

**IN A NAFTA ARBITRATION UNDER THE
UNCITRAL ARBITRATION RULES**

**S.D. MYERS, INC.
(CLAIMANT)**

-AND-

**THE GOVERNMENT OF CANADA
(RESPONDENT)**

PARTIAL AWARD

Edward C. Chiasson, Q.C.
Bryan P. Schwartz
&
J. Martin Hunter

I. PREFACE

A. The parties

The Claimant S.D. Myers, Inc. (“SDMI”) is a privately held corporation established and existing in the State of Ohio, United States of America (“USA”).

SDMI has its principal place of business at 180 South Avenue, Tallmadge, Ohio 44278, USA.

The Respondent is the Government of Canada (“CANADA”), having its address for service at the Office of the Deputy Attorney-General of Canada, Justice Building, 248 Wellington Street Ottawa, Ontario, KIA OH8, Canada.

CANADA is a Party to the North American Free Trade Agreement (the “NAFTA”).

B. The Existence of a Dispute

SDMI claims that it was an “Investor” in Canada and that it owned an “Investment” in Canada as defined in the NAFTA.

CANADA denies that SDMI was an “Investor” or that it owned an “Investment.”

SDMI claims that it has suffered loss or damage as a result of one or more breaches by CANADA of its obligations under Chapter 11 of the NAFTA.

CANADA denies that it was in breach of its obligations under the NAFTA or that SDMI suffered any loss or damage.

C. The Disputes Resolution Provisions

Part B of Chapter 11 of the NAFTA (Articles 1115 to 1138) contains the relevant disputes resolution provisions.

On July 22, 1998 SDMI delivered a Notice of Intent to Submit a Claim to Arbitration under Part B of Chapter 11 of the NAFTA.

Pursuant to Article 1120 of the NAFTA, SDMI elected to submit its claims under the UNCITRAL Arbitration Rules 1976 (the "Rules").

On October 30, 1998 SDMI delivered a Notice of Arbitration pursuant to Article 3 of the Rules. The arbitration is deemed to have "commenced" on that date pursuant to Article 3.1 of the Rules.

By letter dated November 6, 1998 CANADA notified SDMI that Ms. Valerie Hughes was appointed as CANADA's representative pursuant to Article 4 of the Rules.

D. The Tribunal

On January 11, 1999 SDMI nominated Professor Bryan Schwartz of Winnipeg, Manitoba, to be the arbitrator appointed by it pursuant to Article 1123 of the NAFTA.

On January 27, 1999 CANADA nominated Mr. Bob Rae of Toronto, Ontario, to be the arbitrator appointed by it pursuant to Article 1123 of the NAFTA.

By letter dated February 16, 1999 the Disputing Parties jointly invited Professor J. Martin Hunter of London, England to accept appointment as the third and presiding arbitrator. On March 2, 1999 Professor Hunter and the representatives of the Disputing Parties held a telephone conference.

By letter dated March 4, 1999 Professor Hunter formally confirmed to the Disputing Parties' representatives his acceptance of appointment as presiding arbitrator.

The Tribunal was thus duly constituted and became seized of the arbitration on March 4, 1999.

E. Abbreviations

The following abbreviations are adopted in this award:

BITs	Bilateral Investment Treaties
Basel Convention	Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal - adopted 1989, in force May 5, 1992, ratified by CANADA August 29, 1992, in force for Canada November 26, 1992)
CANADA	The Government of CANADA
CCME	Canadian Council of Ministers of the Environment
CEPA	Canadian Environmental Protection Act 1995
Chem-Security	Chem-Security (Alberta) Ltd.
Disputing Parties	SDMI and CANADA
FIRA	The Foreign Investment Review Act
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
MEXICO	The United States of Mexico
Myers Canada	S.D. Myers (Canada), Inc.
NAAEC	The North American Agreement on Environmental Co-operation
NAFTA	The North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
Parties	CANADA, MEXICO and the USA
PCB	Polychlorinated biphenyl
PCO	Privy Council Office of CANADA
PO	Procedural Order Rules

Rules	UNCITRAL Arbitration Rules 1976
SDMI	S.D. Myers, Inc.
TCSA	Toxic Controlled Substances Act
CANADA-USA Transboundary Agreement	Transboundary Agreement on Hazardous Waste
UNCITRAL	United Nations Commission on International trade Law
US EPA	United States Environmental Protection Agency
U.S. or USA	The United States of America
WTO	The World Trade Organization

II. HISTORY OF THE PROCEEDINGS

BY LETTER DATED MARCH 8, 1999 CANADA requested the consent of the Tribunal to its constitution and membership being made public. By letter dated March 24, 1999 the Tribunal confirmed that it had no objection to the existence of the arbitration and the names of its members being placed in the public domain.

By the same letter dated March 24, 1999 the Tribunal sent an “agenda of procedural matters” to the Disputing Parties in order to ascertain the extent that they were agreed on the overall procedural structure for the arbitration.

By letter dated April 19, 1999, having considered the replies of the Disputing Parties to the Tribunal’s agenda of procedural matters, the Tribunal informed the Disputing Parties that there appeared to be some unresolved fundamental procedural issues between them and that a meeting between the Tribunal and the Disputing Parties should be held before the Tribunal made an order designed to establish the procedural structure for the arbitration.

By letter dated April 22, 1999 the Tribunal notified the Disputing Parties that it would hold a first case management meeting with them in Toronto, on May 20, 1999.

By letter dated May 3, 1999 the Tribunal sent a provisional draft Procedural Order No. 1 to the Disputing Parties to act as an agenda for the first case management meeting.

By letter dated May 11, 1999 SDMI, while not alleging actual bias, submitted a challenge under Article 12.1 of the Rules to the Secretary-General of ICSID (in his capacity as appointing authority), objecting to the continued participation of Mr. Rae as a member of the Tribunal on the ground of an appearance of lack of independence because Mr. Rae was a registered lobbyist.

On May 20, 1999 the first case management meeting was held, in Toronto.

By letter dated May 28, 1999 the Tribunal issued Procedural Order No. 1 (establishing an overall procedural framework for the arbitration) and Procedural Order No. 2 (dealing with the confidentiality of certain documents prepared by the Disputing Parties in connection with the arbitration).

By letter dated June 2, 1999 the Secretary-General of ICSID informed the Tribunal and the Disputing Parties that he would uphold the challenge of Mr. Rae unless he discontinued his activities as a registered lobbyist in connection with the Softwood Lumber Agreement between the USA and CANADA.

By letter dated June 3, 1999 Mr. Rae notified his resignation from the Tribunal to the Secretary-General of ICSID.

By letter dated June 10, 1999 the Tribunal issued Procedural Order No. 3, which amended Procedural Order No. 2 at the request of CANADA.

By letter dated June 18, 1999 CANADA (having been granted a short extension of time) submitted its Statement of Defence pursuant to Article 19 of the Rules. (SDMI had delivered its Statement of Claim under Article 18 of the Rules, with its Notice of Arbitration on October 30, 1998, before the Tribunal had been established.)

By letter dated June 24, 1999 CANADA notified the Tribunal and SDMI that it designated Mr. Edward C. Chiasson Q.C. of Vancouver, British Columbia, as the arbitrator to replace Mr. Bob Rae pursuant to Article 13 of the Rules. The newly constituted Tribunal determined pursuant to Article 4 of the Rules that it would not be necessary to repeat any part of the proceedings.

By letter dated July 6, 1999 the Tribunal issued Procedural Order No. 4, which extended the period of time for which Procedural Order No. 3 would remain effective.

By letter dated July 20, 1999 SDMI submitted its Memorial and its Reply to CANADA's Statement of Defence.

On July 28, 1999 the Tribunal held a telephone conference call with the representatives of the Disputing Parties for the purpose of hearing argument on issues that had arisen between them as to the scope of the

documents to be produced pursuant to requests made under the relevant provisions of Procedural Order No. 1.

On the same day, July 28, 1999, after deliberations, the Tribunal issued Procedural Order No. 5. This Order established a procedure for the determination of disputes arising from the requests for document production under the provisions of Procedural Order No. 1.

On September 2, 1999 a second case management meeting was held, in Toronto.

By letter dated September 4, 1999 the Tribunal issued Procedural Order No. 6 concerning matters arising from requests for the production of documents and certain other matters arising out of procedural Order No. 1.

By letter dated September 17, 1999 the Clerk of the Privy Council of CANADA notified the Tribunal that CANADA claimed Crown privilege¹ in respect of certain documents ordered produced by Procedural Order No. 6.

By letter dated September 19, 1999 with the consent of the Disputing Parties, the Tribunal wrote to the other NAFTA Parties (MEXICO and the USA) to:

...enquire whether your Government wishes to make any submissions to the Tribunal in this arbitration; and, if so, to establish an appropriate procedure that will ensure the orderly and expeditious future conduct of the proceedings

By letter dated September 23, 1999 CANADA sought certain urgent procedural directions from the Tribunal.

By letter dated October 4, 1999 the Tribunal issued Procedural Order No. 7, which contained determinations on the outstanding procedural issues.

By letter dated October 5, 1999 following a request by CANADA, the Tribunal communicated to the Disputing Parties a summary of its reasons for the decisions contained in Procedural Order No. 7.

By letter dated October 8, 1999 MEXICO notified the Tribunal that it would send representatives to the third case management meeting scheduled for October 28, 1999 and by letter of the same date, the USA notified the Tribunal that it also would send representatives to the third case management meeting.

On October 28, 1999 a third case management meeting was held in Toronto. Representatives of MEXICO and the USA were present in addition to the representatives of the Disputing Parties.

By letter dated October 31, 1999 the Tribunal issued Procedural Order No. 8 and also confirmed that the Tribunal accepted the basis for calculation of arbitrators' fees proposed by the Disputing Parties.

¹ In the international context this is equivalent to state or cabinet privilege.

By letter dated November 1, 1999 the Tribunal confirmed to MEXICO and the USA the procedural arrangements it proposed in respect of their participation in the arbitration.

By letter dated November 4, 1999 the Tribunal issued Procedural Order No. 9, which gave further directions concerning document production, witness testimony and an option to the parties to deliver Supplemental Memorials.

By letter dated November 11, 1999 the Tribunal issued Procedural Order No. 11 concerning confidentiality in materials produced in the arbitration.

By letter dated November 16, 1999 the Tribunal sent to the Disputing Parties Procedural Order No. 10 concerning CANADA's claims in respect of Crown privilege, together with an explanatory note.

By letter dated November 26, 1999 the Tribunal issued Procedural Order No. 12, concerning written questions to be addressed to certain witnesses.

By letter dated December 10, 1999 CANADA delivered the affidavits of Messrs. Plummer, Mayne and Fosbrooke, as directed by Procedural Order No. 12.

By letter dated December 10, 1999 the Clerk of the Privy Council of Canada notified the Tribunal that CANADA claimed Crown privilege in relation to the documents listed in a schedule attached to his letter.

By letter dated December 13, 1999 CANADA delivered to SDMI a list of "severed documents" as well as the documents themselves. By the same letter CANADA confirmed its belief that it had by that date fully complied with the Procedural Orders Nos. 9 and 10.

By letter dated December 14, 1999 SDMI delivered its Supplemental Memorial.

By letter dated 14 December 1999 CANADA delivered its Supplemental Memorial.

By letter dated December 22, 1999 CANADA requested the Tribunal to give directions for the exchange of reports of expert witnesses on U.S. law and their examination at the hearing.

By letter dated December 22, 1999 SDMI objected to the introduction of expert testimony at this stage of the proceedings.

By letter dated December 23, 1999 CANADA replied to SDMI's objections concerning the introduction of expert testimony on U.S. law.

