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Washington DC

Toronto

January 28, 2000

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

**INVESTOR'S REPLY TO THE SUBMISSIONS OF
THE UNITED MEXICAN STATES**

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

REPLY OF THE INVESTOR
TO MEXICO
Re: S.D. Myers, Inc. and Canada

**INVESTOR'S REPLY TO
THE INTERPRETIVE STATEMENT OF
THE UNITED MEXICAN STATES**

The Investor makes the following reply to the interpretive submission of the United Mexican States ("Mexico").

Scope of the Submission

1. NAFTA Article 1128 provides other NAFTA Parties an extraordinary right to be able to provide written submissions on the interpretation of NAFTA. This right does not make these Parties disputing parties to the Claim. NAFTA article 1128 neither affords Parties the right to provide oral submissions before the Tribunal, nor to even attend at NAFTA Tribunal meetings. All that a non-disputing NAFTA Party is permitted to do is to provide written submissions on the interpretation of NAFTA. Other interested parties, such as business competitors or non-governmental organizations do not have this special privilege.
2. Mexico has submitted a document to this Tribunal containing a wide-ranging commentary on the facts and law involved in this Claim. To the extent that Mexico's submission involves an application of the provisions of the NAFTA to the facts of this Claim, it exceeds the authority of Mexico to participate under NAFTA Article 1128. NAFTA Article 1128 provides only that a NAFTA Party may make submissions to a Tribunal on a question of the interpretation of NAFTA. NAFTA Article 1128 simply does not permit Mexico to delve into the facts of this Claim.
3. The document submitted by Mexico provides observations on issues such as evidence, conclusions made upon the evidence and on the facts of this Claim. It also discusses issues which are outside of the consideration of this phase of the arbitration, such as damages. The Investor requests that this Tribunal simply disregard as inadmissible those statements, submissions and observations made by Mexico dealing with issues beyond the straightforward interpretation of the NAFTA relating to the issues raised in this phase of the arbitration. Accordingly, the Investor submits that to the extent that Mexico's submission delves into an application of the provisions of NAFTA to the facts of this Claim, this Tribunal should accord it no weight. This includes paragraphs 5, 8, 10, 16-21, 23, 25, 31, 37, 51-52, 54 and 56-58 of the submission, as well as paragraphs 15, 22, 24, 26 and 36, where Mexico provides supportive statements about Canada's conclusions of fact and law.

Page -2-

REPLY OF THE INVESTOR
TO MEXICO
Re: S.D. Myers, Inc. and Canada

4. Mexico purports to reserve a right to make further submissions after this Tribunal "hears the evidence and arguments of the parties". The Investor submits that as this Tribunal is master of its proceedings, it alone shall determine whether post-hearing submissions are necessary. The Parties have submitted all of their arguments and evidence. All that remains is for the Tribunal to hear the cross-examination of certain witnesses. The Investor submits that there simply will be no need for post-hearing submissions. If Mexico nonetheless submits another document, the Tribunal would be well within its authority to refuse to consider its contents.

The Existence of an Investment

5. The Investor has taken great liberties to explain its position in relation to the existence of its Investment in other documents and will not re-assert this position in this submission. The Investor does not agree with the observations made by Mexico, which exceed the scope of NAFTA Article 1128. Simply, S.D. Myers had an Investment in Canada through its own activities in Canada as a branch, through its joint venture activities with S.D. Myers Canada and through its investment in S.D. Myers Canada, which was an affiliate of the Investor (with common control) to which the Investor made a loan.

Measures Relating to Investment

6. Mexico supports Canada in arguing that the *PCB Waste Export Ban* does not "relate to" the Investor or its Investments, as required under NAFTA Article 1101. This issue has been directly addressed by the recent NAFTA Investor-State Tribunal award in *Pope & Talbot, Inc. and Canada*, where the Tribunal unanimously determined that a measure need not be "directly related" to investors or investments to be properly subject to a NAFTA Chapter 11 dispute. With the support of Mexico, Canada advanced essentially identical arguments to those which have been advanced by Mexico in its submission¹, including that the structure of the NAFTA requires a far more narrow interpretation of NAFTA Article 1101. In rejecting these arguments, the Tribunal wrote:

*... the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investments or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. But it is clear from the terms of Article 1106 that it is also a measure relating to investment insofar as it might affect an enterprise owned by an investor of a Party.*²
(emphasis added)

¹ At para.'s 11-21.

