IN THAT 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

1. This Supplementary memorial of the Government of Canada is made pursuant to Procedural Order #9. It addresses four basic matters.

2. First: now that the document production is complete and upon review of the supporting evidence provided by S.D. Myers, Inc. ("SDMI") and by Canada, Canada believes that the absence of supporting material for key SDMI allegations is telling. The additional evidence also supports many of the positions documented by Canada in its Counter-Memorial.

3. Second: the recent decision of a Tribunal in another NAFTA Chapter 11 case -- *Robert Azinian and others v. The United Mexican States*, -- is apposite.[1]

4. Third: the recent NAFTA Article 1128 submission made by the Government of the United States in *Metalclad v. United Mexican States*[2] supports the interpretation put forward by Canada on the issue of expropriation.

5. Fourth: any evidence of internal debate about the *Interim Order* between departments or between ministers would have been a normal part of governmental decision-making processes, and would have helped to ensure consideration of all relevant factors

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[1]ICSID Case No. ARB(AF)/97/2

[2]ICSID Case No. ARB(AF)/97/1

A. Now that Document Production is Complete, Canada says that Additional Documents Either Fail to Support SDMI or do Support Canada

6. A combination of lack of evidence supporting SDMI, and additional documents contradicting SDMI's allegations, add weight to Canada's contentions that

(1) SDMI did not have an "investment" in Canada based on physical or real property,

(2) SDMI did not have an "investment" in Canada based on shareholdings, at least not with respect to the export of PCBs from Canada,

(3) prior to the Interim Order, SDMI's Activities in Canada, and those of Myers Canada, were not primarily related to exporting PCB wastes from Canada,

(4) neither SDMI nor Myers Canada was expropriated and Myers Canada's operations in anada continued without impact from the *Interim Order*,

(5) contrary to the allegeation of breach of NAFTA Article 1105, there is no evidence that SDMI was denied the ability to makes its views known to Environment Canada and other departments of the Government of Canada, or that Chem-Security was given preferred access,

(6) contrary to the allegation that the *Interim Order* targeted Myers Canada and SDMI's operations in Canada, thereby breaching NAFTA Article 1105, there is no evidence Canada had any knowledge of SDMI's alleged investment in Canada, and

(7) SDMI was not "in like circumstances" with Canadian PCB waste treatment and disposal companies and its claim of violation of NAFTA Article 1102 is ill-founded.

1. <u>There is No Further Evidence of SDMI Investment in Property in Canada</u>

7. Myers Canada owned or leased no real property, no physical facilities, no offices, possibly one vehicle for a short period of time, little furniture or equipment, and no other property in Canada (including no ownership of PCB wastes).

8. SDMI itself owned no real property, no leases, no facilities, no offices, no vehicles, no furniture, no other property in Canada, no PCB wastes. The one exception -- disclosed by the earlier productions -- is the agreement for telephone answering and mail collection for ten months in 1996 and 1997 referred to in paragraph 64 of Canada's Counter-memorial.

9. SDMI's previous allegations of property in Canada remain unsubstantiated. For example, as identified by Canada in paragraph 49 of its Counter-memorial, in April 1995, SDMI advised the EPA that it had invested $80,000.00 in laboratory equipment in Canada. But neither before nor after the delivery of Canada's Counter-memorial has SDMI presented any evidence of such property or investment located in Canada, despite Canada's various requests for documents relating to such property.[3]

2. The Evidence Confirms that Myers Canada was not SDMI's "Investment" or "Affiliate" Based on Shareholdings

10. In the affidavit of Rev. Michael Valentine, paragraphs 20 and 21 allege that four members of the Myers family control Myers Canada through equal shareholdings, and that they also control SDMI. The Memorial repeats the allegation and argues at paragraph 16 that the two companies have "common control". (Canada's Counter-memorial addresses this argument in paragraphs 59 and 60, contending that there is no "investment of an investor of a Party" as required by NAFTA Article 1139.) The additional documents contain no evidence supporting either of these allegations.

11. The additional documents disprove the second allegation and, with respect to the SDMI shareholding, contradict SDMI's first production of documents. In response to item 15 of Canada First Request for Documents, SDMI produced a document stating that Dana S. Myers, Scott P. Myers, David P. Myers and Seth J. Myers were each a 25 percent shareholder in SDMI. However, a document produced on November 30 appears to show a very different shareholding. According to it, Dana Myer holds more than 50 percent of the "voting" or "A" shares (86.02 of 172 shares, with Scott, Seth and David Myers sharing the remainder), while Scott, Seth and David Myers equally the majority of the "B" shares (100.34 of 344 "B" shares each, with Dana Myers holding the remaining 42.98 "B" shares).

"S.D. Myers, Inc. Shareholders", SDMI Response to item 15 of Canada First Request for Documents, **Tab 1**

S.D. Myers, Inc. Share Holdings Summary, **Tab 2**

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[3]SDMI's letters of September 21 and 23 responded to issues raised by Canada concerning its First Request for Documents. Paragraphs 2 and 24 of Canada's First Request sought documents listing the property in Canada of SDMI and Myers Canada, respectively. No documents were provided. This reply is consistent with Canada's conclusions that neither SDMI or Myers Canada had even minimal property in Canada.

12. If in fact Myers Canada is jointly owned by the four Myers, without any one of them in a controlling position, but SDMI is controlled by Dana Myers through ownership of the majority of voting shares, Myers Canada and SDMI cannot be said to be commonly "controlled" and, on SDMI's own definition, cannot be "affiliates" of each other. Therefore, Myers Canada cannot be an "investment" of SDMI on that basis.

3. Prior to the Interim Order, SDMI's Activities in Canada, and those of Myers Canada, were not Primarily Related to Exporting PCB Wastes from Canada

13. Paragraphs 34 to 56 of Canada's Counter-memorial review the evidence of this fact. Additional documents further substantiate it.

14. In its Further Request for Documents dated September 17, 1999, Canada sought documents relating to statements contained in some of the business plan documentation produced earlier about Myers Canada. As set out in paragraphs 46 to 48 of Canada's Counter-memorial, these business plan documents indicated that Myers Canada was focussed not on PCB waste exports but rather on siting a waste disposal facility in Canada, and in other countries, and the provision of various testing and other services to the electrical industry.

15. The additional documents include a unanimous resolution of the directors of Myers Canada adopted March 13, 1993, for the entry into negotiations with the Sanivan Corporation "to rent, buy or rent with an option to buy an existing 10- 15,000 square foot building in Senneterre, Quebec. The terms and conditions of the lease or purchase agreement are those most advantageous to the anticipated operation of the business at the location as determined by the President, Richard Cormier and the Vice President, Dana S. Myers. The actual agreement for the transaction can be bound and signed solely by the President, Richard Cormier."

Action by Unanimous Consent of the Board of Directors of Myers Company for Environmental Development, Inc., adopted March 18, 1993, **Tab 3**.

16. The additional documents disclose SDMI's interest in a process called the base catalysed decomposition ("BCD") process. It is also referred to in Myers Canada documents as the chemical destruction of organic contaminants ("CDOC") process, for use in Canada. A Myers Canada document entitled "The CDOC Process" and dated June 1993, states that "[t]wo years ago, SDMI acquired the rights for that process then called "BCD". The process is said to "safely, efficiently and economically destroy" contaminants including PCBs and PCB wastes.