By letter dated December 31, 1999 the Tribunal notified the Disputing Parties that it expected to receive argument on U.S. law issues through counsel (or co-counsel) at the hearing rather than through expert witnesses and in Procedural Order No. 13 gave the Tribunal's directions for the exchange of "Memoranda on U.S. Law Issues."

By letter dated January 14, 2000 MEXICO delivered its Submission pursuant to Article 1128 of the NAFTA.

By letter dated January 14, 2000 CANADA's U.S. co-counsel, Garvey, Schubert & Barer, delivered CANADA's Memorandum on U.S. Law Issues.

By letter dated January 18, 2000 CANADA notified SDMI and the Tribunal that neither of the disputing parties in the NAFTA Chapter 11 Arbitral Tribunal in *Metalclad v MEXICO* arbitration objected to the release to SDMI of the Notice of Claim in that case, and attached a copy of that document.

By letter dated January 24, 2000 the Tribunal issued Procedural Order No. 14, notifying the Disputing Parties of certain detailed directions for the conduct of the hearing.

By a further letter dated January 24, 2000, in reply to certain questions raised by the Disputing Parties, the Tribunal issued Procedural Order No. 16 giving supplementary directions concerning the duration of the hearing, time limits for cross-examination and counsels' opening statements.

By letter dated January 24, 2000 SDMI delivered its Pre-Hearing Memorandum pursuant to paragraph 22 of Procedural Order No. 1 and a brief reply to CANADA's Supplemental Memorial pursuant to paragraph 13 of Procedural Order No. 9.

By letter dated January 24, 2000 CANADA delivered its Pre-Hearing Memorandum pursuant to paragraph 22 of Procedural Order No. 1.

By letter dated January 25, 2000 CANADA requested further directions concerning the cross-examination of witnesses, including the unavailability of Mr. Roy Hickman to be present in person.

By letter dated January 28, 2000 SDMI delivered a Response to MEXICO's Submission dated January 14, 2000.

By letter dated January 31, 2000 the Tribunal issued further directions concerning the matters raised by CANADA in its letter of January 25, 2000, introducing those directions with the following paragraph:

The Tribunal considers that the general principle to be applied is that, where written direct testimony is submitted with a memorial as evidence on which the relevant party relies, the witness in question should be offered for oral examination at the witness hearings unless the opposing party states that his or her presence is not required. Where a party fails or refuses to produce any such witness the written testimony will not be ruled inadmissible, but the Tribunal is likely to attach little or no weight to the written testimony concerned to the extent that it is not corroborated by other documentary or witness evidence. However, exceptional circumstances may justify exceptional measures, especially where the

Tribunal itself wishes to have the benefit of hearing a particular witness 'live'. Applying this principle to the present circumstances the Tribunal directs as follows:...

By letter dated February 4, 2000 SDMI raised certain matters concerning the directions given in Procedural Order No. 16.

By letter dated February 4, 2000 CANADA raised certain matters concerning MEXICO's Submission.

By letter dated February 4, 2000 SDMI replied to the matters raised by CANADA concerning MEXICO's Submission and also raised certain matters concerning the confidentiality of material prepared for and submitted in the arbitration.

By letter dated February 6, 2000 CANADA raised certain matters concerning the requests for the examination of witnesses at the hearing.

By letter dated February 7, 2000 SDMI delivered its Reply Memorandum on U.S. Law Issues pursuant to Procedural Order No. 13.

By letter dated February 8, 2000 the Tribunal replied to the parties' several letters dated February 4, 6, and 7, 2000 in order to resolve certain "eleventh hour" procedural matters raised by the parties.

By letter dated February 11, 2000 MEXICO notified the Tribunal that Messrs. Luis Ernesto Gonzalez Rojas, and J. Cameron Mowatt would attend the hearing.

By letter dated February 11, 2000 the USA notified the Tribunal that Ms. Andrea J. Mcnaker would attend the hearing.

The substantive hearing took place in Toronto on February 14, 15, and 16 2000. SDMI was represented by Mr. Barry Appleton and his colleagues, I. Laird, R. Sharma and T. Weiler. CANADA was represented by Mr. Joseph de Pencier and his colleagues B. Evernden, S. Tabet, E. Leroux, and F. Fracassi as well as U.S. co-counsel.

After short opening statements from counsel for each party the following witnesses were heard:

Rev Michael Valentine

Mr. Seth Myers

Mr. Dana Myers

Mr. John Mylicki

Mr. Vic Shantora

(listed in order of appearance.)

Closing statements by counsel for the Disputing Parties, CANADA's U.S. co-counsel and an oral statement by Mr. Cameron Mowatt on behalf of MEXICO were heard on February 16, 2000.

A verbatim transcript of the hearing was prepared and forms part of the record in the arbitration, together with all the other written submissions and documentary and witness evidence presented to the Tribunal during the proceedings.

The Tribunal started its deliberations on February 17, 2000 and thereafter deliberated on several occasions.

By letter dated July 4, 2000 CANADA delivered to the Tribunal a redacted copy of an Interim Award of the NAFTA Chapter 11 Arbitral Tribunal in *Pope & Talbot v. Government of Canada* together with a request that the Tribunal should give procedural directions for the Disputing Parties and the Parties to have an opportunity to make further written submissions.

By letter dated July 6, 2000 SDMI stated that while it had no objection to the Tribunal reading and taking account of this award (or any other international decision), SDMI did object to the Tribunal's deliberations being disrupted by further argument.

By letter dated August 14, 2000 the Tribunal sent to the Disputing Parties Procedural Order No. 18 concerning CANADA's request for an opportunity to deliver further written argument.

Where this award is not unanimous, the Tribunal so states and expresses in summary form the views of the minority.

III. THE FACTUAL BACKGROUND

BY THE END OF THE 20th CENTURY Tallmadge, Ohio, had a population of around 15,000. It is not a large community by modern standards. It is situated about 50 kilometres South East of Cleveland, in the suburban environs of Akron, and is approximately 100 kilometres South of that part of the U.S./Canadian border that runs through Lake Erie.

Mr. Stanley Myers founded his business in Tallmadge in 1965. At that time he was engaged primarily in maintaining and repairing transformers and other industrial electrical equipment. In due time, the business flourished and became one of the two largest employers in Tallmadge. Later, Stanley Myers handed over ownership of the business to his four sons leaving the eldest, Dana, with 51% of the share capital of the principal company within the group. At the time of the events that gave rise to this arbitration Mr. Dana Myers was chief executive officer of SDMI, which by then had an annual turnover of some \$25 million.

Historically, SDMI's core businesses were transformer oil testing, oil reclaiming, and rewinding, rebuilding, manufacturing transformers. It returned to these businesses in 1999 when its PCB remediation activities in the USA were sold. This aspect of the Claimant's business had begun in earnest in the 1980's.²

PCB remediation in this context consists of analysing equipment and oil to assess the level of contamination, the transportation of the oil or

² Transcript, February 15, 2000, q.475.

equipment to a facility and the extraction of the PCBs from the materials so transported. The decontaminated components of the equipment and the oil are recycled. The extracted PCBs and PCB waste material then is destroyed.³

SDMI's interest in Canada developed in the 1990's as the U.S. market declined. Mr. Dana Myers testified that SDMI went into the Canadian market because "that's going to extend the usefulness of our facility. It's going to extend our business."⁴ The PCB remediation business was working its way out of existence, because no new PCBs were being manufactured and the world's stockpiled inventory was decreasing as SDMI and its competitors did their work.⁵

Although SDMI did give consideration to developing a treatment facility in Canada, the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility.⁶ It was envisaged that Canadian entities would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the contract as its remuneration. The business was done through marketing, customer contact, testing, and assessment of oil and other like services. SDMI personnel from the USA participated in these activities.

The term "PCB" is an abbreviation for a synthetic chemical compound known as polychlorinated biphenyl. This compound consists of chlorine, carbon, and hydrogen and has a combination of properties that provide an inert, fire-resistant, and insulating material. This makes the compound suitable for insulation. PCBs were used mainly in electrical equipment and to a lesser extent in other products. PCBs biodegrade slowly and remain in the environment for a long time. To eliminate them from the environment, PCBs must be disposed of through either a process of thermal destruction at high temperatures or by chemical processing. Landfilling is also used as a means of disposal, but this method merely contains the material in a relatively safe manner and does not result in the removal of the substance from the environment.

The most widely used technique for destroying PCBs is high temperature incineration, typically at temperatures of about 1200 degrees Centigrade. Most incinerators can accept the full range of PCB wastes, including high and low concentration PCB liquids, PCB contaminated soils, and electrical equipment. Before incineration,

³ Valentine affidavit, paras. 7 - 12.

⁴ Transcript, February 15, 2000, q.475

⁵ *Ibid.*

⁶ Mr. Jeff Smith, then employed as a political assistant to the Minister of the Environment, was asked if CANADA would be willing to provide funds to SDMI for the purpose of constructing a treatment facility in Canada. The answer was 'No.'

electrical equipment is either shredded or pre-cleaned with heat or solvents to facilitate metal recycling and to reduce the amount of material to be incinerated.

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

Chemical treatment is often used to destroy PCBs found at concentrations of less than 1000 parts per million. Such concentrations are sometimes found in oil from transformers that has been inadvertently contaminated when the transformers were serviced.

By the early 1970s PCBs had become recognised as highly toxic substances that harmed both human and animal health. Since that time PCBs have been the subject of increasingly strict regimes of regulation both in Canada and internationally.

In February 1973 the OECD, of which CANADA is a member, adopted a Council Decision urging member countries to limit the use of PCBs and to control them in a manner designed to minimize risk to human health and the environment. Thereafter, together with other nations, the USA and CANADA banned future production of PCBs and joined the international community in attempting to determine the best way of resolving the substantial environmental problem caused by existing PCBs.

In 1977 CANADA added PCBs to the toxic substances listed under the Environmental Contaminants Act and prohibited the use of PCBs in new products manufactured in or imported into Canada. This legislation was later replaced by the CEPA which came into force on June 30, 1988. The regime imposed by the CEPA were in turn supplemented by the PCB Waste Export Regulations 1990, which effectively banned the export of PCB waste from Canada to all countries other than the USA. Under these regulations exports to the USA were permitted with the prior approval of the US EPA.

The position in the USA was not dissimilar. In 1980 the USA closed its borders to the import and export of PCBs and PCB waste for disposal. Since then the U.S.-Canadian border has been closed so far as PCBs are concerned. It was open to imports from CANADA from November 15, 1995 to July 20, 1997.⁷

In the USA PCBs primarily are regulated under the federal TCSA, which imposes restrictions on the manufacture, sale, use, import, export,

⁷ There were exceptions for U.S. military PCB's and a few minor enforcement discretions.

and disposal of PCBs and PCB contaminated waste. The US EPA may grant an operator exemption for one year if it were satisfied that the activity would not result in unreasonable risk to human health or the environment and that the applicant has made good faith efforts to develop a substitute that does not represent an unreasonable risk.

At the international level, in 1986 CANADA and the USA entered into the Transboundary Agreement, which contemplated the possibility of cross-border activity. The recitals contain the following passage:

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

During the arbitration CANADA took the position that this agreement did not cover PCBs because PCB wastes have never been classified as a "hazardous waste" in the USA. SDMI responded that, pursuant to the terms of the Transboundary Agreement, it was not necessary for PCBs to be so classified.⁸

In March 1989 a number of countries including CANADA signed the Basel Convention. This convention deals with international traffic in PCBs and other hazardous wastes. It was developed under the auspices of the United Nations Environment Programme. Although the USA signed the Basel Convention it had not ratified it by the time of the events under review in this arbitration.

