

FEDERAL COURT – TRIAL DIVISION

**IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL
ARBITRATION ACT*, R.S.C. 1985, C.17 (2ND SUPP.)**

**IN THE MATTER OF ARTICLES 1.6 AND 34 OF THE *COMMERCIAL
ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE
*COMMERCIAL ARBITRATION ACT***

**AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE *NORTH
AMERICAN FREE TRADE AGREEMENT* (“NAFTA”) BETWEEN S.D. MYERS, INC. AND
THE GOVERNMENT OF CANADA**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

S.D. MYERS, INC.

Respondent

**AMENDED MEMORANDUM OF FACT AND LAW
OF THE APPLICANT,
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1.	The Respondent was not an “Investor of a Party” and S.D. Myers (Canada) Inc. was not an “Investment” of the Respondent for the purposes of NAFTA Chapter Eleven, and the Respondent should not be permitted to advance a claim for damages sustained by persons not parties to the arbitration, including shareholders of the Respondent and of the alleged Investment.	<u>44</u>
2.	For the purposes of NAFTA Article 1102, the Respondent and its PCB waste disposal operations in the United States are not in “like circumstances” with Canadian owned and controlled companies and their PCB waste disposal operations	<u>50</u>
3.	NAFTA Article 1105 only applies to “Investments” of an Investor of another party, and a breach of NAFTA Article 1102 does not establish a breach of NAFTA Article 1105.	<u>57</u>
4.	Canada was precluded from allowing exports of PCBs or PCB wastes to the U.S. while imports of PCBs or PCB wastes were contrary to U.S. law, would have been contrary to a well-established Canadian policy requiring the disposal of PCBs and PCB wastes in Canada consistent with Canada’s international obligations under the Basel Convention	<u>59</u>
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PART I – OVERVIEW

1. On November 16, 1995 the Government of Canada banned exports to the United States of toxic wastes contaminated with polychlorinated biphenyls (PCBs). The ban remained in force for fourteen months, when the government replaced it with regulations controlling PCB exports in an environmentally sound manner.
2. Shortly after Canada reopened its border, the Respondent submitted a claim to arbitration under Chapter Eleven of the *North American Free Trade Agreement* (“NAFTA”). The Respondent claimed that a small Canadian company owned by its shareholders constituted its “investment” in Canada for the purposes of NAFTA Chapter Eleven. It also claimed that Canada imposed the ban contrary to obligations set out in NAFTA Article 1102 (National Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements) and 1110 (Expropriation) and sought damages:
3. The Respondent claims the actions by Canada caused damage to its investment and is seeking “not less than” \$20 million in damages and costs.
4. After hearing the parties, an ad hoc arbitration tribunal established under NAFTA Chapter Eleven issued a Partial Award on liability. The Tribunal found that the Canadian company was an “investment” of the Respondent and that the Government of Canada should compensate the Respondent for breaches of NAFTA Articles 1102 and 1105. The Tribunal found in Canada’s favour in respect of NAFTA Articles 1106 and 1110. The Tribunal deferred assessing damages to a second phase of the arbitration.
5. The Attorney General of Canada now seeks an order under Article 34 of the *Commercial Arbitration Code* setting aside the award. The main issues are whether the tribunal exceeded its jurisdiction or issued an award contrary to the public policy of Canada by finding that the Canadian company was an “investment” of the Respondent, and that Canada breached its obligations under NAFTA Articles 1102 and 1105.

6. The Attorney General of Canada submits that the Partial Award should be set aside in whole or in part on the following grounds.

- (a) First, in concluding that the Respondent was an “investor” and the Canadian company was an “investment”, the Tribunal wrongly gave the Respondent standing to bring a claim under NAFTA Chapter Eleven;
- (b) Second, the Tribunal erroneously interpreted the obligation of national treatment in NAFTA Article 1102 as permitting a comparison between the treatment accorded the activities of the Respondent and the Canadian company as a unit, and that of other Canadian companies and then wrongly concluded that they were “in like circumstances”;
- (c) Third, the Tribunal erred in finding that a breach of an obligation related to investment protection at international law weights in favour of finding a breach of NAFTA Article 1105 and that a breach of NAFTA Article 1102 essentially establishes a breach of NAFTA Article 1105; and
- (d) Fourth, the Tribunal erred by disregarding or giving no weight whatsoever to Canada’s other international obligations concerning the transboundary movement of hazardous wastes.

7. If this Court finds that the Canadian company was not an investment of the Respondent, then the Partial Award, insofar as it finds Canada in breach of its obligations under NAFTA Chapter Eleven, must be set aside.

8. The Tribunal’s finding of liability must also be set aside if it erred in finding that Canada breached the national treatment obligation under NAFTA Article 1102 since the Tribunal found in Canada’s favour in respect of NAFTA Articles 1106 and 1110, and found that Canada breached NAFTA Article 1105 only as a result of having breached NAFTA Article 1102.

PART II – FACTS

S.D. Myers Inc.

9. The Respondent, S.D. Myers Inc. (“SDMI”) is a privately held U.S. corporation headquartered in Tallmadge, Ohio. A majority of the share capital of SDMI – 51% - is held by Dana Myers, the eldest of four brothers. The other three brothers hold the balance of the share capital. The chief executive officer of the company is the eldest brother, Dana Myers.

Award, paras. 1 and 89, Vol. I, Tab 2, Record, pp. 9 and 23

10. At all relevant times, SDMI processed transformers, capacitors and other equipment containing or contaminated with PCBs for disposal. This involved: assessing the level of PCB contamination in the equipment; transporting and dismantling the equipment; salvaging copper, steel, aluminum and ceramics from the equipment; and, packaging the PCBs in drums or tanks for destruction elsewhere in the United States. After SDMI or its contractors destroyed the PCBs, the company issued certificates confirming their destruction.

Award, paras. 90-91, Vol. I, Tab 2, Record, p. 23

Myers (Canada)

11. S.D. Myers (Canada) Inc. is a privately held Canadian company first incorporated in 1993 as Myers Company for Environmental Development Inc. By Articles of Amendment dated June 19, 1996, Myers Company for Environmental Development Inc. changed its name formally to S.D. Myers (Canada) Inc. For convenience, the company is referred to hereafter as “Myers (Canada)”.

Affidavit of Rev. Michael Valentine, sworn July 19, 1999, paras. 20 and 35, Vol. I, Tab 4, Record, pp. 261 and 263-64

12. Each of SDMI’s four shareholders “subscribed to and received an equal share” in Myers (Canada).

Affidavit of Michael Valentine sworn July 19, 1999, para. 20, Vol. I, Tab 4, Record, p. 261.

Award, para. 227, Vol. I, Tab 2, Record, p. 62.

13. Until 1998, Myers (Canada) located its head office in several residential properties leased by private individuals. None of these were industrial sites, office buildings or waste transfer or disposal stations.

Affidavit of George Michael Cornwall sworn October 4, 1999, para. 9, Vol. IX, Tab 147, Record, p. 3704

14. Myers (Canada) provided a few PCB waste remediation seminars and solicited potential Canadian customers for SDMI disposal services to be performed in the U.S. It was not in the business of landfilling or incinerating equipment or soils containing or contaminated with PCBs. Furthermore, the company held no permits authorizing it to undertake these activities. Myers (Canada) neither owned PCB wastes in Canada nor did it export them to the United States.

Award, para. 117, Vol. I, Tab 2, Record, p. 29

Affidavit of George Michael Cornwall sworn October 4, 1999, para. 9, Vol. IX, Tab 147, Record, p. 3704

The Nature of PCBs

15. By the early 1970's, scientists identified PCBs as highly toxic synthetic organic chemicals. These highly mobile chemicals persist when released into the environment because they resist metabolic processes that would break them down to simpler chemical compounds. Sustained, high level exposure to PCBs causes many adverse health effects in humans.

Award, para. 98, Vol. I, Tab 2, Record, p. 25

Affidavit of Victor Shantora sworn October 4, 1999, paras. 6 – 13, Vol. IX, Tab 146, Record, p. 3579-81

Affidavit of Roy Hickman sworn October 4, 1999, para. 13, Vol. VIII, Tab 144, Record, p. 3491

PCB Disposal

16. The term "PCB waste" applies to equipment, liquids, solids or substances containing, or contaminated by, PCBs and for which there is no longer any use. For convenience and brevity, PCBs and PCB wastes will be referred to collectively as PCBs.

17. PCBs may be disposed of by various means. In Canada, these include incineration or chemical treatment. Land-filling of PCBs has been discouraged for several years.

Award, paras. 94-96, Vol. I, Tab 2, Record, pp. 24-25

Affidavit of Victor Shantora sworn October 4, 1999, paras. 15-19, Vol. IX, Tab 146, Record, pp. 3581-82

The Regulation of PCB Waste Disposal

18. Beginning in the 1970's, increasingly strict regimes of regulation both in Canada and internationally governed the disposal of PCB wastes. By 1995, the international agreements, statutes and policies potentially relevant to the transboundary movement of PCBs between Canada and the U.S. included: the U.S. *Toxic Substances Control Act* ("TSCA"); the *Agreement concerning the Transboundary Movement of Hazardous Waste* ("Canada-U.S. Agreement"); the *Basel Convention*; various decisions of the OECD issued since 1973; the *Canadian Environmental Protection Act* ("CEPA"); regulations passed under *CEPA* governing the export of PCBs and PCB wastes; and policies fixed by federal and provincial Ministers of the Environment.

Award, paras. 98-103 and 105-108, Vol. I, Tab 2, Record, pp. 25-28

The U.S. Ban on PCB Waste Imports

19. The U.S. Congress passed the *Toxic Substances Control Act* in 1976. That act presumes that PCBs pose an unreasonable risk to human health and the environment, directs the United States Environmental Protection Agency ("EPA") to regulate them accordingly, and prohibits the manufacture, processing, use, or distribution in commerce of any PCB or PCB waste unless the activity meets criteria established by EPA regulations. For the purposes of the TSCA, "manufacture" includes importation.

Toxic Substances Control Act, 15 USC§2605 (1994)

Award, para. 101, Vol. I, Tab 2, Record, p. 26

20. For a brief period in 1979 and 1980, the EPA allowed imports of PCB wastes into the U.S. from Canada. This “Open Border Policy” lapsed, however, on May 1, 1980. In a notice filed in the *Federal Register*/Vol. 45, No. 86/Thursday, May 1, 1980/Notices at 29115, the EPA explained that the U.S. needed to close its border to encourage the development of PCB destruction facilities in other countries. Except for a brief period between November 15, 1995 and July 20, 1997, the U.S. border has remained closed to imports of PCBs from Canada.

Award paras.101 and 102, Vol. I, Tab 2, Record, p. 26

The Transboundary Agreement

21. In 1986, Canada and the US entered into an *Agreement concerning the Transboundary Movement of Hazardous Waste* (the "*Canada-U.S. Agreement*"). This agreement allowed exports and imports of hazardous wastes as defined in the agreement on terms intended to ensure proper control from the point of generation to final disposal. The US negotiated this agreement under the authority of the *Resource Conservation and Recovery Act*. That act did not apply to PCBs as PCBs were expressly subject to the *Toxic Substances Control Act*.

