the Iranian government alleged to be expropriatory. Here the Tribunal ruled that the appointment of temporary managers was the date of the expropriation. It was at this point that there was deemed to be an assumption of control on the part of the government's agents. See also G.H. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal" (1994) 88 A.J.I.L. 585.

according to international law none of these criteria would be sufficient to establish that there has been an expropriation.

**SDMI Memorial, paras. 200, 203**

411. In paragraph 181 of its Memorial, SDMI asserts what it believes to be the relevant test: "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." (emphasis added) In paragraph 186, SDMI states that "expropriation refers to an act by which governmental authority is used to deny some benefit of property." (emphasis added)

**SDMI Memorial, paras. 181, 186**

412. These are misstatements of the international law of expropriation. Governments are not required to compensate investors for mere interference with their property rights. Neither will the denial of "some benefit" associated with property will be sufficient for a finding of expropriation. Rather, the language of tribunals has consistently demanded much more than that for there to be a taking.

413. Higgins states, "[t]he tendency is for a diminution in value to remain uncompensated, so long as the rights of use, exclusion and alienation remain."[111] In *Starrett Housing* the standard applied was interference with property rights to "such an extent that these rights are rendered so useless that they must deemed to have been expropriated." In *Tippetts* the operative standard was a deprivation of the "fundamental rights of ownership" for an extended period of time."[112] These formulations are significantly more rigorous than a test of the "denial of some benefit". Rather, the denial must be of a fundamental nature.

414. Canada says that the effect of the *Interim Order* on Myers Canada, and on SDMI, did not render SDMI's property rights "useless" or deprive it of the "fundamental rights of ownership" for an extended period of time. The fact is, Myers Canada and SDMI carried on with the operations they conducted before the *Interim Order* was made.

---

[111] R. Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 Rec. des Cours 259, at 271.

[112] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al.*, 6 Iran-U.S. C.T.R. 219 at 225-226 [hereinafter "Tippetts"].

415. SDMI also argues that one element of a finding of expropriation is substantial interference, stating in paragraph 190 of its Memorial that an "expropriation will take place whenever there is a substantial and unreasonable interference with the enjoyment of a property right."

416. SDMI does not define the term substantial interference. It does mention the term in paragraph 188 but does not provide any basis in either law or jurisprudence for which that term can be relied on. On the contrary, there are a number of cases that the United States Foreign Claims Commission found, with respect to Czechoslovakian claims, that certain substantial interferences with personal property did not constitute a 'taking'.[113]

417. However, the term "unreasonable interference with property" is cited in *the 3rd Restatement on Foreign Relations of the United States*; the *Harvard Draft* and *Harza Engineering*. But SDMI does not define what exactly constitutes an "unreasonable interference" with property and presents an oversimplified statement on the law on expropriation to the extent that it is misleading. The applicable test requires a much more nuanced and complex inquiry than such a categorical statement would imply.

418. There is difficulty in SDMI's reliance on predominantly American views of the international law of expropriation: it ignores the fact that NAFTA Article 1110 represents a trilaterally-agreed obligation of three sovereign countries, and not the imposition by one of them of its legal norms on the other two. Particularly for this reason (and because of the revolutionary circumstances giving rise to the claims that body heard), caution must be exercised in the application of the jurisprudence of the Iran-U.S. Claims Tribunal. Also, the authority of that body and of NAFTA Chapter Eleven tribunals is different. NAFTA Article 1110 authorizes a Chapter Eleven Tribunal to consider claims for "expropriation". The Iran-U.S. Claims Tribunal had a wider authority: to decide claims that arose "out of debts, contracts ... expropriation *or other measures affecting property rights*". (emphasis added)[114]

419. The need for caution in relying on the jurisprudence of the Iran-U.S. Claims Tribunal is summarized by M. Sornarajah.[115] Similar concern is expressed by A. Mouri, reflecting on

---

113 C. Christie, "What Constitutes a Taking of Property under International Law" (1988) 33 B.Y.I.L. 307 at 318, citing *Erna Speilberg*, Decision No. CZ-2,466 (1961), Fourteenth Semiannual Report, at 146 and *Mitzi Schoo*, Decision No. CZ-279 (1960), Fourteenth Semiannual Report, at 180, respectively.