² *Pope & Talbot, Inc. and Canada*, Preliminary Award Concerning the Interpretation of NAFTA Article 1101: "Measures Relating to Investment", NAFTA Tribunal, January 26, 2000, at para. 33.

Page -3-

REPLY OF THE INVESTOR
TO MEXICO

Re: S.D. Myers, Inc. and Canada

7. The *Pope & Talbot* dispute raised the issue of whether a measure imposed by Canada to limit exports by softwood lumber producers in certain parts of Canada to the United States was related to investors and their investments. Supported by Mexico, Canada argued that since its measure was of general application and clearly addressed to limiting the trade in a particular good, it could not possibly be said to relate to any particular investment. In considering the effects of Canada's measure, the Tribunal decided:

It is not a mere linguistic truism to say that such a system directly applies to a particular enterprise, namely each of the relevant softwood lumber producers in the Listed provinces. It directly affects their ability to trade in the goods they seek to produce, but it can equally be described as the way that the measures applied to the various enterprises affect the total trade in the relevant products.³

In dismissing Canada's motion, the Tribunal concluded by stating:

For these reasons, the Tribunal rejects Canada's submissions that a measure can only relate to an investment if it is primarily directed at that investment and that a measure aimed at trade in goods ipso facto cannot be addressed as well under Chapter 11.⁴

8. The Investor submits that the reasoning in the *Pope & Talbot* award is directly applicable to the issues raised in this Claim. Accordingly, the Investor respectfully disagrees with the position advanced by Mexico.
9. At paragraph 20, Mexico asserts that since the Investor and its Investments were engaged in the provision of a service, the Investor was somehow precluded from bringing a Claim under NAFTA Article 1116 for the harm caused to it and its Investments in Canada because of the definition of "cross-border trade in services" in NAFTA. This argument, apparently concerning NAFTA Article 1213, is obviously incorrect.
10. NAFTA Article 1101 sets out the conditions under which a NAFTA Party's measures will, or will not, be made subject to the obligations contained within Chapter 11. NAFTA Article 1101 does not in any way suggest that the obligations contained within Chapter 11 are to be constrained by whether the measure at issue might also be subject to the obligations contained within Chapter 12 (concerning cross-border trade in services). NAFTA Article 1101(3) only states that Chapter 11 does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 14 (Financial Services).

³ At para. 33.

⁴ At para. 34.

11. As indicated recently by a WTO Panel in *Canada – Certain Measures Affecting the Automotive Industry*, the determination of whether a measure is covered under a particular agreement (or in the case of NAFTA, a chapter),

*cannot be done in abstract terms in isolation from whether the effect of such a measure is [consistent with the obligations contained within that agreement (or chapter)].*⁵

In other words, the correct approach to determining whether a measure relates to investors and their investments is to actually consider whether the measure brings about a result that breaches any of the obligations contained within Chapter 11, is clearly not to determine whether the measure is directly targeted at investors or investment.

12. At paragraph 21, Mexico claims that the Investor's Claim concerns the interaction between two measures: one by Canada and one by the United States of America. As indicated at paragraphs 33-56 of the Statement of Claim, the measure at issue is the *PCB Waste Export Ban*. The imposition of this measure resulted in the less favourable treatment of the Investor and its Investments than that accorded to investors and investments in like circumstances; as well as the expropriation of their business as of the date of its imposition. The manner in which the measure was implemented violated Canada's obligations under international law; and resulted in the imposition of a prohibited performance requirement, both of which caused harm to the Investor and its Investments.