State parties to the Basel Convention accept the obligation to ensure that hazardous wastes are managed in an environmentally sound manner. The Basel Convention establishes rules and procedures to govern the transboundary movement of hazardous wastes and their disposal. Amongst other things, it prohibits the export and import of hazardous wastes from and to states that are not party to the Basel Convention (Article 4(5)), unless such movement is subject to bilateral, multilateral, or regional agreements or arrangements whose provisions are not less stringent than those of the Basel Convention (Article 11).

The Basel Convention also requires appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that are located within it (Article 4(2)(b)). It also requires that the transboundary movement of hazardous wastes be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and be conducted in a

⁸ Investor's Supplemental Memorial, paras. 78 - 79.

manner that will protect human health and the environment (Article 4(2)(d)).

Following signature of the Basel Convention, but before it came into force, the CCME, which includes the Federal and provincial ministers responsible for the environment, agreed that the destruction of PCBs should be carried out to the maximum extent possible within Canadian borders. At the same time, CANADA confirmed its policy that PCB wastes from Federal sites would not be exported for disposal in other countries.

This was the regulatory and policy background that confronted SDMI in 1990 when it began its efforts to obtain the necessary approvals to import electrical transformers and other equipment containing PCB wastes into the USA from Canada. By this time SDMI had become one of the most prominent operators in the PCB disposal industry in the USA. It also had expanded into Australia, MEXICO and South Africa and was looking for other markets in which its expertise could be deployed.

SDMI possessed full details of the PCBs inventory in Canada, because a computerised database was available freely. It also knew that it could compete successfully against the Canadian hazardous waste disposal industry, which was virtually non-existent in 1990.

In 1993, Myers Canada was incorporated under the Canada Business Corporations Act.

Even by 1993, when SDMI entered the Canadian market, there was only one credible Canadian competitor: Chem-Security, which was located in Swan Hills, Alberta. As the majority of the Canadian PCB inventory was in Ontario and Quebec - several thousand kilometres from Alberta - SDMI possessed a significant cost advantage as against Chem-Security and, indeed, as against many of its U.S. competitors.

SDMI started a lobbying campaign that involved making numerous petitions to the US EPA in the USA (there were two in August 1993 alone) and many representations to Environment Canada. In Canada, SDMI enlisted the assistance of several potential Canadian customers who were under pressure to dispose of their PCB waste and wanted to have it done as cost-effectively as possible.

Research carried out by CANADA for the purposes of the arbitration indicated that SDMI's lobbying "involved at least 2 mayors, 6 Congressmen, 2 Senators, a County Executive, the US Chamber of Commerce" and others.

The position was clearly moving towards a critical point in the USA during the spring and summer of 1995. All the players were expecting a significant development. Whichever way the USA moved there would be considerable publicity. A number of participants had much to gain and much to lose.

The position in Canada was equally sensitive. In answer to a parliamentary question on July 9, 1995, the then Minister for the Environment is recorded by Hansard as saying:

It is still the position of the government that the handling of PCBs should be done *in Canada by Canadians*. [Emphasis added.]

This may have reflected a movement from the 1989 policy, referred to above, that CANADA's policy (in line with the Basel Convention), was simply that disposal of PCBs should take place in Canada.

The Tribunal received a substantial amount of evidence concerning SDMI's activities during the period 1990 to the Fall of 1995. In summary, SDMI through its employees and the employees of Myers Canada, contacted Canadian PCB holders with the objective of having their PCBs remediated by SDMI using its facilities in the USA. Marketing initiatives were undertaken and assessments made of PCB contaminated equipment. Equipment was drained and transportation organized.

That evidence may be relevant to other questions that arise in the case, but no more need be said about it for the purposes of this narrative of the events giving rise to the measure taken by CANADA to close the border to the transit of PCBs. For present purposes, it is sufficient to record that on October 26, 1995 the US EPA issued an enforcement discretion to SDMI, valid from November 15, 1995 to December 31, 1997, for the purpose of importing PCBs and PCB waste from Canada into the USA for disposal.

The term "enforcement discretion" is not defined in U.S. law, but apparently means that the US EPA would not to enforce the U.S. regulations banning importation of PCBs against SDMI, provided that SDMI met the detailed conditions that were attached to the US EPA's October 26, 1995 letter (which included "no landfilling"). The import ban itself would remain in place and any imports to the USA technically would be contrary to U.S. law. Following the decision relating to SDMI, the US EPA (as predicted in its October 26, 1995 letter) granted further enforcement discretions to about nine other U.S. companies, permitting them to import PCBs and PCB waste from Canada for disposal.

From early 1995 CANADA was well aware that the US EPA was likely to take action to open the border within a relatively short period, but the Tribunal accepts that CANADA's ministers and their officials were taken by surprise by the lack of government-to-government consultation, the timing, and the method used by the US EPA to achieve this result.

A period of intensive activity followed, both inside and outside Canadian government circles. Within government, a number of meetings took place and a number of memoranda were circulated. Undoubtedly,

there were legitimate concerns. These were listed in CANADA's Counter Memorial as follows:

- whether the enforcement discretion fully complied with U.S. law;
 - whether exports of PCB wastes to the U.S., a non-party, would comply with the Basel Convention;
 - whether PCBs would be disposed of in the U.S. in an environmentally sound manner;
 - compliance with CANADA's 1989 policy to destroy Canadian PCBs in CANADA;
 - the long-term viability of domestic PCB disposal facilities;
- and
- what would happen in the event that U.S. disposal facilities subsequently became unavailable, or if the U.S. border was closed again, as eventually happened.

Simultaneously, the fledgling Canadian PCB disposal industry started a vigorous lobbying campaign designed to persuade CANADA to maintain the closed status of the border. For example, on November 1, 1995 a letter written by the General Manager of Chem-Security to the Minister of the Environment stated:

I am writing to reaffirm your commitment to assist the Canadian hazardous waste industry by removing the exemption which allows export of PCB waste to the United States and to underline the urgency of the situation currently facing the industry... You should be aware that EPA estimates that it will take only approximately 30 days to import the entire Canadian PCB inventory. You will recall that we stressed the fact that the inventory is a finite resource which is vital to our industry's growth and our ability to provide capital for the export of our technology. Any delay in the Canadian response to the EPA action could have serious repercussions.

On November 16, 1995 the Minister of the Environment signed an Interim Order that had the effect of banning the export of PCBs from Canada. This order was defective for procedural reasons and, after the procedural defect had been remedied, on November 20, 1995 the Minister approved and signed the following Interim Order which was in the same terms:

INTERIM ORDER RESPECTING THE PCB WASTE EXPORT REGULATIONS

WHEREAS PCB's are substances specified on the list of Toxic Substances in Schedule 1 to the Canadian Environmental Protection Act;

AND WHEREAS the Minister of the Environment and the Minister of National Health believe that PCBs are not adequately regulated and that immediate action is required to deal with a significant danger to the environment and to human life and health;

THEREFORE, the Minister of the Environment, pursuant to subsection 35(1) of the Canadian Environmental Protection Act, hereby makes the annexed Interim Order respecting the export of PCB wastes. Ottawa, in the National Capital Region, November 20, 1995. The annexed Interim Order stated as follows:

INTERIM ORDER RESPECTING THE PCB WASTE EXPORT REGULATIONS

Short title:

This Order may be cited as the PCB Waste Export Interim Order Amendment Section 4 of the PCB Waste Export Regulations is replaced by the following:

4. Section 3 does not apply to a person who exports:

(a) to the United States, any PCB waste from United States agencies operating in CANADA where the Environmental Protection Agency has given prior consent in respect of the export or (b) any product that is in good working order and has a capacitor that contains not more than 500 g of PCB and is an integral part of the product where the capacitor is necessary for the operation of the producer.

EXPLANATORY NOTE (This note is not part of the Order.)

On becoming aware of information indicating that the U.S. Environmental Protection Agency is allowing PCB imports into the U.S. from CANADA for destruction, the Minister of the Environment made this Interim Order to Amend the PCB Waste Export Regulations on November 20, 1995. The purpose of the Interim Order is to ensure that Canadian PCB Wastes are managed in an environmentally sound manner in CANADA and to prevent any possible significant danger to the environment or to human life or health.

Under Canadian law the Interim Order had to be approved by the Privy Council within fourteen days. This requirement led to further intensive activity within the government. Among this activity two

meetings were held at the offices of the Canadian Privy Council, at which several government departments were represented. These meetings are referred to in more detail later in this award.

The Interim Order was confirmed by the Canadian Privy Council on November 28, 1995 in the following terms:

ORDER IN COUNCIL DEPARTMENT OF THE ENVIRONMENT

Interim Order Respecting the PCB Waste Export Regulations P.C. 1995 2013 November 28, 1995

Whereas, pursuant to subsection 35(1) of the Canadian Environmental Protection Act, the Minister of the Environment, on November 20, 1995, made the annexed Interim Order respecting the PCB Waste Export Regulations to deal with a significant danger to the environment or to human life or health;

Whereas the Minister of the Environment has, within 24 hours after making the Order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger;

Whereas the Minister of the Environment has consulted with other Ministers of the Crown in right of CANADA to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger; And whereas less than 14 days have elapsed since the Order was made;

Therefore, His Excellency the Governor General in Council on the recommendation of the Minister of the Environment pursuant to subsection 35(3) of the Canadian Environmental Protection Act, is pleased hereby to approve the annexed Interim Order respecting the PCB Waste Export Regulations, made by the Minister of the Environment on November 20, 1995.

INTERIM ORDER RESPECTING THE PCB WASTE EXPORT REGULATIONS

Whereas PCBs are substances specified on the List of Toxic Substances in Schedule 1 to the Canadian Environmental Protection Act;

And whereas the Minister of the Environment and the Minister of the National Health and Welfare believe that PCBs are not adequately regulated and that immediate

action is required to deal with a significant danger to the environment and to human life and health;

Therefore, the Minister of the Environment pursuant to subsection 35(1) of the Canadian Environmental Protection Act, hereby makes the annexed Interim Order respecting the export of PCB wastes.

Ottawa, in the National Capital Region, November 20, 1995

SHEILA COPPS

Minister of the Environment

On February 26, 1995, by means of an Order in Council of the Governor General amending the PCB Waste Export Regulations, CANADA turned the Interim Order into a Final Order banning the commercial export of PCB waste for disposal. This Order was in the following terms:

WHEREAS, on November 20, 1995, the Minister of the Environment made, pursuant to subsection 35(1) of the Canadian Environmental Protection Act, the PCB Waste Export Interim Order.

WHEREAS, by Order in Council P.C. 1995 2013 of November 28, 1995 the Governor in Council approved the Interim Order pursuant to subsection 35(3) of the Act;

AND WHEREAS, pursuant to subsection 35(5) of the Act, the Minister of the Environment and the Minister of National Health and Welfare within ninety days after approval of the Interim Order by the Governor in Council, recommended to the Governor in Council that the PM Waste Export Regulations be amended under section 34 of the Act to have the same effect as the Interim Order,

THEREFORE HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL on the recommendation of the Minister of the Environment and the Minister of National Health and Welfare pursuant to subsection 35(5) of the Canadian Environmental Protection Act is pleased hereby to accept the recommendation of the Minister of the Environment and the Minister of National Health and Welfare that the PCB Waste Export Regulations be amended under section 34 of the Act to have the same effect as the PCB Waste Export Interim Order.

In February 1997 CANADA opened the border by a further amendment to the PCB Waste Export Regulations. The border was closed (for the cross-border movement of PCBs and PCB waste) by

regulations introduced by CANADA for a period of approximately 16 months, from November 20, 1995 to February 1997. Thereafter, the border was open and there were seven contracts pursuant to which PCBs and PCB waste material was exported from CANADA to the USA for processing by SDMI.