114 As cited in Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, (1994), at 34.

115 *The International Law on Foreign Investment*, (1994), at 282-3. (footnotes omitted):

> "The awards of the Iran-U.S. Claims tribunal have been a fruitful recent source for the identification of such takings ["indirect takings", or "disguised" or "creeping expropriation"].

decisions that ignored the relatively settled requirements in international law of "expropriation" of property and that applied as its synonym the more elastic and less well-settled concept of "deprivation" of property.[116]

420. SDMI and Canada agree that it is the effect of the impugned measure that determines whether it is "tantamount to" expropriation. This is consistent with international authority. Tribunals have looked to the *effect* of a measure in order to determine whether there has been a taking under international law. In general, the effect has to be similar to what might have occurred had there been an outright expropriation.[117]

421. In the Iran-U.S. Claims Tribunal this has meant a deprivation of the "fundamental rights of ownership"[118] or the "deprivation of the effective use, control and benefits of property

---

> But the Iran-U.S. Claims Tribunal dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events that attended the Iranian upheaval following the overthrow of the Shah of Iran. Also, one has to be cautious in the making of any generalisation on the basis of dicta in the awards of this tribunal as its constituent documents gave the tribunal power to deal not only with direct takings of physical assets but "all measures affecting property rights". It is clear that such a wide definition of taking will not be acceptable in international law for the simple reason that many normal activities of states, such as taxation, affect property rights and cannot be expected to give rise to international concern."

[116] *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, (1994), at 65-66. (footnotes omitted):

> "The first question to be addressed is whether the term *expropriation* is synonymous with the term *deprivation*, the latter being used when one looks at the issue from the perspective of the owner of the property. Although the term "expropriation" has a relatively more settled and established meaning in this field of law, in comparison with the portions of Article II of the CSD [Claims Settlement Declaration, which authorised the Iran-U.S. Claims Tribunal] that speak about "measures affecting property rights", the concept and definition of "expropriation" often seemed to be confused. In many awards and opinions [of the Iran-U.S. Claims Tribunal] on the subject, the term "expropriation" has been mistakenly interchanged with the concept of "deprivation". The confusion is not caused because of the ambiguity of the word but, if not due to laxity, because some arbitrators seem to be influenced by some recent writings which favour replacing the term expropriation with "deprivation", because to them it is the loss to the aggrieved, and not the gain of the government, which matters. To them this would avoid concern as to the Government ownership or the passage or distribution of the title.
>
> ...
>
> "Yet some awards deliberately confused these terms. These awards seem to be labouring under the misperception that they have a free choice to prefer the term "deprivation", admitted to have a particular and different connotation, over another term, "expropriation", which is specifically used in Article II (1) of the CSD and carries with it all its legal consequences."

[117] R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995).

[118] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, et al., 6 Iran-U.S. C.T.R. 219.

rights".[119] Christie observes that the "right which seems, from an examination of the cases and of the underlying realities, to be least subject to successful interference, is the right of the owner to manage his enterprise."[120]

422. In view of the apparent vitality of Myers Canada after the making of the *Interim Order*, and SDMI's continuing offer of services from Tallmadge, Ohio, to customers in Canada, none of the established tests for expropriation is met in the circumstances.

### C. THE *INTERIM ORDER* WAS A LEGITIMATE EXERCISE OF CANADA'S REGULATORY OR "POLICE" POWER

423. Moreover, States will not be liable to compensate for economic loss flowing from measures which are an exercise of a state's police power, as long as those measures are not arbitrary or discriminatory. Under international law, "jurists supporting the compensation rule recognize the existence of exceptions, the most widely accepted of which include: a legitimate exercise of police power [which includes] loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property."[121] Consistent with this, the Comments to the *3rd Restatement* read.

"A state is not responsible for loss of property or for other economic disadvantage resulting from ***bona fide*** general taxation, regulation, forfeiture for crime or other action of the kind that is commonly accepted as within the ***police power*** of states, if it is not discriminatory [...] and is not designed to cause the alien to abandon the property to the state or sell it at a distress price."[122] [emphasis added]

424. There are not many cases in international law that have specifically dealt with the police power. Yet Brownlie, Wortley and Christie[123] all articulate an expansive definition of the police power: absent discrimination or arbitrariness, then a government has a wide scope

---

119 *Starrett Housing v. Islamic Republic of Iran.* (1983) 4 Iran-U.S. CTR 122 .

120 C. Christie, "What Constitutes a Taking of Property under International Law" (1988) 33 B.Y.I.L. 307 at 333.

121 See B.A. Wortley. Expropriation in International Law. (1959) at 40-57 and Sohn and Baxter *supra* note 59 at 561-2. Also see Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, Canada Law Book, 1994, at page 289.