Myers Canada, "The CDOC Process", June 1993, **Tab 4**

Separation and Recovery Systems, Inc., "The Base Catalysed Decomposition (BCD) Process for Treating Heavy Halocarbons in Soils and Sludges", presented to the 14th Annual HMCRI Superfund Conference, November 30-December 2, 1993, **Tab 5**

17. The additional documents set out a portion of SDMI's and Myers Canada's discussions with BCD Group, Inc. concerning efforts to employ this technology in Canada, Taiwan and Mexico. A memo dated July 9, 1993, to Dana Myers of SDMI and Richard Cormier of Myers Canada, entitled "CDOC Budget costs - Taiwan" refers to the "CDOC process for Canada". A memorandum from Richard Cormier of Myers Canada to Dana Myers of SDMI dated January 18, 1994, entitled "Laboratory work needed about CDOC", begins be referring to "the actual emergence of projects in Taiwan and in Mexico" and goes on: "We have had a request from Taiwan to prepare and forward to them what is required for getting a permit. A similar request came from the Mexicans today."

Memo dated July 9, 1993, to Dana Myers of SDMI and Richard Cormier of Myers Canada, entitled "CDOC Budget costs - Taiwan", **Tab 6**

Memorandum dated January 18, 1994, from Richard Cormier of Myers Canada to Dana Myers of SDMI, entitled "Laboratory work needed about CDOC", **Tab 7**

18. By March, 1994, there is communication between BCD Group, Inc. and SDMI referring to "the Canadian license agreement" for the BCD process, SDMI expenditures of "$100,000.00 already paid", "any further payments would not be required until you are in commercial operations", "[u]nder this arrangement SDMI would still have a presence in Canada permitting it to pursue work there.", and suggesting that if SDMI wishes "to drop Canada altogether [sic], we are willing to consider a credit toward the Mexican agreement." A handwritten response signed "Dana" states that "[w]e are trying to find a partner in Canada who has the $ and the risk-taking ability you want to take over our licence."

Fax dated March 15, 1994, from BCD Group, Inc to Dana Myers, SDMI, **Tab 8**

19. SDMI and BCD Group, Inc. are still communicating in mid-summer, 1994 about possible use of BCD in Canada. A letter from SDMI states that it had been attempting to establish a transformer recycling process in Canada that would require the BCD process, refers to expenditures by SDMI of $250,000.00 to $300,000.00 for the license fee and "experimenting and marketing and getting ready to build a process to do BCD in Canada, Taiwan and Mexico", and reviews the roles of Richard Cormier and Pierre Lefebvre of Myers Canada. They are described as having "called over 100 companies discussing BCD with people in Canada", doing mass mailings to companies who own PCBs, talking to consultants who recommend technologies to companies, putting in bids for BCD.

Letter dated July 1, 1994, from Dana Myers, President SDMI to BCD Group, Inc, **Tab 9**.

20. A newly produced memorandum, dated April 28, 1995, from Myers Canada to SDMI entitled "1995, Canadian marketing objectives" refers to marketing of services to electrical contractors and transformer manufacturers and their customers, to testing and rewind services, to attendance at electrical conferences, trade shows and electrical association meetings, placing advertisements in specialized magazines. There is no mention of PCBs or PCB wastes, no mention of exports of PCB wastes from Canada, and no mention of Chem-Security, Cintec or other so-called Canadian competitors of SDMI.

Memorandum dated April 28, 1995, from Myers Canada to SDMI entitled "1995, Canadian marketing objectives", **Tab 10**

4. Neither SDMI nor Myers Canada were Expropriated; Myers Canada's Operations in Canada Continued Without Impact from the *Interim Order*

21. The SDMI Memorial, page 13, last paragraph, alleges: "As a result of the *PCB Waste Export Ban*, the Investor and its Investment lost the opportunity to do business in Canada." There is still no evidence to support this allegation.[4]

22. The SDMI Memorial, page 14, last paragraph alleges that the Investor and Investment were unable to conduct their ordinary and regular business. The business activities in Canada are summarised in the SDMI Memorial, page 13, last paragraph, as: advertising in Canada; offering price quotes and soliciting bids; and, environmental consulting and site visits.[5] Far from there being evidence that these activities could not be carried out once the *Interim Order* was made, there is considerable evidence that the volume and value of these activities increased after November, 1995.

23. The SDMI Memorial, page 14, last paragraph, alleges: "negotiations with new customers

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[4]Nor is there any evidence to suggest that any SDMI "loan" to Myers Canada (which Canada continues to deny for the reasons set out in paragraphs 231 to 240 of its Counter-memorial.

[5]It is telling that the evidence referred to support this allegation refers to work by employees of SDMI emanating from Tallmadge, Ohio, and makes no reference to work in Canada or by Myers Canada. The letters presented as evidence of those activities (schedule 72 to the SDMI Memorial) are all signed by either Dave Walmsley, Todd Stover or Ed Methany, all identified as employees of SDMI, and ***not*** of Myers Canada, in item 10 of SDMI response to Canada's First Request for Documents. The advertising materials presented as evidence (Schedule 74 to the SDMI Memorial) were all purchased by "Dana Myers", not Myers Canada.

were frustrated." Again, there is no evidence to support this allegation. The letters set out in schedules 48 and 73 make no reference to negotiations with SDMI or Myers Canada, nor any reference to contracts with SDMI or Myers Canada.

24. The SDMI Memorial, page 14, second full paragraph, alleges that Custom Environmental Services "sent a letter to the Investor on December 7, 1995, stating that it would have to cancel its order for $5,720,000.00 worth of work from the Investor and the Investment." This is completely unfounded. The letter (Schedule 71) makes no mention of any contract or agreement. It makes no mention of any cancellation. It makes no mention of Myers Canada (referring only to "SD Myers in Ohio and Arizona"). Custom Environmental Disposal does say that "[i]t is our intent to pursue this disposal option should the interim order banning PCB shipment be reversed." This must mean that it was willing to maintain its stockpile while the *Interim Order* was in place.

25. Canada has already responded to these allegations in paragraphs 33 to 74 of its Counter-memorial. The additional documents support Canada's position. They include what appears to be an eighteen-page record of cash flow between SDMI and Myers Canada. It demonstrates an increase, and not a decrease, in activity between SDMI and Myers Canada subsequent to the *Interim Order*. For example, while there are eleven pages of entries for 1996, 1997, 1998 and 1999 (with approximately fifty entries per full page), after the *Interim Order* was made, only six and ½ pages of entries pre-date the *Interim Order*. The earliest entry appears to be April 30, 1993 and the latest entry appears to be April 30, 1999.