In July 1997 the border once again was closed to PCBs and PCB wastes as a result of a decision of the Ninth Circuit of the U.S. Court of Appeals. The overall effect of these events in Canada and the USA was that the border was only open for cross-border shipment of the materials in question from February to July 1997 – a period of approximately five months.

IV. SUMMARY OF THE POSITIONS OF THE PARTIES

A. SDMI's Claims

SDMI claims that CANADA failed to comply with its obligations under the NAFTA in four respects, as described in the following paragraphs.

B. Article 1102

The NAFTA Article 1102 (National Treatment) sets out the NAFTA's national treatment obligation for investment. SDMI contend that under Article 1102(2) the investments of investors of other NAFTA Parties must be given the best in jurisdiction treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in like circumstances to the investments of Canadian investors.⁹ SDMI claims that, when read substantively, the national treatment obligation ensures that all companies, whether domestic or foreign, are treated equally and without discrimination. SDMI says that the PCB Waste Export Interim Order and Final Order constituted disguised discrimination aimed at SDMI and its investment in Canada contrary to Article 1102.

SDMI asserts that the Interim Order discriminated against U.S. waste disposal operators who sought to operate in Canada by preventing them from exporting PCB contaminated waste for processing in the USA. U.S. waste disposal companies were not permitted to operate in Canada in the same fashion as Canadian PCB waste disposal companies. CANADA limited SDMI's ability to carry out its operations on an arbitrary and discriminatory basis. SDMI claims that, by granting better treatment to

⁹ This is a direct reference to SDMI's Statement of Claim. A more accurate description of the obligation is the provision of the same in-jurisdiction treatment.

Canadian waste disposal companies, CANADA breached its national treatment obligation under the NAFTA.

SDMI claims that, when preparing and effecting the measure, CANADA was well aware that SDMI had been operating in Canada and had been seeking to process, distribute and treat PCB contaminated wastes in the USA. SDMI claims that, on November 20, 1995 when CANADA issued the Interim Order, it was clear that CANADA knew that its export ban specifically would affect SDMI and its investment in Canada. SDMI says that the Interim Order was a clear and direct government measure aimed at prohibiting the export of Canadian PCB wastes to the USA by a U.S. PCB waste disposal company. SDMI claims that this was discrimination against it as a U.S. investor actively operating and competing within the Canadian marketplace.

SDMI asserts that the Interim Order was intended to curtail its operations and its investment in Canada. SDMI claims that while it was prohibited from conducting its business of exporting PCB contaminated wastes, Canadian based companies were given better treatment by being permitted to conduct their business in Canada without interference.

C. Article 1105

Article 1105 (Minimum Standard of Treatment) of the NAFTA requires the Parties to treat investors of another Party in accordance with international law, including fair and equitable treatment. Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith, and natural justice.

SDMI claims that in the making export bans, CANADA failed to accord to it and its Investment, treatment in accordance with international law in violation of Article 1105.

SDMI claims that the promulgation of the export ban by CANADA was done in a discriminatory and unfair manner that constituted a denial of justice and a violation of good faith under international law.

D. Article 1106

The NAFTA Article 1106(1) (Performance Requirements) prohibits a number of specific governmental activities collectively referred to as performance requirements. Under Article 1106(1), a Party must not impose or enforce a “requirement, commitment or undertaking” in connection with the establishment, acquisition, expansion, management, conduct, or operation of an investment of an investor.

Under subparagraph (1)(b) of Article 1106, a Party may not require investors to include in their products or services an amount of goods or services that originate within the territory of that Party.

Under subparagraph (1)(c) of Article 1106, the Parties may not require investors to give any preferential treatment to any products or services made domestically. Investors cannot be required to acquire or use goods or services that originate within a Party.

SDMI claims that the Interim Order operated effectively to force it to dispose of PCB contaminated waste in Canada, if such disposal were to occur at all. SDMI says that this resulted in a performance requirement requiring PCB disposal operators to accord preference to Canadian goods and services and to achieve a given level of domestic content contrary to CANADA's obligations under Article 1106.

SDMI claims that CANADA's measures affecting the operations of PCB waste exporters were applied in an arbitrary and unjustifiable manner that also constituted a disguised restriction on international trade or investment.

E. Article 1110

SDMI claims that Article 1110 (Expropriation) of the NAFTA obliges the Parties to pay fair market value in the case of an expropriation or a measure tantamount to the expropriation of the property of an investor of another Party. The NAFTA does not define the term "expropriation," but SDMI claims that Article 1110 clearly is designed to protect against direct and indirect measures by extending its coverage to "measures tantamount to expropriation." Under international law, expropriation refers to the act by which governmental authority is used to deny some benefit of property. This denial can be actual or constructive.

SDMI contends that international law and the NAFTA both impose standards on the treatment of those whose property has been expropriated. Article 1110 does not prevent regulatory actions by governments. It merely requires governments to compensate investors for interference with their property rights. SDMI claims that CANADA has not paid any compensation to SDMI for this expropriation despite the requirement of Article 1110.

F. Losses Suffered by SDMI

SDMI claims that it has suffered or will suffer losses in the following categories as a result of CANADA's breaches of its obligations under the NAFTA:

i. Lost sales and profits since the date of introduction of the measures;

- ii. Loss of its investment in its joint venture with Myers CANADA
- iii. The cost of reducing operations in CANADA;
- iv. Fees and expenses of professional services incurred to defend itself NAFTA inconsistent measure;
- v. Tax consequences of the award to maintain the integrity of the award.

G. CANADA's Claims

CANADA claims that the Interim Order was not a measure that related to an investor or an investment in Canada.

Canada asserts that even if SDMI were to have had an investment in Canada, the Interim Order and Final Order did not breach any NAFTA Chapter 11 obligation owed to SDMI or to any investment it had in Canada.

CANADA claims that it has demonstrated its full compliance with its obligations under Chapter 11 and that, in any event, SDMI is not entitled to recover damages under the heads of damage or in the amounts claimed.

CANADA contends that if SDMI were to be successful it would require inflating the scope and application of Chapter 11 out of all proportion and that a proper construction of the provisions in question must result in dismissal of this claim.

CANADA says that, as the complaining party, SDMI bears the burden of proving its claim and that SDMI has not done so.

CANADA's position is that SDMI's construction of Chapter 11 is inconsistent with Canada's other international obligations, including the Basel Convention and Transboundary Agreement and that these prevail over Chapter 11 obligations in the circumstances to the extent of the inconsistency.

CANADA asserts that it was necessary for it to pass the Interim Order because the legality of the Enforcement Discretion was uncertain and it did not know whether PCBs were covered by the Transboundary Agreement.

CANADA says that the measure was made because CANADA believed PCBs are a significant danger to health and the environment when exported without appropriate assurances of safe transportation and destruction.

The Disputing Parties acknowledge that PCBs are highly toxic and harmful to human health and the environment. CANADA claims that the sudden and surprising US EPA decision to grant the enforcement discretion effectively opened the U.S. border and required prompt action on CANADA's part. Given the circumstances, CANADA had no duty to consult. CANADA's actions were in compliance with its domestic laws

and with its international obligations. CANADA claims that there was no bad faith on its part in the making or implementation of the Interim Order.

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

CANADA claims that, even if the Interim Order were to have violated Article 1106, the Article's exception applies because it is a measure necessary to protect human, animal, or plant life or health or was necessary for the conservation of living or non-living exhaustible natural resource.

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

CANADA claims that, as a result, SDMI is not entitled to the compensation or damages claimed, or any compensation or damages, and that SDMI's claim is grossly exaggerated.

CANADA asserts that if Chapter 11 were interpreted with the result that it was violated by the Interim Order, Chapter 11 would be inconsistent with Chapter 3 of the NAFTA (Trade in Goods). In the event of inconsistency between Chapter 11 and another Chapter of NAFTA, Article 1112 requires Chapter 11 to give way. SDMI's claim would have to be dismissed.

CANADA adopts the positions taken by MEXICO which include the contention that because SDMI and Myers Canada were engaged in the provision of a service, Chapter 11 does not apply.

CANADA claims that it is entitled to the costs it has incurred in this arbitration.

V. THE EXPORT BAN

THE INTENT OF GOVERNMENT is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives. Each of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole.

The evidence establishes that CANADA's policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals. Other factors were considered, particularly at the bureaucratic level, but the protectionist intent of the lead minister in this matter was reflected in decision-making at every stage that led to the ban. Had that intent been absent, policy makers might have reached a conclusion in November 1995 that would have been consistent with the conclusion reached by CANADA when the ban was lifted in February 1997. CANADA's view in 1997 was that the opening of the U.S. border should be welcomed in the interests of expediting the elimination of PCBs from the environment, provided that any risks associated with exporting PCB waste to the U.S. was minimised through proper regulations and safeguards.

In order to explain the Tribunal's assessment of the events that took place some of the facts that appeared in the evidentiary record are set out in the paragraphs that follow.

On August 2, 1994 a briefing note prepared by Mr. John Hilborn and two other officials in the Department of the Environment stated that the US EPA might approve the import of PCBs from Canada. This briefing note concluded by advising that federal and provincial policies should be changed so as to open the border from the Canadian side, because such a policy would represent ...a technically and environmentally sound solution to the destruction of some of Canada's PCBs.¹⁰

A policy memorandum to the Minister of the Environment in the autumn of 1994, signed by Mr. H.A. Clarke, Assistant Deputy Minister, Environmental Protection Service, refers to a current policy that PCB waste be managed in Canada, but calls for a review of the policy based on the following factors.

- Our domestic destruction capacity, either short term or long term, has seen limited development;

¹⁰ Joint Book of Documents, vol. 3, tab 86.

- CANADA's position at Basel Convention meetings has been to support the use of regional capacity;
- The U.S. EPA is considering a change to their PCB policy and may permit selected Canadian PCB imports;
- The U.S. ban has effectively allowed CANADA to restrict PCB shipments to the U.S. in the absence of authority in CEPA to do so.¹¹

In March 1995, federal and provincial officials discussed the issue of PCB waste shipments to the USA. According to a letter from the Minister of the Environment of the Province of Manitoba, dated December 18, 1995:

...the open border concept was specifically discussed and supported by all the jurisdictions. Environment CANADA's position was that the U.S. closed the border and it was the U.S. who could open it. Now, without prior consultation, the Interim Order [banning exports to the U.S., issued by the Minister of the Environment] seems to reverse the federal position.¹²

The Deputy Minister of the Environment¹³ expressed support for the principle of opening the border at a meeting with Mr. Cloghesy in 1995.¹⁴

In July 1995 senior officials of two Canadian operators of hazardous waste facilities, Chem-Security and Cintec, met the Minister of the Environment in her office. They warned that the US EPA might respond positively to lobbying to permit the import of PCB waste from Canada for disposal. It is clear from the account of Mr. Mathes, who attended that meeting on behalf of Chem-Security, that the arguments of the Canadian companies focused on the contention that U.S. competition would threaten the economic viability of their own operations. In addition to the account of the meeting by Mr. Mathes, there is on record a letter from him dated March 14, 1995, invoking "...the economic benefits of maintaining the current Canadian policy." Also in attendance at the meeting on behalf of Chem-Security was Mr. Jeff Smith, who earlier had been a staff member in the Minister's office.¹⁵

¹¹ Loc. Cit., tab 80.

¹² Op. Cit., vol. 4, tab 101.

¹³ Unless otherwise stated, references to "minister" and "ministries" are to those of the Federal Government.

¹⁴ Joint Book of Documents, vol. 2, tab 43.

¹⁵ Op. Cit., vols. 2 and 3, tabs 39 and 81.