National Treatment

13. Mexico has raised the question of whether the Investor or its Investment were denied treatment no less favourable to that accorded to domestic investors "in like circumstances" as required by NAFTA Article 1102.⁶ At paragraph 23-25, Mexico mis-states the appropriate test, under NAFTA and international law, for application of a national treatment obligation. The test is not simply whether the *PCB Waste Export Ban* applied equally to domestic investors and investments operating in like circumstances. The test required under Article 1102 is whether the *PCB Waste Export Ban* had the effect of treating the Investor or its Investments less favourably than domestic investors or their investments operating in like circumstances.
14. The correct approach to a national treatment obligation can be discerned from the GATT Panel report in *United States – Section 337 of the Tariff Act of 1930*:

⁵ WT/DS139/R, WT/DS142/R, 31 January 2000, at para. 10,234.

⁶ At para.'s 22-25.

[The] "no less favourable" treatment requirement set out in Article III:4 is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation treatment standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for the effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum possible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where application of formally identical provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable... In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment.⁷ (Emphasis added)

15. The Investor and the Investment are in like circumstances with other PCB waste remediators operating in Canada. The Investment attempted to carry on a business in a market requiring the remediation of its PCB waste. The Investment obtained its contracts from customers who had contracted with the other PCB waste remediators in Canada. Simply, there is no appreciable difference between the business of the Investment and the business of other PCB waste remediators producers in Canada.
16. The only difference between the Investor and its Investment in comparison with its Canadian competitors was the geographical location of its major PCB waste destruction facility. But for the operation of Canada's unfair *PCB Waste Export Ban* in 1995, PCB waste remediation companies in Canada were all directly competitive in the same environmental remediation market in Canada.

The Best Treatment Available in Canada Is for Investments Who Destroy PCBs in Canada

17. Canada's *PCB Waste Export Ban* accords more favourable treatment to Canadian investors and their investments. This best treatment is not provided to the investments of investors of other NAFTA Parties operating in Canada - even though they are operating in like circumstances. By failing to provide the best treatment in Canada to US-based investors and their investments, Canada has violated its national treatment obligations under NAFTA Article 1102.

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36 B.I.S.D. (1989) at 345.

Page -6-

REPLY OF THE INVESTOR
TO MEXICO

Re: S.D. Myers, Inc. and Canada

18. The NAFTA does not permit a Party to discriminate, in any way, against manufacturers in the same industry and market sector. Canada has denied the Investor and its Investment the ability to effectively compete on an equal basis with Canadian-based investors and investments, even though both were in the same industry sector and engaged in the same business activities for the same clients.
19. In preparing the *PCB Waste Export Ban*, Canada must have known that S.D. Myers would be adversely affected. Evidence of an intent to discriminate also proves a breach of the principle of national treatment and clearly contravenes the explicit terms of NAFTA Article 1102.
20. Canadian PCB waste remediation companies received better treatment than the Investment and the Investor as a result of Canada's *PCB Waste Export Ban*. These include every Canadian based remediator of PCB wastes. The *PCB Waste Export Ban* has adversely affected the expansion, management, conduct and operation of the Investor and its Investment by not providing them national treatment. As a result of this unfair and discriminatory measure, the Investor, and its Investment, have been harmed and have incurred damages.
21. The best treatment in Canada has not been provided to S.D. Myers, Inc. and its Investment in Canada. The best treatment has been provided to other Canadian-based investors and investments operating in like circumstances to S.D. Myers, Inc. and its Investment. Accordingly, Canada has breached its national treatment obligations under NAFTA Article 1102. Since the Investment is in like circumstances with other PCB waste remediators operating in the country, **Canada has failed to provide the best treatment in Canada to the Investor and the Investment by failing to provide the best treatment provided in Canada.**