SDMI/Myers Canada Cash Flow Record, **Tab 11**

26. The two largest single "credits" to SDMI from Myers Canada post-date the making of the *Interim Order*. They are (a) $1,089,703.34, dated March 31, 1999 (and described as "WO CDN INVEST AS PCB RIGHTS"), approximately three and ½ years after the expropriation without compensation alleged in paragraph 199 of the SDMI Memorial, and (b) $126,148.81 dated June 30, 1996, (and described as "PYMT FROM CDN: SALES COMMISSION") over six months after the *Interim Order* was alleged in paragraph 2(D) of the SDMI Memorial to have "destroyed the business operations of the Investor's Investment in Canada by making it impossible for the Investment to operate in Canada, frustrating their contracts and business dealings and thereby nullifying their market share."[6]

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[6]Similarly, the allegation in paragraph 47 of the affidavit of the Rev. Michael Valentive, fails. It alleges: "However, by this time [July 1997] our position in the shrinking Canadian market has already been irretrievably compromised. The Canadian ban had provided both our Canadian and our American-based competitors with an opportunity to "catch up" with our joint venture in terms of marketing and sales contacts." There is no evidence whether American

SDMI/Myers Canada Cash Flow Record, **Tab 11**

5. Contrary to the Allegation of Breach of NAFTA Article 1105, There is No Evidence that SDMI Could Not Make its Views Known to Environment Canada and Other Departments of the Government of Canada, or that Chem-Security was Given Preferred Access

27. As part of its allegations of breach of NAFTA Article 1105 (Minimum Standard of treatment), SDMI complains that Canada permitted its "competition" special access while the *Interim Order* was being made, that Canada acted without regard to SDMI's interests while and that, generally, Canada acted without "good faith". As Canada argues in paragraphs 303 to 334 of its Counter-memorial, these allegations do not withstand scrutiny. Additional documents – or the absence of any – reinforce Canada's position.

28. The related complaint set out in SDMI's Memorial at paragraphs 122-125 that its so-called competition was "lobbying" in Canada would be at best ironic even if well-founded, which it is not.

29. Paragraph 123 of the Memorial alleges that Chem-Security and Cintec "were provided with access to the Minister [Copps] on more than one occasion to request a ban be imposed if the border was ever opened." There is no evidence to support this allegation. Paragraph 123 cites Federal Court cross-examination of Art Mathes. In fact, Art Mathes makes it quite clear that there was only ***one*** meeting he or Chem-Security had with the Minister and her officials on the treatment of PCB waste in Canada (on July 6, 1995 during the Minister's "Business Week" meetings with representatives of a wide range of Canadian industries). He also encountered the Minister at a "Laurier Club function" at some unknown date (he could not specify if it was in 1995) where he introduced himself to her without any further discussions.

Investor's Memorial Schedules, Tab 39, pp. 61-75

30. ***The New Shorter Oxford English Dictionary*** (1993), page 1613, defines "lobby": "**1.** *v.t.* Seek to influence (members of a house of legislature) in the exercise of legislative functions, orig. by frequenting the lobby; seek to win over to a cause. Also, procure the passing of (a bill etc.) *through* a legislature by such means. M19 **2** *v.i.* Frequent the lobby of a house of legislature; for the purpose of influencing members' votes; seek to gain support (*for* a cause). M19" [emphasis in original].

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competitors with enforcement discretions made any effort in the Canadian market. There is no evidence that Chem-security or Cintec (which had actual disposal facilities in Canada whereas SDMI did not) had caught-up, maintained their relative positions or had fallen behind.

31. This is an accurate description of exactly what SDMI (but not Myers Canada) was engaged in Canada the seven months after the *Interim Order* was first made. It is also an accurate description of the efforts SDMI made in the United States to get the enforcement discretion in the first place.

32. The affidavit of the Rev. Michael Valentine, paragraph 43, alleges that the "Minister [Copps] never made herself available to discuss this issue with us despite our many efforts to contact her and her cabinet colleagues." This is in fact incorrect.

Affidavit of Rev. Michael Valentine, paragraph 43, Investor's Memorial Schedules, Tab 1

33. Dana Myers and Michael Valentine of SDMI, and Richard Cormier of Myers Canada (although there is no evidence he was identified as such), talked to Minister Copps in July, 1994 "at the first environmental meeting of NAFTA in Washington D.C. about importing PCBs to the U.S. for disposal." Thereafter, few of SDMI's many letters to Minister Copps or other Ministers asked for meetings.

Letter dated November 20, 1995, from SDMI to Minister Copps, **Tab 12**

34. Based on a suggestion of the Minister during the conversation of July, 1994, SDMI subsequently met with Gordon Donnelly and John Myslicki of Environment Canada. The affidavit of the Rev. Michael Valentine refers to a meeting on August 17, 1994 between SDMI and John Hillborn and two other DOE officials, and a September 1994 response from Jeff Smith in response to SDMI queries.

Letter dated November 20, 1995, from SDMI to Minister Copps, **Tab 12**

Affidavit of Rev. Michael Valentine, paragraph 37, Investor's Memorial Schedules, Tab 1

35. That letter of November 20, 1995, also refers to additional communications although unspecified between SDMI and Environment Canada: "Others in Environment Canada had expressed to us and to others their interest in sending PCBs to the U.S. for disposal."

Letter dated November 20, 1995, from SDMI to Minister Copps, **Tab 12**

36. In fact, the evidence shows that SDMI had numerous communications of various sorts with the Government of Canada while the *Interim Order* was being considered by Cabinet and while the New Regulations were being developed thereafter.

37. SDMI's nine page letter of November 20, 1995 to Minister Copps presents an extensive review of SDMI's concerns.[7]

Letter dated November 20, 1995, from SDMI to Minister Copps, **Tab 12**

38. It was followed by shorter letters from SDMI to Minister Axworthy (November 22, 1995), to all federal cabinet ministers (November 30, 1995), to Minister Copps, including a worksheet titled "Benefits of Allowing S.D. Myers, Inc. Permission to Import PCBs for Disposal to Canadian Standards" that describes SDMI's services and prices but makes no mention of Myers Canada (November 30, 1995). The letters make no mention of Myers Canada or SDMI operations in Canada.

Letter dated November 22, 1995, from SDMI to Minister Axworthy , **Tab 13**

Letter dated November 30, 1995 from SDMI to all federal cabinet ministers, **Tab 14**

39. These were followed by SDMI's five page letter of December 1, 1995, to Minister Copps which reiterates its concerns in considerable detail. In turn, it refers to "much information" having been faxed by SDMI to Vic Shantora, the Director General at Environment Canada involved in the *Interim Order*. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated December 1, 1995, from SDMI to Minister Copps, **Tab 15**

40. This was followed by SDMI's five page letter of December 11, 1995 to Minister Marleau (copied to Ministers Copps, Manley and McLellan, and to Mel Cappe) which further discusses SDMI's concerns in considerable detail, including sections titled "Trade Relationship" and "Economic" consequences. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated December 11, 1995, from SDMI to Minister Marleau, **Tab 16**

41. During the first week of December, 1995, Mel Cappe, Deputy Minister of the Environment, Director General Victor Shantora and Alain Pilon, Minister Copps Legislative Assistant, met with SDMI's Michael Valentine and an official of the U.S. Embassy in Ottawa, to discuss SDMI's concerns.

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[7]Page six includes an oblique reference to "our Canadian company". The reference is not in the section of the letter describing SDMI's PCB waste treatment and disposal operations (paragraph 7 on pages 4 and 5).