Affidavit of John Myslicki sworn October 4, 1999, paras. 10 and 17, Vol. VII, Tab 145, Record, pp. 3498 and 3500

Award, para. 103, Vol. I, Tab 2, Record, p. 26

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

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

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

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

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

The Basel Convention

24. In 1989, Canada and other countries signed the Basel Convention. This convention established a global regime to control transboundary movement of hazardous wastes and their disposal. Some important obligations of the Convention are:

- to ensure that the generation of hazardous waste is reduced to a minimum and as much as possible to dispose of hazardous waste in the country of its generation;
- to establish enhanced controls on exports and imports of hazardous waste; and
- to prohibit shipments of hazardous waste to countries that will not manage hazardous waste in an environmentally sound manner.

Award, paras. 105-108, Vol. I, Tab 2, Record, pp. 27-28

25. State Parties to the Basel Convention accept the obligation to ensure that hazardous wastes are managed in an environmentally sound manner. To that end, the Basel Convention 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).

Award, para. 106, Vol. I, Tab 2, Record, p. 27

26. The Basel Convention also requires State Parties to maintain adequate disposal facilities within their territory for the environmentally sound management of hazardous wastes found there (Article 4(2)(b)). It also requires reductions in the transboundary movement of hazardous wastes to the minimum consistent with the environmentally sound and efficient management of such wastes and that all such movements be conducted in a manner that will protect human health and the environment (Article 4(2)(d)).

Award, para. 107, Vol. I, Tab 2, Record, p. 27

27. The United States signed but has not yet ratified the Basel Convention.

Award, para. 105, Vol. I, Tab 2, Record, p. 27

The Regulation of Transboundary Movements of PCBs – PCB Waste Export Regulations

27. On July 27, 1990, Canada enacted the *PCB Waste Export Regulations*, SOR/90-453 under the *Canadian Environmental Protection Act* (“CEPA”).

Affidavit of John Myslicki sworn October 4, 1999, para. 24, Vol. VIII, Tab 145, Record, p. 3502

28. The *PCB Waste Export Regulations* prohibited the export of PCBs from Canada with the limited exception of PCBs exported to the United States with the prior consent of the EPA. Since the United States border had been closed to imports of PCBs since 1980, the only exports that took place with the EPA’s consent were of PCBs from decommissioned United States military installations in Canada and of PCBs improperly

or inadvertently imported into Canada. These regulations remained in force until modified in 1995.

Affidavit of John Myslicki sworn October 4, 1999, para. 25, Vol. VIII, Tab 145, Record, p. 3502

The Regulation of Transboundary Movements of PCBs – Export and Import of Hazardous Wastes Regulations

29. On November 26, 1992, Canada introduced the *Export and Import of Hazardous Wastes Regulations* SOR/92-637. These regulations imposed strict reporting and disclosure requirements on exporters, together with a requirement to maintain liability insurance of \$5,000,000 when hazardous wastes are destined for disposal. For the purposes of the regulations, exporters included: hazardous waste generators; individuals acting for government; and, persons who collect or receive hazardous waste and then process or bulk it for disposal.

Affidavit of John Myslicki sworn October 4, 1999, para. 26, Vol. VIII, Tab 145, Record, p. 3502

SDMI's Effort to Remove the U.S. Import Ban

30. The TSCA provides that any person may petition the Administrator of the EPA for an exemption from the ban on importing PCBs. Exemptions are subject to such terms and conditions as the Administrator may prescribe. Once granted, exemptions remain in effect for not more than one year.

Toxic Substances Control Act, supra.

31. Between May 1991 and October 1993, SDMI filed four petitions requesting exemptions that would allow it to import PCB wastes from Canada into the United States for disposal. While the petitions remained under consideration for several years, the EPA issued no final decision on them.

Award, para. 113, Vol. I, Tab 2, Record, p. 28

Letter dated October 13, 1995 from SDMI to S. Herman, USEPA, Vol. VII, Tab 109, Record, pp. 3081-82

60 *Fed. Reg.* 7742 (Feb. 9, 1995)

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

32. Beginning in April 1995, SDMI asked that the EPA consider granting it an “enforcement discretion”. The proposed enforcement discretion would allow the company to import PCBs until the EPA finalized a rule allowing PCB imports from Canada. The term “enforcement discretion” is not defined in U.S. law, but the Tribunal understood the term to mean that the EPA would not enforce U.S. regulations banning importation of PCBs against SDMI. The government of Canada received no information from SDMI or the EPA about these requests.

Award, para. 119, Vol. I, Tab 2, Record, p. 30

33. On October 13, 1995 SDMI wrote the EPA requesting an “enforcement discretion” permitting it to import PCBs from Canada into the US. Again, neither SDMI nor the EPA provided copies of the letter to Canada or informed Canada of SDMI’s request.

Letter dated October 13, 1995 from SDMI to S. Herman, USEPA, Vol. VII, Tab 109, Record, pp. 3081-82

The Enforcement Discretion

34. On October 26, 1995, the EPA responded to SDMI’s letter of October 13, 1995 by issuing it an “enforcement discretion” effective November 15, 1995. The “enforcement discretion” allowed SDMI to import PCBs from Canada into the U.S. for disposal under certain conditions.

Letter dated October 26, 1995 from S. Herman, USEPA, to SDMI, Vol. VII, Tab 108, Record, pp. 3076-80

35. In its letter granting enforcement discretion to the Respondent, the EPA stated that the enforcement discretion would remain in effect until new U.S. rules regarding imports of PCBs were put in place or until December 31, 1997, whichever came first.

The letter also observed that the EPA would “give other similarly qualified companies the opportunity to apply . . . thereby ensuring equity in the marketplace”.

Letter dated October 26, 1995 from S. Herman, USEPA, to SDMI, Vol. VII, Tab 108, Record, p. 3077

Affidavit of John Myslicki sworn October 4, 1999, para. 27, Vol. VIII, Tab 145, Record, pp. 3502-03

36. Within a week after the EPA issued “enforcement discretion” to SDMI, Chemical Waste Management, Inc., one of SDMI’s American competitors, applied to the EPA for similar relief.

Affidavit of Victor Shantora sworn October 4, 1999, para. 67, Vol. IX, Tab 146, Record, p. 3593

37. Other competitors applied subsequently for enforcement discretion. By January 19, 1996 ten of SDMI’s competitors – including Chemical Waste Management, Inc. held enforcement discretions issued by the EPA allowing them to import PCBs from Canada for the purpose of storage and disposal.

Government of Canada’s Counter-Memorial, para. 49, Vol. XI, Tab 189

38. On October 27, 1995 Canadian officials learned from a competitor of SDMI that enforcement discretion had been extended to SDMI.

Affidavit of Victor Shantora sworn October 4, 1999, para. 60, Vol. IX, Tab 146, Record, p. 3591

39. On November 8, 1995 the Department of the Environment received a copy of the letter from Chemical Waste Management, Inc. to the EPA seeking enforcement discretion similar to that provided SDMI.

Affidavit of Victor Shantora sworn October 4, 1999, para. 67, Vol. IX, Tab 146, Record, p. 3593

40. On November 13, 1995 the Department of the Environment received six notices from Custom Environmental, an Alberta-based hazardous waste brokerage company, seeking permits to export PCB wastes to the U.S.

Affidavit of John Myslicki sworn October 4, 1999, para. 32, Vol. VIII, Tab 145, Record, p. 3504

41. On November 15, 1995 a senior official at the Department of the Environment telephoned the Director General of the Environmental Health Directorate, at the Department of National Health and Welfare. The purpose of the call was to alert him that the Minister of the Environment was considering issuing an interim order and that she would seek the concurrence of the Minister of National Health and Welfare. During that conversation, the Director General of the Environmental Health Directorate expressed unqualified support for an Interim Order.

Affidavit of Victor Shantora sworn October 4, 1999, para. 85, Vol. VIII, Tab 146, Record, p. 3599

The Interim Order

42. On November 16, 1995, the Minister of the Environment signed an Interim Order under subsection 35 (1) of CEPA prohibiting the export from Canada of any PCBs with the exception of PCBs from U.S. agencies operating in Canada where the EPA has given prior approval. The Minister cured a procedural defect in the order by reissuing it on November 20, 1995.

Award, para. 123, Vol. I, Tab 2, Record, p. 31

43. As required by the CEPA, the Governor in Council approved the Interim Order on November 28, 1995 and subsequently continued it.

Award, paras. 124-125, Vol. I, Tab 2, Record, pp. 32-34

The U.S. Replaces the Enforcement Discretion with an Import for Disposal Rule

44. On March 18, 1996, the EPA promulgated a PCB Import for Disposal Rule (“Import Rule”). The Import Rule reversed the ban on importing PCB's into the US and replaced the “enforcement discretion” issued to SDMI in October 1996.

Development of the PCB Waste Export Regulations, 1996

45. On October 5, 1996, the government published proposed amendments to the *PCB Waste Export Regulations* in Part I of the *Canada Gazette* and invited public comment.

Affidavit of John Myslicki sworn October 4, 1999, para. 40, Vol. VIII, Tab 145, Record, p. 3505

46. In early December 1996 the time fixed for public comment expired. Thereafter, Department of Environment officials reviewed and responded to the public comments. The government published the *PCB Waste Export Regulations, 1996*, SOR/97-109 in early February 1997. These regulations repealed the 1990 *PCB Waste Export Regulations*, and provided that PCBs could only be exported to the U.S. for destruction in EPA approved facilities if certain conditions remained in place and the exporter undertook to ensure the destruction of the PCBs.

Affidavit of John Myslicki sworn October 4, 1999, paras. 41 and 44, Vol. VIII, Tab 145, Record, p. 3506

47. The *PCB Waste Export Regulations, 1996* came into force on February 4, 1997. Within a short time thereafter, the Department of the Environment began receiving requests for permits to export PCBs to the U.S.

Affidavit of John Myslicki sworn October 4, 1999, para. 45, Vol. VIII, Tab 145, Record, p. 3507

The U.S. 9th Circuit Court of Appeals Overturns the Import Rule

48. In the meantime, opponents of PCB imports into the US sought judicial review of the Import for Disposal Rule. On July 7, 1997, the 9th Circuit Court of Appeals overturned the Import Rule and reinstated the PCB import ban established in the TSCA. Subsequently, the EPA closed the border to PCB imports into the U.S. as of 12:01 am. local time Sunday, July 20, 1997.

Affidavit of John Myslicki sworn October 4, 1999, para. 47, Vol. VIII, Tab 145, Record, p. 3507

Award, para. 128, Vol. I, Tab 2, Record, p. 35

The Arbitration Proceedings

49. On July 28, 1998, the Respondent delivered a Notice of Intent to Submit a Claim to Arbitration under Section B of NAFTA Chapter Eleven. Three months later, the Respondent delivered its Notice of Arbitration and Statement of Claim. The Respondent claimed that the Interim Order breached NAFTA Articles 1102, 1105, 1106 and 1110 of the NAFTA and that it suffered damage as a result.

