

July 20, 1999

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

**REPLY OF THE INVESTOR  
INITIAL PHASE**

BETWEEN:

**S.D. MYERS, INC.**

Claimant / Investor

v.

**GOVERNMENT OF CANADA**

Respondent / Party

## REPLY

S.D. Myers, Inc. ("Investor") notes the contents of the *Statement of Defence* ("Defence") by the Government of Canada ("Canada") and replies as follows:

1. The Investor reserves its right to reply to issues raised in the respondent's Defence with regard to the quantification of damage phase of this arbitration in this Claim.
2. At paragraph 9 of its Defence, Canada provides an unnecessarily narrow definition of "PCB disposal" in the Canadian context. At paragraphs 2(i) and 12, Canada admitted ratifying and implementing the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal* ("*Basel Convention*"). PCB disposal is defined under Article IV of the *Basel Convention* to include the repackaging and storage of waste prior to submission to operations such as biological treatment or incineration. It also includes the accumulation of material intended for operations such as solvent reclamation, regeneration or recycling. This definition encompasses the PCB waste disposal activities of the Investor and its Investment in Canada.
3. At paragraph 10 of its Defence, Canada asserts that the Investor has never conducted PCB disposal in Canada. This is incorrect. The Investor conducted PCB waste disposal in Canada as early as 1986.
4. At paragraph 12 of its Defence, Canada asserts that the only exports of PCB waste from Canada to the United States that occurred prior to February 1997 were by agencies of the United States Government operating in Canada. At least three private sector owners of PCB wastes have obtained permission from the United States Environmental Protection Agency ("EPA") to import those wastes into the United States from Canada: Ford Motor Company, General Motors Corporation and Premark International.<sup>1</sup> Canada has provided no evidence indicating that it objected to any of these shipments.
5. At paragraph 12 of its Defence, Canada refers to a 1989 position of the Canadian Council of Ministers of the Environment ("CCME") that PCB waste in Canada should be disposed of in Canada, implying that the Canadian provinces (who share jurisdiction over the environment) were in favour of an export ban. In fact, Canada knew that the majority of provinces were in favour of PCB waste exports and that the CCME Hazardous Waste Task Group was also in favour of opening the border for PCB waste disposal by American

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<sup>1</sup> EPA letter to Ford Motor Company, "Re: Consent To Import Sixteen PCB Capacitors", March 18, 1988, set out in the Investor's Memorial as Schedule 64; EPA letter to General Motors Corporation, "Re: Consent To Import PCB Articles", September 10, 1987, set out in the Investor's Memorial as Schedule 65; and EPA letter to Premark International, "Re: Consent To Import PCBs in Cookware", April 8, 1993, set out in the Investor's Memorial as Schedule 66.

firms.<sup>2</sup>

6. After Canada imposed the *PCB Waste Export Ban*, the Chair of the CCME wrote to the Canadian Environment Minister, Sheila Copps, informing her that the 1989 CCME position on PCB waste could not be used to support the ban and urging her to reconsider it immediately.<sup>3</sup>
7. Further and with reference to Paragraph 12 of its Defence, Canada knew that only the province of Alberta was in favour of banning PCB waste exports. In 1995, Alberta had sold its interest in a joint venture to incinerate hazardous waste in Alberta and opened its borders to waste from outside the province. Alberta wrote the Canadian Minister of the Environment asking her to protect the market for this treatment facility by banning the export of PCB waste.<sup>4</sup>
8. At paragraph 16 of its Defence, Canada states that there is no requirement for public hearings or notification for an enforcement discretion. In fact hearings were held by the EPA concerning S.D. Myers, Inc.'s application to import PCB waste from Canada on March 6 and June 6, 1995. Canada admits at paragraph 19 of its Defence having received public notice of the hearings in December 1994 but apparently chose not to participate or make submissions.
9. Further and with reference to paragraph 16, the Minister of Environment informed the House of Commons that her departmental officials had participated in the hearings, although there is no evidence that they did. She also said that she wrote a letter to the Chief Administrative Officer of the EPA, Carol Browner, about the export of PCB waste from Canada, although there is no evidence that she did. All Canada did about the EPA hearings was to send an intern from its embassy in Washington whose report displays a clear bias against S.D. Myers, Inc. in relation to the actual testimony given on that day.<sup>5</sup>

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<sup>2</sup> John Hilborn, Officer, Hazardous Waste Branch, Environmental Protection Service, Environment Canada. "Export of PCBs to the United States" Memorandum to Minister dated November 1, 1995 ("Hilborn Memorandum 2"). Set out in the Investor's Memorial as Schedule 10. Examination of Victor Shastora dated September 18, 1996 from the Centre Patronal Case at para. 130-178.

<sup>3</sup> Letter from Brenda Elliott, Minister of the Environment and Energy, Province of Ontario, to Sheila Copps as set out in the Investor's Memorial as Schedule 62.