42. This was followed by SDMI's further letter to Minister Copps of December 12, 1995, (cc'd to "Cabinet members") suggesting that it will commence legal proceedings in Canada against the *Interim Order*. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated December 12, 1995, from SDMI to Minister Copps, **Tab 17**

43. This was followed by a two-page letter dated January 5, 1996, from SDMI to Ministers Copps, McLellan, Rock, Dingwall, Martin and Tobin. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letters dated January 5, 1996, from SDMI to Minister Copps, McLellan, Rock, Dingwall, Martin and Tobin, **Tab 18**

44. This was followed by a four-page letter received January 31, 1996, from SDMI to Deputy Minister of the Environment Mel Cappe. That letter urges Canada ***not*** to open its borders to every company which has received an enforcement discretion from the E.P.A., only to companies which have "U.S. EPA permits to dispose of the PVB wastes according to Canadian standards", including SDMI and a few of its American competitors. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter received January 31, 1996, from SDMI to Deputy Minister Cappe, **Tab 19**

45. This was followed by a six-page letter dated February 1, 1996, from SDMI to John Myslicki of Environment Canada. It covers much of the same ground as the letter to Mel Cappe. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated February 1, 1996, from SDMI to John Myslicki, **Tab 20**

46. This was followed by a letter dated February 8, 1996, from SDMI to John Myslicki. It reiterates the proposal that the Canadian border be opened only to those companies with U.S. EPA permits to dispose of PCB wastes according to Canadian standards. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated February 8, 1996, from SDMI to John Myslicki, **Tab 21**

47. This was followed by a two-page letter dated February 27, 1996, from SDMI to Minister of the Environment Marchi (there had been a cabinet shuffle in late January, with Ms. Copps becoming Minister of Canadian Heritage). The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated February 27, 1996, from SDMI to Minister Marchi, **Tab 22**

48. This was followed by letters dated April 10, 1996, from SDMI to Minister Marchi and to Vic Shantora of Environment Canada. The letter to Vic Shantora refers to the process then underway to make the New Regulations ("What Environment Canada now wants to do is exactly what we were going to do...and I am wondering if there is a way to expedite the process."). The letters make no mention of Myers Canada or SDMI operations in Canada.

Letters dated April 10, 1996, from SDMI to Minister Marchi and to Vic Shantora, **Tab 23**

49. This was followed by a three page letter dated April 15, 1996, from SDMI to Ministers Marchi, Robillard, Irwin, Rock and Peters. It refers to the legislative process then underway to make the New Regulations, and to discussions between Canada and the United States ("Since the interim ban, Environment Canada has asked for many things from the U.S....and has gotten all of them excepting that the U.S. will allow landfill of PCBs and Environment Canada does not want to allow Canadians the choice of landfilling."). The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letters dated April 15, 1996, from SDMI to Ministers Marchi, Robillard, Irwin, Rock and Peters, **Tab 24**

50. This was followed by a six page letter dated April 19, 1996, from SDMI to Ron Harper, Environment Canada. It discusses price comparisons between SDMI's services and Chem-Security's, and includes as an attachment a "pricing study". Neither the letter nor that attachment suggest that the Canadian inventory of PCB wastes has diminished in the five months that the *Interim Order* had been in effect. On the contrary, the letter relies on 1991 information about the inventory, suggesting that information was still valid in April 1996. The letter makes no mention of Myers Canada. The letter does talk about one instance of SDMI "quoting through a Canadian company" for its services, and prices for SDMI's services to Canadian customers having "been marked-up by the Canadian company who bid the job".

Letter dated April 19, 1996, from SDMI to Ron Harper, **Tab 25**

51. This was followed by a letter dated April 22, 1996, from SDMI to Ministers Marchi, Rock, Irwin and Peters. It comments on the then-outstanding issue about potential landfilling of Canadian PCB wastes in the United States. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated April 22, 1996, from SDMI to Ministers Marchi, Rock, Irwin and Peters, **Tab 26**

52. This was followed by a three-page letter also dated April 22, 1996, from SDMI to Ministers Marchi, Martin, Rock and Irwin, relating to a letter that day in the ***Hill Times***, apparently from the Quebec PCB treatment and disposal company Cintec. The letter makes no mention of Myers Canada or SDMI operations in Canada.

Letter dated April 22, 1996, from SDMI to Ministers Marchi, Martin, Rock and Irwin, **Tab 27**

53. This was followed by a two-page document from SDMI entitled "Optimizing the Environmental Benefits of PCB Disposal Activities" faxed June 10, 1996, to twenty-four federal cabinet ministers, including Minister Marchi. While the document addresses the landfilling issue, it so belies that allegation that while the *Interim Order* was in force, the stockpile of Canadian PCBs was substantially reduced. The final paragraph reads, in part:

> **"Many PCB owners are holding onto their PCBs waiting for some competition before they dispose of them. If disposal of PCB stockpiles (at over 3,5000 PCB storage sites throughout Canada) are of environmental interest, then acting before the summer break is imperative."** (Emphasis in original)
>
> The document makes no mention of Myers Canada or SDMI operations in Canada.

Fax sent June 10, 1996, from SDMI to Minister Marchi and twenty-three other Ministers, **Tab 28**

54. This was followed by a three-page letter dated June 13, 1996, from SDMI to Ministers Marchi and Manley. The letter refers to the then-current debate within the government concerning landfilling:

> "My understanding of the different Cabinet positions is that some are committed to getting borders open totally without any incineration restriction and others are equally committed to keeping the borders closed unless export for incineration the only option....one member's office even intimating that a 2 year ban would be more acceptable than allowing export for landfill."
>
> A two page "worksheet" attached to the letter repeats the statement in the June 10th fax that many Canadian owners are stockpiling their PCBs. Neither the letter nor the worksheet make mention of Myers Canada or SDMI operations in Canada.

Letter dated June 13, 1996, from SDMI to Ministers Marchi and Manley, **Tab 29**

55. Over time, SDMI received responses to many of its letters and communications, indicating its concerns were being considered.

Investor Memorial Schedules, Tabs 37 and 38

56. Letter dated October 30, 1996, from Dale V. Slaght, Minister-Counsellor for Commercial Affairs, U.S. Embassy, Canada, to Dana Myers, describes lobbying of the Government of Canada by Michael Valentine of SDMI and by the U.S. Government on SDMI's behalf, and the fruit that it bore:

> "After having worked with the U.S. Environmental Protection Agency (EPA) for many months to open the U.S. border for imports of PCBs, Mr. Valentine was shocked to hear that several days after the United States agreed to open its border, Canada issued an emergency decree to close its border to PCB exports. Mr. Valentine joined me in calls on more than half a dozen Canadian officials in three different departments over the course of nearly a year beginning in November of 1995 to urge the Canadian Government to reverse its decision.. Included in those visits were one Deputy minister and one Assistant Deputy Minister. In between calls, Mr. Valentine was on the telephone "working" the staffs of these decision makers. At one session where Michael was personally meeting an official for the first time, both remarked that while never having met they felt they knew each other well because of the intensity of their telephone conversations....He also used the Canadian press appropriately and effectively. The U.S. Embassy also sent two letters on separate occasions to five different Canadian government cabinet ministers and Mr. Valentine was helpful to us in the preparation of one of those letters. In the end, I am confident the Canadians would not have reversed their position had it not been for the extremely able work of Michael Valentine."

Letter dated October 30, 1996, from Dale V. Slaght, Minister-Counsellor for Commercial Affairs, U.S. Embassy, Ottawa, to Dana Myers, SDMI, **Tab 30**

57. If Michael Valentine's role was as described, then it is clear that SDMI's submissions to the Government of Canada about the *Interim Order* were considered and were effective.[8]

58. As interesting as what SDMI was submitting to Canada was what it was not. In an effort to support its exemption petitions, SDMI made numerous submissions and letters to the EPA through 1994 and especially in 1995 seeking permission to import PCB wastes from Canada. It appears that SDMI made little effort to advise Canada of these stream of communication about Canadian PCB wastes, highly regulated in Canada and, as SDMI well-knew, of particular concern to the Government of Canada.

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[8]As paragraph 169 of Canada's Counter-memorial indicates, the draft New Regulations to open the Canadian border had been published for public comment at the beginning of October, 1996.