Affidavit of John Myslicki sworn March 7, 2001, Exhibits “B”, “C” and “D”, Vol. I, Tab 3, Record, pp. 200-228

50. On May 28, 1999 an ad hoc tribunal established pursuant to NAFTA Chapter Eleven issued Procedural Order No. 1. This order established the overall procedural framework for the arbitration. The Procedural Order divided the proceedings into two phases – the first to deal with liability, and the second to deal with damages.

Affidavit of John Myslicki sworn March 7, 2001, Exhibit “E”, Vol. I, Tab 3, Record, pp. 230-34

51. Canada submitted its Statement of Defence on June 18, 1999. Among other things, the Statement of Defence denied that the Respondent held an investment in Canada or that the Interim Order related to investors or their investments, or that the Interim Order breached any NAFTA obligation. The Statement of Defence also pleaded that the Interim Order did not breach any relevant NAFTA provision.

Affidavit of John Myslicki sworn March 7, 2001, Exhibit “F”, Vol. I, Tab 3, Record, pp. 236-251

52. In February 2000 the tribunal held hearings in Toronto. It considered witness statements, oral testimony, a joint book of documents and oral submissions.

Award, paras. 79-82, Vol. I, Tab 2, Record, p. 21

The Award

53. In a final award on liability issued November 13, 2000, the tribunal established under Part B of the NAFTA found that Myers (Canada) was an investment of SDMI and

that the ban on PCB exports breached Canada's national treatment and minimum standard of treatment obligations under NAFTA Articles 1102 and 1105.

54. The Tribunal held that while SDMI did not own shares in Myers (Canada) "an otherwise meritorious claim should [not] fail solely by reason of the corporate structure adopted by a claimant in order to organize the way in which it conducts its business affairs." The shares of Myers Canada were owned by four members of the Myers family in equal proportions. The same members of the Myers family also owned shares in SDMI, but in different proportions. The Tribunal found that by reason of the Myers' family shareholdings in both SDMI and Myers (Canada) and the influence of a single shareholder in both companies (i.e., Mr. Dana Myers), Myers (Canada) was an "investment" of SDMI.

Award, paras. 229 and 230, Vol. I, Tab 2, Record, p. 65

55. The shares of Myers Canada were owned equally by four members of the Myers family, including Dana Myers. The same members of the Myers family also owned shares in SDMI, but in different proportions. As noted above, Dana Myers owned 51% of the shares in SDMI.

56. The Tribunal declined to further define the nature of SDMI's investment saying:

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.

Award, para. 232, Vol. I, Tab 2, Record, p. 65

57. In support of its finding that the PCB export ban breached NAFTA Articles 1102 and 1105, the Tribunal observed that 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.”

Award, para. 162, Vol. I, Tab 2, Record, p. 43

58. In analysing Canada’s obligations under NAFTA Article 1102, the Tribunal noted that “by 1993, when SDMI entered the Canadian market, there was only one credible Canadian competitor: Chem-Security ...” The Tribunal noted that “[t]he 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.”

59. Next, the Tribunal stated that it was of the view that “the word “sector” has a wide connotation that includes the concepts of “economic sector” and “business sector”.” The Tribunal went on to find that “[f]rom a business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operators such as Chem-Security and Cintec.”

Award, paras. 112 and 250-251, Vol. I, Tab 2, Record, pp. 28 and 70-71

60. Based on that analysis, the tribunal concluded that Canada breached its obligations under NAFTA Article 1102 by “preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order”.

Award, para. 255, Vol. I, Tab 2, Record, pp. 71-72

61. The tribunal also concluded that Canada breached its obligations under NAFTA Article 1105. In that case, the tribunal observed that it:

. . . 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.

Award, para. 263, Vol. I, Tab 2, Record, p. 73

62. It then determined by a majority that “on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.”

Award, para. 266, Vol. I, Tab 2, Record, p. 74

PART III– STATEMENT OF THE POINTS IN ISSUE

63. The Award deals with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA, or is in conflict with the public policy of Canada because of the following errors made by the Tribunal:

- (a) finding that SDMI was an “investor of a Party” and that Myers (Canada) was an “investment” of SDMI for the purposes of NAFTA Chapter Eleven, and permitting SDMI to advance a claim for damages sustained by persons not parties to the arbitration, including shareholders of SDMI, and of its alleged investment;
- (b) comparing, for the purposes of NAFTA Article 1102 “in like circumstances,” SDMI and its PCB waste disposal operations in the United States, with Canadian-owned and controlled companies and their PCB waste disposal operations in Canada;
- (c) finding that a breach of NAFTA Article 1105 occurs when it is shown that an “investor” has received treatment not in accordance with international law, including fair and equitable treatment and full protection and security; and concluding that a breach of NAFTA Article 1102 essentially establishes a breach of NAFTA Article 1105; and
- (d) finding that Canada should have allowed exports of PCBs or PCB wastes to the United States of American while imports of PCBs or PCB wastes were contrary to U.S. law, and in face of a well-established Canadian policy requiring the disposal of PCBs and PCB wastes in Canada consistent with Canada’s international obligations under the *Basel Convention*.

PART IV - ARGUMENT

A. NAFTA Chapter Eleven Arbitrations

1. Nature and Scope of NAFTA Chapter Eleven

64. NAFTA is a treaty among three Parties, namely the sovereign states of Mexico, the U.S. and Canada

Azinian, Davitian & Baca v. United Mexican States (“Desona v. Mexico”), November 1, 1999, ICSID ARB(AF)/97/2 (NAFTA Arbitral Tribunal), paras 80-81, Book of Authorities Vol. I, Tab 4.

65. NAFTA Chapter Eleven deals with the general rules applying to investors and their investments. It is divided into two Sections.

66. The obligations in Section A of NAFTA Chapter Eleven are owed by the NAFTA Parties to one another and are also subject to state-to-state dispute settlement procedures in NAFTA Chapter Twenty, in common with the other NAFTA obligations.

67. The obligations listed in Section A of NAFTA Chapter Eleven are not owed directly to individual investors. Rather, the disputing investor must prove that the NAFTA Party claimed against has breached an obligation owed to another NAFTA Party under Section A and that the investor has incurred loss or damage by reason of or arising out of that breach.

Desona v. Mexico, November 1, 1999, ICSID ARB (AF)/97/2 (NAFTA Arbitral Tribunal), para. 84 where the Tribunal noted that the Claimants were required to “point to a violation of an obligation established in Section A of Chapter Eleven attributable to the Government of Mexico.” (Book of Authorities Vol. I, Tab 4).

NAFTA Articles 1116(1) and 1117(1).

68. Section A of NAFTA Chapter Eleven defines the scope and coverage of this chapter, which is limited by NAFTA Article 1101 to measures relating to “investors” of another NAFTA Party and “investments” of another NAFTA Party. NAFTA Article 1101 further states that the obligations contained in Section A apply only to investors of another NAFTA Party and their investments located “in the territory of the Party”. Section A of NAFTA Chapter Eleven also sets out the substantive obligations of each NAFTA Party to the other NAFTA Parties respecting measures relating to investors of other NAFTA Parties and to their investments. The obligations appear in NAFTA Articles 1102 to 1114, inclusive.

69. Section B of NAFTA Chapter Eleven provides for investor-state dispute settlement procedures that may be invoked by investors of NAFTA Parties under certain conditions. This section of the NAFTA describes who may submit a claim to arbitration, the steps and conditions precedent that must be met before a claim is properly the subject of arbitration and the rules governing the conduct of the arbitration. The investor-state dispute settlement procedures under Section B are in addition to the state-to-state dispute settlement procedures in NAFTA Chapter Twenty.

70. The grounds for bringing an investor-state dispute are set out precisely in Section B of NAFTA Chapter Eleven. They are limited to the specific obligations enumerated in NAFTA Article 1116 (1) and Article 1117(1).

71. These grounds do not include every conceivable grievance that an investor might have against a NAFTA Party. Nor do they include the myriad of claims that may be pursued in domestic litigation. As the arbitral tribunal noted in *Desona v. Mexico*, the first case decided under NAFTA Chapter Eleven:

It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in

this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.

... NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.

Desona v. Mexico, November 1, 1999, ICSID ARB (AF)/97/2 (NAFTA Arbitral Tribunal), paras 83 and 87 (Book of Authorities Vol. I, Tab 4).

72. A Claim under Section B of NAFTA Chapter Eleven must be based on a breach by a NAFTA Party of an obligation under Section A or certain provisions of Chapter Fifteen, which are not relevant here. If no breach of an obligation under Section A has occurred, there can be no claim.

73. The issue of whether a breach has occurred is determined in accordance with the provisions of the NAFTA and the applicable rules of international law. These rules include the interpretive rules set out in the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”).

NAFTA Article 1131(1)

May 23, 1969, 1155 U.N.T.S. 331 (in force January 27, 1980) (Book of Treaties, Tab 2).

74. To sustain a claim under NAFTA Chapter Eleven, the investor must have incurred loss or damage by reason of, or arising out of, the breach. The words “by reason of, or arising out of” used in NAFTA Articles 1116(1) and 1117(1) establish that there must be a clear and direct nexus between the breach and the loss or damage incurred.

2. The Jurisdiction of NAFTA Chapter Eleven Tribunals

75. A cornerstone of the law of arbitration is the requirement that the parties consent to the arbitration. That consent must comprehend not only the fact of arbitration but also the specific issues to be resolved by arbitration and may stipulate the governing law. An arbitration tribunal only has jurisdiction over those specific issues that the parties have agreed to submit and any award that goes beyond those issues will be beyond the scope of the submission to arbitration.

76. As Redfern and Hunter explain:

An arbitration agreement does not merely serve to evidence the consent of the parties to arbitration and to establish the obligation to arbitrate. It is also a basic source of the powers of the arbitral tribunal... Finally, it is the arbitration agreement that establishes the jurisdiction of the arbitral tribunal. The agreement of the parties is the only source from which this jurisdiction can come.

Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Third edition, 1999) at pp. 3-8 (Book of Authorities, Appendix B, Vol. II, Tab 36)

77. In *Waste Management, Inc. v. United Mexican States*, another NAFTA Chapter Eleven case, the arbitration tribunal observed that:

The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000, para. 16 (Book of Authorities, Appendix B, Vol. I, Tab 17)

78. The sole basis of jurisdiction under NAFTA Chapter Eleven in arbitration under the UNCITRAL Rules is the consent of the Parties as evidenced by the NAFTA and the applicable rules of international law. Unlike private arbitrations, the NAFTA Parties do

not enter into separate arbitration agreements for each alleged breach of obligation. Instead, NAFTA Article 1122 provides that the NAFTA Parties consent to arbitration in accordance with the procedures set out in the NAFTA. This means the Parties consent to arbitration only in respect of matters mentioned in NAFTA Chapter Eleven provided the alleged investor complies with all required procedures. Investor-state arbitration is not available for matters beyond the scope of NAFTA Chapter Eleven.

