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Toronto, Canada, 25 September 2001

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**RE:** *S.D. Myers vs. Government of Canada*

**Supplemental Submission of the United Mexican States**  
**(Damages Phase)**

**A. Introduction**

1. The United Mexican States (Mexico) makes this submission pursuant to Article 1128 of the NAFTA and the directions of the President of the Tribunal given at the hearing of the Damages Phase.
2. Having heard the oral submissions of the disputing parties and the evidence adduced in the hearing, Mexico wishes to elaborate on only one issue—the fundamental distinction between the obligations of the NAFTA Parties to investors of the other Parties under Chapter Eleven and their obligations to cross-border service providers of the other Parties under Chapter Twelve.
3. Mexico's failure to comment further on any other issue raised in the proceeding should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.
4. Mexico affirms and continues to rely on its submission dated 12 September 2001. Mexico concurs in the oral submissions of Ms. Tabet on behalf of Canada at pages [57 to 64] of the transcript of 21 September 2001.

**B. Chapter Eleven in Proper Context**

5. It is appropriate to commence by placing Chapter Eleven in its proper context of the NAFTA as a whole. The Agreement covers trade in goods, trade in services, temporary business travel, government procurement, intellectual property and investment. The general and most likely form of dispute settlement is Chapter 20. It, like the WTO Dispute Settlement

Understanding, provides for State to State dispute settlement for all matters covered by the Agreement.

6. With the exception of Chapter Eleven, the only means for challenging a Party's actions that are alleged to have contravened the NAFTA is a State to State proceeding under Chapter 20<sup>1</sup>. Thus,

- all trade in goods disputes are only actionable by the NAFTA Parties through Chapter 20;
- all temporary business travel disputes are only actionable by the NAFTA Parties through Chapter 20;
- all services disputes are only actionable by the NAFTA Parties through Chapter 20;
- all government procurement disputes are only actionable by the NAFTA Parties through Chapter 20; and
- all intellectual property disputes are only actionable by the NAFTA Parties through Chapter 20.

7. Where a breach is alleged, therefore, the vast majority of NAFTA obligations are remediable only by the means afforded by Chapter 20. That chapter does not contemplate the award of damages.

8. Thus, consistent with other international trade agreements, breaches of the NAFTA are, for the vast majority of obligations, not compensable in monetary damages to the complainant's benefit. Rather, the objective is the removal of the offending measure.

9. This underscores the extraordinary nature of the only chapter of NAFTA that does contemplate the award of damages for a breach, namely, Chapter Eleven. An alleged breach of Chapter Eleven can be the subject of either a State to State proceeding—where damages would not be recoverable by the complainant State—or an investor-State claim (or both).

10. The reason why the Parties included this extraordinary remedy is that they wanted to offer specific treaty protections to their nationals who, encouraged by the trade liberalization of NAFTA, established investments in the territory of the other Parties.

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<sup>1</sup> There is a specialized form of dispute settlement in Chapter Nineteen for the binational panel review of anti-dumping and countervailing duty orders. However, this mechanism is not designed to determine whether a Party's order is consistent with its international obligations but rather whether it is in accordance with its national law.

11. If an investor committed substantial economic resources to investment in another Party and encountered problems there, Chapter Eleven would allow the investor to seek damages for an alleged breach of Section A, rather than having to convince its own government to espouse a claim at international law.

12. However, the Parties never intended to permit commercial actors with an interest in carrying on trade in goods or services with persons in other NAFTA Parties to use Chapter Eleven to claim damages against the measures of the other Parties that may have affected their ability to provide such goods or services. In such instances, the only recourse is a State to State proceeding under Chapter Twenty.

13. Instead, a tribunal's jurisdiction under Section B of Chapter Eleven is restricted to awarding damages to a qualifying investor (within the meaning of Chapter Eleven) for a breach of Section A only, where that breach of Section A has resulted in loss or damage to an investor or an enterprise that the investor owns or controls directly or indirectly.

14. A Chapter Eleven tribunal has no jurisdiction to award damages for a breach of any other NAFTA obligation. It has no jurisdiction to determine that another provision of the Agreement has been breached and it therefore follows that it has no jurisdiction to compensate a would-be exporter of goods who is adversely affected by a Party's restriction on trade in goods or a would-be exporter of services who is adversely affected by a Party's restriction on cross-border trade in services.