Minimum Standard of Treatment

22. It would be completely inappropriate for a Tribunal to refrain from reviewing the application of a measure to an investment under NAFTA Article 1105 out of some misplaced sense of deference. NAFTA Article 1105 establishes a universal "**minimum standard of treatment**" against which this Tribunal is to review Canada's treatment of the Investments of the Investor. The only question is whether Canada's treatment fell below this standard. Accordingly, there is simply no room, or reason, for deference to be accorded.
23. The Investor cannot accept Mexico's argument, contained within paragraphs 29-35 of its submission, that some form of deference should be shown to the policy decisions or regulatory measures of a NAFTA Party. Mexico argues that this Tribunal should not

Page -7-

REPLY OF THE INVESTOR
TO MEXICO

Re: S.D. Myers, Inc. and Canada

"second guess" Canada's implementation of the *PCB Waste Export Ban* because the NAFTA Parties did not explicitly provide for such a review under Article 1105. The Investor submits that the drafters of NAFTA Article 1105 did explicitly direct that a Tribunal established under Chapter 11 must determine whether a NAFTA Party treated the investment of a NAFTA investor "in accordance with international law".

24. There is absolutely no indication in the wording of NAFTA Article 1105 that this Tribunal must be circumspect in its review of the Claim because, as Mexico suggests, a large number of regulatory actions are taken daily by various levels of government, or because the promulgation of a regulatory measure might involve "complex social, economic, legal or scientific issues". Mexico ignores the simple fact that investors are not entitled to challenge (or "impugn") government measures under Chapter 11.
25. At paragraph 28, Mexico admits that in order for a NAFTA Party to treat investments in accordance with international law, it must:

act in good faith and will not subject foreign investors to abusive or discriminatory treatment, nor fail to accord them full protection and security.

NAFTA Article 1105 actually requires Parties to accord treatment in accordance with international law to investments of the investors of other NAFTA Parties (as opposed to investors, as Mexico suggests). However, the Investor agrees with Mexico that examples of international law which must be upheld by NAFTA Parties in their treatment of investments include: the principle of good faith; an obligation not to discriminate against investments; and an obligation to accord full protection and security to investments. In this case, the Investor has thoroughly demonstrated how Canada breached its international obligations to act in good faith, and not to discriminate, in imposing the *PCB Waste Export Ban* upon its Investment.

26. The Investor also agrees with the proposition, admitted by Mexico at paragraph 35, that in observing NAFTA Article 1105, a NAFTA party may not impose an "arbitrary" measure, "as that concept is understood in international law". However, the Investor cannot accept Mexico's use of *Case Concerning Elettronica Sicula S.p.A., (U.S.A. v. Italy)* ("the ELSI Case"), to suggest that "arbitrary" can be equated with "egregious". The International Court of Justice made no such finding in the ELSI case. The Court merely clarified that the submission of a judgement by a lower-level domestic court (that some government action was unlawful) is not sufficient evidence to establish a finding of state responsibility due to arbitrariness.⁸ As set out at paragraphs 125 to 130 of the Investor's Supplemental

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[1989] I.C.J. Rep. 15 at 74.

Memorial, there is substantially more evidence of Canada's arbitrary conduct before this Tribunal than was before the International Court of Justice in the ELSI case.

27. Under NAFTA Article 1116, NAFTA investors are entitled to seek compensation for treatment not in accordance with obligations such as those contained within NAFTA Article 1105. Under NAFTA Article 1121(2)(b), NAFTA investors are provided with the choice of seeking that compensation either before a domestic court, or an international tribunal. As NAFTA Articles 1121(2)(b) and 1134 provide, if NAFTA investors actually want to enjoin a measure, rather than just seek compensation, they must do so in a domestic court.