59. For example, at one point in June, 1995, SDMI even requested the EPA call Minister Copps as a cross-examination witness in the public hearings that the EPA was conducting on the exemption petitions. There is no evidence that Minister Copps, Environment Canada or the Government of Canada were advised of this request. By a letter dated July 3, 1995, the EPA denied this request. After numerous further letters from SDMI pursuing the matter, the EPA reiterated its denial in a letter to SDMI dated August 18, 1995, and again in a letter dated September 26, 1995.

Letters dated June 20, 1995, from SDMI to TSCA Non-Confidential Information Centre (of the EPA) and to the Office of Pollution Prevention and Toxics, EPA, **Tab 31**

Letters dated July 3, August 18 and September 26, 1995, from EPA to SDMI, **Tab 32**

60. Another example is SDMI's letter of July 18, 1995, to the U.S. EPA including a document which alleged Environment Canada's support:

"For the last four years, S.D. Myers, inc. has been gathering support for its exemption petitions to import PCBs from Canada for disposal in the U.S. via recycling and total destruction. During those four years, SDMI has gathered the following support specifically for its exemption requests. ...

Environment Canada and Quebec Ministry of the Environment as spoken through Michael Cloughesy, a NAFTA JPAC member (in writing via transcription of the March 6 formal hearing. He can be reached at (514) 393-1122)." (emphasis in original)[9]

Letter dated July 18, 1995, from SDMI to U.S. EPA, **Tab 33**

61. The additional documents disclose that SDMI's lobbying in the United States was as energetic as it was in Canada. The additional documents disclose an intensive lobbying effort by and on behalf of SDMI in the summer and fall of 1995, resulting in the enforcement discretion. There is no evidence that Canada was aware of any of this. As

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[9]Paragraph 132 of Canada's Counter-memorial noted other instances of this misrepresentation. Others complained during 1995 that SDMI had cited them as supporters without authoritisation.

Letter dated July 14, 1995, from Victor Lichtinger, Executive Director, NAFTA Commission for Environmental Cooperation, to SDMI, **Tab 35**

Letter dated September 21, 1995, from Dr. Christine Augustyniak to SDMI, **Tab 36**

stated in paragraph 135 of Canada's Counter-memorial, there is no requirement for public hearings or notification for the issuance of an enforcement discretion.

Letter dated July 10, 1995, from U.S. Department of Commerce to U.S. EPA
Letter dated July 18, 1995, from SDMI to U.S. EPA
Letter dated August 11, 1995, from Representative McIntosh to U.S. EPA
Letter dated August 14, 1995, from Senator Glenn, Representative Sawyer and Representative Regula to U.S. EPA
Letter dated August 15, 1995, from Mayor Warzinski (Tallmadge, Ohio) to U.S. EPA
Letter dated August 15, 1995, from Senator DeWine to U.S. EPA
Letter dated August 28, 1995, from Rollins Environmental Services (DE) Inc. to U.S. EPA
Letter dated September 14, 1995, from Institute of Scrap Recycling Industries, Inc. to U.S. EPA
Letter dated September 20, 1995, from Representative Sawyer to U.S. EPA
Letter dated October 3, 1995, from Representative Sawyer to U.S. EPA
Letter dated October 12, 1995, from SDMI to U.S. EPA, **Tab 33**

62. As late as September 26, 1995, the U.S. EPA was answering the August 11 letter of Representative McIntosh by referring to EPA rulemaking (based on a "comprehensive package of regulatory reforms for the PCB regulations") and the hope of publication "of a final rule which addresses those [SDMI's] petitions by December 1995." One month latter, the enforcement discretion was issued to SDMI, contrary to this stated intent.

Letter dated September 26, 1995, from U.S. EPA to Representative McIntosh, **Tab 34**

6. Contrary to the Allegation that the *Interim Order* Targeted Myers Canada and SDMI's Operations in Canada, Thereby Breaching NAFTA Article 1105, there is No Evidence Canada had any Knowledge of SDMI's Alleged Investment in Canada

63. It is striking that SDMI made virtually no reference to Myers Canada, nor any description of that company or the alleged consequences to it of the *Interim Order*, in its many communications with the Government of Canada. It mirrors the lack of evidence to support the allegations that the *Interim Order* was specifically directly against SDMI's so-called investment in Canada. Since Canada did not know of Myers Canada, or of SDMI's operations in Canada, the allegation that Canada somehow targeted either by the *Interim Order* (thereby breaching NAFTA Article 1105) is hollow.

64. Paragraph 24 of the SDMI Memorial alleges that Canada "has acknowledged on the public record" that its promulgation of the *PCB Waste Export Ban* was directly related to the PCB waste treatment business of the Investor ***and the Investment***." (emphasis added) But the only evidence cited for this allegation, the Regulatory Impact Assessment Statement of pre-publication of the New Regulations, makes no reference to Myers Canada, or to SDMI.

65. The SDMI Memorial, page 10, 4th paragraph and footnote 22, suggest that Canada was aware of the "cross-border business operated by S.D. Myers, Inc ***and the Investment***" and that they "presented a major obstacle to Chem-Security's desire to increase its share of the Canadian market." (emphasis added) The only evidence cited for this allegation, the letter from the Alberta Minister of the Environment, makes no mention of Myers Canada (or SDMI at all), and merely refers to "certain American hazardous waste treatment facilities which have an economic interest in obtaining Canadian PCB's [sic]." Schedule 67 to the SDMI Memorial

66. As described in paragraphs 35 to 54, above, the many communications from SDMI to Canada included but two passing allusions to Myers Canada.

67. Paragraph 37 of the Valentine Affidavit describes earlier contacts (August 17, 1994 SDMI meeting with John Hillborn and two other DOE officials, and September 22, 1994 letter from Jeff Smith, Legislative Assistant to Minister Copps, to SDMI in response to SDMI queries). It makes no suggestion that Myers Canada was involved or even mentioned. There is no mention of Myers Canada or SDMI operations, except noting that SDMI had sought financial assistance "to build a mobile plant in Canada.".

Letter dated September 22, 1994, from Jeff Smith to SDMI, **Tab 37**

Letter dated March 7, 1995, from SDMI to Minister Copps, **Tab 38**

68. The first ***and only*** communication to the Government of Canada from Myers Canada is a letter dated December 13, 1995, addressed to the "Direction Générale, Approvisionnnement et services opérationals Ouest du Québec" of Public Works and Government Services Canada, in Montréal, Québec. While referring to the meeting the previous week between SDMI's Michael Valentine and a official of the U.S. Embassy in Ottawa, and Mel Cappe, Victor Shantora and Alain Pilon, Minister Copps Legislative Assistant, the letter offers PCB waste recycling and disposal services (at SDMI's facility in Tallmadge, Ohio).

Letter dated December 13, 1995, from Myers Canada to "Direction Générale, Approvisionnnement et services opérationals Ouest du Québec" of Public Works and Government Services Canada, in Montréal, Québec, **Tab 39**

69. Paragraphs 122, 123 and 125 of the Memorial allege that Canada failed to consult with Myers Canada, but presents no evidence that SDMI ever advised Canada of the existence of Myers Canada, or that Myers Canada ever had any dealings with Canada during the relevant period (except for one letter to a regional office of Public Works and Government Services Canada in Montreal). Canada does not admit that it had any duty to consult as alleged. Canada cannot be faulted to failing to consult with a company of which it had no knowledge (and which, from the evidence, appears not to have been operating in the field).