122 See Comments to the 3rd Restatement at §712 (g).

123 *Ibid.* Wortley refuses to limit what the form a police power measure may take as long as the measure is *bona fide* and is not an abuse of power on the part of the State. For example, a state could go so far as to revoke a concession if that was necessary for the attainment of the regulatory objective. B.A. Wortley. Expropriation in International Law. (1959) at 40-57

to take measures that negatively affect the value of foreign-owned property. Christie states that the reasons need only "be valid and bear some plausible relationship to the action taken."[124] And there need not be a deeper investigation beyond that determination—"no attempt may be made to search deeper to see whether the State was activated by some illicit motive."[125] In other words, the state must only establish that:

(a) the measure is not arbitrary;
(b) the measure is not discriminatory; and
(c) the measure is *bona fide* and there is a plausible relationship between the action taken and the regulatory objective.

425. Beyond this, no further analysis is required.

426. There is a presumption in favour of a Government purporting to be acting by virtue of its police powers.[126] Challenging a state on the basis that it has acted for improper motives is difficult; international law traditionally has granted States broad competence in the definition and management of their economies."[127] In this sense, and as a practical matter, the exercise of a government's power in the full range of its authority is the rule, and expropriation requiring compensation the exception. Put another way: expropriation is but one of the many powers or authorities a government wields, and not paramount to all others.

427. In order to determine the dividing line between expropriation and other forms of

---

124 Christie at 338.

125 *Ibid.*

126 Brownlie views the sphere of government's police powers as expansive, stating that "[s]tate measures, *prima facie* a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation." I. Brownlie, *Principles of Public International Law*, 5th ed., (Oxford: Clarendon, 1998) at 535; Mouri's view of the police power exception is similarly large, especially in the case of emergency or distress situations, "Under the rules of international law, measures taken by States or attributable to them are not considered to be wrongful or to depart from international standards of justice which may entail liability for compensation of damages inflicted, if they were taken in a distress or emergency situation reasonably necessary to conserve life and property, or if they were taken to maintain the public order or to regulate the internal affairs of the country, such as to enforce revenue or customs laws, impose exchange control regulations, *or preserve or protect the environment, health and safety of the nation.*" Mouri at 248. Christie too enunciates an expansive definition of the police power. He writes: "A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But, *if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive."* [Emphasis added]

127 B.H. Weston ""Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"" (1975)16 Va. J. Int'l L. 103 at 121. He argues that it "is serious business to dispute a State's claim to regulation"'.

government regulation, one can ask the following questions: Does the action fundamentally restrict the right of the owner to manage or dispose of the property, or has the property been rendered virtually valueless in which case compensation is due? Or is it a case where there is no entitlement to compensation because while the government action limits the owner's right in relation to his property, such action does not significantly affect fundamental rights associated with the property?[128]

428. In summary, regulatory measures can be defences to liability "provided that they are reasonable, not in breach of due process of law and non-discriminatory."[129] A regulatory measure that is directed solely at foreigners that does not apply to nationals is clearly "discriminatory".

429. SDMI states that there is a duty for a government to compensate even when it is acting in the capacity of its police power. This is a misstatement of the law. As support for this, SDMI cites Higgins at paragraph 193 of its Memorial. But the supporting quote of Higgins has been taken out of context by SDMI. Higgins does not intend it to be a statement of law—a few sentences prior to the quote she makes it clear that the state of the law is otherwise ("recent case law has made it clear that this is not to be regarded on all fours with a taking of property in pursuance of the so-called 'police power'"... which does *not* attract a duty to compensate).[130] Rather, Higgins is struggling (as many commentators have, such as Dolzer and Christie) with the difficulties in articulating a precise theory that is capable of making the distinction between compensable takings and non-compensable actions within a State's lawful exercise of police power. Higgins is simply stating that there are inconsistencies in the current state of the law that are unsatisfactory from a doctrinal or theoretical perspective.

**SDMI Memorial paragraph 195**

430. Despite the absence of a clear theory, it is a well established rule in international law that a state is not liable to compensate for economic loss flowing from measures which are an exercise of a state's police power, so long as those measures are not arbitrary or discriminatory. The legal issue with expropriations and the police power is not whether activities that are classified as within the police power of a state give rise to liability.

---

128 W. Mapp, *The Iran-United States Claims Tribunal: The First Ten Years.* (Manchester: Manchester University Press, 1992) at 155.

129 Mouri at 248. Also: In *Sedco, Inc. v. National Iranian Oil Co.*,. 15 Iran-U.S. C.T.R. 23, the majority wrote that "a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police power of states."

130 R. Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 Rec. des Cours 259, at 330.

That point is clear: police power measures do not give rise to liability. Rather the legal issue is whether a specific state measure can be classified as falling within the sphere of its police power.