Expropriation

28. Mexico has raised the question of whether Canada's *PCB Waste Export Ban* to the United States was a measure tantamount to the expropriation of the Investor's Investment under NAFTA Article 1110. NAFTA Article 1110 deals with the requirement to pay compensation whenever a government takes an expropriatory act, or takes a measure tantamount to expropriation, of an investment of an investor from another NAFTA Party.

i. "Expropriation" is Broadly Defined in the NAFTA and under Customary International Law

29. Mexico has interpreted expropriation in its submission in terms that seriously circumscribe the scope of NAFTA Article 1110. This approach is inconsistent with the NAFTA and Canada's international law obligations. Although the NAFTA does not define the term expropriation, it is clear that under the terms of NAFTA Article 1110, it provides the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights.
30. The meaning of the concept of expropriation is the result of extensive decisions of international tribunals which have provided considerable guidance as to what types of governmental action constitute an expropriation. In essence, for there to be an expropriation under international law it is necessary to establish that a government has interfered unreasonably with the use of private property.⁹
31. It is a well recognized international legal principle that expropriation refers to an act by which governmental authority is used to deny some benefit of property. Under international law the principle of expropriation is now accepted as going beyond absolute takings to include "creeping expropriation". Accordingly, as evidenced in the findings of

⁹ See *Harza Engineering Co. v. Iran*, (1982) 1 Iran-US C.T.R. 499 at 504.

various international tribunals, there is no longer any distinction between direct, indirect or creeping expropriations.¹⁰

32. The broad interpretation of expropriation is also confirmed by tribunals other than the Iran-US Claims Tribunal. For example, in the *Biloune* case, heard under the UNCITRAL Rules, an international tribunal determined that no distinction should be drawn between direct and creeping expropriations, stating:

This Tribunal must determine whether the above facts constitute, as the Claimants charge, a constructive expropriation of MDCL's assets and Mr. Biloune's interest in MDCL. The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL.¹¹

33. The NAFTA Investment Chapter protects the investments of investors from other NAFTA Parties from uncompensated expropriations. This obligation recognizes the importance now given to the protection of international investment flows. At the same time, the NAFTA does not restrict the ability of governments to engage in regulatory acts which could deprive investors of their investments. The NAFTA does not restrict expropriatory behaviour -- all that it requires is compensation under its terms to be paid to the affected investors.
34. In NAFTA Article 1110(1), three kinds of acts are defined as expropriations. The NAFTA permits these expropriations to occur as long as governments observe four conditions:
- (a) That the expropriation is taken for a public purpose;
 - (b) That the expropriation be taken in a non-discriminatory fashion;

¹⁰ *Harza Engineering Co. v. Iran* (1982) 1 Iran-US CTR, 499 at 504. *ITT Industries Inc. v. Iran* 2. Iran-US CTR at 349. *Tippets, Abbott, McCarthy, Stratton v. TAMS-APFLA Consulting Engineering of Iran* (1984), 6 Iran-US CTR 219 at 255.

¹¹ *Biloune v. Ghana Investment Centre*, 95 ILR (1993) 183 at 209.

Page -10-

REPLY OF THE INVESTOR
TO MEXICO

Re: S.D. Myers, Inc. and Canada

- (c) That the expropriation be taken with due process of law and in accordance with NAFTA Article 1105; and
 - (d) That compensation be paid as required by NAFTA Articles 1110(2) - (6).
35. These requirements clarify the broad protection of investment that was intended by the drafters of the NAFTA Investment Chapter. The inclusion of each of these requirements means that NAFTA Article 1110 is violated, and the duty to compensate operates under the terms of NAFTA Article 1110(2), whenever an expropriation occurs that is not for a public purpose, in a discriminatory manner, or not executed in accordance with both the principles of due process and the Party's obligations under NAFTA Article 1105. This means that even if an expropriatory measure purports to compensate for interfering with an investment, the presence of such factors as discrimination or a breach of some other element of international law, as provided under NAFTA Article 1105, would lead to an award for compensation granted under the terms of NAFTA Article 1110(2).
- ii. *NAFTA Creates a Lex Specialis for Expropriation*
36. The NAFTA goes further than traditional international law in interpreting the meaning of expropriation. NAFTA Article 1110(1) establishes a *lex specialis* which extends beyond customary international law. These modifications of the customary international law of expropriation include: the manner of compensating investors; a broadened scope for the protection of property rights; and increased coverage for most regulatory takings.
37. In particular, the NAFTA modifies existing customary international law in four ways:
- (a) the NAFTA establishes a specific level of compensation under NAFTA Article 1110(2);
 - (b) the NAFTA establishes a very broad concept of "property" through its definition of "investment" in NAFTA Article 1139, which is the focus of the NAFTA expropriation provisions;
 - (c) NAFTA expands the coverage of international responsibility from direct and indirect expropriations to include "measures tantamount to expropriation".
 - (d) Through the operation of NAFTA Article 1110(8), the NAFTA amends customary international law by applying all non-discriminatory measures of a general application that are tantamount to expropriation other than a loan or debt security.