79. The investor-State arbitration mechanism set out in Section B of NAFTA Chapter Eleven is an exception to the rule that NAFTA dispute settlement can be initiated only by a Party to the Treaty and is available only in respect of alleged breaches of Section A of Chapter Eleven and two Articles of NAFTA Chapter Fifteen. As the British Columbia Supreme Court explained in the *Metalclad* case:

Under most agreements containing arbitration provisions, it is provided that a dispute between the parties to the agreement may be resolved through arbitration. Strangers to the agreement cannot invoke the arbitration procedure because it is only the parties to the agreement who consented to resolve disputes between themselves by arbitration. This normal type of arbitration provision is found in Chapter 20 of the NAFTA, which is the general section in the NAFTA dealing with arbitration of disputes between the NAFTA Parties.

Section B of the Chapter 11 establishes a separate arbitration procedure. It allows investors of a NAFTA Party (who are not themselves a party to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other than the obligations imposed by Section A of Chapter 11 and two Articles of Chapter 15, the investor would have to prevail upon its country to espouse an arbitration on its behalf against the other Party.

Mexico v. Metalclad Corp. (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950 per Tysoe J. at paras. 57,58, (Book of Authorities, Appendix B, Volume I, Tab 26)

3. INTERPRETION OF NAFTA

80. The NAFTA does not adopt unique rules of interpretation. The NAFTA is interpreted according to the customary rules of international law governing treaty interpretation.

81. The rules of international law governing treaty interpretation are specifically made applicable to disputes under NAFTA Chapter Eleven by NAFTA Article 1131(1) which states that:

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

82. NAFTA Article 102(2) expressly adopts the rules of international law governing treaty interpretation. NAFTA Article 102(2) provides:

The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

83. The applicable rules of international law relevant to the interpretation and application of international treaties are set out in the *Vienna Convention*, which is accepted as part of customary international law.

United States – Standards for Reformulated and Conventional Gasoline, May 20, 1996, WT/DS2/AB/R (WTO Appellate Body) pp. 17-18, (Book of Authorities Vol. I, Tab 6); *Japan – Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) pp. 11-13, (Book of Authorities Vol. I, Tab 7).

84. NAFTA tribunals have recognized the *Vienna Convention* as the appropriate rules of treaty interpretation. For example, the NAFTA Panel in *the Matter of Tariffs*

Applied by Canada to Certain U.S.-Origin Agricultural Products recognized that Articles 31 and 32 of the *Vienna Convention* are “generally accepted as reflecting customary international law.”

(1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel) para. 119 (Book of Authorities Vol. I, Tab 8).

85. Article 31 of the *Vienna Convention* provides:

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. 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 parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

86. Article 32 of the *Vienna Convention* allows recourse to supplementary means of interpretation only if the application of the rules in Article 31 result in an interpretation which is ambiguous or obscure, or leads to a manifestly absurd or unreasonable conclusion.

87. In short, NAFTA tribunals must give the relevant provisions of the NAFTA their ordinary meaning in their context and in light of the object and purpose of the NAFTA as a whole, in accordance with the fundamental rule of interpretation in Article 31 of the *Vienna Convention*.

(a) Ordinary Meaning of the NAFTA

88. The ordinary meaning of NAFTA Chapter Eleven of NAFTA is found in the text of the Agreement. As noted by the Appellate Body of the WTO, “interpretation must be based above all on the text of the treaty.”

Japan – Taxes on Alcoholic Beverages, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) p. 12 (Book of Authorities Vol. I, Tab 7).

89. Treaty interpretation should give effect to the intention of the Parties as expressed in the words used by them in light of the surrounding circumstances:

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 365 (Book of Authorities Vol. I, Tab 9).

India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, December 19, 1997, WT/DS50/AB/R (WTO Appellate Body), para. 45 (Book of Authorities Vol. I, Tab 5). See also *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/DS2/AB/R, (WTO Appellate Body), pp. 17-18 and 24 (Book of Authorities Vol. I, Tab 6).

90. In *the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* the NAFTA Panel commenced its inquiry by identifying “the plain and ordinary meaning” of the words used in the Agreement, taking into consideration:

...the meaning actually to be attributed to words and phrases looking at the text as a whole, examining the context in which the words appear and considering them in the light of the object and purpose of the treaty.

(1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 120 (Book of Authorities Vol. I, Tab 8).

91. Article 31(4) of the *Vienna Convention*, provides that “a special meaning shall be given to a term if it is established that the parties so intended.” While this provision is helpful when interpreting defined expressions, it does not supplant Article 31(1) of the *Vienna Convention*.

92. In his treatise, Sir Ian Sinclair observes that the International Law Commission was of the view that, respecting special meaning, “there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term”.

The Vienna Convention on the Law of Treaties, 2nd ed. (Manchester: Manchester University Press, 1984), p. 126 (Book of Authorities Vol. I, Tab 10).

(b) Object and Purpose of the NAFTA

93. Article 31 of the *Vienna Convention* also mandates interpretation of a treaty in accordance with the object and purpose of the treaty. This requires examination of the treaty in light of the entirety of the agreement, including its preamble and objectives.

In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, (1996), 1.T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 122 (Book of Authorities Vol. I, Tab 8).

94. While object and purpose is one of the elements to be considered in interpreting a treaty, interpretation must be based above all on the text of the treaty. The object and purpose of the treaty cannot support an interpretation that is at variance with the text.

95. Ian Sinclair, in his treatise *The Vienna Convention on the Law of Treaties*, states as follows:

... reference to the object and purpose of the treaty is, as it were, a secondary or ancillary purpose in the application of the general rule on interpretation. The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified. (emphasis in original)

Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984), p. 130 (Book of Authorities Vol. I, Tab 10).

96. NAFTA Article 102(1) states the objectives of the NAFTA. These objectives are “elaborated more specifically through its principles and rules, including national treatment...”.

97. The statement in NAFTA Article 102(2) that the Parties shall “interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1” merely affirms the rule of interpretation set out in Article 31(1) of the *Vienna Convention*. Article 102(1) does not authorize novel interpretations of “national treatment” at variance with the text of Articles 1102(1) and (2). ~~Nor does Article 102(1) of NAFTA licence interpretations of concepts such as “performance requirement” or “expropriation” at variance with their meaning in international law.~~

(c) Context

98. When a tribunal is called upon to interpret a specific provision in a treaty, it must not adopt an interpretation that reduces other provisions of the treaty to redundancy or inutility. The WTO Appellate Body has repeatedly stressed this principle:

A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*). In *United States - Standards for Reformulated and Conventional Gasoline*, we noted that “[o]ne of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”.

Japan – Taxes on Alcoholic Beverages, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) p. 12 (Book of Authorities, Appendix B, Vol. II, Tab 38)

99. In *Korea – Definitive Safeguard Measures*, the WTO Appellate Body reaffirmed the rule of customary international law which provides that treaty interpreters must take into account the basic architecture of the treaty they are interpreting:

In light of the interpretative principle of effectiveness, it is the *duty* of any treaty interpreter to “read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.” An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.

Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, December 14, 1999, WT/DS98/AB/R, (WTO Appellate Body) para. 81 (Book of Authorities, Appendix B, Vol. III, Tab 55)

(d) Special Provisions in NAFTA Chapter Eleven

100. NAFTA Article 1131(2) provides that:

An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

101. On July 31, 2001, the Commission issued a binding Interpretative Note relevant to NAFTA Article 1105. The relevant part of the Interpretative Note reads as follows:

Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

NAFTA Chapters Eleven and Twelve, Definitions 2.01, Book of Authorities, Volume I, Appendix B, Tab 46

B. STATUTORY REVIEW

1. Domestic Legislation Governing NAFTA Chapter Eleven Arbitrations

102. The *Commercial Arbitration Act* (“CAA”) implements in Canada at the federal level the Model Law on International Commercial Arbitration (“Model Law”) as adopted by the United Nation Commission on International Trade Law (“UNCITRAL”).

103. In 1985, the UNCITRAL adopted the Model Law to promote the efficient functioning of private international commercial arbitrations.

Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al. (1999), 45 O.R. (3d) 183 at p. 190 (Sup.Ct.), appeal dismissed (2000), 49 O.R. (3d) 414 (Ont. C.A.). (Book of Authorities, Appendix B, Volume I, Tab 1)

104. The CAA implements the Model Law in a schedule to the act called the *Commercial Arbitration Code* (the “Code”).

Commercial Arbitration Act, R.S. 1985, c. 17 (2nd Supp.), ss. 2 (definition of “Code”), 6, 10 and Schedule, (Book of Authorities, Appendix A, Tab 1)

Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al., supra.

See also: *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1991] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207 (C.A.), leave to appeal to S.C.C. refused (1990) 50 B.C.L.R. (2d) xxvii, (Book of Authorities, Appendix B, Volume I, Tab 2)

105. Section 5 of the CAA makes the Code applicable to NAFTA Chapter Eleven Investor-State disputes involving the government of Canada. The CAA and the Code therefore apply to awards rendered by a NAFTA Chapter Eleven Tribunal to which Canada is a disputing party.

Commercial Arbitration Act, supra., ss. 5(2) and 5(4)

106. Article 5 of the Code provides for review on the grounds set out in Article 34 of the Code.

Commercial Arbitration Code, supra., Articles 5 and 34(2)

107. Article 34 of the Model Law and the Code allows a disputing party to bring an application for the setting aside of an arbitral award. The grounds listed under Article 34(2) are the following:

(a)(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of Canada;

(a)(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the case;

(a)(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or

(a)(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Code from which the parties cannot derogate, or, failing such agreement, was not in accordance with this code; or

(b)(i) the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Canada; or

(b)(ii) the award is in conflict with the public policy of Canada.

108. The Applicant seeks statutory review of the Partial Award on the grounds set out in Articles 34(2)(a)(iii) and 34(2)(b)(ii) namely, that the Partial Award deals with a dispute that is beyond the Tribunal's jurisdiction or is in conflict with the public policy of Canada.

2. Standard of Review

(a) Excessive Jurisdiction

109. Under Article 34(2)(a)(iii) of the Code, an arbitral award may be set aside if it “deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.”

Commercial Arbitration Act, supra., ss. 5 & 6

Commercial Arbitration Code, supra., s. 34(2)(a)(iii)

110. Since the sole jurisdictional basis for an arbitration under NAFTA Chapter Eleven is the consent of the NAFTA parties as evidenced by the express terms of the NAFTA and applicable rules of international law, the proper standard on questions of whether a NAFTA Chapter Eleven Tribunal acted within the terms of its authority is correctness.

111. In *Quintette Coal Ltd. v. Nippon Steel Corp.* the British Columbia Court of Appeal considered an application to set aside a private commercial arbitration award under the *International Arbitration Act*, which implements the Model Law in British Columbia, on the grounds that the arbitral tribunal had decided matters beyond the scope of the question submitted for arbitration. The petitioner applied to set aside an arbitral award on the ground that the arbitral tribunal only had jurisdiction to fix a base price as at April 1, 1987. The petitioner argued that in fixing a series of base prices for fifteen quarters after that date, the board acted beyond its mandate. The petitioner relied on the court's jurisdiction to set aside awards dealing with "matters beyond the scope of the submission to arbitration".