Mr. Mathes said that, at that meeting, the Minister stated it was CANADA's policy that PCB waste should be disposed of "...in Canada by Canadians."¹⁶

CANADA did not make formal submissions to the US EPA at its hearings in Washington on SDMI's application. CANADA was well aware of the hearings, because it monitored them. Indeed the Deputy Minister suggested to Mr. Cloghesy that he should say to the US EPA hearing that the Department (of the Environment) favoured an open border with the USA.¹⁷

On June 9, 1995 the Minister of the Environment repeated her "...in Canada by Canadians..." statement in the House of Commons. A statement by the lead Minister in the House of Commons with respect to government policy on an issue is ordinarily to be accepted at face value as stating official government policy and the rationale behind it.¹⁸

On July 13, 1995 a Department of Environment note on the Minister's "business week" recalled that the Minister had promised the Canadian industry that she would close the border from the Canadian side if the US EPA opened it from the U.S. side. This note referred to concerns over the NAFTA and attached a ...paper that Chem-Security... had prepared on this. Chem-Security's paper does not appear on the record in this case.¹⁹

On August 2, 1995 Messrs. Hilborn, Dave Campbell, and Hugh Dibbs, three Department of the Environment officials, prepared a briefing note on the potential opening of the border from the U.S. side. They recommended that federal policy be changed to support the US EPA proposal "...because it represents a technically and environmentally sound solution for the destruction of some of Canada's PCBs."²⁰

An undated draft letter from the Deputy Minister of the Environment thanked Mr. Smith for a memorandum of September 1, 1995, concerning a possible opening of the border by the US EPA. This draft recalls the promise that the Minister had made to Chem-Security and Cintec officials earlier in the summer. The reference to that promise is crossed out by hand, with the explanatory note "...I don't want to put the commitment down on paper."²¹

¹⁶ This evidence is from the cross-examination of Mr. Mates on an affidavit filed in other proceedings.

¹⁷ Joint Book of Documents, vol. 3, tab 43.

¹⁸ Op. Cit., vol. 1, tab 17.

¹⁹ Op. Cit., vol. 2, tab 59.

²⁰ Op. Cit., vol. 3, tab 86.

²¹ Op. Cit., vol. 2, tab 56.

On September 7, 1995 Mr. Hilborn prepared a briefing note on PCB waste management policy. It was essentially identical to what Mr. Clark had written in the autumn of 1994.²²

On October 27, 1995 Mr. Hilborn prepared a memorandum at the request of the Associate Deputy Minister. He stated that

...an interim order to amend the PCB Waste Export Regulations quickly is not a viable option because it cannot be demonstrated that closing the border is required to deal with a significant danger to the environment or to human health.

This memorandum noted that the Minister had told the House of Commons that PCB Waste should be destroyed in Canada and suggested that banning exports to the USA would be consistent with "...current policy..." and would mean that "...the Commitment to the Canadian PCB destruction industry..." would be fulfilled.²³

The October 27, 1995 memorandum also outlines the case against banning exports. It notes that:

PCBs destroyed in either country is positive for the environment. PCB owners may have lower destruction costs due to competition and more incentive to destroy CBs, but offset by liability insurance costs if U.S. option is selected.

On October 30, 1995 Mr. George Cornwall, Director of the Hazardous Waste Branch, wrote a note referring to the Minister's possible immediate action on PCB wastes. She would pass an interim order that would close the border from the Canadian side and make a public statement that an open border with the USA was contrary to her "...long standing position that Canadian PCBs should be destroyed in this country." Mr. Cornwall cited as the only "pro" factor in favour of this decision was that "the Canadian environmental industry investment, i.e., Chem-Security is protected by a secure supply of PCBs for their facility in Swan Hills."²⁴

In the same note of October 30, 1995 Mr. Cornwall outlined the "cons" of the Minister's possible closing of the border as follows:

Interim orders are design [sic] to provide immediate action to resolve 'significant danger' to the environment and/or

²² Op. Cit., vol. 3, tab 80.

²³ Op. Cit., vol. 1, tab 6.

²⁴ Loc. Cit., tab 30.

human health. It can be argued that the opening of the U.S. border poses no such significant danger.²⁵ S.D. Myers will certainly seek redress through NAFTA intervention, since they have invested/lobbied heavily to get the border opened. The company can be expected to object formally to any action taken under CEPA to close the border. It will be difficult to argue that the transportation of PCBs to the U.S.A. poses a greater danger than transporting PCBs to Swan Hills, Alberta.

Industry Canada and Foreign Affairs are likely to object to the closing of the Canadian border because it will appear to be an unjustifiable restriction on international trade. Current practice of returning U.S. owned PCBs in Canada to their originators in the U.S. will be jeopardized if the Canadian border is completely shut. An 'escape hatch' will have to be provided.

On November 9, 1995 Mr. Cornwall sent a note to Mr. Clarke. It refers to serious legal problems with an interim order to close the border from the Canadian side. It suggests that a note from the Department of Justice might make it easier for the Minister of the Environment to accept contrary advice. Mr. Cornwall suggested that officials were looking at a means to at least delay PCB exports along these lines:

- (i) We could ask an (independent?) consultant to assess that the disposal facilities in the U.S. that would be handling/disposing of Canadian PCB wastes in an environmentally acceptable way. U.S. EPA did this before accepting stablex (??);
- (ii) We need to satisfy ourselves that U.S. consents are all adequate vis-a-vis our export-import of hazardous waste (eihw) regulations;²⁶

On November 10, 1995 Mr. Smith sent a letter to the Deputy Minister of the Environment suggesting points that could be used as a "justification" for an interim ban. The Deputy Minister appears to have passed the note on to Messrs. Victor Shantora and Hilborn, two department officials, with the comment that "...this letter makes some interesting arguments which could be used as its basis for the Minister's justification." Mr. Smith's letter does not appear in the record in the arbitration.²⁷

²⁵ Ibid.

²⁶ Op. Cit., vol. 2, tab 58.

²⁷ Loc. Cit., tab 35.

On November 15, 1995 Mr. Hilborn prepared a note entitled "...justification for the interim order." He stated that:

Export of PCB waste from CANADA to the U.S. is consistent with the CANADA-U.S.A. Agreement on the Transboundary Movement of Hazardous Waste. Furthermore, the Canadian position at the Third Conference of the parties to the Basel Convention was to use facilities in other OECD countries where we could be sure that hazardous wastes would be managed in an environmentally sound manner for final disposal.²⁸

In that same note Mr. Hilborn also noted that a draft opinion from the Department of Foreign Affairs and International Trade "...indicates the closing the Canadian border would likely be found by a NAFTA panel to be a restriction on trade." The first consideration listed by Mr. Hilborn in his review of the considerations for or against an interim order was the Minister's statement in the House that "...the handling of PCBs in CANADA should be done in Canada by Canadians."²⁹

On the morning November 16, 1995 the Minister signed an "interim order" that prohibited PCB exports to the USA unless they were PCBs in CANADA owned by U.S. agencies. The Minister relied on her authority under the CEPA to issue such an order "...where there is a significant danger to the environment and to human life and health."

In a speech to the Canadian Bar Association Environmental Section later on the same day the Minister stated that:

We are meeting our obligations under the Basel Convention to dispose of our own PCBs. And this kind of action was supported by provincial and territorial environment ministers when they met in Charlottetown in 1989. The handling of PCBs should be done in Canada by Canadians. We have to take care of our own problems.

On November 16, 1995 Mr. Hilborn revised the note he had written on the previous day. The second version omitted the references to the Transboundary Agreement. It referred to the fact that CANADA has signed the Basel Convention, which imposed obligations upon CANADA to ensure that it had adequate destruction facilities within its borders and to ensure that it reduced the transboundary movement of PCBs to a minimum: "...consequently, the federal government's policy is that

²⁸ Loc. Cit., tab 42.

²⁹ Ibid.

Canadian PCBs should be destroyed in this country.” There was “...no confirmatory evidence at this time to assure ourselves that Canadian PCBs would be managed in an environmentally sound manner.” There were also uncertainties, the note said, about assured long-term access to U.S. facilities, and the US EPA’s granting of an enforcement discretion might be challenged in the courts.³⁰

The Minister of Health was required by CEPA to concur in the issuance of the interim order. There was no evidence before the Tribunal that the Minister of Health personally directed her mind to the issue. There also was no evidence that her Department made an independent evaluation of whether any health risk existed. On the contrary, such evidence as there was suggested that the Department simply accepted the Department of the Environment’s assertion that a risk existed.

On November 20, 1995 the Interim Order was re-issued.

Shortly afterwards a meeting of officials from various departments was held to discuss the position. It was attended, among others, by Mr. Aharon Mayne, a Department of Foreign Affairs and International Trade official. His responsibilities included cross-border transportation issues involving the USA, including PCB wastes. He had not heard of any proposed ban prior to it being imposed. He recalled that some officials at the meeting thought the ban was ill-conceived:

...some of them thought it was not being done on the merits, but rather for ‘political reasons’ that had nothing to do with the substance of the issue. Some Environment Canada officials were not happy with the Order and were quite ‘expressive’ on this point.³¹

On December 6, 1995, CANADA sent a diplomatic note to the USA asking whether PCBs were defined as hazardous waste under U.S. legislation and implementing regulations, and whether PCBs were covered by the Transboundary Agreement. On January 23, 1996, the USA confirmed that the answer to both questions was “yes.” CANADA’s concerns could have been investigated long before the Enforcement Discretion was issued. It was well aware of the possibility that the border might open.

CANADA sought to establish in this arbitration that the Enforcement Discretion, which ultimately was set aside in U.S. court litigation, was not lawful. The Tribunal makes no determination on this issue because in this case the Disputing Parties acted on the basis of the law as it then appeared to exist. CANADA passed the Interim and Final Orders and did

³⁰ Op. Cit., vol. 1, tab 29.

³¹ Op. Cit., vol. 3, tab 84.

not challenge the legality of the Enforcement Discretion. Once the border was re-opened, SDMI arranged for the importation of PCBs and a quantity did cross the border.

On December 12, 1995, Mr. Dana Myers wrote to the Minister of the Environment to propose that SDMI should be required by CANADA to satisfy any possible environmental concerns by making it a condition of allowing the cross-border movement that the waste should be destroyed or recycled in the USA (rather than landfilled).³² The evidentiary record does not contain a reply from the Minister.

Having reviewed all the documentary and testimonial evidence before it, the Tribunal is satisfied that the Interim Order and the Final Order favoured Canadian nationals over non-nationals. The Tribunal is satisfied further that the practical effect of the Orders was that SDMI and its investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors.

Insofar as intent is concerned, the documentary record as a whole clearly indicates that the Interim Order and the Final Order were intended primarily to protect the Canadian PCB disposal industry from U.S. competition. CANADA produced no convincing witness testimony to rebut the thrust of the documentary evidence.

The Tribunal finds that there was no legitimate environmental reason for introducing the ban.³³ Insofar as there was an indirect environmental objective - to keep the Canadian industry strong in order to assure a continued disposal capability - it could have been achieved by other measures.

VI. INTERPRETATION OF THE NAFTA

A. Introduction

The NAFTA provides internal guidance for its interpretation in a number of provisions. In the context of a Chapter 11 dispute, it is appropriate to begin with the Preamble to the treaty, which asserts that the Parties are resolved, *inter alia*, to:

...Create an expanded and secure market for the goods and services produced in their countries... to ensure a

³² *Op. Cit.*, vol. 10, tab 186. In fact, it was a condition of the US EPA's permission to SDMI that imported PCB wastes should not be landfilled. SDMI did not use landfill methods.

³³ The Tribunal has noted that there were other equally effective means of encouraging the development and maintenance of a Canadian based PCB's remediation industry.

predictable commercial framework for business planning and investment... and to do so in a manner consistent with environmental protection and conservation.