38. NAFTA Article 1110 creates an obligation upon governments to provide immediate compensation to investors whose investment has been expropriated or interfered with to the detriment of the investor. Under NAFTA Article 1110, expropriation is essentially treated as a no-fault compensation mechanism with a comprehensive scope that covers most regulatory takings. It does not outlaw a government's right to take or interfere with the private rights of an investor. NAFTA only establishes a specialized international obligation to compensate the investor for the harm caused as a result of such takings or interference.
39. The NAFTA was carefully drafted to ensure that there were no exceptions from the compensation rule. No "standard" GATT Article XX exceptions apply to the requirement to pay compensation.¹² Canada has reserved thousands of existing non-conforming measures from the operation of the NAFTA Investment Chapter through Annexes I, II, III and VII of the NAFTA. The NAFTA did not permit governments to make any reservations to the obligation of compensation (or to the obligation to meet minimum standards of treatment) due to their special status as objectives and obligations, which all NAFTA Parties are obliged to meet.

iii. *Extension to Measures Tantamount to Expropriation*

40. International law generally regards "expropriation" as including concepts such as direct, indirect, and "creeping expropriation". The drafters of the NAFTA went further, however, by requiring compensation to be paid for "measures tantamount to expropriation."
41. NAFTA Article 1110(1) expands upon the existing range of customary international law definitions of expropriation to their broader category of measures tantamount to expropriation. In their study of Bilateral Investment Treaties, Dolzer and Stevens have commented that the inclusion of this term has had the effect of broadening the coverage of expropriation provisions in which it is included. They state:

The latter provision represents possibly the broadest scope in investment treaties with respect to indirect expropriation insofar as the "impairment...of [the] economic value" of an investment, equates expropriation with a host of measures which might otherwise be considered as such under general international law, let alone under liberal systems of domestic law (emphasis added).¹³

¹² These standard public policy exceptions were permitted for some NAFTA Chapters but not for the Investment, Services or Financial Services Chapter obligations.

¹³ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Boston: Martinus Nijhoff, 1995) at 102.

42. Further evidence of the intention of NAFTA drafters to expand upon traditional customary international law concept of expropriation can be found in NAFTA Article 1110(8). As such, NAFTA Article 1110 encompasses even non-discriminatory measures of general application that have the effect of substantially interfering with the investments of investors of NAFTA Parties. This interpretation is clear on the face of NAFTA Article 1110, particularly with regard to paragraph (8), which provides:

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

43. Under the *expressio unius est exclusio alterius* principle,¹⁴ by expressly providing for this exception under paragraph (8) of NAFTA Article 1110, the NAFTA Parties indicated their intention that the term "measures tantamount to expropriation" should be given the broad interpretation provided for in that provision, with no further exceptions.
44. Accordingly, an expropriation will take place under NAFTA Article 1110 whenever there is a substantial interference with the enjoyment of an investment right. Mindful of the scope of its obligations under NAFTA Article 1110, Canada has even prepared a paper for discussion with the other NAFTA Parties on the subject of expropriation, entitled *Chapter Eleven: Operational Review- Issues Paper on Expropriation* ("Expropriation Paper").¹⁵ The *Expropriation Paper* provides some understanding as to whether regulatory takings are compensable under the NAFTA. In this paper Canada states:

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

iv. ***Regulatory Measures of General Application Can Constitute Measures Tantamount to Expropriation***

45. At Paragraph 52, Mexico alleges that "regulatory takings" are not compensable under international law and, by extension, under NAFTA Article 1110. This interpretation is incorrect, as is Mexico's attempt to rely on the writings of a learned judge of the

¹⁴ It is a well established interpretive principle that the specific exclusion of one element means that the others are included.