15. Thus, to the extent that a cross-border service provider seeks to recover damages for an alleged NAFTA breach that has adversely affected its ability to offer such services to consumers in the territory of another Party, it has no claim and a tribunal has no jurisdiction to award it damages.

16. With these general contextual comments in mind, Mexico will now turn to the specific issues facing this Tribunal. They are, it is submitted, fundamental to the proper operation of the Agreement and of great significance to the Parties and their citizens.

### **C. The Issue as Further Defined in the Hearing**

17. In his opening submission, counsel for the Claimant contended that Canada's submission—that the Claimant's activities in Tallmadge, Ohio are governed by Chapter Twelve, not Chapter Eleven—can succeed only if there is a conflict between Chapter Eleven and Chapter Twelve. He submits there is no conflict between the two Chapters in the circumstances of this case<sup>2</sup>.

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<sup>2</sup> Transcript of Hearing on 21 September 2001 at pp. 29-31 and 43-44.

18. Counsel for the Claimant further submits that because the Claimant is an “investor”—variously through ownership of an enterprise (Myers Canada), having made a loan to that enterprise, and having intended to share profits with that enterprise—all of its activities relating to its “Canadian Project” are governed by Chapter Eleven by virtue of Article 1213(2)(c) which states that “**cross-border trade in services** ... 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 Party”<sup>3</sup>. [Bolding in the original.]

19. The Claimant seemingly ignores the important qualifying language of the Article 1213 exclusion: a cross-border trade in services “does not include the provision of a service in the territory of a Party by an investment...in that territory”.

20. Thus, had SDMI established an investment in Canada to provide PCB waste destruction services in Canada, it would have clearly taken all of its planned commercial activities out of the Article 1213 definition and into Chapter Eleven.

21. However, the record evidence indicates that it did not do so: the center of gravity of its service providing business was and remains Ohio. It is a service provider within the meaning of Article 1213:2(b).

22. The President of the Tribunal indicated that this issue of the relationship between investment and services arose late in the Liability Phase and, after deliberation, was put over to the Damages Phase for further consideration as it could be highly relevant in determining quantum. He asked the disputing parties to summarize their positions on the issue in their closing arguments and provide the Tribunal with rules and criteria to determine to what extent the Claimant’s activities should be treated as investment under Chapter Eleven rather than cross-border trade in services under Chapter Twelve.<sup>4</sup>

23. The issue, as it is now presented, raises two questions:

- a) can Chapter Eleven and Chapter Twelve have concurrent application over a given commercial activity?
- b) can a cross-border service provider that has an investment in the territory of another Party claim compensation under Chapter Eleven for losses suffered in its capacity as a cross-border services provider that are not damages suffered by its investment?

24. Mexico submits that the answer to the first question is “yes” to the extent that there may be a service provider who makes an Article 1139 investment in order to enhance its ability to offer the service. Mexico would add the caveat that, in the event of conflict, the provisions of Chapter Twelve shall prevail. However, in order to determine which of the two Chapters applies

<sup>3</sup> Transcript of Hearing on 21 September 2001 at pp. 31-36.

<sup>4</sup> Transcript of Hearing on 21 September 2001 at pp. 40-41.

and, if both apply, whether there is conflict in the application of their respective provisions, it is necessary to properly characterize the nature and extent of the investment and cross-border services at issue.

25. Mexico submits that the answer to the second question is “no”. Both common sense and the text of Chapter Eleven indicate that an investor of another Party may only claim damages suffered by itself (under Article 1116) in its capacity as an investor, or damages suffered by its investment in the territory of the host Party (under Article 1117) in its capacity as an investment.

26. Mexico submits that the Tribunal lacks jurisdiction under Section B of Chapter Eleven to award compensation for the Claimant’s intended provision of cross-border services at its facilities in the United States. Its jurisdiction is limited to awarding compensation to the Claimant for losses it may have suffered as an investor in Canada and losses suffered by its investment in Canada by reason of or arising from Canada’s breach of Articles 1102 and 1105, as previously found. Mexico understands the United States’ position, as expressed in paragraphs 12-13 of its 18 September 2001 Article 1128 Submission, to be entirely consistent with the position taken by the other NAFTA Parties.