Quintette Coal Ltd. v. Nippon Steel Corp., 50 B.C.L.R. (2d) 207 (C.A.)
(Book of Authorities, Appendix B, Volume I, Tab 2)

112. The British Columbia Court of Appeal refused to interfere with the arbitral tribunal's award setting prices to be paid for the supply of coal. Gibbs, J.A., on behalf of the majority of the court, commented as follows on the standard of review:

...courts should exercise restraint in reviewing arbitration awards in the international arena. The views expressed by those courts are substantially the same as the consensus referred to in the preamble to our International Act, and thus reflect the purpose of the Act.

It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of juridical review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken by Blackmun J. [in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985)] are as compelling in this jurisdiction as they are in the United

States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. (p. 229)

Quintette Coal Ltd. v. Nippon Steel Corp., 50 B.C.L.R. (2d) 207 (C.A.), Book of Authorities, Appendix B, Volume I, Tab 2

113. Gibbs, J.A. also stated that unless the arbitral award contained decisions beyond the scope of the submission to arbitration, the court has no jurisdiction to set the award aside under s. 34(2)(c)(iv) (the analogous provision of Article 34(2)(a)(iii) of the CAA) even if it could be shown that the arbitration tribunal had erred in interpreting the contract.

114. Decisions in Ontario under its equivalent to the *International Commercial Arbitration Act* are to the same effect as the *Quintette Coal Ltd.* case.

Corporation Transnacional de Inversiones v. STET International, (1999) 45 O.R. (3d) 183 (S.C.), aff'd 49 O.R. (3d) 414 (C.A.) (Book of Authorities, Appendix B, Vol. I, Tab 1)

See *Food Services of America Inc. v. Pan Pacific Specialities Ltd.* (1997), 32 B.C.L.R. (3d) 225 at 229 (B.C.S.C.) and *Corporacion Transnacional de Inversiones v. STET International* (1999), 45 O.R. (3d) 183 (S.C.), aff'd 49 O.R. (3d) 414 (C.A.) (Book of Authorities, Appendix B, Vol. I, Tab 4)

115. In a recent decision reviewing *Mexico v. Metalclad Corp.* a case that involved a challenge by Mexico of an award rendered by a tribunal constituted under NAFTA Chapter Eleven, the British Columbia Supreme Court adopted the approach endorsed in the *Quintette* case. It did so despite being urged by Mexico and Canada to utilize the “pragmatic and functional approach” to determine the appropriate standard of review under the *International Commercial Arbitration Act* (“I.C.A.A.”).

(2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950 per Tysoe, J. (Book of Authorities, Appendix B, Volume I, Tab 26)

116. The British Columbia Supreme Court noted that the “pragmatic and functional approach” was developed by the Supreme Court of Canada to apply to the review of

domestic administrative tribunals in place of the previous approach which involved applying the test of jurisdictional error. The court noted, however, that the I.C.A.A. does not utilize the term “excess of jurisdiction” or the like but instead, sets out with particularity the grounds on which the court may set aside an arbitral award. The court held that the standard of review is set out in sections 5 and 34 of the I.C.A.A. and that the principles discussed by the Supreme Court of Canada in relation to the “pragmatic and functional approach” cannot be used to create a standard of review not provided for in the I.C.A.A.

117. However, in holding that the Tribunal decided a matter outside the scope of the submission to arbitration when it concluded that Mexico, had breached NAFTA Article 1105, the British Columbia Supreme Court effectively invoked and applied what is known in the context of the pragmatic and functional approach as the correctness standard. As the Court explained:

In its reasoning, the Tribunal discussed the concept of transparency after quoting Article 1105 and making reference to Article 102. It set out its understanding of transparency and it then reviewed the relevant facts. After discussing the facts and concluding that the Municipality’s denial of the construction permit was improper, the Tribunal stated its conclusion which formed the basis of its finding of a breach of Article 1105; namely, Mexico had failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. Hence, the Tribunal made its decision on the basis of transparency. This was a matter beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11.

The Tribunal went on to state that the acts of the State of SLP and the Municipality, for which Mexico was responsible, also failed to comply with the requirements of Article 1105 but it did not state any reasons for this conclusion. Based on the preceding discussion, the Tribunal must have been referring to the acts of the State of SLP and the Municipality which contributed to the perceived failure to provide a transparent and predictable framework for Metalclad’s business planning and investment.

Mexico v. Metalclad Corp. (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 50 per Tysoe J. at paras. 72,73

118. In other words, pursuant to Section 34 (2)(a)(iii), a Tribunal must properly state and apply the law, as stipulated by the relevant provisions of NAFTA Chapter Eleven, failing which any decision it makes will fall outside the scope of the submission to arbitration.

119. In the alternative, and to the extent that the decision in the *Metalclad* case does not flow from the application of the correctness standard, neither the *Metalclad* case nor the *Quintette Coal* case should be followed on the issue of what constitutes the proper standard of review of NAFTA Chapter Eleven decisions.

120. First, the courts in the *Quintette* and *Metalclad* cases neither acknowledged nor took into account the fundamental difference between international commercial arbitration and international arbitration involving a claimant and a state in respect of a treaty, such as the NAFTA, to which the claimant is not a party. Unlike commercial disputes which deal essentially with private issues, arbitration under NAFTA Chapter Eleven involves matters of public import.

121. Second, the courts did not address the question of how one determines whether a tribunal decision deals with the question of whether a dispute, or any part thereof falls outside the terms or scope of the submission to arbitration. One of the purposes of the “pragmatic and functional approach” is to deal with this very issue.

122. The central question in determining the standard to be applied by a court in reviewing the decision of a tribunal is “whether the question which the provision raises is one that was intended . . . to be left to the exclusive jurisdiction of the tribunal.” In addressing this issue, the Supreme Court of Canada enunciated a “pragmatic and functional” approach to deciding the proper curial deference to be shown the decision of a tribunal. This approach requires the weighing of several different factors including:

- (1) the presence or absence of a privative clause;
- (2) the relative expertise of the tribunal, as compared to the Court;
- (3) the purpose of the provision and the constating documents more generally;

- (4) whether the decision to be made is polycentric, (i.e. necessarily involves a consideration of often conflicting and multi-faceted issues); and
- (5) the nature of the decision being made, (i.e. whether it is a question of law or fact).

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at p. 855 (Book of Authorities, Appendix B, Volume I, Tab 8)

Pushpanathan and the Minister of Citizenship and Immigration [1998] 1 S.C.R. 982 at pp. 1003-1012 (Book of Authorities, Appendix B, Volume I, Tab 22)

123. All these factors must be taken together to come to a view of the proper standard of review.

124. The presence of a “full” privative clause denying an appeal or judicial review is compelling evidence that a court ought to show deference to a tribunal’s decision unless other factors strongly suggest otherwise. Less compelling, though still a factor favouring deference, is a partial or equivocal privative clause.

Pushpanathan, supra, at p. 1006 (Book of Authorities, Appendix B, Volume I, Tab 22)

125. A decision which involves the application of highly specialized expertise also weighs in favour of a high degree of deference.

Pushpanathan, supra, at pp. 1006-1008 (Book of Authorities, Appendix B, Volume I, Tab 22)

126. Where the object of the proceedings is not primarily concerned with establishing rights as between disputing parties but rather, is directed at balancing the claims of various constituencies, the appropriateness of court supervision diminishes. Similarly, a lower standard of review is called for where the legal principles in issue are “vague, open-textured or involve a multi-faceted balancing test”. These considerations are all specific expressions of the broad principle of “polycentricity”. In general, deference is given on questions of fact. Less deference is shown on questions of law.

Pushpanathan, supra, at pp. 1008-1012 (Book of Authorities, Appendix B, Volume I, Tab 22)

127. The adoption of the “pragmatic and functional” analysis results in a spectrum of available standards of review, ranging from the “correctness” standard to the standard of “patently unreasonable”.

(i) The “Correctness” Standard

128. Where the standard of review is correctness, the tribunal is not entitled to any deference. It must be correct, or its decision will be set aside. The Court is entitled to substitute its own views for those of the original decision-maker.

Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342 at p. 355 (Book of Authorities, Appendix B, Vol. I, Tab 10)

129. Where the question at issue concerns a provision limiting the tribunal’s powers, the standard of review is that of correctness. The point was made by the Supreme Court of Canada in *U.E.S., Local 298 v. Bibeault*;

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal’s jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. if however the question at issue concerns a legislative provision limiting the tribunal’s powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at 1086 (Book of Authorities, Appendix B, Volume I, Tab 11)

(ii) The “Patently Unreasonable” Standard

130. While the Applicant contends that appropriate standard in assessing the legal conclusions of a NAFTA tribunal is one of “correctness”, the patently unreasonable standard requires some explanation. The Supreme Court of Canada has repeatedly affirmed that the enforcement of a patently unreasonable decision violates the most basic notions of justice. The “patently unreasonable” standard of review has been defined in various ways.

131. Recently, Bastarache J., dissenting in the result, but not on this point, said:

There is no doubt that the patently unreasonable test sets a high standard of review: *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, 101 D.L.R. (4th) 673. Nevertheless, a decision is patently unreasonable if it gives to the section of an Act a meaning which the words of a statute cannot reasonably bear: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385, at para. 62.

Ajax (Town) v. C.A.W., Local 222 (2000), 185 D.L.R. (4th) 618 at 623 (Book of Authorities, Appendix B, Volume I, Tab 13)

132. In some cases, “patent unreasonableness” has been construed to require an assessment of whether the tribunal’s decision is “clearly irrational”.

Ajax (Town) v. C.A.W., Local 222 (2000), 185 D.L.R. (4th) 618 at 621 (S.C.C.) (Book of Authorities, Appendix B, Volume I, Tab 13)

Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941 at 963-4 (Book of Authorities, Appendix B, Volume I, Tab 14)

133. When determining whether a tribunal’s decision is patently unreasonable, it is often necessary to examine closely the factual and legislative record. As Gonthier J. held in *National Corn Growers Assn. v. Canada (Import Tribunal)*:

In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis. Such was the case in the *C.U.P.E.* decision where it was found that the Board’s interpretation of the

legislation at issue was reasonable even though it was not the only reasonable one. Similarly, understanding of the issues raised by the appellants herein as to the reasonableness of the Tribunal's decision requires some analysis of the relevant legislation and the way in which the Tribunal has interpreted and applied it to the facts.

National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 at p. 1370 (Book of Authorities, Appendix B, Volume I, Tab 15)

134. Although the inquiry is whether the decision was patently unreasonable, it may be that “a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem”.

Canada (Director of Investigation and Research) v. Southam Inc., supra, at p. 777 (Book of Authorities, Appendix B, Volume I, Tab 12)

(iii) Application of “Pragmatic and Functional Approach”

135. Based on the pragmatic and functional approach, NAFTA Chapter Eleven Tribunals should not attract extensive judicial deference.