¹⁵ Prepared on November 13, 1998 by John Gero, Director General Trade Policy Bureau II, NAFTA Coordinator for the Department of Foreign Affairs and International Trade.

International Court of Justice, Dame Rosalyn Higgins to support its argument. A closer look at the article cited by Mexico actually discloses that Judge Higgins holds a much different view. While Judge Higgins did consider the argument that just compensation should only be paid when private property is diverted to public use, but not paid when a government's "police power" is used to allow for a "regulatory taking", she concluded:

It would seem to be the case that while it is acknowledged that property may be indirectly "taken" through regulation, this does not attract the duty to compensate. The position seems to be (and the present writer finds the underlying policy difference hard to appreciate) that a taking for public use requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the purposes of the taking.... Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of in the general, rather than for a private, interest). And just compensation would be due.¹⁶

46. Judge Higgins' rationale for compensating for virtually all takings, regardless of the government's *post facto* rationale for acting, is clearly the approach intended by those who drafted the NAFTA provisions on expropriation and "measures tantamount to expropriation". NAFTA Articles 1110(1)(d) and 1110(2) expressly provide that any expropriatory act must be immediately accompanied by compensation, regardless of the justifications or purpose of the expropriatory act.
47. Under NAFTA Article 1110, it is not necessary to examine what the purported intention of the government was in taking or interfering with an investment. This approach to expropriation is in accord with the findings of many international tribunals that *ex-post facto* explanations by governments of their "motivations" for an expropriatory measure tend to be a less than satisfactory tool in determining whether an expropriation has, in fact occurred, rather than simply reviewing the actual impact of a measure on a foreign investor's property. For example, in the *TAMS-AFFA* case, the US-Iran Claims Tribunal stated:

The intent of the government is less important than the effects of the measures on the owner and the form of the measures of control or interference is less important than the reality of their impact.¹⁷

¹⁶ R. Higgins, "The Taking of Property by the State" (1982) *Réueil des Cours* 267 at 330-331.

¹⁷ *Tippets, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* at 225-226.

v. *The PCB Waste Export Ban Constituted a Measure Tantamount to Expropriation of the Investment of S.D. Myers, Inc.*

48. The *PCB Waste Export Ban* substantially interfered with the Investment's ability to carry on its business of remediating PCB waste. As a result of the imposition of the *PCB Waste Export Ban*, S.D. Myers, Inc. and its Investment in Canada were forced to cease their primary business activity – participation in the Canadian PCB waste remediation market. The date of the expropriation of the Investment was November 16, 1995 – the day that Canada purported to impose its measure. NAFTA Article 1110(3) states that such compensation shall be paid “without delay”, based on the fair market value of the Investment as immediately before the expropriation took place, i.e. November 16, 1995. Under NAFTA Article 1110(2), it makes absolutely no difference whether the measure was repealed or altered, or whether any material changes occurred that may have affected the Investment months or years later.
49. In its submission, Mexico claims that “the property which the Claimant alleges was expropriated is not an ‘investment of an investor of another NAFTA Party as required under Article 1110’”. The Investor submits that Mexico is wrong in its interpretation of NAFTA Article 1110. The requirements for compensation under NAFTA have clearly been met as a result of the Investment qualifying under the definition of “investment”, as set out in NAFTA Article 1139.
50. As the effect of the *PCB Waste Export Ban* was to cause substantial harm to the Investment, the imposition of this measure constitutes indirect expropriation under customary international law, and therefore must constitute “a measure tantamount to expropriation” under the expanded terms of the *lex specialis* created by NAFTA concerning expropriation. Despite the fact that it has imposed an expropriatory measure, Canada has failed to compensate the Investor without delay, as required under NAFTA Article 1110(3).
51. It is not necessary to determine that Canada actually intended to expropriate the business of the Investment for it to be required to pay compensation under NAFTA Article 1110,¹⁸ although it is clear that Canada was aware that its measure would have an expropriatory effect on the investments of NAFTA investors within its territory. The dispositive factor in determining the existence of an indirect expropriation, or a measure tantamount to expropriation, is the effect of the measure - not the intent of the government responsible for its imposition.