Article 102(2) obliges the Parties to

...interpret and apply the provisions of [the] Agreement in the light of its objectives set out in paragraph 1 and in accordance with the applicable rules of international law.

The objectives specified in Article 102(1) are to:

- (a) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties;
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- (f) establish a framework for further trilateral, regional and multilateral co-operation to expand and enhance the benefits of this Agreement.

Furthermore, Chapter 11 arbitrators are required by Article 1131(1) to "...decide the issues in dispute in accordance with [the] Agreement and applicable rules of international law."³⁴ Pursuant to Article 1112(1), in the event of inconsistency between Chapter 11 and another chapter of the NAFTA, the other chapter prevails "...to the extent of the inconsistency."

It is appropriate for the Tribunal to examine the international law rules of interpretation. The first port of call is the Vienna Convention on the Law of Treaties.

B. The Vienna Convention

Article 31 of the Vienna Convention states:

³⁴ The Tribunal does not suggest that national law is irrelevant, as it may be relevant in various ways; but the general principle of interpretation is clear.

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In interpreting the NAFTA the Tribunal must start by identifying the plain and ordinary meaning of the words in the context in which they appear and also must take due account of the object and purpose of the treaty. The context for the purpose of interpretation of a treaty includes its preamble and any annexes.

The Vienna Convention also contains, in Article 27, a general principle that "...A party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty."

The next step is for the Tribunal to review the other international agreements to which the Parties adhere. The first is the Transboundary Agreement. This agreement recognizes the possibility of achieving both economic efficiencies and the effective management of hazardous waste by cross-border shipments.

C. The Transboundary Agreement

The preamble of the Transboundary Agreement states:

Recognizing that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facilities, which may involve the transboundary shipment of hazardous waste. Recognizing that the most effective and efficient means of achieving environmentally sound management procedures for hazardous waste crossing the United States - Canada border is through cooperative efforts and controlled regulatory schemes.

Article 2 of the Transboundary Agreement provides that:

The parties shall permit the export, import and transit of hazardous waste across their common border for treatment, storage or disposal pursuant to the terms of their domestic laws, regulations and administration practices, and the provisions of this agreement. The parties will cooperate in monitoring and spot-checking shipments of hazardous waste to ensure, to the extent possible, that such shipments conform to the requirement of the applicable legislation and of this Agreement. To the extent that any implementing regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the parties will make their best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such regulation.

Article 11 states: “[t]he provisions of this Agreement shall be subject to the applicable laws and regulations of the Parties.”

Article 11 does not give a party to the Transboundary Agreement absolute freedom to exclude the import or export of hazardous waste simply by enacting whatever national laws it chooses.³⁵

Chronologically, the next instrument to be reviewed is the Basel Convention.

The Basel Convention came into force in May 1992, when twenty states had ratified it. CANADA became a party to it. The U.S. has not.

The Basel Convention commits its participants to:

- reduce the production of hazardous waste (Article 4(2)(a));
- ensure the availability of adequate disposal facilities, to the extent possible, within its own boundaries (Article 4(2)(b));
- ensure that the transboundary movement of hazardous wastes and other waste is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement (Article 4(2)(d)).

³⁵ Insofar as CANADA did refer to its domestic legal regime, it anchored its position on the contention that the measure was necessary to protect health and the environment.

The Basel Convention is not as explicit as the Transboundary Agreement in emphasizing the potential benefits of cross-border movement of toxic wastes in achieving economies and better protecting the environment. Article 4(2)(d) of the Basel Convention acknowledges that the environmentally sound and efficient management of waste is not necessarily accomplished by avoiding cross-border shipments.

Article 11 expressly allows parties to enter into bilateral or multilateral agreements for the cross-border movement of waste, provided that these agreements do not undermine the Basel Convention's own insistence on environmentally sound management. So far as CANADA and the USA were concerned, Article 11 clearly permitted the continuation of the Transboundary Agreement with its emphasis on including cross-border movements as a means to be considered in achieving the most cost-effective and environmentally sound solution to hazardous waste management.³⁶

The drafters of the NAFTA evidentially considered which earlier environmental treaties would prevail over the specific rules of the NAFTA in case of conflict. Annex 104 provided that the Basel Convention would have priority if and when it was ratified by the NAFTA Parties.

Even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed that CANADA would have been able to use it to justify the breach of a specific NAFTA provision because:

³⁶ NAFTA's Commission for Environmental Cooperation issued a report in June 1996 on the Status of PCB Management in North America. Its discussion of the various agreements notes that:

[a]lthough NAFTA is designed to promote free, uninhibited trade between the three countries, it also recognizes the supremacy of the Basel Convention, the 1986 Agreement between CANADA and the U.S. and the 1983 La Paz Agreement between the United States and MEXICO in case of any inconsistency between NAFTA and these environmental agreements. In fact, the CANADA - U.S. - MEXICO hazardous waste agreements are predicated upon the free movement of hazardous waste between the parties subject to prior notice and consent by the importing country. The Basel Convention principles that disposal facilities be established within the country generating waste and that transboundary movement of waste shall be reduced to the minimum do not apply to bilateral movements of hazardous waste between the U.S. and MEXICO or CANADA because these would be governed by the principle of the freedom of movement, subject to notification and consent of the country of import." [Authorities, tab 4].

where a party has a choice among equally effective and reasonably available alternatives for complying....with a Basel Convention obligation, it is obliged to choose the alternative that is ...least inconsistent... with the NAFTA.

If one such alternative were to involve no inconsistency with the Basel Convention, clearly this should be followed.

The next international instrument to be considered is a "side agreement" to the NAFTA on the environment, the NAAEC.

D. The NAAEC

The NAAEC's Statement of Objectives include both:

- Article 1(d) - support for the environmental goals and objectives of the NAFTA, and
- Article 1(e) - avoidance of new barriers of distortions in cross-border trade.

Article 3 of the NAAEC states that:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

The NAAEC mandates the creation of a Commission for Environmental Cooperation. The Council of the Commission is authorized to strengthen cooperation on environmental laws and regulations. Without reducing levels of environmental protections, the Council is to consider ways to render technical requirements more compatible (NAAEC, Article 93).

The Preamble to the NAFTA, the NAAEC and the international agreements affirmed in the NAAEC suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles:

- Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- Parties should avoid creating distortions to trade;

- environmental protection and economic development can and should be mutually supportive.

In the Tribunal's view, these principles are consistent with the express provisions of the Transboundary Agreement and the Basel Convention. A logical corollary of them is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements.

VII. WAS SDMI AN INVESTOR? WAS THERE AN INVESTMENT?

SDMI'S CLAIM IS ADVANCED pursuant to Article 1116.³⁷ It is a claim by SDMI itself as an "investor" on its own behalf. It is a dispute in relation to SDMI's alleged investment in Canada and is for damages arising out of the alleged breach by CANADA of its obligations under Section A of Chapter 11. SDMI asserts that it "...has suffered economic harm to its *Investment* through interference with its operations, lost contracts and opportunities in CANADA" [emphasis added].³⁸ That is, that it has sustained damages because its investment in Canada has suffered harm.

The issue is one of standing. To sustain a claim, SDMI must meet the qualifying requirements of Chapter 11.

Chapter 11 covers claims by investors against a host Party. In the context of this case, SDMI contends that it is an investor which is a national of a Party ...that seeks to make, is making or has made an investment. It is common ground that SDMI is a national of a Party, but CANADA asserts that it did not have an investment in Canada.

Two of the definitions set out in Section C of Chapter 11 are of consequence in considering CANADA's contention. First:

investment means: an enterprise; an equity security of an enterprise; a debt security of an enterprise where the enterprise is an affiliate of the investor, or where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; a loan to an enterprise where the enterprise is an affiliate of the

³⁷ SDMI's Notice of Arbitration, Section C.

³⁸ *Ibid.* Section E.

investor, or where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but an investment does not mean, claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h); second: *investment of an investor of a Party* means an investor other than an investor of a Party, that seeks to make, is making or had made an investment; [Emphasis in original.]

During the proceedings there was considerable debate concerning whether Myers Canada fitted into any of the categories under the definition of "investment." Evidence was presented to demonstrate that SDMI lent money to Myers Canada and that SDMI had an expectation that it would share in the income or profit if there were any. In fact, some payments for services were made by Myers Canada to SDMI.³⁹

³⁹ See generally the evidence of Dana Myers, Transcript, February 15, 2000.

At the relevant time Myers Canada was undoubtedly an “enterprise,”⁴⁰ but CANADA submitted that it was not owned or controlled directly or indirectly by SDMI. This is because the shares of Myers Canada were owned not by SDMI, but equally by four members of the Myers family. They also owned the shares in SDMI, but in different proportions. As noted previously, Mr. Dana Myers owned 51% of that company. His was the authoritative voice in SDMI and the evidence of his brother, Mr. Scott Myers, was that Dana Myers was the authoritative voice in Myers Canada.⁴¹

Mr. Dana Myers explained the basis on which the Claimant carried on its international operations at the relevant time:

Q. Now, just to return for a moment, and I understand it was in your capacity as an official with SDMI that you were involved in the operations in Australia, Saudi Arabia and MEXICO. And I wanted to clarify from what perspective you were operating in this sense: Were you providing direction as the Chief Executive of SDMI or were you providing direction as an officer of those companies in those locations?

A. Okay. Here’s how we operate. S.D. Myers was the big portion of our business. We were trying to expand into other countries, and so we would set up these other companies because it’s better to have a local presence in these companies countries. I’m sorry. Specifically, I think it was my position as President of S.D. Myers, Inc. that I exercised control over all these other places because all these other places were basically just an offshoot or an outpost of S.D. Myers, Inc. to do business around the world.

Q. Now, but in each of those cases, they were corporations with their own directors and their own shareholders?

A. Correct.

Q. And their own corporate officers?

A. Correct.

Q. Were you a corporate officer of any of those concerns in Australia?

A. Yeah. Yes.

Q. And the same is true of Saudi Arabia and MEXICO?

A. Yes, yes.

⁴⁰ Article 1139 refers incorporates the definition in article 201 which says that *enterprise means any entity constituted or organized under applicable law...*

⁴¹ Transcript, February 14, 2000, qq. 34, 117.

Q. All right. Now you also told us, I believe it was in connection with MEXICO, but it may have been in connection with Saudi Arabia, as well, that you signed some papers

A. Okay.

Q. in respect of those operations. Were those papers that related to your arrangement with individuals within those companies or those countries, rather, for the delivery of PCB disposal services?

A. No. What it would have been was we had 51 per cent. My brothers and I had 51 per cent of the operation in MEXICO and the Mexican owner had 49 per cent. So we had a document that laid out what he was going to provide and what we were going to provide.

Q. And that's what you would characterize as a joint venture, a joint venture agreement?

A. Yes.

Q. Did you have a similar agreement in respect of Australia?

A. At the beginning, because we were dealing with a guy named Neil Richter and I forget the other guy's name. So we had something. Then we bought them out and then basically there wouldn't have been an agreement because it was just all within the family.

Q. So, in fact, in Australia, you did as well have

A. To begin with.

Q. a joint venture agreement?

A. For a year or two.

Q. All right. And that document set out the respective responsibilities and obligations of the participants?

A. Correct.

Q. And indicated the extent to which they would share in the success of the venture?

A. Correct.

Q. Now, in respect of Myers CANADA, was there such a document ever signed by you or anybody else for your company?

A. Because it was all in the family, no.⁴²

Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a

⁴² Transcript, February 15, 2000, qq. 139-152.

claimant in order to organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above.

The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons so that it remained wholly within the family and that he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests.

On the evidence and on the basis of its interpretation of the NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of the NAFTA and that Myers Canada was an "investment."

