

**IN THAT MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

**GOVERNMENT OF CANADA'S REPLY
TO S.D. MYERS, INC. SUPPLEMENTAL MEMORIAL**

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Summary

1. Pursuant to Procedural Order # 9, Canada submits its reply to the Claimant's Supplemental Memorial and wishes to address arguments introduced by S.D. Myers Inc. ("SDMI") in its Supplemental Memorial dated December 15, 1999.
2. In summary, Canada makes the following response:
 - (iii) The allegations regarding the existence of an investment in Canada by SDMI are either not substantiated or do not constitute investments meeting the definition of Article 1139 of NAFTA.
 - (iv) The impugned measure did not relate to an "investment" or to S.D. Myers Canada ("Myers Canada") and is therefore outside the scope of Chapter Eleven. In this regard, the Mexican submission supports Canada's interpretation of the scope of Chapter Eleven.
 - (v) Canada's actions were consistent with the *Basel Convention on the Transboundary Movements of Waste and Their Disposal* (adopted May 5, 1992, in force for Canada November 26, 1982) ("*Basel Convention*"). At the time of the *Interim Order*, it was unclear to both Canada and the United States Government whether the *Agreement of the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste* (October 26, 1986) ("*Canada-US Transboundary Agreement*") applied to PCBs. Under its Basel obligations, before allowing the export of PCB waste to the U.S. Canada had to *ensure* that the bilateral agreement applied and that PCB waste sent to the U.S. would be managed in an environmentally sound manner.
 - (vi) Canada did not violate its obligations under NAFTA Chapter Eleven.
 - (a) Canada accorded the investor and its alleged investment national treatment, that is, treatment no less favourable than accorded to domestic investors or investments in like circumstances. Myers Canada was not "in like circumstances" to Canadian PCB disposal companies. The joint-venture theory does not assist SDMI in this regard.
 - (b) Canada did not breach its minimum standard of treatment obligation. Canada has put forward substantial evidence to demonstrate that the Minister of the Environment had a number of concerns, including concerns about the validity of U.S. EPA enforcement discretions and whether PCB waste exported to the United States would be managed in an environmentally sound

manner, which justified imposing the *Interim Order*. The measure was made in good faith and was not arbitrary.

- (c) Canada did not impose a performance requirement: Canada imposed none of the proscribed requirements under Article 1106 (or in fact any requirement) in connection with Myers Canada.
 - (d) The interim order was not a measure tantamount to expropriation. Canada was acting *bona fides* in accordance with its general regulatory power or its police power to protect health and the environment.
- (vii) Even if Chapter Eleven applies, given that Canada has demonstrated that, in this case, the measure can be justified under the GATT Article XX exceptions incorporated by NAFTA Article 2101, this creates an inconsistency between Chapter Three and NAFTA Chapter Eleven. Therefore, in accordance with NAFTA Article 1112 Chapter Three should prevail.

A. SDMI had no investment in Canada

[Paragraphs 18-63 of SDMI's Supplemental Memorial]

3. SDMI makes various allegations about the nature of its investment which contradict each other and are *post-facto* attempts to create an investment which did not exist at the time of the *Interim Order*. SDMI argues that Myers Canada was a branch of SDMI. It also argues that SDMI and Myers Canada operated as a joint-venture. Evidence shows that Myers Canada was acting as an agent of SDMI. These cannot all be true. In fact what this demonstrates is that SDMI had no investment in Canada at the time of the *Interim Order*.
4. The only evidence that has been provided relates to commercial contracts for the sale of services from SDMI to Canadian companies. Such contracts are specifically excluded from the definition of investment¹.

(1) The evidence of the existence of a loan is insufficient

[Paragraphs 19-30 of SDMI's Supplemental Memorial]

5. SDMI has now put forward new affidavits from Rev. Michael Valentine, Dana Myers and Seth Myers to attempt to provide a basis for its claim that a loan was made from SDMI to Myers Canada which constituted an investment. None of the affidavits address the issue of whether there were any terms of repayment to the loan. None provide or even refer to any documentation for the loan. As the Black's law dictionary definition cited by SDMI indicates, for a loan to exist it is necessary that there be an expectation of repayment. While the unaudited financial statements show payment of interest, they do not indicate any repayment of the alleged loan.
6. SDMI submits a very vague definition of affiliate taken from *Black's Law Dictionary*. This is insufficient. Both in Canadian law² and under the *General Agreement on Trade in Services* definition of affiliate³ there must common control for there to be affiliates.

¹Article 1139, definition of investment at paragraph (i), (i).

² *Canada Business Corporation Act*, R.S.C. 1985, c. C-44, s.2. See Canada's Counter-Memorial at paragraph 234.

³ Article XXVIII(n): "a juridical person is ... 'affiliated' with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person."