431. For the purposes of the present fact situation the law is relatively clear: this is a case where Canada was acting, in accordance with its obligations under the *Basel Convention*, to regulate the export of PCBs for the reason of safety as well as for environmental and health protection.[131] The protection of public health and safety is a classic form of the police power, as recognized by leading commentators, such as Wortley, Christie, Sohn and Baxter.[132] In *Gallagher v. Lynn*[133], it was held that "expropriation does not normally occur through the incidental effect of legislation." Here the Tribunal found that the impugned regulation was designed to safeguard the health of the inhabitants of Northern Ireland by permitting the sale only of inspected milk. It was not designed to affect trade with Southern Ireland or damage the 'goodwill' attaching to Southern Irish business, despite the fact that it had such an effect. Rather, the purpose of the Northern Irish law was to 'secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk'.[134] This reasoning was followed by the Privy Council in *Shannon v. Lower Mainland Dairy Products Board.*[135] In light of these two cases, Wortley concludes that it seems reasonable to adopt this reasoning in public international law."[136]

432. Other government measures such as the refusal to issue approvals or licenses or the refusal to grant export permits have been held to be within the police power of the state. In *Too v. United States*[137], the seizure of a liquor license was found to be within the police power of a state. Likewise, in *Kügele* v. *Polish State*[138], the Tribunal dismissed the argument that licensing fees imposed by Poland had forced the claimant to close his brewery and were thus expropriatory.

---

131 The Regulatory Impact Analysis Statement, *PCB Waste Export Regulations, 1996*, SOR/97-109, 4 Fenruary, 1997, *Canada Gazette Part II*, Vol 131 Extra, summarizes the history.

132 See Soloway memo at 31.

133 [1937] A.C. 863

134 *Ibid* at 870.

135 [1938] A.C. 708.

136 Wortley at 53.

137 *Too v. United States* 23 Iran –U.S. C.T.R. 378.

138 *Kügele v. Polish State,* 6 Ann. Dig. 69 (1931-32) (Upper Selesian Arbitral Tribunal, 1930).

433. The failure to grant export permits have only been held to be a taking where there was a contractual obligation that stated otherwise. The United States Foreign Claims Commission held that the "refusal to grant an export license for jewelry or to permit the transfer of funds abroad did not constitute a 'taking' under international law."[139] And Aldrich states that the "refusal by a state or its agents to permit the export's of an alien's property or to assist in the export of such property where a contractual duty to give such assistance exists, creates liability."[140] (emphasis in original)

434. SDMI attempts in paragraphs 194 and 195 of its Memorial to distinguish between the law of regulatory takings and the law of the police power. It confuses the law here. Regulatory takings -- as a category of indirect expropriations -- are compensable unless the measure falls within the police power. There is no choosing between areas of international law that are applicable -- it is one body of law and jurisprudence and is not excluded by the clarifications noted in paragraph 194 of the SDMI Memorial. NAFTA Article 1131 states that the Tribunal should be governed by the applicable rules of international law. The international law of expropriation includes the police power.

435. 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.

436. SDMI's overly broad interpretation of the expropriation provisions would prevent governments from changing their standards (in either direction) because of potential claims for compensation. This would be contrary to the intent of the NAFTA Parties.

**SDMI Misinterprets NAFTA Article 1110(8)**

437. In paragraph 194 of its Memorial, S.D. Myers, Inc. alleges that:

438. "Article 1110(8) specifically addresses the situation of a regulatory taking and exempts the circumstances mentioned therein from the application of the expropriation provisions.

---

139 G.C. Christie, "What Constitutes a Taking of Property under International Law" (1962) 33 B.Y.I.L. 307 at 318, citing *Erna Speilberg*, Decision No. CZ-2,466 (1961), Fourteenth Semiannual Report, at 146 and *Mitzi Schoo*, Decision No. CZ-279 (1960), Fourteenth Semiannual Report, at 180, respectively.

140 Aldrich at 609.

[...] 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 *expression unius* rule requires that the NAFTA to be interpreted as applying to all other regulatory takings."

**SDMI Memorial paragraph 194**

439. Here and elsewhere, SDMI relies primarily on a press report containing an "issues paper" on expropriation circulated by Canada to the other NAFTA Parties. On its face, the document was prepared for "informal brainstorming". Clearly it has no authoritative status. SDMI's extensive reliance on this document is indicative of the lack of authority supporting its arguments. Mischevious speculation about the purpose of the paper (contrary to what it says on its face) is idle and adds little to the proceedings.