¹⁸ However, under Article 1110(1)(b), if an expropriation occurs on discriminatory grounds compensation must be paid under Article 1110(2).

Page -15-

REPLY OF THE INVESTOR
TO MEXICO
Re: S.D. Myers, Inc. and Canada**vi. Other Mandatory Conditions of NAFTA Article 1110**

52. NAFTA Article 1110(1) sets out that a NAFTA Party may expropriate an investment on the basis of four conditions, including the payment of compensation. Assuming that the requirements of NAFTA Article 1110(1)(a)-(d) are met, Canada is merely required to pay compensation for any such expropriation. NAFTA Article 1110 does not prohibit Canada from implementing the *PCB Waste Export Ban* in a manner that expropriates the investment of a NAFTA investor, so long as the appropriate compensation is paid.
53. In imposing the *PCB Waste Export Ban*, Canada failed to comply with at three requirements set out in NAFTA Article 1110(1). These are the requirements not to act in a discriminatory manner; to act consistently with NAFTA Article 1105, and to pay compensation in the manner provided for in paragraphs (2) to (6) of NAFTA Article 1110.
54. There is no evidence that Canada paid compensation to the Investor for its expropriation of the Investment, as required under Article 1110(1)(d).
55. There is substantial evidence that Canada imposed the *PCB Waste Export Ban* in order to harm the Investor and its Investment. As indicated at paragraph 109 of its Supplemental Memorial, and paragraphs 82 and 113-114 of its Memorial, when a government acts with intent to harm a particular foreign investment, or class of foreign investments, it is acting in a discriminatory manner that is not permissible under international law.
56. As demonstrated by the Investor at paragraphs 105-131 of its Supplemental Memorial, and paragraphs 115-142 of its Memorial, the *PCB Waste Export Ban* was not imposed in accordance with international law, as required under Article 1105. Accordingly, compensation must be paid under NAFTA Article 1110(1)(c) because the *PCB Waste Export Ban* constitutes a measure tantamount to expropriation.

vii. Conclusion

57. The *PCB Waste Export Ban* has deprived the Investor of the benefits of its Investment, in addition to substantially interfering with its conduct, management and operation. Canada's *PCB Waste Export Ban* therefore constitutes both a measure tantamount to expropriation within the meaning of NAFTA Article 1110, and an indirect expropriation under international law.

58. Whether Canada intended to expropriate the Investment is not an issue. The *PCB Waste Export Ban* is expropriatory in effect and yet was not accompanied by appropriate compensation. Canada also failed to impose the *PCB Waste Export Ban* in accordance with its obligations under international law. Canada is therefore obligated to pay compensation to the Investor without delay, in accordance with its obligation under NAFTA Article 1110(3), for damages suffered to its Investment as a result of these expropriations.

Other Issues

59. At paragraph 38, Mexico argues that NAFTA Article 1110 is "informed" by NAFTA Article 1114. NAFTA Article 1114 has no bearing on the interpretation of NAFTA Article 1110, or the *PCB Waste Export Ban*. NAFTA Article 1114 only provides that NAFTA Parties may take measures that they consider appropriate to ensure that investment activity is undertaken "in a manner sensitive to environmental concerns" if – and only if – the measure is "otherwise consistent" with Chapter 11. The *PCB Waste Export Ban* is not consistent with NAFTA Articles 1102, 1105, 1106 and 1110. Accordingly, it cannot possibly "inform" an interpretation of Article 1110. Moreover, the evidence on the record clearly demonstrates that Canada did not act in order to protect the environment, only domestic environmental businesses.

Submitted this 28th day of January, 2000 at Toronto, Canada.



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