70. Moreover, there is no evidence that Canada had any knowledge of the "substantial operating loan", "inter-affiliate loans", "operating loan financing and...capital by way of common shares" alleged in SDMI's Memorial, Part II, paragraphs 4, 17 and 18.

71. Therefore, allegation in SDMI's Memorial, General Introduction, paragraph 1, that Canada "designed an export ban to discriminate against an American-owned investment" is puffery.

7. Additional Documents Confirm that SDMI was not "In Like Circumstances" with Canadian PCB Waste Treatment and Disposal Companies and its Claim of Violation of National Treatment is Ill-founded

72. In paragraph 71 of its Memorial, SDMI admits that to grant an investment treatment no less favourable under NAFTA Article 1102 "means the foreign investment must be allowed to operate ***in the country*** just as other similar domestic investments operate ***in that country***." (Emphasis added) In other words, national treatment involves a comparison of investments' operations within the country whose measure is impugned. SDMI's considerable operations in Tallmadge, Ohio are irrelevant for the consideration of whether its (or Myers Canada's) operations ***in Canada*** were "in like circumstances" with operations of Canadian investors ***in Canada***.

73. SDMI's PCB treatment and disposal activities comparable to those of Chem-Security were not activities SDMI conducted ***in Canada***. SDMI's PCB treatment and disposal were conducted ***in the United States***. ***In Canada***, Myers Canada did not provide the PCB waste treatment and disposal services that Chem-Security did. ***In Canada***, SDMI and Myers Canada were not "in like circumstances" with Chem-Security.[10]

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[10]It is telling that the inappropriate comparison between SDMI in the United States and Chem-security ***in Canada*** is never substantiated. SDMI's Memorial, page 6, third full paragraph, and page 7, Table 1, alleges cost differences between SDMI and Chem-Security as of March, 1995. (See also Affidavit of Rev. Michael Valentine, paragraph 16.) There is no specific material substantiating these calculations or setting out the sources of information used for them.

74. In its Memorial, page 8, third full paragraph, SDMI alleges that SDMI had a competitive advantage over competitors operating in Canada at the time that Canada made the *Interim Order*. No evidence is cited.

75. The affidavit of the Rev. Michael Valentine, paragraph 42, alleges that Chem-Security and Cintec knew that if they could delay S.D. Myers Inc.'s and S.D. Myers Canada Inc's access to the market for year [sic] or two they could seriously damage a competitor's position in the market. Again, no evidence is cited.

Affidavit of Rev. Michael Valentine, paragraph 42, Investor's Memorial Schedules, Tab 1

76. In any event, the various advantages SDMI alleges were at best hypothetical, since prior to November, 1995, it had never actually received any Canadian PCB waste at its Ohio facility for treatment and disposal because the American border was closed. To the extent SDMI did seek customers in Canada for its American facility, it took on a business risk with no assurance of any return on whatever investment it might have made. Confounding the facts and the rules of business, SDMI now denies that risk, and the losses (if there were any) properly attributable to it. Instead, it seeks to blame Canada – where once it blamed the United States[11]

In reply to Canada's explicit request for "copies of any documents which describe or substantiate the costing figures for S.D. Myers, Inc. set out in Table 1 (Canada's Further Request for Documents of September 17, 1999, item 15), SDMI replied: "Your question raises an interrogatory that cannot be answered through this document process. In the preparation of the Memorial, Counsel and the Investor made calculations that were the basis of these tables. These calculations were based on the documents which have already been provided to you."

[11]Up to just days before the enforcement discretion was issued, SDMI was blaming the U.S. EPA for allegedly enormous losses due to the failure of the United States to open the American border to imports of PCB wastes from Canada:

> "Our timing is that we just lost over $5 million in orders in Canada last month because we could no import. Our timing is that we are now in the danger of losing $15 million or more of business in the month of October — all because of "bad" timing. The jobs from those October orders could alone would [sic] create 20 jobs. Our timing is that the losses will just continue until something happens."

Letter dated October 12, 1995, from SDMI to U.S. EPA, **Tab 33**

B. The Award of the Chapter 11 Tribunal in *Desona*

1. Generally

77. Since Canada filed its Counter-memorial, another Chapter 11 Tribunal has issued the first award on the merits of an investor's complaint. That award is apposite in several respects. In ***Desona***[12], the award of November 1, 1999 dismissed the investors' claim in its entirety.

78. The investors challenged a series of decisions of a local municipality (Naucalpan, an industrial suburb of Mexico City). The decisions revoked or cancelled a concession awarded to the investors for garbage collection. The investors had unsuccessfully challenged the decisions through three levels of Mexican courts. The investors claimed that the cancellation by Naucalpan amounted to an expropriation without compensation, contrary to NAFTA Article 1110, and a breach of the requirement for a "minimum standard of treatment", set out in NAFTA Article 1105. The investors did *not* directly challenge the decisions of the Mexican courts.

79. At the outset, the Tribunal held that Chapter 11 is not a mechanism for challenging any deed or misdeed of a government. Unless there is a breach of a specific provision of Chapter 11, government malfeasance does not give rise to a proper claim. As the Tribunal put it in the circumstances, where an investor has entered into a contract with a public authority and the public authority has breached the contract, there is no Chapter 11 claim without a breach of Chapter 11 obligation.[13]

80. The basic principle is an important one: where an investor fails to meet the requirements of Chapter Eleven, a tribunal cannot make an award in the investor's favour simply because the conduct of the NAFTA Party was wrong, even egregious. In this case, the failure of SDMI to prove that it had an "investment" or that the measure had any detrimental impact on the so-called "investment" disentitles it to an award in its favour, even if the objective of the Interim Order, or the manner of its making, were wrong, which Canada does not concede.

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[12] *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, **Tab 40**

[13] *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, paragraphs 83-84, **Tab 40**

2. The Threshold for a Breach of NAFTA 1105 (Minimum Standards of Treatment) is High

81. The Tribunal in ***Desona*** found that the claim for breach of "minimum standard of treatment" was pursued as a restatement of the expropriation claim and without any independent basis. It was dismissed, and with instructive analysis of the sort of ***serious*** misconduct that might constitute a breach of NAFTA Article 1105. The Tribunal suggested as examples: refusal by the domestic courts to entertain a suit; undue delay; administering justice in a seriously inadequate way; clear and malicious misapplication of domestic law; lack of good faith on the part of the domestic courts; and judicial findings on evidence so insubstantial, or so bereft of a basis in law, so as to be arbitrary or malicious.[14] The threshold is high. According to the Tribunal, a mere breach of contract by a government authority or a simple error of law by a domestic court do not constitute a violation of NAFTA Article 1105. As the Tribunal put the test: "for the Claimants to prevail, it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento."[15]

82. In this case, the conduct complained of as an alleged breach of the minimum standard of treatment, even if true, is hardly of the malicious or arbitrary type necessary to breach the NAFTA provision; the action was taken consistent with Canada's international legal obligations under the ***Basel Convention***. There is considerable congruence between Canadian standards of judicial review and those prescribed by international law. In no case do Canadian standards, or the conduct in this case, come close to those described by the panel in ***Desona*** as standards that do not achieve international norms.