#### **D. The Practical Consequences of the Claimant’s Position**

27. The Claimant urges the Tribunal to award compensation totaling US\$53 million for loss or damage suffered jointly by SDMI and Myers Canada in connection with SDMI’s inability to provide PCB waste destruction services to Canadian customers at its facility in the United States during the period that Canada’s ban on PCB exports was in effect.

28. This claim is made notwithstanding SDMI’s apparent intention of paying a ten percent commission to Myers Canada on the Canada PCB waste destruction contracts, and testimony that Myers Canada’s profit would have accounted for four or five percent of the revenue earned from such contracts.

29. The Claimant nonetheless reasons that because it is an “investor”—the Tribunal having found Myers Canada to be an investment owned or controlled by SDMI—it is entitled to claim the entire loss arising from the border closure, not just the loss suffered by its investment or that SDMI suffered in its capacity as an investor.

30. Mexico submits that the Claimant’s proposition (in addition to being contrary to the text of Chapter Eleven and in excess of jurisdiction) leads to anomalous results:

- a) SDMI’s very modest expenditure to maintain a small sales office in Quebec gives rise to a massive claim against Canada based on its inability to provide cross-border PCB destruction services to Canadian customers at its U.S. facility where substantially all of its capital has been invested;

- b) SDMI would recover all losses arising from its inability to provide PCB waste destruction at its Ohio facility but its U.S. competitors who would have handled sales purely on a cross-border basis, or who would have retained a local broker to represent them in Canada, would not be entitled to advance any claim under Chapter Eleven;
- c) it would follow that any cross-border service provider having any form of investment in another Party, no matter how nominal—even a “virtual office”—could “piggy-back” damages actually suffered by a cross-border service provider in the territory of another NAFTA Party in a Chapter Eleven claim; and
- d) it would also follow that a producer of goods having any sort of sales or distribution office in the territory of another Party could claim compensation for all damages, including loss of home territory profits, arising from a measure restricting the sale of such goods in the other Party, but a producer who sold goods directly or through a local distributor would have no claim.

#### **E. The Intentions of the NAFTA Parties**

31. Each NAFTA Party agreed to undertake the obligations stipulated in Section A of Chapter Eleven for the following reasons:

- a) to attract direct foreign investment from the other NAFTA Parties;
- b) to provide protection to its own investors when they invested in the territory of the other NAFTA Parties.

32. Mexico submits that none of the Parties agreed to undertake any Section A obligations in the expectation that they would be liable to pay compensation to investors of another Party in respect of investment already made in the territory of that other Party.

33. The Tribunal has seen the Claimant’s video depicting its Ohio facility where it is evident that a substantial capital investment was made in land, buildings, equipment and technology—in the United States—for the purpose of providing PCB waste destruction services in the United States.

34. The Tribunal has also seen the Claimant’s letters to the EPA which call for the issuance of an enforcement discretion in order to support the creation of 85 new jobs—at SDMI’s facility in the United States, then operating at half capacity—and the possibility of a further plant expansion in the United States.

35. Mexico submits that Canada could not have expected Chapter Eleven to require it to protect or promote SDMI’s existing and future investment in the United States, or to pay compensation to SDMI for loss of revenue resulting from regulatory measures implemented in Canada that may have affected its ability to use its facilities in the United States. As the United

States has stated in its Submission: "The Tribunal may not assess damages with respect to any decrease in cross-border trade in goods or services as such, for those matters are not addressed by Chapter Eleven."

## F. The Text of Chapter Eleven and Chapter Twelve

36. The plain and ordinary meaning of the text of Chapter Eleven and Chapter Twelve refutes the Claimant's central argument—that because it has one or more forms of investment in Canada, its rights are governed solely under Chapter Eleven and it is thus entitled to claim all losses associated with its "Canadian Project", whether or not they arise in whole or in substantial part from services that SDMI intended to perform in the United States.

### 1. Chapter Eleven

37. Contrary to the Claimant's assertions that NAFTA recognizes the "seamless" nature of business, NAFTA is in fact completely based upon the notion of territoriality and the different means by which business is transacted within a territory and from one national territory to another.

38. Article 1101 provides that Chapter Eleven applies to measures adopted or maintained by a Party relating to ... investments of investors of another Party in the territory of the Party...

39. Article 1139 defines investor as a person of a party that has made, is making or seeks to make an investment. Investment is confined eight categories of legal or economic interests, including "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory...".