**SDMI Memorial paragraph 190**

440. Article 1110(8) must be read as a provision that was inserted for greater certainty with respect to a very particular situation (i.e. with respect to debt securities and loans) and that this provision in no way affects the general principle by virtue of measures taken by a state under its police powers do no amount to expropriation. As stated above, one should be cautious in relying on the *expressio unius* maxim. The *expressio* rule has indeed been used in international jurisprudence but only rarely and certainly not often in recent times (i.e. this century) and should not be applied when it leads to injustice or inconsistency[141]. To Canada's knowledge, neither WTO or FTA or NAFTA panel has ever relied upon it. S.D. Myers, Inc. provides no jurisprudence to support the use of this principle.

441. S.D. Myers, Inc.'s interpretation would result in an absurdly broad interpretation of the expropriation provisions of the NAFTA where any measure by a state except in the situation contemplated by 1110(8) would require compensation if it has any effect on a foreign investor (regardless of how indirect or incidental), even if non-discriminatory and of general application. As discussed above, this cannot be consistent with the intent of the Parties.

---

[141] Lord McNair cautioned that the rule was a "valuable servant but a dangerous master" and that it should be applied with caution and not when it leads to injustice or inconsistency -- at page 400 (citing from the Lopes L.J. in *Colquhoun* v. *Brooks*, [1888] 21 QBD 52,65.

### *3. Conclusion*

442. 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.

## H. Finding of a Violation of Chapter Eleven Would Give Rise to an Inconsistency with Chapter Three

443. If the Tribunal finds that the scope of Chapter Eleven is so broad as to encompass the measure at issue, and finds further that obligations in Chapter Eleven have been violated, Canada submits that these findings would give rise to an inconsistency with Chapter Three of the NAFTA. The inconsistency arises in this case because the *Interim Order,* although it was an export restriction under Article 309 of the NAFTA, was justifiable under the general exceptions provided by NAFTA Article 2101. Therefore, as provided by NAFTA Article 1112 Chapter Three should prevail. As a result, the claim under Chapter Eleven should be rejected.

444. As an export ban on goods, the *Interim Order* falls directly within the purview of Chapter Three. This means that the general exceptions of NAFTA Article 2101 which incorporate GATT Article XX are applicable and can be invoked to justify measures otherwise inconsistent with Chapter Three of the NAFTA.

445. Canada submits that the *Interim Order* can be justified under paragraph (b) of GATT Article XX as it is a measure necessary to protect human, animal or plant life or health, and under paragraph (g) as it is a measure relating to the conservation of living and non-living exhaustible natural resources taken in conjunction with restrictions on domestic production or consumption, and the measure was not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and did not constitute a "disguised restriction on international trade".

### *1. Article XX (g) of the GATT*

#### A. Conservation of Exhaustible Natural Resources

446. Canada refers the Tribunal to the section with respect to 1106(6) (c) where Canada has shown that the *Interim Order* fell within the range of measures for the conservation of exhaustible natural resources.

#### B. Measure "Relating" to the Conservation of Exhaustible Natural Resources

447. The first part of the test here is less stringent than the one in Article 1106(6)(c). Canada refers to the section where it has shown that the *Interim Order* was necessary conservation of living or non-living exhaustible natural resources. In any event, the measure related to the conservation of living or non-living exhaustible natural resources

and therefore satisfies the first part of this test.

### C. "IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION OR CONSUMPTION"

448. Unlike Article 1106(6)(c), to justify an otherwise inconsistent measure under Article XX(g) an invoking Party would also have to establish that the measure is being promulgated or brought into effect together with restrictions on domestic production or consumption of the natural resources in question. The objective of this requirement is a simple one of "even-handedness" in the imposition of restrictions, in the name of conservation, upon the production or consumption of natural resources.[142]

449. The *Interim Order*, as stated previously, was enacted to ensure that PCB waste exported to the United States would be handled in an environmentally sound manner and in accordance with the requirements of the *Basel Convention*. Canada had already implemented by way of regulations these obligations under CEPA, *the Export and Import of Hazardous Waste Regulations*, SOR/92-637 (effective November 26, 1992). Furthermore, PCBs and PCB waste are subject to a strict domestic regime of regulation.

450. Accordingly, the *Interim Order* was made effective in conjunction with the domestic restrictions within the meaning of Article XX(g).

### D. THE INTRODUCTORY CLAUSE

451. The first part of the test contained in the introductory clause of Article XX is different from that found in Article 1106(6). Article XX provides a measure must not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" while Article 1106(6) does not. It simply provides that a measure must not be "applied in an arbitrary or unjustifiable manner". The remainder of the test is same and as stated above has been satisfied.