83. Canada provides a comprehensive legal regime for the fair and expeditious determination of disputes about the validity of decisions made by federal boards, commissions and other tribunals. Decisions made by federal Ministers[16] and the Governor-in-Council[17] are generally subject to judicial review in the Federal Court system and, where the claimant seeks declaratory relief based on an alleged failure to comply with constitutional norms,

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[14]*Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, paragraphs 102-105, **Tab 40**

[15]*Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, paragraphs 87, 97 and 99, **Tab 40**

[16] See, for example: *LGS Groupe Inc. v. Canada (A.G.)*, [1995] 3 F.C. 474 (FCTD); and *Friends of the Island Inc. v. Canada (Min. of Public Works.)*, [1993] 2 F.C. 229 (FCTD); reversed as to costs (1995), 191 N.R. 241 (F.C.A.)

[17]See, for example: *Saskatchewan Wheat Pool v. Canada (A.G.)*, 67 F.T.R. 98 (FCTD); *National Anti-Poverty Organization v. Canada (A.G.)*, [1989] 1 F.C. 208 (FCTD); reversed without comment on this point [1989] 3 F.C. 684 (F.C.A.)

relief may also be available in the provincial superior courts. The regime provides persons affected by decisions access to the court system and imposes no punitive terms on those who seek such access[18]. Finally, the regime provides principled bases for reviewing ministerial and Governor-in-Council decisions to ensure compliance with the constitution, the statute granting the power at issue, and appropriate procedural or substantive norms[19].

84. Similarly, Canadian courts have adopted an approach of granting more or less deference to decisions depending upon the nature of decision-making process at issue, the expertise of the decision-maker and the process provided by Parliament for judicial review of the resulting decision. This approach centres around the so-called "standard of review" and the standard varies from least deferential (the so-called "correctness" standard) through to extremely deferential (the so-called "patently unreasonable" test). The Supreme Court of Canada recently articulated a "reasonableness" test for statutory appeals[20] and

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[18]Indeed, successful applicants may recover a substantial portion of their legal costs and the court retains a discretion not to award costs against unsuccessful litigants: see, *Federal Court Rules, 1998*, SOR/98-106, Rule 400 and the cases cited in Sgayias at pp. 725-731,

[19] Where the Federal Court – Trial Division has jurisdiction, section 18 of the *Federal Court Act* provides that the court may grant redress for any "error" described in subsection 18(4). The potential errors listed in subsection 18(4) are:

> (a) the federal board, commission or other tribunal acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> (b) the federal board, commission or other tribunal failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> (c) the federal board, commission or other tribunal erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> (d) the federal board, commission or other tribunal based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
> (e) the federal board, commission or other tribunal acted, or failed to act, by reason of fraud or perjured evidence; or
> (f) the federal board, commission or other tribunal acted in any other way that was contrary to law.

[20]See: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, where at page 776 Mr. Justice Iacobucci described an "unreasonable" decision" as one that:

". . . in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must

subsequently imported those principles into the area of judicial review[21].

85. The *Canadian Environmental Protection Act*[22] ("*CEPA*") bestows discretion upon the Minister of the Environment in certain circumstances. That discretion is not unfettered and can only be exercised or maintained in prescribed circumstances.

86. Paragraph 35(1)(b) of the *CEPA* bestows discretion on the Minister to make an interim order when both the Minister and the Minister of Health "believe" that a substance on the List of Toxic Substances (which includes PCBs) is inadequately regulated. The two Ministers may only take this step where circumstances require immediate action to deal with a significant danger to the environment or to human life or health.

87. An interim order made under paragraph 35(1)(b) of the *CEPA* may include any provision the Governor-in-Council can include in a regulation made under subsection 34(1) or (2). The most significant limit on this power appears in subsection 34(3), which prohibits the Governor-in-Council from making a regulation if, in the opinion of the Governor in Council, the regulation regulates an aspect of the substance that is regulated by or under any other Act of Parliament.

88. In making an interim order, the Minister need not comply with the conditions precedent to action by the Governor-in-Council set out in subsection 34(1) of *CEPA*. That subsection requires to the Governor-in-Council to obtain a recommendation from the Minister and the Minister of Health and advice from the federal-provincial advisory committee under section 6 before issuing a regulation.

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look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it."

21See: *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] S.C.J. No. 39; (1999) 174 D.L.R. (4th) 193 (SCC)

[22] R.S. 1985, c. 16 (4th Supp.)

89. The general principles constraining the exercise of any discretionary power limit the Minister's discretion under paragraph 35(1)(b) of the *CEPA*[23]. A Minister must exercise her discretionary powers in good faith[24], in accordance with law and on the basis of relevant criteria or evidence[25]. If the Minister complies with those requirements, no reviewing court can intervene or substitute its views for that of the Minister, even if it views the Minister's decision as unwise or wrong[26].

90. Applying those principles to the present case leads to the conclusion that the Minister complied with the requirements of Canadian administrative law. There is no evidence the Minister was motivated by bad faith. Nor is there any evidence she failed to comply with the statutory requirements of subsection 35(1). When the Minister issued the Interim

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[23]The general principles cited in this paragraph derive primarily from the following cases and secondary sources: *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)* (1998), 162 D.L.R. (4th) 625 (F.C.A.).supra. at pp. 633-635, paras. 14 through 19; *Maple Lodge Farms Ltd. v. Government of Canada et al.,* [1982] 2 S.C.R. 2 at 7-8 (S.C.C.); *Oakwood Development v. St. François Xavier*, (1985) 6 W.W.R. 147 at 157 (S.C.C.), per Wilson J.; *Minister of Citizenship and Immigration v. Williams* [1997] 2 F.C. 646 (F.C.A.)at pp. 664 & 678; and, 1 C.E.D. (Ont.), 3rd edition, Title 3, §§ 477-487

[24] For example, untainted by self interest or undue favour or animosity, see: 1 C.E.D. (Ont.), 3rd edition, Title 3, §§ 447

[25]An irrelevant consideration is one that is wholly outside the policy or intendment of the governing statute, see: *Padfield and others v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 (H.L.) at pp. 1041, 1046, 1053, 1058-1059; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, [1977] A.C. 1014 (H.L.) at pp. 1047, and 1064-1066; and, *Canadian Association of Regulated Importers v. Canada,* [1994] 2 F.C. 247 at 260 (F.C.A.). In this context, irrelevant evidence is evidence that lacks probative value.

[26]Thus, in the oft-cited *Vancouver Island Peace Society v. Canada*, [1992] 3 F.C. 42 at 48 (T.D.) Mr. Justice Strayer described the role of the Federal Court Trial Division in judicial review proceedings as follows:

"In reviewing the decision of an initiating department taken under section 12, the Court should not interfere unless it is satisfied that there is no reasonable basis for the decision taken by the department. In relation to decisions taken under section 13 as to whether there is such public concern as to make a public review "desirable", . . . the Court is entitled on judicial review to see if the Minister acted in good faith and took into account relevant considerations. Unless the Court is satisfied that the decision was made on completely irrelevant factors it cannot quash such a decision. It is not for the Court to substitute its own assessment of the weight and nature of public concern and determine that a public review is or is not "desirable".

Order, she and the person delegated to exercise the powers of the Minister of Health believed the export of Canadian PCBs to the United States was inadequately regulated in Canada and in the United States. Both Ministers (or their delegates) further believed that exposure to unregulated PCB wastes posed a significant danger to the environment, human life and health sufficient to require immediate action. In considering whether to issue the order, the Minister considered Canada's international obligations fixing standards for the safe treatment of PCBs, Canada's international obligation to maintain capacity to destroy PCB and other hazardous wastes within Canada, the adequacy of the existing regulatory regime and various uncertainties surrounding the intentions and ability of the United States to regulate imports of PCB wastes. None of these considerations could be said to be irrelevant bearing in mind the language of subsection 35(1) of *CEPA* and the purpose of the legislation[27].