<sup>4</sup> Ty Lund, Alberta Minister of Environmental Protection, letter to Sheila Copps, Canadian Minister of Environment, dated November 9, 1995. Set out in the Investor's Memorial as Schedule 67.

<sup>5</sup> Adam Block, Environment Section Intern, Canadian Embassy, Washington DC, Memorandum to file, June 20, 1995 as set out in the Investor's Memorial as Schedule 61.

10. Canada also states, at paragraph 16 of its Defence, that imports to the United States from Canada by firms granted an enforcement discretion were, "technically in contravention of the law". This is false. Section 2605(e)(3)(B) of the *Toxic Substances Control Act* ("*TSCA*") clearly provides the statutory authority for enforcement discretions to be granted. At no time was S.D. Myers, Inc. in contravention of the law, technical or otherwise.
11. At paragraph 17 of its Defence, Canada states that in the days following the EPA granting S.D. Myers, Inc. an enforcement discretion, at least nine other U.S. companies received similar enforcement discretion letters. This is not true. The EPA did not grant any other enforcement discretions until January 19, 1996 – well after Canada had imposed the *PCB Waste Export Ban*.<sup>6</sup>
12. At paragraph 19 of its Defence, Canada states that it expected the EPA to permit the importation of PCB waste from Canada no sooner than June 1996, if at all. Departmental memoranda written in October and November 1995 clearly state that Canadian officials expected permission to be granted as soon as the end of 1995 and that they had been aware of the border's imminent opening for at least one year.<sup>7</sup>
13. At paragraph 19 of its Defence, Canada asserts that the United States Government never explained the EPA decision to grant an enforcement discretion to S.D. Myers, Inc. In its first correspondence to the EPA after being informed by S.D. Myers, Inc. that an enforcement discretion had been granted, Canada did not seek any explanation. In fact, Canada stated that its "conditions for consenting to any such exports from Canada require that the EPA consent to the import in writing and that the importation to the US complies with laws of the United States".<sup>8</sup>
14. At paragraph 20 of its Defence, Canada states that the EPA's decision to permit S.D. Myers, Inc. to import PCB waste from Canada raised five "concerns":
  - a. whether the decision was in compliance with US law;

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<sup>6</sup> Sara T. Rollin, "EPA Allows More Imports From Canada; Mexico, Guam, Panama Shipments Banned", *The Bureau of National Affairs, Inc.*, January 30, 1996. Set out in the Investor's Memorial as Schedule 68.

<sup>7</sup> Hilborn Memorandum 2. Set out in the Investor's Memorial as Schedule 10; Reg Plummer, Department of Finance, Memorandum to File re: Privy Council Office Meeting on the Interim Order, dated November 24, 1995, as set out in the Investor's Memorial as Schedule 40.

<sup>8</sup> H.A. Clarke, Assistant Deputy Minister, Environmental Protection Service, Environment Canada, letter to Steven A. Herman, Administrator, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency, November 1, 1995, as set out in the Investor's Memorial as Schedule 60.

- b. whether permitting PCB waste exports would breach the *Basel Convention*;
- c. whether PCB waste would be disposed in an environmentally-sound manner;
- d. whether permitting PCB exports would violate Canada's policy to ensure that PCB waste were disposed of in Canada by Canadians; and
- e. whether PCB waste could be stranded at the border if exports were permitted.<sup>9</sup>

Departmental memoranda clearly indicate that Canadian officials gave absolutely no thought to four of these five "concerns" prior to the day that the first Interim Order was issued. The only one of these concerns mentioned by officials in their memoranda to the Minister before November 16, 1995 was Canada's policy to protect the Canadian PCB waste treatment market for Canadians. These alleged "concerns" are clearly nothing more than unmeritorious *post facto* rationales for imposing the *PCB Waste Export Ban*.

15. Further and with reference to paragraph 20(a) of its Defence, Canada suggests that it was concerned that the EPA had not been satisfied that there was no unreasonable risk to the environment from PCB waste imports for disposal. However, in its Notice dated December 6, 1994, the EPA clearly stated that it "believes there are instances where the import or export for disposal of PCBs at higher concentrations would not pose an unreasonable risk of injury to health or the environment".<sup>10</sup>
16. At paragraph 21 of its Defence, Canada claims that the "main focus [of officials] was on the need to take immediate action so that there would be sufficient time to address Canada's concerns". It is clear that the first reaction of officials to requests from the Minister's Office was to inform her that immediate action was simply not feasible, because neither the law, nor Canada's obligations under the NAFTA, would permit it. It was not until three days later that Canadian officials wrote about the feasibility of immediate action, clearly in response to directions from the Minister.<sup>11</sup>
17. At paragraph 22 of its Defence, Canada claims that the "concurrence of the Minister of National Health and Welfare with the issuance of an interim order, as required by section