136. NAFTA Chapter Eleven does not contain a full privative clause declaring that decisions of the Tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded. Instead, it contemplates limited review in the courts of the place of arbitration (in the case of ICSID Additional Facility and UNCITRAL Arbitrations) or ad hoc revision or annulment (in the case of ICSID arbitrations) with an automatic stay of enforcement pending review and further appeal.

137. A NAFTA Chapter Eleven Tribunal is an ad hoc body whose members are not necessarily chosen for their knowledge of trade law generally or of NAFTA Chapter Eleven in particular. Unlike the Canadian International Trade Tribunal and World Trade Organization panels, NAFTA Chapter Eleven Tribunals are not standing tribunals with established or recognized expertise in trade matters.

138. Domestic administrative tribunals displaying very different characteristics than Chapter Eleven tribunals are afforded deference. In *National Corn Growers Assn. v. Canada (Import Tribunal)* the threshold issue was the standard of review governing the Canadian Import Tribunal in the exercise of its jurisdiction under s. 42 of the *Special Import Measures Act*. It was recognised that in exercising that jurisdiction, the Tribunal might have regard to the General Agreement on Trade and Tariffs (“GATT”). Both the majority and the concurring judgment of Dickson C.J. and Wilson and Lamer JJ. concluded that the Tribunal's interpretations of its Act should receive considerable deference -- the standard of patent unreasonableness. The judgment noted:

More precisely, it seems to me that it is for the Tribunal, staffed by *experts familiar with the intricacies of international trade relations* who are in the business of dealing with a large volume of trade related cases, to decide what documents may or may not be of assistance in interpreting the Act. While my colleague's discussion of the documents that a court may refer to in interpreting legislation may well be sound, we are not faced with an appeal from an ordinary court's decision. Instead, we are dealing with a statutory tribunal's interpretation of its own constitutive legislation. If the legislature wishes to place limits on the range of documents that the Tribunal may refer to, then it is for the legislature to do so. In the meantime, courts should not get into the business of assessing what documents a statutory tribunal may consult. (at pp. 1348-9) (emphasis added).

National Corn Growers Assn. v. Canada (Import Tribunal) [1990] 2 S.C.R. 1324 (Book of Authorities, Appendix B, Volume I, Tab 15)

139. More recently, in *M.N.R. (Customs and Excise) v. Schrader Automotive Inc.*, the court applied a reasonableness standard to a decision of the Canadian International Trade Tribunal interpreting and applying a classification under the *Custom Tariff Act*.

M.N.R. (Customs and Excise) v. Schrader Automotive Inc. (1999), 240 N.R. 381 (F.C.A.) (Book of Authorities, Appendix B, Volume I, Tab 23)

140. NAFTA Chapter Eleven arbitrations differ substantially from a private commercial arbitration in terms of the extent to which their decisions affect interests beyond those of the immediate parties to the dispute. Claims under NAFTA Chapter Eleven are not contractual disputes but challenges to government “measures”, a term

NAFTA Article 201(1) defines as including “any law, regulation, procedure, requirement or practice”.

141. The decisions of NAFTA Chapter Eleven Tribunals have important public policy implications that impact upon, and are of interest to Canadians generally and non-disputing NAFTA Parties.

142. In the ongoing *Methanex* claim, a NAFTA Chapter Eleven dispute involving the United States, the Tribunal ruled that it had the authority to accept amicus briefs from several concerned non-governmental organizations. In reaching this conclusion, the Tribunal noted:

There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.

Methanex Corporation v. United States of America Decision of the Tribunal on Petitions From Third Persons to Intervene as “Amici Curiae”, dated 15 January 2001 (Book of Authorities, Appendix B, Volume I, Tab 16)

143. A NAFTA Chapter Eleven dispute is therefore concerned not only with establishing rights as between disputing parties but rather, is directed at balancing the interests of various constituencies affected by the NAFTA through the application of rules and principles by which the NAFTA Parties have agreed with one another to be bound.

144. In recognition of the public interest at stake in NAFTA Chapter Eleven arbitrations provision is made for making certain documents publicly available, providing documents filed with Tribunals to non-disputing NAFTA Parties and providing NAFTA

Parties with an entitlement to participate in arbitrations to which they are not disputing parties.

145. NAFTA Articles 1126(10) and (13) provide for the filing of certain arbitral documents on a public register. NAFTA Article 1137(4) and Annex 1137.4 spell out rules for the publication of awards. Canada publishes all tribunal awards, whether on procedure or the merits, in NAFTA Chapter Eleven cases against it.

146. NAFTA Article 1127 requires the disputing NAFTA Party to deliver to the other Parties written notice that a claim has been submitted for arbitration and “copies of all pleadings filed in the arbitration.” NAFTA Article 1128 provides that the other Parties can “make submissions to a Tribunal on a question of interpretation of this Agreement.” NAFTA Article 1129 requires the disputing Party to provide the other Parties with copies of the evidence and of written arguments before the Tribunal, on request.

147. All these factors lead inexorably to the conclusion that the standard of review for conclusions of law made by Chapter Eleven tribunals is “correctness”, particularly for present purposes where the question is whether an award deals with a dispute contemplated by or falling within the scope of the arbitration. As Bastarache J explained in *Pushpanathan v. Canada (M.C.I.)*:

Although the language and approach of the ‘preliminary’, ‘collateral’ or ‘jurisdictional’ question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of ‘jurisdictional questions’ which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which ‘goes to jurisdiction is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. **In other words, ‘jurisdictional error’ is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.** (emphasis added)

Pushpanathan, supra., at p. 1005 (Book of Authorities, Appendix B, Volume I, Tab 22)

(b) Public Policy

148. Article 34(2)(b)(ii) of the Code provides that a court may set aside an award where it “is in conflict with the public policy of Canada.”

149. The *UNCITRAL Analytical Commentary* describes what was intended by the addition of a ground for review based on the relationship between the award and the public policy of the state in which the award was sought to be set aside:

In examining the expression of “public policy”, we have decided to recognize that this does not mean the political position or the international position of the state, but that it covers the fundamental notions and principles of justice ...

... It was agreed that the term “public policy” which was used in the *New York Convention* of 1958 and in many other agreements included the fundamental principles of law and justice, both questions on the merits and procedural issues.

Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration, Eighteenth Session of the United Nations Commission on International Trade Law, Supplement Canada Gazette, Part I (Ottawa: Queens Printer, 1986) at p. 105 (Book of Authorities, Appendix B, Volume II, Tab 32)

150. In *Navigation Sonamar Inc. v Algoma Steamships Ltd*, Gonthier J (sitting as Justice of the Quebec Superior Court) considered the meaning of “public policy” in the Model Law. He held that the “fundamental principles of law and justice” inherent in the use of the term “public policy” in the Model Law included the principle that a tribunal could not exceed its jurisdiction in the course of the inquiry. He also referred to the basic principle of Canadian justice that it can be a “jurisdictional” error to reach a result by a process of reasoning that is patently unreasonable. Gonthier J stated:

Counsel for the applicant recognizes that a simple error of law cannot justify setting aside the award because that would mean examining the merits of the dispute. Rather, he relies on a patent absence of applicable law, claiming that the effect of the award is to disregard the law and the parties’ agreement. He seems to be invoking the notion of a patently unreasonable error, which Mr. Justice Beetz,

in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 at 480, described as an abuse of authority amounting to fraud of such a nature as to cause a flagrant injustice. The Court of Appeal, quoted by Mr. Justice Beetz at the same page, had described as follows the error which it saw in that case: “[the arbitrator] committed an excess of jurisdiction by giving the facts an unreasonable interpretation: his award was totally lacking in reality and contrary to public order ... it constituted a flagrant denial of justice ...

One may refer to the formulation of the Supreme Court of Canada in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*: “Put another way, was the board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.

Navigation Sonamar Inc. v Algoma Steamships Ltd [1987] R.J.Q. 1346; (1995), 1 M.A.L.Q.R. 1 (Que. S.C.) (Book of Authorities, Appendix B, Vol. I, Tab 25)

151. Gonthier J. referred in his reasons to Canadian cases governing jurisdictional errors by administrative tribunals, consensual arbitrators and statutory bodies protected by privative clauses. He concluded that a patently unreasonable error, amounting to an excess of jurisdiction such that the tribunal’s findings of fact could not be rationally supported, would permit setting aside by a Court to preserve “public policy” (although he did not find such error in that case). Thus, the excess of jurisdiction and review for patently unreasonable findings are open to a court under Article 34(2)(b)(ii) of the Code in respect of all grounds for statutory review discussed below.

C. GROUNDS OF REVIEW

1. **The Respondent was not an “Investor of a Party” for the purposes of NAFTA Chapter Eleven and S.D. Myers (Canada) Inc. was not an “Investment” of the Respondent for the purposes of NAFTA Chapter Eleven, and the Respondent should not be permitted to advance a claim for damages sustained by persons not parties to the arbitration, including shareholders of the Respondent and of the alleged investment**

152. A claim submitted by an investor is arbitrable pursuant to NAFTA Chapter Eleven only if it meets certain conditions. These include the requirements set out in NAFTA Articles 1101 and 1116. NAFTA Article 1101 (1) states:

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

1. investors of another Party;
2. investments of investors of another Party in the territory of the Party.

153. NAFTA Article 1139 defines an “investor of a Party” to include “...an enterprise of such Party, that seeks to make, is making or has made an investment.” NAFTA Article 1139 defines an “investment” to mean, *inter alia*,

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

154. For the purposes of NAFTA Chapter Eleven “enterprise” means an “enterprise as defined in NAFTA Article 201 (Definitions of General Application) and a branch of an enterprise”. NAFTA Article 201 defines “enterprise” to mean:

...any entity constituted or organized under applicable law, whether or not for profit and whether privately owned or government owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

155. NAFTA Article 1139 defines an “investment of an investor of a Party” to mean “an investment owned or controlled directly or indirectly by an investor”.

156. NAFTA Article 1116 (1) states that “an investor of a Party may submit to arbitration under this section a claim that another Party has breached an obligation under Section A ...” In other words, NAFTA Article 1116 provides that an Investor can bring a claim to arbitration on his own behalf.

157. Based on the foregoing, the Respondent must establish that it was an “investor of another party” that was seeking to make, was making or had made an investment

(NAFTA Article 1139 “investor of a Party”); and that the “investment” met the definition of the term (NAFTA Article 1139 “investment”), including the definition of enterprise (NAFTA Article 1139 “enterprise” and NAFTA Article 201 “enterprise”) if relevant.

158. The Tribunal erred in concluding that the Respondent was an “investor” and that Myers Canada was an “investment” of the Respondent within the meaning of NAFTA Article 1139. The Tribunal reached these conclusions even though Myers Canada was neither a subsidiary nor an affiliate of the Respondent. The Tribunal’s reasoning is set out in paragraph 226, 227, 229, 230, and 231 of the Partial Award:

226. During the proceedings there was considerable debate concerning whether Myers Canada fitted into any of three 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.

227. At the relevant time Myers Canada was undoubtedly an “enterprise”, 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 and the evidence of his brother, Mr. Scott Myers, was that Dana Myers was the authoritative voice in Myers Canada.