3. NAFTA 1110 (Expropriation and Compensation) Must be Proven on the Facts

91. The claim for expropriation was also rejected in ***Desona***, principally on the facts.[28]

92. In this case, the documents produced by SDMI belie its allegation that its so-called investment was expropriated as of November 16, 1995 (Memorial, paragraph 199). Clearly, Myers Canada continued to operate after that date. Indeed, its operations appear to have flourished after that date and even after the U.S. border was closed in July, 1997. It is logical that Myers Canada was able to continue its operations after the Interim Order was made because the Interim Order was never aimed at Myers Canada or the sorts of activities it conducted. It is logical that Myers Canada was able to continue its operations after the U.S. closed its border to imports from Canada because Myers Canada had little

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[27]As La Forest J. wrote in *R. v. Hydro-Québec, supra.*, at pp. 303 – 309, the purpose of Part II of *CEPA* is, among other things, to provide " -- a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks" and provide an effective environmental regime for dealing with them.

[28]There was little evidence that the actions of the local government were without factual justification or legal authority. In effect, the Tribunal confirmed the decision of the local government by finding that the investors had misrepresented themselves in gaining the concession, and subsequently proved totally incapable of performing it. There was no argument that the Mexican court decisions departed from established principles of Mexican law or that their standards violated international legal norms. Since the investors did not challenge the determination of the Mexican courts that a contract governed by Mexican law was invalid under Mexican law, there was by definition no contract to be expropriated. *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, paragraphs 96-97, 100, 120, **Tab 40**

to do with that business, which was always conducted by SDMI and from the United States. As in ***Desona***, on the facts of this case, there was never any expropriation.

C. The United States has made a NAFTA Article 1128 Submission that for the purposes of NAFTA Article 1110(1), NAFTA claimants may not seek damages for actions beyond those contemplated in the customary international law concepts of direct and indirect expropriation

93. NAFTA Article 1128 authorises the three NAFTA Parties to make submissions to a tribunal on a question of interpretation of the Agreement. The Government of the United States has taken a position in another NAFTA Chapter 11 case on the scope of NAFTA Article 1110 that accords with Canada's position.

Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Submission of the Government of the United States, November 9, 1999, **Tab 41**

94. In its Statement of Claim, paragraph 48, and its Memorial, paragraph 203, SDMI alleges that the *Interim Order* was a measure "tantamount to" expropriation (as opposed to a measure of "direct" or "indirect" expropriation). In its Counter-memorial, paragraphs 401 to 422, Canada reviews the international law authorities to demonstrate that SDMI has misstated the tests for expropriation. It is notable that those authorities recognise two basic categories of expropriation: "direct" expropriation and "indirect" expropriation. It is also notable that international law recognises that the exercise of a State's regulatory or "police powers" does not give rise to a claim for compensations as direct or indirect expropriation (Canada's Counter-memorial, paragraphs 423 to 436).

95. The Government of the United States has now filed a NAFTA Article 1128 Submission that for the purposes of NAFTA Article 1110(1), NAFTA claimants may not seek damages for actions beyond those contemplated in the customary international law concepts of direct and indirect expropriation. In particular, it is the position of the Government of the United States that

> "the phrase "take a measure tantamount to ... expropriation" explains what the phrase "indirectly expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation."

Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Submission of the Government of the United States, November 9, 1999, paragraph 9, **Tab 41**

96. The Submission of the United States is based on a consideration of the construction of NAFTA Article 1110 and based on the language of its predecessors: bilateral investment treaties.

Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Submission of the Government of the United States, November 9, 1999, paragraphs 10 to 13, **Tab 41**

97. Canada agrees with the Submission of the Government of the United States and the reasoning advanced to support it.

D. Internal Government Debate about the Interim Order Demonstrates a Full Consideration of the Merits of the Measure, Including Many of the Objections Advanced by SDMI, Contrary to the Allegation of Breach of NAFTA Article 1105

98. Paragraph 21 of the SDMI Statement of Claim alleges "strong opposition" from other government departments to the then possibility of an interim order. Paragraph 28 of the SDMI Memorial also makes reference to the positions of departments other than Environment and National Health and Welfare. SDMI pursued this matter at the most recent case management meeting seeking to question members of departments other than Environment Canada and Health Canada.

99. Divergent views of officials or within government would indicate, if anything, full consideration of all relevant factors. It is exactly this sort of decision-making that Canadian responsible government permits and encourages at the cabinet level.

100. As Canada indicated in its August 9, 1999 Reply to the SDMI motion of July 26, 1999 on production of documents, the character of cabinet deliberations in the Canadian system of government is at the heart of our system of government. In fact, the confidentiality of those discussions is at the very centre of the Canadian democratic system. It is the ability of ministers of the Crown to consider and weigh alternatives, and the ability to advance departmental positions without embarrassment if ultimately unsuccessful, that is at the heart of Cabinet decision-making. The uncontroverted evidence of Nicholas d'Ombrain reviews these fundamental characteristics in speaking of the necessity of respecting cabinet confidences:

> the maintenance of cabinet solidarity and collective responsibility of the cabinet to Parliament; (para. 15)
>
> the freedom and the informality necessary to consider options and pursue practical solutions; (paras. 15 and 16)

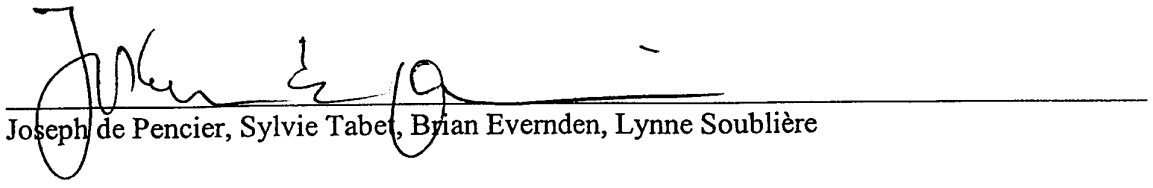
the enabling of frank discussions without the risk of extraneous pressure and controversy, and to permit the surrender of personal or departmental preferences. (paras. 18 and 25)

Affidavit of Nicholas D'Ombrain, **Tab 42**

101. Under the legislation authorising the making of the *Interim Order*, Cabinet was twice required to take action. According to section 35(3) of the *Canadian Environmental Protection Act*, the *Interim Order* had to be approved within 14 days of being made. The Cabinet must not approve an interim order unless there has been intra-governmental and inter-governmental consultation. According to section 35(6), Cabinet had to convert the *Interim Order* into a regulation within ninety days of the interim order being made. It appears common ground that each of these actions occurred.

102. The *Interim Order* was of interest to a variety of departments and agencies of the federal government. It was the subject of consultations between federal ministers and with provincial governments. It was acted on by Cabinet.

103. If opposition by other departments to Environment Canada and its Minister's actions resulted in a canvassing of arguments for and against the Interim Order (including, allegedly, many of those advanced by SDMI in these proceedings), then it cannot be credibly claimed that the measure was made without due consideration. In fact, as indicated above, it appears that SDMI played a role in prompting that consideration.



Joseph de Pencier, Sylvie Tabet, Brian Evernden, Lynne Soublière