452. In order for a measure to be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, the measure must: (1) result in discrimination; (2) the discrimination must be arbitrary or unjustifiable in character; and (3) this discrimination must occur between countries where the same conditions prevail which means discrimination not only between products of different exporting countries, but also between products of exporting countries and those of the importing country concerned.[143]

---

142 See *Reformulated Gasoline* at 20-21.

143 See *Shrimp Turtle Case* at para. 150.

453. The *Interim Order* was not such a measure. The *Interim Order* was a temporary measure of general application. It did not result in discrimination at all.

## *2. Article XX (b) of the GATT*

### A. PROTECTION OF HUMAN, ANIMAL OR PLANT LIFE OR HEALTH

454. Canada refers the Tribunal to the section with respect to 1106(6) (b)where Canada has shown that the *Interim Order* fell within the range of measures for protection of human, animal or plant life or health.

### B. MEASURE "NECESSARY" TO PROTECT HUMAN, ANIMAL OR PLANT LIFE OR HEALTH

455. Canada refers the Tribunal to the section with respect to 1106(6) (b) where Canada has shown that the *Interim Order* was necessary for the protection of human, animal or plant life or health.

### C. THE INTRODUCTORY CLAUSE

447. Canada refers the Tribunal to the section with respect to Article XX(g) where Canada has shown that the requirements of the introductory clause have been satisfied.

456. Therefore, the *Interim Order* met the criteria of NAFTA Article 2101 and Article XX (b) and (g) of the GATT.

457. It would make no sense that an export ban on PCBs, which can be justified because it is necessary to protect human, animal or plant life or health or because it relates to the conservation of living and non-living exhaustible natural resources would give rise to compensation under Chapter Eleven because of incidental and inescapable effects of the measure on an investor or its investment.

458. SDMI suggests that there is no inconsistency with Chapter Eleven Canada because a Party could compensate investors for a measure that was justified under Article 2101 but nonetheless in violation of Chapter Eleven. This interpretation cannot be sustained as it would render Article 1112 meaningless and would limit unduly the Government's ability to regulate for environmental purposes.

459. Accordingly, in the event that this Tribunal were to find that the *Interim Order* fell within

the scope of Chapter Eleven and that it in violation with the obligations in that Chapter, this would create an inconsistency between Chapter Eleven and Chapter Three. Pursuant to Article 1112.1, Chapter Three would then prevail to the extent of the inconsistency with the result that SDMI's claim must fail.

## I. Damages

448. The Procedural Order No. 1, dated May 28, 1999, requires the disputing parties to address the principles on which damages (if any) should be awarded, leaving the calculation of the quantum to a second stage of the proceedings. Canada does not admit that SDMI has suffered any loss or damage as a result of the *Interim Order*.

449. The general principle for awarding damages is that when a wrong has been proven damages ought to be awarded for the direct result of that wrong.[144] In order to apply this rule, a test had been first stated, in international law, by the Permanent Court of International Justice[145] and rephrased by several authors such as Madam Whiteman:

> "Grotius states that "fault creates the obligation to make good the loss". This statement comprehends within its scope three problems in the settlement of a claim: (1) a possible "fault" on the part of the respondent state; (2) the existence and extent of the "loss" sustained; and (3) the amount of reparation which will "make good" the loss." [146]

### *1. There Should Be No Double or Multiple Recovery*

450. Nothing in Chapter Eleven suggests that damages are cumulative where the same measure breaches two or more NAFTA provisions. It is a well-established rule that one is compensated only once for the damage suffered, even if several provisions are breached.[147]

### *2. Actual Loss or Damages Must Be Matched to Particular Breaches of NAFTA Provision*

451. SDMI must prove the causal link between the damages to or with respect to its alleged

---

144 See the *Case Concerning the Factory at Chorzòw* (*Germany* v. *Polish republic*) (1928), P.C.I.J. (Ser. A) No. 17 (claim for indemnity; the merit) [hereinafter, the *Chorzòw Factory Case*].

145 *Ibid.* at 29.

146 M.M. Whiteman, *Damages in International Law*, vol. 2 (Washington: United States Government Printing Office, 1937) at 829.

147 For an application of that rule, see the *Chorzòw Factory Case*, *supra* note @ at 48, where the Tribunal warned about the problem of double compensation and managed to avoid it. The facts of the *Chorzòw Factory Case* were quite different of those in the present case, because the double compensation would not have arisen of one set of facts breaching two obligations, but rather from one wrong causing damages to two individuals that "shared" some damages. The general principle remains nevertheless unchanged.