229. Taking into account the objectives of the NAFTA, and the obligations 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 claimant in order to organize 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.

230. 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.

231. 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”.

159. The Tribunal’s reasoning is flawed in three fundamental respects.

160. First, though for economic and social reasons a corporation consists of a group of individuals who have pooled their resources for a common purpose, in law a corporation is not simply an aggregate of its parts. Corporations are legal entities in their own right. It follows that two corporations such as Myers Canada and SDMI remain two entirely distinct legal personalities. The Tribunal ignored this distinction when it stated that “an otherwise meritorious claim [not] fail solely by reason of the corporate structure adopted by the claimant in order to organize the way in which it conducts its business affairs.” Nor was the Tribunal correct in suggesting that Myers Canada was in any way controlled by the Respondent within the meaning of NAFTA Article 1139.

See Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), I.C.J. Reports 1970, 3 (Book of Authorities, Amended Appendix B, Vol. III, Tab 58

161. Myers Canada was incorporated under the *Canada Business Corporations Act* (“CBCA”) pursuant to which the issue of whether a corporation controls another corporation is addressed through the concept of “affiliate”.

162. Subsection 2(1) of the CBCA states that “affiliate” means an affiliated body corporate within the meaning of subsection (2). For the purposes of the CBCA, subsection 2(2) provides:

- (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person...

163. Subsection 2(3) of the CBCA stipulates that:

For the purposes of this Act, a body corporate is controlled by a person or by two or more bodies corporate if,

- (a) securities of the body corporate to which are attached more than fifty percent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of those bodies corporate; and
- (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

164. Myers Canada was neither a subsidiary nor an affiliate of the Respondent. SDMI did not own shares in Myers Canada and the controlling shareholder in the Respondent – Dana Myers – was not the controlling shareholder in Myers Canada.

165. As previously noted, the shares in Myers Canada were owned and held equally by four members of the Myers family, including Dana Myers. The same members of the Myers family also owned the shares in SDMI, but in different proportions, with Dana Myers owning 51% of the shares.

166. Second, the Tribunal's finding that form does not matter is inconsistent with NAFTA Article 201 which defines an enterprise as an entity "constituted under applicable law" of a NAFTA Party. In corporate and commercial law, form matters. Individuals are entitled to arrange their affairs and conduct business in various ways – as sole proprietorships, partnerships and corporations – and benefit from whatever economic and legal advantages that flow from their decision, as well as bear any adverse consequences. Myers Canada could have been established as a subsidiary or affiliate of SDMI. For reasons of their own, the members of the Myers family chose to incorporate Myers Canada personally and then decided not to bring a claim against Canada in their individual capacity.

167. Third, an international arbitral tribunal does not have any inherent jurisdiction and therefore, has no authority to decide a case *ex aequo et bono* – in justice and fairness – unless such authority is expressly conferred. NAFTA does not expressly confer such an *ex aequo et bono* power on a Chapter Eleven Tribunal and therefore, it was not open to the Tribunal in the *Myers* case to cure a failure to initiate a claim on behalf of the

shareholders of Myers Canada by disregarding “the corporate structure adopted by a claimant in order to organize the way in which it conducts its business affairs.”

168. Writing of the Statute of the International Court of Justice, Schwarzenberger, stated:

The power of the Court to decide a case *ex aequo et bono*, that is to say, to ignore the rules which are the product of the above three laws creating agencies [treaties, international customary law, on the general principles of law recognized by civilized nations] and to substitute itself as a law creating agency, depends upon agreement of the parties to a dispute. In other words, such power must itself rest on a rule created by one of the three normal law-creating processes, in this case a treaty.

Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*: Third Edition (1957) at p. 26 (Book of Authorities, Amended Appendix B, Volume III, Tab 59.

169. Article 33(2) of the UNCITRAL Arbitration Rules, under which the Tribunal operated, provides that:

The arbitral tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

The NAFTA does not confer expressly such an *ex aequo et bono* power upon a NAFTA Chapter Eleven Tribunal.

170. In obiter (paragraph 232), the Tribunal posits four alternative grounds on which SDMI “could contend that it has standing to maintain a claim.” However, the Tribunal neither further discusses the alternative grounds nor reaches a conclusion as to their applicability to the arbitration:

232. The Tribunal recognizes that there are a number of other bases on which SDMI could contend that it was 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.

171. In the circumstances, the Tribunal’s conclusion that the Respondent was an “investor” and that Myers Canada was an “investment” of the Respondent within the meaning of NAFTA Article 1139, and the Tribunal’s invocation of jurisdiction *ex aequo et bono* in this regard, is a manifest excess of power beyond the scope of the submission to arbitration and contrary to Canadian public policy.

172. As the ICSID ad hoc annulment committee stated in *MINE v. Guinea*:

... a tribunal’s disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.

Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.

ICSID Case No. ARB/84/4, Ad Hoc Committee Decision of December 22, 1989, 5 ICSID Rev. FILJ 95 (1990) at paragraphs 5.03 and 5.04, Book of Authorities, Appendix B, Volume I, Tab 24

2. For the purposes of NAFTA Article 1102, the Respondent and its PCB waste disposal operations in the United States are not in “like circumstances” with Canadian owned and controlled companies and their PCB waste disposal operations

173. NAFTA Article 1102(2) provides:

Each Party shall accord to investments of investors of another Party treatment no less favourable 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.

174. The purpose of the national treatment obligation is to prohibit discrimination on the basis of nationality of the investor or ownership of the investment. It calls for a

comparison of the treatment accorded to domestic and foreign investors and investments that are “in like circumstances”.

175. The Tribunal found that SDMI and Myers Canada were “in like circumstances” with Canadian operators such as Chem-Security and Cintec. The decision of the Tribunal on this issue is set out in paragraphs 250 and 251.

250. 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”.

251. From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operations 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 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.

176. The Tribunal’s decision is flawed in three fundamental respects.

177. First, the Tribunal failed properly to ascertain the nature and extent of SDMI’s investment in Canada, if any. Such a determination necessarily precedes an assessment of whether the investment is in like circumstances with one or more investments in Canada. As the Government of Mexico emphasized in its NAFTA Article 1128 submission to the Tribunal, it was “crucial” for the Tribunal “to ascertain the nature and extent of the claimant’s investment in Canada (if any)” before it can address the question

of “whether the claimant and/or its investment in Canada (if any) were denied treatment no less favourable to that accorded to domestic investors ‘in like circumstances’ contrary to Article 1102.”

Submission of Mexico under NAFTA Article 1128, dated January 14, 2000 at para. 9 (Book of Authorities, Appendix B, Volume II, Tab 49)

178. For example, if the nature and extent of the Respondent’s “investment” was a loan made to Myers Canada, then the analysis under NAFTA Article 1102 would proceed by determining whether similar loans made by Canadian investors (i.e. loans made “in like circumstances”) were accorded treatment more favourable than that accorded to the investment.

179. If the nature and extent of the Respondent’s “investment” in Canada was the establishment of an office to act as a broker, and procure sales of PCB waste disposal services to be performed in the United States, then the analysis under NAFTA Article 1102 would proceed by determining whether there were any Canadian owned brokers who were attempting to procure sales of PCB waste disposal services (i.e. Canadian investments “in like circumstances”) and if so, whether they were accorded treatment more favourable than that accorded to the investment.

180. The WTO Appellate Body has repeatedly stressed that treaty interpreters “may not ignore the “fundamental structure and logic” of a provision in deciding the proper sequence of steps in its analysis, save at the peril of reaching flawed results.”

Canada – Certain Measures Affecting the Automotive Industry, May 31, 2000, WT/DS139/AB/R, WT/DS142/AB/R (WTO Appellate Body) para. 151, Book of Authorities, Appendix B, Volume II, Tab 50

United States – Import Prohibition of Certain Shrimp and Shrimp Products, November 6, 1998, WT/DS58/AB/R, (WTO Appellate Body) para. 119, Book of Authorities, Appendix B, Volume II, Tab 53

181. Second, the Tribunal failed to confine its analysis of NAFTA Article 1102 to the treatment accorded to SDMI’s alleged investment in Canada.

182. NAFTA Article 1102 must be interpreted and applied in light of NAFTA Articles 1101 and 1139. NAFTA Article 1101 states that NAFTA Chapter Eleven obligations only apply to investments located “in the territory” of the Party whose measure is being challenged. NAFTA Article 1139 defines “investor of a Party” as a national or enterprise “that seeks to make, is making or has made an investment”. When these two provisions are read together, the complete definition of “investor of a Party” is a national or enterprise that seeks to make, is making or has made an investment “in the territory” of the NAFTA Party whose measure is being challenged.

183. NAFTA Chapter Eleven therefore only applies to investments in the territory of the Party whose measure is being challenged and not collectively to an investor and its investment. The investor cannot be the investment and the Tribunal cannot make an award against a NAFTA Party (Canada) on the basis of measures affecting the investor.

184. SDMI was a cross-border service provider pursuant to NAFTA Chapter Twelve in respect of its PCB waste disposal service in the United States. It sought to provide these services through sales and marketing activities in Canada. As a cross-border service provider, SDMI has no standing to make a claim under NAFTA Chapter Eleven for measures allegedly affecting its ability to provide these services.

185. However, the Tribunal concluded that the issue of whether SDMI was a cross-border service provider was not relevant to liability but rather to damages. As the Tribunal explained at paragraphs 299 and 300 of its Award:

299. 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 whether there is a conflict between Chapters 11 and 12, but whether the cross-border supply of services involve an “investment”.

300. This latter issue has not been fully addressed by the disputing parties and may be of more significance to a consideration of damages. The Tribunal finds that it is not relevant to this case.

186. NAFTA Article 1213 defines the cross-border provision of services on cross-border trade in services through three forms of service delivery but excludes the provision of a service in the territory of a NAFTA Party by an investment as defined in NAFTA Article 1139.

187. NAFTA Article 1213(2) states in relevant part:

For the purpose of this Chapter:

Cross-border provision of a service or

Cross-border trade in services means the provision of a service:

- (a) from the territory of a Party into the territory of another Party;
- (b) in the territory of a Party by a person of that Party to a person of another Party;
- (c) by a national of a Party in the territory of another Party, but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment-Definitions), in that territory....

188. SDMI falls into the category of service provider defined by NAFTA Article 1213(2)(b). It provided PCB waste disposal services in the United States to customers in Canada whose PCB waste was shipped to Ohio for destruction.

189. By virtue of providing a service within the meaning of NAFTA Article 1213, the Respondent cannot advance a claim under NAFTA Chapter Eleven in relation to this activity. In other words, NAFTA Article 1213(2) stipulates that any service not provided through an investment as defined in NAFTA Article 1139 is a matter that falls within the purview of NAFTA Chapter Twelve and, therefore, is necessarily excluded from NAFTA Chapter Eleven.

190. Had the NAFTA Parties intended cross-border service providers to be entitled to commence claims under NAFTA Chapter Eleven against measures of a NAFTA Party they would have so provided.