40. Article 1102 requires each Party to accord treatment no less favorable than it accords to its own investors and their investments to the investors of the other Parties and their investments.

41. Article 1105 requires each Party to accord treatment in accordance with international law to the investments of the investors of the other Parties.

42. Article 1110 prohibits a Party from expropriating an investment of investor of another Party in its territory.

43. Article 1112 (1) provides that in the event of inconsistency between Chapter Eleven and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

44. Article 1112 (2) provides that where a service provider is required to post financial security as a condition of providing a service in the territory of another Party, that fact does not of

itself make Chapter Eleven applicable to the provision of the cross-border service. It would apply only to the host Party's treatment of the financial security<sup>5</sup>.

45. Article 1116 and 1117 provide that an investor may make a claim on its own behalf, or on behalf of an investment that it owns or controls, that another Party has breached an obligation under Section A and that the investor, or its investment (as the case may be), has suffered loss or damage by reason of, or arising out of, such breach.

46. Mexico submits that Chapter Eleven's central focus on territoriality and how territoriality shapes the scope of its substantive obligations is beyond serious dispute. Simply put, Chapter Eleven does not apply to investments made outside the territory of a disputing Party, nor does it apply to obligations arising under Chapter Twelve or any other provision of the NAFTA that is not stipulated in Article 1101.

## 2. Chapter Twelve

47. Chapter Twelve requires that NAFTA Parties accord national treatment to the service providers of the other Parties under the following three modes of trade in cross-border trade in services:

- a) from the territory of a party into the territory of another Party;
- b) in the territory of a Party by a person that Party to a person of another Party; and
- c) by a national of a Party in the territory of a Party

subject to the caveat that "provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment – Definitions), in that territory".

48. The WTO General Agreement on Trade in Services (GATS) covers four modes of cross border trade in services:

- a) from the territory of one Member into the territory of any other Member (cross border supply);
- b) in the territory of one Member to the service consumer of any other Member (consumption abroad);
- c) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence); and

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<sup>5</sup> Article 1112(2) exemplifies the intent of Article 1213. A service provider is only covered by Chapter Eleven to the extent that it is an investment within the meaning of Article 1139.

- d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (presence of natural persons).

49. Three modes of service covered by Chapter Twelve—1213 (2)(a), (b) and (c) are equivalent to the cross border supply, consumption abroad and presence of natural persons modes under the GATS. The remaining GATS mode—commercial presence in the territory of a Member—is treated as investment under the NAFTA<sup>6</sup>.

50. The fact that Chapter Eleven covers the supply of services in the territory of another Party by the investment of a service supplier of another Party does not support the contention urged by the Claimant in this case, that once any element of investment is established, the entire range of economic activity the investment may relate to is subject to the investment chapter.

51. Article 1112 (2) exemplifies the intent of Article 1213(2)—that service provider is only covered by Chapter Eleven to the extent that it is an investment within the meaning of Article 1139—as can be seen in its stipulation that a requirement for a service provider to post financial security as a condition of providing a service in the territory of another Party does not of itself make Chapter Eleven applicable to the provision of the cross-border service. Rather, it would apply only to the host Party's treatment of the financial security.

#### **G. Criteria for Distinguishing Between the Application of Chapter Eleven and Chapter Twelve**

52. As explained in Mexico's first submission in the Liability Phase, it is necessary to properly characterize the nature and extent of Claimant's investment to determine the extent to which Chapter Eleven and Chapter Twelve apply in the circumstances of this case.

53. Mexico submits that the two Chapters can be of concurrent application (and not be in conflict) in the context of this case only if:

- a) SDMI is characterized as an "investor" for the purposes of its ownership of Myers Canada, its loan to Myers Canada and any other aspect of investment the Tribunal may find to exist; and
- b) SDMI is characterized as a "cross-border service provider" for the purposes of
  - i) waste destruction services to be performed at its facility in the United States, and

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<sup>6</sup> The NAFTA entered into force before the conclusion of the Uruguay Round negotiations on the General Agreement on Trade in Services (GATS). It is helpful to understand generally the manner in which the GATS categorizes cross-border services to better appreciate and understand the categorization of services under Chapter Twelve.

- ii) contract facilitation services supplied by SDMI in Canada on its own account.