"investment" and the breaches of the NAFTA provisions it says the *Interim Order* caused. But SDMI makes no effort to attribute its losses or damages to any particular alleged breach of NAFTA provision. Since obligations are very different, SDMI cannot simply assume that the losses attributable to any one are of the same type or amount. For example, SDMI alleges that the *Interim Order* was a proscribed performance requirement because it required SDMI to "achieve a given level or percentage of domestic content" (Article 1106(1)(b)). What was the "incurred loss or damage" of SDMI (Article 1116(1)) caused by that particular breach of NAFTA provision?

452. As a matter of principle, SDMI should be obliged to at least identify the nature of the loss or damage suffered particular to each breach of NAFTA provision alleged (such as diminution in the value of real or other corporate property, higher borrowing costs, reduction in cash flow, reduced profits, lay-offs or redundancies, loss of particular contracts or higher operating costs).

### *3. Damages for Breach of One NAFTA Provision May Limit Recovery for Other Actual Losses for Other Breaches*

453. It is not clear that claims for damages for each of the four NAFTA provisions in question can stand together. For example, SDMI alleges that its "investment" was expropriated as of November 16, 1995, and that it ought to be compensated for that expropriation under Article 1110. If that is the case, then SDMI did not have an "investment" left after that date to incur loss or damage because the *Interim Order* was a proscribed performance requirement.

454. As a matter of principle, SDMI ought to demonstrate to the Tribunal that its claims for damages can proceed together without any limitation caused one by another.

### *4. Damages Must Be Attributable to the Breaches Claimed and not Other Factors*

455. Finally, damage must be the direct result of a breach of some NAFTA provision, and not due to some other factor. Canada says that it was the closure of the U.S. border in July, 1997, if anything, that caused loss or damage to its "investment". Canada says that it was the competition of other American companies granted enforcement discretions that reduced SDMI's competitive opportunities in Canada and reduced its potential market. SDMI's claim for loss or damage must be discounted by factors not attributable to Canada.

***5. Damages Must Be Assessed on the Strict Basis of the Evidence Admissible***

456. The onus is on the claimant to establish loss or damage.

457. Damages should be calculated on the basis of the evidence before the Tribunal. Documents that are tendered at the damages phase of the hearing, and that were responsive to but not produced in answer to requests for documents made during the liability phase, should be inadmissible. In other words, S.D. Myers, Inc. cannot introduce documents at damages phase that could and should have been produced for liability phase.

***6. Only the Damages to the "Investment", or to the "Investor" with Respect to the "Investment", Can Be Awarded***

458. If there is a breach of NAFTA provisions, only damages to the "investment" (or to the "Investor", but only with respect to its "investment" in Canada) need to be compensated. There is a territorial limit. Article 1101(1) limits the scope and coverage of Chapter Eleven to measures relating to investors or investments "in the territory of the Party".[148] Nothing in Chapter Eleven excepts the application of this territorial limit with respect to loss or damage alleged to have occurred as a result of a measure. To ignore the territorial limits of Chapter Eleven would be to suggest that Canada's measures have extraterritorial effect and consequently that extraterritorial compensation may be due.

459. SDMI concedes that for the purposes of expropriation and performance requirements, compensation is limited to the harm done within the territory of Canada. It claims that compensation for breach of national treatment or minimum standard of treatment should be for loss or damage in and out of Canada. This implies that national treatment and minimum standard of treatment apply extraterritorially. SDMI cites no authority for this proposition.

**SDMI Memorial, para. 239**

---

[148] This express territorial limitation is consistent with the international law principle of territorial sovereignty and the presumption that the jurisdiction of a State is limited to its territory. Ian Brownlie, *Princples of Public International Law*, 4th ed, 1990, at 298. See also *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1095:

> "...[O]ne of the basic tenets of international law [is] that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states hesitate to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction."

460. The only evidence before the Tribunal of the alleged "investment" are allegations of certain corporate advances or financings or "loans" identified in the unaudited statements of Myers Canada. As a consequence, only the damages caused "to the loan" lent by SDMI to its "investment" would have to be considered, and then only to the extent that the "loan" was related to PCB waste exports and not the other business operations of Myers Canada.

### *7. Speculative Losses Should Be Discarded*

461. Damages are limited to actual losses incurred, and not possible or hypothetical losses: Article 1116(1). Simply put, the S.D. Myers, Inc. must prove that the *Interim Order* actually caused it to loose business opportunities.