The Tribunal recognizes that there are a number of other bases on which SDMI could contend that it has standing to maintain its claim including that (a) SDMI and Myers Canada were in a joint venture, (b) Myers Canada was a branch of SDMI, (c) it had made a loan to Myers Canada, and (d) its market share in Canada constituted an investment. It is not necessary to address these matters in this context and the Tribunal does not do so, although they may be relevant to other issues in the case. Insofar as they are, they will be dealt with at the appropriate time.

VIII. DID THE MEASURE RELATE TO AN INVESTMENT?

ARTICLE 1101 OF THE NAFTA states:

Scope and Coverage

This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party; and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

In this case, the requirement that the import ban be "in relation" to SDMI and its investment in Canada is easily satisfied. It was the prospect that SDMI would carry through with its plans to expand its Canadian operations that was the specific inspiration for the export ban. It was raised to address specifically the operations of SDMI and its investment.

That is sufficient to dispose of the "relating to" requirement for the immediate purpose of determining liability in this case.

CANADA also took the position that the requirement was not met because the measure concerned trade in goods. This contention is dealt with separately in the context of the relationship between Chapter 11 and other chapters of the NAFTA.

IX. DID CANADA COMPLY WITH ITS NAFTA CHAPTER 11 OBLIGATIONS?

IN THIS CHAPTER THE TRIBUNAL reviews the merits of SDMI's claims under four separate provisions of Chapter 11 of the NAFTA.

A. Article 1102

SDMI claims that CANADA denied it "national treatment," contrary to Article 1102. Article 1102(1) (National Treatment) states:

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

Article 1102(2) is identical, except that it refers to "investments," rather than "investors":

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

Article 1102(3) addresses the obligations of "sub-national" authorities - local states or provinces - and states that in that context the relevant comparison is between the treatment accorded to an investment or an investor and the best treatment accorded to investments or investors within the jurisdiction of the sub-national authority:

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or a province, treatment no less favorable than the most favorable

treatment accorded, in like circumstances, by that state or province to investors, and to the investments of investors, or the Party of which it forms a part.⁴³

CANADA argues that the Interim Order merely established a uniform regulatory regime under which all were treated equally. No one was permitted to export PCBs, so there was no discrimination. SDMI contends that Article 1102 was breached by a ban on the export of PCBs that was not justified by bona fide health or environmental concerns, but which had the aim and effect of protecting and promoting the market share of producers who were Canadians and who would perform the work in Canada.

CANADA's submission is one dimensional and does not take into account the basis on which the different interests in the industry were organized to undertake their business.

B. "Like Circumstances"

Articles 1102(1) and 1102(2) refer to treatment that is accorded to a Party's own nationals "in like circumstances." The phrase "like circumstances" is open to a wide variety of interpretations in the abstract and in the context of a particular dispute.

WTO dispute resolution panels, and its appellate body, frequently have been required to apply the concept of "like products." The case law has emphasized that the interpretation of "like" must depend on all the circumstances of each case. The case law also suggests that close attention must be paid to the legal context in which the word "like" appears; the same word "like" may have different meanings in different provisions of the GATT. In *Japan - Alcoholic Beverages*, WT/DS38/AB/R, the Appellate Body stated at paragraphs 8.5 and 8.6:

[the interpretation and application of "like"] is a discretionary decision that must be made in considering the various characteristics of products in individual cases. No one approach to exercising judgment will be appropriate for all cases. The criteria in [an earlier case], *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that

⁴³ Article 1102(4) appears to be of little relevance to the current discussion. It confirms that a state cannot require that a minimum level of equity in an enterprise in its territory be held by its own nationals, and that an investor of another Party cannot be required to sell or otherwise dispose of its investment in the territory of the Party.

evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which the provisions may apply.

In considering the meaning of “like circumstances” under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears.

In the GATT context, a *prima facie* finding of discrimination in “like” cases often takes place within the overall GATT framework, which includes Article XX (General Exceptions). A finding of “likeness” does not dispose of the case. It may set the stage for an inquiry into whether the different treatment of situations found to be “like” is justified by legitimate public policy measures that are pursued in a reasonable manner.

The Tribunal considers that the legal context of Article 1102 includes the various provisions of the NAFTA, its companion agreement the NAAEC and principles that are affirmed by the NAAEC (including those of the Rio declaration). The principles that emerge from that context, to repeat, are as follows:

- states have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- states should avoid creating distortions to trade;
- environmental protection and economic development can and should be mutually supportive.

As SDMI noted in its Memorial, all three NAFTA partners belong to the OECD. OECD practice suggests that an evaluation of “like situations” in the investment context should take into account policy objectives in determining whether enterprises are in like circumstances. The OECD Declaration on International and Multinational Enterprises, issued on June 21, 1976, states that investors and investments should receive treatment that is ...no less favorable than that accorded in like situations to domestic enterprises. In 1993 the OECD reviewed the “like situation” test in the following terms:

As regards the expression ‘in like situations’, the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy

objectives of Member countries could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment.

The Supreme Court of Canada has explored the complexity of making comparisons as it has developed its line of decisions on discrimination against individuals. In the *Andrews* case, the Court stated that the question of whether or not discrimination exists cannot be determined by applying a purely mechanical test whether similarly situated individuals are treated in the same manner. Whether individuals are “similarly situated,” and have been treated in a substantively equal manner, depends on an examination of the context in which a measure is established and applied and the specific circumstances of each case.⁴⁴

The Tribunal considers that the interpretation of the phrase “like circumstances” in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of “like circumstances” invites an examination of whether a non-national investor complaining of less favourable treatment is in the same “sector” as the national investor. The Tribunal takes the view that the word “sector” has a wide connotation that includes the concepts of “economic sector” and “business sector.”

From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.

⁴⁴ [1989] 1 S.C.R. 143, at paragraphs 27 to 31. Decisions of U.S. courts are to a similar effect. Although domestic law is not controlling in Chapter 11 disputes, it is not inappropriate to consider how the domestic laws of the parties to the dispute address an issue.

C. National Treatment and Protectionist Motive or Intent

The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:

- whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals;
- whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.

Each of these factors must be explored in the context of all the facts to determine whether there actually has been a denial of national treatment.

Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word “treatment” suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.

CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them. The indirect motive was understandable, but the method contravened CANADA’s international commitments under the NAFTA. CANADA’s right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures. The fact that the matter was addressed subsequently and the border re-opened also shows that CANADA was not constrained in its ability to deal effectively with the situation.

The Tribunal concludes that the issuance of the Interim Order and the Final Order was a breach of Article 1102 of the NAFTA.

The consequences of the Tribunal’s determination in relation to Article 1102 of the NAFTA are considered later.

D. Article 1105

SDMI submits that CANADA treated it in a manner that was inconsistent with Article 1105(1) of the NAFTA. Entitled “Minimum Standard of Treatment,” it reads as follows:

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

The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a “minimum standard” provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious, and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The “minimum standard” is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.

The US-Mexican Claims Commission noted in the Hopkins case that:

It not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws...The citizens of a nation may enjoy many rights which are withheld from aliens, and conversely, under international law, aliens may enjoy rights and remedies which the nation does not accord to its own citizens.⁴⁵

When interpreting and applying the “minimum standard,” a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.

Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases “...fair and equitable treatment...” and “...full protection and security...” cannot be read in isolation. They must be read in conjunction with the introductory phrase “...treatment in accordance with international law.”

⁴⁵ *The USA on behalf of George W. Hopkins v. The United Mexican States* (Docket No. 39), 21 *American Journal of International Law* 160, at 166-167 (1926).

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied “fair and equitable treatment,” but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105.

The breadth of the “minimum standard,” including its ability to encompass more particular guarantees, was recognized by Dr. Mann in the following passage:

...it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment....so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.⁴⁶

Although modern commentators might consider Dr Mann’s statement to be an over-generalisation, and the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.

Mr. Chiasson considers that a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11. On the facts of this case,

⁴⁶ F.A. Mann, “*British Treaties for the Promotion and Protection of Investments*”, (1981) 52 Brit. Y.B. Int’l L. 241 at p. 243.

CANADA's actions come close to the line, but on the evidence no breach of Article 1105 is established.

By a majority, the Tribunal determines that the issuance of the Interim and Final Orders was a breach of Article 1105 of the NAFTA. The Tribunal's decision in this respect makes it unnecessary to review SDMI's other submissions in relation to Article 1105.

The consequences of the Tribunal's determination in relation to Article 1105 of the NAFTA are considered in the next chapter.

E. Article 1106

SDMI contends that CANADA's export ban breached Article 1106 (Performance Requirements) of NAFTA because, in effect, SDMI was required, as a condition of operating in Canada, to carry out a major part of its proposed business, the physical disposal of PCB waste in Canada. In doing so, SDMI effectively would have been required to consume goods and services in Canada.

Article 1106 states:

No party may imposed or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non Party in its territory:

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

(c) to purchase, use or accord a preference to goods produced or services provided in its territory or to purchase goods or services from persons in its territory;

Article 1106(5) states: "[p]aragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs."

The export ban imposed by CANADA was not cast in the form of express conditions attached to a regulatory approval but, in applying Article 1106 the Tribunal must look at substance not only form.

The 1947 GATT agreement contained no specific provisions on performance requirements. One dispute was brought before a GATT panel. The USA challenged CANADA's FIRA. Under that statute, non-Canadian investors in some circumstances had to obtain regulatory approval before operating or expanding in CANADA. The regulator could attach conditions to its approval. For example, a factory operator might be required to purchase 50% of its supplies from local suppliers, rather than from abroad. The GATT panel accepted some aspects of the U.S.

complaint and rejected others, but the GATT panel looked at the substance of the measure notwithstanding the fact that the GATT did not contain any express provision equivalent to Article 1106 of the NAFTA.

Although the Tribunal must review the substance of the measure, it cannot take into consideration any limitations or restrictions that do not fall squarely within the “requirements” listed in Articles 1106(1) and (3).

The only part of the definition that might apply to the current situation is “...conduct or operation of an investment... .” but in the opinion of the majority of the Tribunal, subparagraph (b) clearly does not apply and neither does subparagraph (c).

Looking at the substance and effect of the Interim Order, as well as the literal wording of Article 1106, the majority of the Tribunal considers that no “requirements” as defined were imposed on SDMI that fell within Article 1106. Professor Schwartz considers that the effect of the Interim Order was to require SDMI to undertake all of its operations in Canada and that this amounted to a breach of subparagraph (b).

By a majority, the Tribunal concludes that this is not a “performance requirements” case.

F. Article 1110

SDMI claims that the Interim Order and the Final Order were “tantamount” to an expropriation and violated Article 1110 (Expropriation) of the NAFTA.

The term “expropriation” in Article 1110 must be interpreted in light of the whole body of state practice, treaties, and judicial interpretations of that term in international law cases. In general, the term “expropriation” carries with it the connotation of a “taking” by a governmental-type authority of a person’s “property” with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the “taking.”

The Tribunal accepts that, in legal theory, rights other than property rights may be “expropriated” and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures. The Interim Order and the Final Order were regulatory acts that imposed restrictions on SDMI. The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.

Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments

will be subject to claims as they go about their business of managing public affairs.

An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.

In this case the closure of the border was temporary.⁴⁷ SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive advantage. This may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 1105,⁴⁸ but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110.

SDMI relied on the use of the word "tantamount" in Article 1110(1) to extend the meaning of the expression "tantamount to expropriation" beyond the customary scope of the term "expropriation" under international law. The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent." Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.

The Tribunal agrees with the conclusion in the Interim Award of the *Pope & Talbot* Arbitral Tribunal⁴⁹ that something that is "equivalent" to something else cannot logically encompass more. In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping expropriation," rather than to expand the internationally accepted scope of the term expropriation.