191. Third, even if SDMI became an “Investor” as a result of establishing only a minimal investment in Canada to facilitate the provision of its cross-border services, the Tribunal ignored the requirement in NAFTA Article 1102 to compare only the treatment accorded the “Investment” with Canadian companies in Canada that are in like circumstances.

192. The concept of “in like circumstances” is properly interpreted as requiring a comparison between the treatment accorded foreign and domestic investments engaged in the same activities in Canada. This interpretation precludes the Tribunal from doing what it did in paragraph 251 of the Award namely, treating SDMI and Myers Canada as a unit and comparing the treatment allegedly accorded to this unit with that of Canadian companies in Canada engaged in PCB disposal and remediation.

193. In so doing, the Tribunal effectively imported into NAFTA Chapter Eleven the obligations of NAFTA Chapter Twelve relating to the provision of, or trade in cross-border services. NAFTA Article 1202 provides substantially the same national treatment protection to cross-border service providers as does NAFTA Article 1102 to investments.

194. However, as already noted, the obligations of NAFTA Chapter Twelve do not apply where the service is provided in the territory of a NAFTA Party by an investment, and the obligations of NAFTA Chapter Eleven only apply in respect of an investment. As the Tribunal has already found, SDMI is the investor and Myers Canada is the investment of the investor.

195. Insofar as investments are concerned, the concept of “like circumstances” involves looking at factors other than whether the investments were operating in the same sector, such as the activities and operations of the investments and the nature of the goods and services provided. By this standard, the Applicant established that Myers Canada and Canadian companies such as Chem-Security and Cintec were not engaged in the same type of business. Whereas Chem-Security and Cintec were engaged in the business of PCB destruction, the activities of Myers Canada were limited to sales and marketing activities making arrangements for shipping of Canadian PCBs for processing in the U.S.

196. A parallel exists between NAFTA Article 1102, which calls for a comparison of the treatment accorded investors and investments “in like circumstances”, and Article III of GATT 1994, which calls for a comparison of the treatment accorded to “like” products. The WTO Appellate Body has noted that the analysis of whether two or more products are “like” can only be undertaken on a case-by-case basis and necessarily involves an element of discretion. This does not mean that the analysis and determination of whether two products are “like” is purely discretionary. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body stressed that the determination “must be made in considering the various characteristics of products in individual cases.”

Japan – Taxes on Alcoholic Beverages, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) p. 22. (Book of Authorities, Appendix B, Volume II, Tab 38)

197. The WTO Appellate Body has shown no deference to WTO Panel “like products” analyses where Panels failed to base their findings on the evidence, or failed to consider relevant “characteristics” of two or more products. In *Canada – Certain Measures Concerning Periodicals*, the Appellate Body reversed the Panel’s finding that imported split-run magazines and domestic non-split run magazines were “like” products. The Appellate Body held that the Panel’s findings were speculative, because the Panel failed to base its finding on the evidence before it. In *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, the Appellate Body reversed the Panel’s finding that two different types of asbestos were “like” products. The Appellate Body held that the Panel’s analysis failed to take the different characteristics of the two products into account in its determination of whether or not they were “like” products.

Canada – Certain Measures Concerning Periodicals, June 30, 1997, WT/DS31/AB/R (WTO Appellate Body) pp. 22-25 (Book of Authorities, Appendix B, Volume II, Tab 47)

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, March 12, 2001, WT/DS135/AB/R (WTO Appellate Body) pp. 31-48 (Book of Authorities, Appendix B, Volume II, Tab 48)

198. In concluding that the Applicant breached the national treatment obligation, the Tribunal did not simply interpret the wording of NAFTA Article 1102. Rather, it failed

properly to state and then apply the law respecting the obligations of national treatment. In so doing, the Tribunal made a decision on this matter that is outside the terms and scope of the submission to arbitration and is also contrary to Canadian public policy.

3. NAFTA Article 1105 only applies to “Investments” of an Investor of another Party and a breach of NAFTA Article 1102 does not establish a breach of NAFTA Article 1105

199. NAFTA Article 1105(1) provides:

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.

200. NAFTA Article 1105 adopts the minimum standard of treatment as defined by international law. In order to constitute a violation of the minimum standard of treatment, the treatment of an investment must amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.

201. The concepts of “fair and equitable treatment” and “full protection and security” are aspects of the minimum standard of treatment and do not expand the protection afforded by the minimum standard of treatment.

202. By a majority, the Tribunal determined that the issuance of the *Order* was a breach of NAFTA Article 1105. The Tribunal’s decision is set out in paragraph 263, 264, 265 and 266 of the Partial Award:

263. 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 the 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.

264. 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 a breach of Article 1105.

265. 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 favoured-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.”

266. 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.

203. The decision of the Tribunal is flawed in two fundamental respects.

204. First, in finding that a breach of Article 1105 can be established on the basis of the treatment accorded to an “investor”, the Tribunal ignored the text of NAFTA Article 1105 which clearly stipulates that it applies only to “investments” and not “investors”.

205. Second, in concluding that a breach of NAFTA Article 1102 can constitute a breach of the minimum standard of treatment, the Tribunal misconstrues the words “international law” in NAFTA Article 1105. As the British Columbia Supreme Court explained in the *Metalclad* case, these words refer to customary international law, which must be distinguished from conventional international, which is comprised of treaties

entered into by countries (including provisions contained in NAFTA other than NAFTA Article 1105 and other provisions of Chapter 11).”

Mexico v. Metalclad Corp. (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950 per Tysoe J. at paras. 51-55 (Book of Authorities, Appendix B, Vol. I, Tab 26)

206. This interpretation of the words “international law” was confirmed in the binding interpretation adopted by the NAFTA Commission on July 31, 2001 which states that, the standard of treatment provided by NAFTA Article 1105 is the minimum standard of treatment under customary international law, which does not include other distinct NAFTA obligations. A breach of NAFTA Article 1105 cannot therefore be established on the basis of a breach of NAFTA Article 1102.

207. In other words, whereas the national treatment standard is a comparative one, the international minimum standard is an absolute standard defined by customary international law and not in any way dependent on the treatment a state accords its nationals.

208. The Tribunal’s interpretation of NAFTA Article 1105 amounts to a complete disregard of the text and therefore, falls beyond the terms and scope of the submission to arbitration and is contrary to Canadian public policy.

4. Canada was precluded from allowing exports of PCBs or PCB wastes to the U.S. while imports of PCBs or PCB wastes were contrary to U.S. law, would have been contrary to a well-established Canadian policy requiring the disposal of PCBs and PCB wastes in Canada consistent with Canada’s international obligations under the Basel Convention

209. Article 4.2 of the Basel Convention provides as follows:

Each Party shall take the appropriate measures to:

- (b) Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal;

...
 (d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement;

210. Consistent with the Basel Convention Canada established a hazardous waste treatment infrastructure.

Affidavit of Victor Shantora sworn , paras.14-16, 22, 29, 34-35, 47, 49-56, Vol. IX, Tab 146, Record, pp. 3581-3586, 3588-3590

211. The process of developing a hazardous waste treatment infrastructure was expensive and time-consuming. Facilities must provide sufficient capacity to deal with available waste streams without compromising the financial viability of the project.

Affidavit of Victor Shantora sworn , paras.14-16, 22, 29, 34-35, 47, 49-56, Vol. IX, Tab 146, Record, pp. 3581-3586, 3588-3590

Testimony of Dana Myers, Transcript of proceedings for February 15, 2000, question 45 (Ontario Hazardous Waste, for example, spent \$115-million and 15 years trying to site a place in Ontario to dispose of PCBs.), Vol. XII, Tab 191, Record,

212. The substantial financial commitment of such undertakings requires an assurance of a reasonably predictable regulatory environment in which to operate.

Affidavit of Victor Shantora sworn October 4, 1999, paras.65-66, Vol. IX, Tab 146, Record, p. 3593

213. The Preamble to NAFTA includes an undertaking to, among other things, “ensure a predictable commercial framework for business planning and investment” “in a manner consistent with environmental protection and conservation” and a commitment to “promote sustainable development”.

214. The Tribunal’s failure to acknowledge the need to integrate economic and environmental policies by recognizing Canada’s obligations under NAFTA ignores the clear direction imparted by NAFTA preambular language to ensure a predictable

commercial framework in a manner consistent with environmental protection and conservation while promoting sustainable development. As such, it conflicts with the public policy of Canada.

215. Furthermore, the conclusion that no justifiable environmental basis for PCB export controls existed denies the objects of the Basel convention.

216. Throughout this dispute, the importation of PCBs into the United States remained illegal under the TSCA. The Tribunal acknowledges this at paragraph 119 of its Award.

217. However, without notice to Canada, the EPA purported to waive enforcement of US statutory and regulatory requirements subject to certain specified conditions. From the outset, the “enforcement discretion” was controversial and legally dubious. Canada presented argument on this point but the Tribunal dismissed the argument as immaterial.

Testimony of Dick Wegman, Transcript of proceedings for February 16, 2000, Vol. XII, Tab 192, Record, pp. 5282-5310

Award, para. 191, Vol. I, Tab 2, Record, p.51

218. Indeed, the enforcement discretion endured only as long as it took the EPA to substitute an import for disposal rule that itself failed to survive judicial consideration.

Award, para. 191, Vol. I, Tab 2, Record, p.51

219. Canada’s decision to respect the statutory constraints of US environmental law, was not only prudent and responsible, but necessary under international law. Its approach was no more than consistent with the standard of behaviour expected of all nations.

220. It is contrary to public policy to require Canada to facilitate exports to another jurisdiction in contravention of the environmental laws of that country. Nor would it be appropriate for Canada to disregard clear legal constraints on the basis of administrative policies of dubious and untested legal validity.

221. The award penalizes Canada for refusing to facilitate hazardous waste exports that were unlawful in the receiving jurisdiction, and entirely inconsistent with commitments

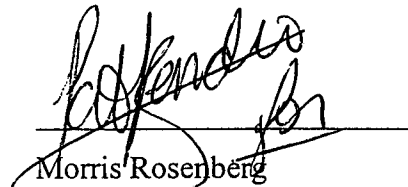
Canada made in signing and then ratifying the Basel Convention. This Award is fundamentally inconsistent with Canadian public policy and must be set aside.

222. Under Article 4.5 of the Basel Convention, transboundary movements of hazardous wastes with non-Parties to that Treaty (like the United States) are prohibited. Article 11 of the Basel Convention creates an exception to this rule, by allowing Parties to maintain bilateral agreements which pre-date the entry into force of the Convention, as long as such agreements are compatible with environmentally sound management of hazardous wastes as required by the Convention. At the time of the Interim Order the transboundary movement of PCB wastes was not covered by the Canada-U.S. Agreement. Therefore, Canada's obligations under the Basel Convention prevented it from shipping PCB wastes to the United States. The Interim Order was consistent with Canada's commitments under the Basel Convention.

223. The Tribunal's failure to interpret the scope and coverage of the NAFTA Chapter Eleven provisions in a manner consistent with Canada's obligations under the Basel Convention conflicts with public policy of Canada.

Part IV - Relief Requested

224. The Attorney General requests an order setting aside the award issued November 13, 2000 and her costs of this application.



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