54. Mexico also notes as a general point that the Tribunal should pay careful attention to the temporal relationship between the acts of the Claimant. That is, if it was an established service provider in the territory of a Party which then sought to attract additional business from customers in another Party without establishing facilities in the other Party, then the expenditures that it made in the other Party may be more properly characterized as marketing expenses in furtherance of its cross-border services business than as an investment.

55. In contrast, a party might decide to acquire land and construct a facility in the territory of another Party. Such an expenditure would clearly be an investment interest within the meaning of Article 1139.

56. In every case, a tribunal must carefully analyze which side of the Article 1213 definition a potentially combined investor/cross-border service provider falls. The decision has clear jurisdictional consequences.

#### 1. SDMI *Qua* Investor

57. Mexico submits that SDMI's ownership interest in Myers Canada (as previously found by the Tribunal) is its "investment" for the purposes of Chapter Eleven and its claim of compensation must be limited to loss or damage suffered by the investment by reason or arising out of Canada's breach of Articles 1102 and 1105 (as found by the Tribunal).

58. The loss or damage suffered by Myers Canada must be assessed in the context of its function. There seems to be no dispute that it performed a sales and marketing function for SDMI, notably in Quebec. The Tribunal has heard evidence of the value that SDMI attributed to this function. Mexico submits that the Tribunal's assessment of compensation cannot exceed the profits that properly would have been attributed to the Myers Canada during the period that the border was closed—if the Tribunal is of the view that damages based on lost or delayed opportunity can be ascertained with sufficient certainty.

59. The loss or damage suffered by Myers Canada could have been greater if SDMI's investment in the territory of Canada had been greater. For example, if Myers Canada had acquired land and buildings to use as a transfer station for PCB waste pending shipment to the United States, or if it had trained and employed "its own Lynn Fritz" to provide site services and transportation services in support of its PCB waste disposal contracts, Myers Canada's allocation of the contract revenues would increase accordingly (as would the quantum of SDMI's claim for compensation).

60. To illustrate the point differently, had the Tribunal found an expropriation, the quantum of the loss under Article 1110 would have been the fair market value of Myers Canada. Applying the notion that fair market value is the price a properly informed, willing purchaser would pay a

willing seller, it is difficult to conceive that the value could take into account profits that the vendor expected to earn on its own account using other facilities not for sale. Myers Canada would be valued on the basis of what it is—a sales or brokerage operation, not a PCB waste remediation and disposal company. Mexico submits that any analysis of damages arising from breaches of Articles 1102 or 1105 must take the same considerations into account.

**2. SDMI *Qua* Cross-Border Service Provider**

61. Mexico submits that the essential commercial activity relating to SDMI's "Canadian Project" is properly characterized as a cross-border service.

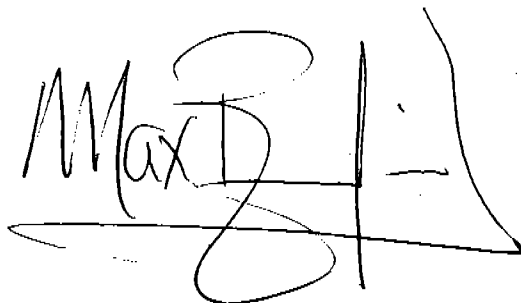
62. It seems undisputed that SDMI was offering a service to Canadian holders of PCB waste—removal and disposal of such waste resulting in the issuance of a certificate of destruction as required by applicable laws—that falls wholly within Article 1213(2)(b)'s definition of cross-border trade in services: "in the territory of a Party (the U.S.) by a person of that Party (SDMI) to a person of another Party (a Canadian PBC waste-holder)".

63. This aspect of SDMI's "Canadian Project" is not investment and cannot form part of its claim for compensation. On the facts, it seems to be responsible for the substantial majority of the anticipated revenues.

64. The evidence indicates that SDMI engaged in sales activities and provided limited site services in Canada, on its own account, using personnel based at its home office in Tallmadge, Ohio. This was designed to facilitate the procurement of its services.

65. Neither of these activities amount to investment and neither can be the subject of a claim for compensation under Chapter Eleven.

All of which is respectfully submitted,

A handwritten signature in black ink, appearing to read "Max D. H.", with a large, sweeping flourish underneath.

c.c.: Counsel for Claimant.  
Counsel for Respondent.