In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed.

The Tribunal concludes that this is not an "expropriation" case.

⁴⁷ The fact that the border was closed again on the U.S. side in July 1997 cannot be laid at CANADA's door.

⁴⁸ This is a matter for argument at a later stage of the proceedings.

⁴⁹ Award of June 26, 2000, para. 104.

X. IS SDMI'S CLAIM BARRED BY OTHER CHAPTERS OF THE NAFTA?

CANADA AND MEXICO CONTEND that SDMI's claim is met or circumscribed by either or both of Chapters 3 and 12 of the NAFTA. The former deals with trade in goods and the latter with cross-border trade in services.

A. The Claim

As noted previously, the claim advanced by SDMI is that it has suffered economic harm to its investment through interference with its operations, lost contracts and opportunities in Canada. SDMI submits its claims pursuant to Article 1116 of the NAFTA. That is, SDMI alleges that it has incurred loss or damage by reason of conduct that caused economic harm to its investment in Canada.

B. Chapter 3

In Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, the Panel summarized the line of WTO cases as follows, at paragraph 738 of its report:⁵⁰

It is now well established that the WTO Agreement is a “Single Undertaking” and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a formal “conflict” between them.

The chapters of the NAFTA are part of a “single undertaking.” There appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as “cumulative” and complementary.

The WTO Panel in the Korean Dairy Products case adopted the definition of “conflict” in several earlier cases, including the report of the Appellate Body of the WTO in Guatemala Cement, at paragraph 65.⁵¹

⁵⁰ Wt/396/R.

⁵¹ The Dispute Settling Panel, at footnote 422 to the quoted passage, elaborates: The principle of interpretation against conflict has been confirmed by the Appellate Body in Canada - Certain Measures Concerning Periodicals adopted on July 30, 1997, WT/DS31/AB/R, (“Canada Periodicals”), page 19; in EC Bananas, paras. 219-222; in Guatemala Cement, para. 65; and by the panel in Indonesia - Certain Measures Affecting the Automobile Industry, adopted

The latter case suggests that provisions of agreements in the WTO system should be read as complementary unless there were a conflict in the sense that adherence to one provision would cause a violation of the other.

The view that different chapters of the NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict, was accepted by the decision of the Arbitral Tribunal in *Pope and Talbot*. The reasoning in the case is sound and compelling. There is no reason why a measure which concerns goods (Chapter 3) cannot be a measure relating to an investor or an investment (Chapter 11).

Chapter 3 deals with items of trade – namely, “goods.” A measure that relates to goods can relate to those who are involved in the trade of those goods and who have made investments concerning them. The thrust of a dispute under Chapter 11 is that the impugned measure relates to an investor or an investment. If it were to do so, it would be covered by Chapter 11 unless excluded. If it were not to do so, it would not be covered.

On the facts of this case there is a clear causal link between the Interim Order and the Final Order and the activities of SDMI. It is common ground that the Orders were passed in response to the Enforcement Discretion granted to SDMI by the US EPA. It was designed to prevent the export of PCBs for processing by SDMI. Insofar as SDMI can otherwise establish the requirements for it to be classified as an investor and can show that the measure related to it or its investment, Chapter 11 is engaged.

CANADA argued that Chapter 3 is inconsistent with Chapter 11 on the facts of this case. It contended that even if the export ban appears to contravene Chapter 11, it would also be an export ban with respect to goods and controlled by Chapter 3. CANADA appears to contend that insofar as the measure concerns the export of goods it was driven by proper environmental concerns. That proposition has been rejected by the Tribunal, but the contention also is not sustainable on a proper interpretation of the NAFTA.

The NAFTA Parties properly wanted to ensure that Chapter 11 could not be used to impugn government measures that are protected by other specific aspects of the NAFTA, but the Orders are not protected by either Article XX(b) (Human, Animal or Plant Life) or Article XX(e) (Conservation) of GATT. The measures taken by CANADA would not satisfy the requirements of the chapeau of Article XX (General Exceptions).

July 23, 1998, WT/DS54, 55, 59 and 64/R (not appealed) (“Indonesia Autos”), para. 14.28. For a definition of conflict, see for instance the Appellate Body statement in *Guatemala Cement*, para. 65 or the Panel Report on *Indonesia Autos*, para. 14.28.

CANADA could have satisfied any health or environmental concerns it had in a manner that did not impair open trade. As CANADA implicitly agreed when it subsequently lifted the ban, it would have better served the cause of a safe environment if it had kept the Canadian border open, but put in place safeguards.

C. Chapter 12

Consideration of the relationship between Chapters 11 and 12 is more complex. Insofar as the focus is merely on the fact that the two chapters may relate to the same activity, the Tribunal's observations concerning Chapter 3 are apt, but it may be that the question is not whether there is a conflict between Chapters 11 and 12, but whether the cross-border supply of services involves an "investment."

This latter issue has not been addressed fully by the Disputing Parties and may be of more significance to a consideration of damages. The Tribunal finds it not relevant to liability in this case.

XI. THE PRINCIPLES ON WHICH COMPENSATION SHOULD BE AWARDED

THE TRIBUNAL HAS DETERMINED that CANADA's ban on PCB exports to the USA was a breach of CANADA's obligations under Articles 1002 and 1005 Chapter 11 of the NAFTA. Insofar as this conduct caused harm to SDMI by injuring its investment, Myers Canada, CANADA must pay compensation to SDMI.

Paragraph 1 of Procedural Order No. 1 stated as follows:

Bifurcation

As a first stage of the proceedings the Tribunal will determine (in a partial award) liability issues and issues as to the principles on which damages (if any) should be awarded, leaving the calculation of the quantification of such damages, if any, to a second stage.

This stage of the arbitration is concerned solely with the principles on which damages should be awarded. Quantification is to be the subject of a second stage of the proceedings.

Article 1131 provides that Chapter 11 tribunals shall decide "...in accordance with [the NAFTA] and applicable international law." Article 1135 provides that an investor may submit to arbitration a claim that "...the enterprise has incurred loss or damage by reason of, or arising out of, that breach." Article 1135 also provides that an arbitral tribunal has

the authority to award only “...monetary damages and any applicable interest or restitution of property.”

So far as the NAFTA is concerned, the only guidance on the principles to be adopted in awarding compensation is contained in Article 1110, which concerns expropriation. The relevant provisions are as follows:

1110(1) No Party may directly or indirectly nationalize or expropriate an investment of an investor or another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) For a public purpose;
- (b) On a non-discriminatory basis;
- (c) In accordance with due process of law and Article 1105(1); and
- (d) On payment of compensation in accordance with paragraphs 2 through 6.

1110(2) Compensation shall be equivalent to the firm market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”) and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

SDMI suggested in its Memorial that Chapter 11 tribunals are likely to find that the standard set out in Article 1110(2) applies also to breaches of other Articles of Chapter 11. The Tribunal doubts that Article 1110(2) supplies the appropriate standard when a Party has breached one of the other provisions of Chapter 11.

The drafters of the NAFTA did not state that the “fair market value of the asset” formula applies to all breaches of Chapter 11. They expressly attached it to expropriations.⁵²

⁵² According to some commentators, that express provision was intended to resolve a long standing difference of opinion between the USA and MEXICO over compensation in expropriation cases. The latter contended that in the case of a lawful expropriation, a lower standard of compensation might be appropriate than all of the economic loss sustained.

Expropriations that take place in accordance with the framework of Article 1110 – that is, expropriations that are conducted for a public purpose, on a non-discriminatory basis, and in accordance with due process of law - are “lawful” under Chapter 11 provided that compensation is paid in accordance with the “fair market value of the asset” formula. Under other provisions of Chapter 11, the liability of the host Party arises out of the fact that the government has done something that is contrary to the NAFTA and is “unlawful” as between the disputing parties. The standard of compensation that an arbitral tribunal should apply may in some cases be influenced by the distinction between compensating for a lawful, as opposed to an unlawful, act. Fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor.⁵³

By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. In some non-expropriation cases a tribunal might think it appropriate to adopt the “fair market value” standard; in other cases it might not. In this case the Tribunal considers that the application of the fair market value standard is not a logical, appropriate, or practicable measure of the compensation to be awarded.

There being no relevant provisions of the NAFTA other than those contained in Article 1110 the Tribunal turns for guidance to international law.

The principle of international law stated in the *Chorzow Factory (Indemnity)* case is still recognised as authoritative on the matter of general principle:

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

⁵³ The Tribunal does not suggest that punitive damages may be awarded, as these are expressly prohibited by NAFTA.

determine the amount of compensation for an act contrary to international law.

The Draft Articles on State Responsibility under consideration by the International Law Commission at the date of this award similarly propose that in international law, a wrong committed by one state against another gives rise to a right to compensation for the economic harm sustained.

It was not suggested to the Tribunal by either of the parties that the Chorzow principle is somehow inapplicable because the claim in this case is brought directly by SDMI. Under international law, a wrong done to an investor is usually viewed as a wrong done to its home state and it is the state that brings the claim against the host state, not the investor directly.

The Tribunal agrees with CANADA that it would be premature at this stage to attempt to set out detailed, exclusive, principles for calculating the compensation payable. The disputing parties should have the opportunity to make further factual and legal submissions on the question of the precise methodology to be used.

The Tribunal already has suggested that whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.

CANADA has submitted, and the Tribunal accepts, that the following principles also apply:

- the burden is on SDMI to prove the quantum of the losses in respect of which it puts forward its claims;
- compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes;
- damages for breach of any one NAFTA provision can take into account any damages already awarded under a breach of another NAFTA provision; there must be no “double recovery.”

In summary, the Tribunal will assess the compensation payable to SDMI on the basis of the economic harm that SDMI legally can establish.

When both Article 1102 and 1105 have been breached, as the Tribunal has found in this case, the usual principle to be applied is that rights and remedies under trade agreements are cumulative unless there is actual conflict between different provisions. The fact that a host Party has breached both Articles 1102 and 1105 cannot be taken to mean that the investor is entitled to less compensation than if only Article 1102

were breached. A host Party does not reduce the extent of its liability by breaching more than one provision of the NAFTA.

On the facts of this case, the Tribunal is satisfied that the damages to which SDMI is entitled arising out of CANADA's breach of Article 1102 are neither increased nor diminished by its breach of Article 1105.

XII. CONCLUSIONS AND DISPOSITIVE PROVISIONS OF THE AWARD

A. The Tribunal's conclusions

The Interim Order and the Final Order did "relate to" an "investor" of a Party and its "investment."

SDMI was an "investor" and it had an "investment" in Canada at the relevant time.

The Interim Order and the Final Order were in breach of Articles 1102 and 1105 of the NAFTA.

The Interim Order and the Final Order were not in breach of Articles 1106 or 1110 of the NAFTA.

SDMI's claim is not barred by any inconsistencies between Chapter 11 and any other provisions of the NAFTA.

B. Dispositive Provisions of the Award

CANADA shall pay to SDMI compensation for such economic harm as is established legally by SDMI to be directly as a result of CANADA's breach of its obligations under Articles 1102 or 1105 of the NAFTA.

Such compensation shall be quantified in accordance with the principles set out in this Partial Award, at the second stage of the arbitration as contemplated by paragraph 1 of Procedural Order No. 1.

All questions concerning the parties' claims in respect of costs under Articles 38 and 40 of the UNCITRAL Arbitration Rules are postponed to the Tribunal's Final Award.

MADE at the City of Toronto, Ontario, Canada.

SIGNED:

signed – BPS

signed – ECC

Bryan P. Schwartz

Edward C. Chiasson, Q.C.

signed - MH

J. Martin Hunter

13 November 2000