### *8. The Temporary Period of the Interim Order Limits the Amount of any Damages That Ban Be Awarded*

462. The *Interim Order* that supposedly violated the NAFTA was limited in time. The damages it might have caused must be limited accordingly. The *Interim Order* was in force from November 20, 1995, to February 4, 1997, date when the Canadian law permitted the export of PCB contaminated waste. Thereafter, SDMI could and did receive shipments of PCB wastes exported from Canada, at least until the U.S. border was closed in July, 1997.

### *9. Only Actual Losses Are Compensable*

463. As a general rule, once it has been proved that the a party to a dispute has a claim to reparation, as much as possible

> "The status should be restored that would have existed without the injury, or appropriate compensation should be made."[149]

464. However, as noted above, Article 1116(1) provides that only losses actually incurred are to be compensated. In paragraphs 212 and 213 of its Memorial, SDMI argues for some elevated compensation or "the highest level of damages", attributable to some

---

149 B. Graefrath, "Responsibility and Damages Caused: Relationship Between Responsibility and Damages" in Hague Academy of International Law, ed., *Collected Course of the Hague Academy of International Law: 1984: II* (Boston: Martinus Nijhoff, 1985) 13 at 73.

presumption of unlawfulness or illegality. There is no authority for such an approach. As SDMI says itself in paragraph 209 of its Memorial: "The process set out in Part B of NAFTA Chapter 11 does not ask the Tribunal to find fault or any aspect of blameworthiness for the establishment of a measure that violates a Party's NAFTA obligations." Accordingly, Article 1135(3) states that punitive damages cannot be awarded.

**SDMI Memorial, paras. 209, 212 - 213**

***10.It Is Premature to Choose Methodologies But Not to Caution Against Double Counting***

465. NAFTA Chapter Eleven gives some guidance for the measure of the damages for expropriation but not for breaches of other obligations. Paragraphs 221 to 235 of the SDMI Memorial contain general discussions on different approaches to the quantification of damages. It is too early to tell whether some or all of these approaches are relevant. Canada says that will be a matter for expert evidence in the damage quantification phase. For example, SDMI says that the discounted cash flow methods is the most appropriate method for the calculation of lost profits. Canada says that the contribution margin approach is generally used and may be more appropriate. The proper approach depends on the facts as revealed by all of the financial information that will be needed to address the amount of damages.

**SDMI Memorial, para. 228**

466. However, it appears to Canada that SDMI double counts its losses in its Memorial and it should be established that the methodology or methodologies to be employed in the damages phase not result in duplication of damages.

**SDMI Memorial, paras. 241 - 245**

467. For example, in order for SDMI to have had the ability to make the profits it is advancing in its claim, it is necessary for SDMI to have made and presumably continue to make investments in its facilities, and the marketing and development of its business in Canada. These costs are usually recovered out of future profits, which are presumably being claimed by SDMI. To claim for both lost profits and the value of the "investment" at a specific point in time appears to be double counting, as the benefits from any lost revenue is included in both a lost profit calculation and a fair market determination of a going concern operation (i.e., the value of the "investment").

*11. Damages Must Be Limited by SDMI's Failure to Mitigate*

468. SDMI had an obligation to mitigate its losses. Without any evidence, it claims that it "has been unable to mitigate its losses", presumably in Canada or the United States (given its claim for damages outside of Canada). SDMI might have brought a domestic legal challenge that, if successful, could have limited its losses. Since it argues that the U.S. Court of Appeals decision of July, 1997 did not affect the ability of the EPA to grant enforcement discretions, SDMI could have sought another. Or it might have renewed its efforts to open a waste treatment facility in Canada, as did at least one of its U.S. competitors (Trans-Cycle Industries Inc.) successfully. Canada should not be held liable for SDMI's refusal or failure to take this or other reasonable steps to mitigate its losses. Since there is no evidence of mitigation (or even of efforts to mitigate), the Tribunal must find that SDMI failed to make any effort to mitigate its losses. This finding be taken into account in the quantification of damages.

**Myers' Memorial, page 15, last paragraph, and para 220**

**Myers' Response to Canada's First Request for Documents, Tab 41 Annexes to Canada's Counter-memorial, Vol. II, tab. 52**

**TCI Inc. PCB Waste Disposal, http://www.tci-pcb.com/index.html, Annexes to Canada's Counter-memorial, Vol. II, tab. 53**

## PART FOUR: AWARD SOUGHT

469. Canada respectfully requests that this honourable Tribunal dismiss this claim and order SDMI 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.

470. All of which is respectfully submitted this 5th day of October, 1999, Ottawa, Canada.

Joseph de Percier, Sylvie Tabet, Fulvio Fratassi, Brian Evernden and Lyne Soublière
Counsels for Canada

TO: The Tribunal

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