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<sup>9</sup> John Hilborn, Officer, Hazardous Waste Branch, Environmental Protection Service, Environment Canada. "Export of PCBs to the United States" Memorandum to Minister dated October 27, 1995 ("Hilborn Memorandum 1", as set out in the Investor's Memorial as Schedule 6; Hilborn Memorandum 2, set out in the Investor's Memorial as Schedule 10; John Hilborn, "Export of PCBs to the United States" Memorandum to Minister dated November 16, 1995. Set out in the Investor's Memorial as Schedule 30; and G. Cornwall, Director, Hazardous Waste Branch, Environmental Protection Service, Environment Canada, "Possible Immediate Action The Minister Could Take re PCB Export" Memorandum dated October 30, 1995. Set out in the Investor's Memorial as Schedule 31.

<sup>10</sup> Set out in the Investor's Memorial as Schedule 69.

<sup>11</sup> Hilborn Memorandum 1, as set out in the Investor's Memorial as Schedule 6 ; and George Cornwall, "Possible Immediate Action". Set out in the Investor's Memorial as Schedule 31.

35(1)(b) of *CEPA*, was obtained". The Minister of National Health and Welfare never gave her concurrence, as required by law. A mid-level bureaucrat purported to provide such concurrence on her behalf.<sup>12</sup> A memorandum explaining that the Interim Order had already been signed was not provided to the Minister of Health until November 24, 1995. A memorandum explaining that the Interim Order had already been signed was not provided to the Minister of Health until November 24, 1995.<sup>13</sup>

18. At paragraph 24 of its Defence, Canada alleges that the requirements of section 34 of *CEPA* were met. This statement is false. Canada did not properly comply with its obligation to consult with the provinces, who share constitutional jurisdiction over the environment, to determine whether any action by Canada or the provinces was truly necessary.<sup>14</sup> Canada knew most provinces were not in favour of closing the border to PCB waste exports, particularly Ontario, where the majority of the waste was being stored.
19. At paragraph 27 of its Defence, Canada asserts that the *PCB Waste Export Ban* did not target any specific investor, but in its official register for regulatory notifications under the NAFTA, the *Canada Gazette*, Canada admitted that the ban was imposed in response to S.D. Myers, Inc. receiving permission from the United States EPA to import PCB wastes from Canada for disposal.<sup>15</sup>
20. At paragraph 33 of its Defence, Canada states that it opened the border for the export disposal of PCB waste only once it could ensure that PCB waste would not be landfilled. Canadian officials knew long before the ban was imposed that S.D. Myers, Inc. did not landfill PCB waste from Canadian transformers.<sup>16</sup> They also knew that competitors of S.D. Myers, Inc. who were lobbying to close the border, such as Cintec, were themselves landfilling PCB waste.<sup>17</sup>

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<sup>12</sup> Affidavit of J. Roy Hickman, Director General, Environmental Health Directorate, Health Protection Branch, Health Canada, dated February 2, 1996, with attachment B in *Centre Patronal v. case T-3092-93*, September 19, 1996. Set out in the Investor's Memorial as Schedule 37.

<sup>13</sup> Set out in Investors Memorial as Schedule 63.

<sup>14</sup> Section 35(4) states: The Governor in Council shall not approve an interim order unless (a) the Minister has, within twenty-four hours after making the order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger; and (b) the Minister has consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

<sup>15</sup> *Canada Gazette*, Part II, February 1997.

<sup>16</sup> Affidavit of Rev. Mike Valentine as set out in the Investor's Memorial as Schedule 1.

<sup>17</sup> From 1990 to 1994, representatives from the Ontario Ministry of the Environment and Environment Canada paid three visits to S.D. Myers, Inc's facility in Tallmadge.

21. At paragraph 35 of its Defence, Canada asserts that the United States Court of Appeals for the 9<sup>th</sup> Circuit determined that "the opening of the US border by the EPA to imports of PCB waste contravened US law and was invalid". The Court only found that the EPA could not use its authority to impose an *Import for Disposal Rule* of general application. The validity of the EPA's authority to grant enforcement discretions of the kind granted to S.D. Myers, Inc. on October 26, 1995 has never been challenged.

Submitted this 20<sup>th</sup> day of July, 1999



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See affidavit of Rev. Mike Valentine, set out in the Investor's Memorial as Schedule 1. At the same time, Environment Canada officials knew that Cintec did landfill waste and that landfilling of PCB wastes was permitted in Alberta and Quebec. See John Hilborn, "Cost of Destroying PCB Wastes" Memorandum dated November 24, 1995. Set out in the Investor's Memorial as Schedule 46. See also Memorandum from Howard Mains dated June 26, 1996 to Dale Slaght, "Alberta Regulations". Set out in the Investor's Memorial as Schedule 70.