(2) There was no "joint-venture" meeting the requirements of NAFTA Article 1139

[Paragraphs 31-43 of SDMI's Supplemental Memorial]

7. There is no evidence of even an informal joint-venture between SDMI and Myers Canada.
8. There is no evidence that the joint-venture was owned or controlled by SDMI. In fact, statements in the Claimant's Supplemental Memorial seem to indicate that Dana Myers, not SDMI, controlled Myers Canada and any joint-venture there might have been.
9. There is no evidence of revenue-sharing between SDMI and Myers Canada. In fact, the allegations made in the Myers' Supplemental Memorial contradict this notion by presenting Myers Canada as an agent for SDMI, whose purpose was to sell the services of SDMI, a type of activity covered by Chapter Twelve of the NAFTA (Cross-border Services). The extract from the SDMI standard form letter in paragraph 42 of SDMI's Supplemental Memorial confirms this:

"The Myers Co....has been offering in Canada, through the use of an agent, its services for the chemical destruction of PCBs in transformer oils." ⁴ [our emphasis]

If Myers Canada was an agent acting as an intermediary for SDMI, it was likely not entitled to a share of the profits. The existence of a joint-venture is therefore excluded.

(3) An investment must exist for Chapter Eleven to apply

[Paragraphs 61 of SDMI's Supplemental Memorial]

10. SDMI argument⁵ that one does not even need to have an investment to be entitled to protection under Chapter 11 is simplistic and misleading. One not only needs to look at the definition of "investor," but also at the actual obligations contained in Chapter 11, which all relate to an investment. The fact that some of the obligations, like the national treatment, have a pre-establishment dimension does not change the fact that such obligations apply in regard to the establishment, operation, etc., of an investment in Canada.

⁴Other statements in Myers Supplemental Memorial confirm this. At para. 56, it is stated that "Myers (Canada) made it clear in its letters that it was part of Myers, *and that it was Myers' services that were being offered.*" (emphasis added). See also para. 59, where it is again referred to the provision of services in the U.S. through an agent in Canada.

⁵Paragraph 60 of Myers Supplemental Memorial

(4) The determination of the exact nature and the extent of the investment is crucial

[Paragraphs 18-63 of SDMI's Supplemental Memorial]

11. SDMI continues to make vague and contradictory assertions about the nature of the investment and states that the size of the investment is not important at this stage. This is not true. The definition of the nature and the size of the investment is crucial because it will influence the finding of whether certain NAFTA Chapter Eleven obligations were breached and the damages that can be claimed. For example, this determination will be necessary to assess if the investor or its alleged investment were denied treatment no less favourable than that accorded to domestic investors or investments in like circumstances.
12. The Mexican submission provides useful illustrations of the importance of this determination and its potential consequences in its paragraphs 9 and 10.

"9. In Mexico's submission, it will be crucial for the Tribunal to ascertain the nature and extent of the Claimant's investment in Canada (if any) before it can address the following questions:

- 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;
- whether the Claimant or its investment (if any) in Canada were denied treatment in accordance with international law, contrary to Article 1105;
- whether Canada's ban on the export of PCB waste to the United States for a period of fourteen and a half months pursuant to the *Interim Order* was a measure "tantamount to expropriation" of the Claimant's investment in Canada (if any), contrary to Article 1110; and
- if Canada breached one or more of the foregoing obligations under Section A of Chapter Eleven, whether the Claimant has suffered loss or damage in connection with its investment and whether it has standing to assert a claim for any loss suffered by Myers-Canada.

10. The following examples illustrate the importance of properly characterizing the nature and extent of the Claimant's investment (if any) in Canada:

- if, as the Claimant alleges, Myers-Canada is an investment of the Claimant and if the intended economic activity of Myers-Canada was to act as the agent of Myers-USA in procuring sales of PCB waste disposal services to be performed by Myers-USA in the United States, did the *Interim Order* violate Article 1102 if it equally prevented Canadian investors from engaging in the same economic activity?
- if, as the Claimant alleges, Myers-Canada is an investment of Myers-USA, and if, as Canada alleges, Myers-Canada had engaged in or sought to engage in other economic activities, such as the intended licensing in Canada of PCB waste disposal technology owned by Myers-USA or the establishment of its own PCB disposal facilities in Canada, did the *Interim Order* amount to a permanent, complete, or even substantial taking of Myers-USA's investment in Canada?

- if the Claimant's investment is restricted to a "loan to an affiliate" within the meaning of Article 1139 (its financial expectation being repayment of the loan with interest), is Myers-USA entitled to compensation for the alleged loss of profits of the affiliate arising from the alleged breach? Or for its own expectation of profits that it would have earned as a result of economic activity (i.e. disposal of PCB wastes) that it might have carried on in the United States?"

B. Canada's measure does not relate to investment

[Paragraphs 63-76 of SDMI's Supplemental Memorial]

13. Contrary to SDMI allegations, the *Regulatory Impact Analysis Statement* published along with the PCB Waste Export Regulations⁶ does not indicate that the regulation related to any investment or investor. They indicate that the regulations were adopted in response to the sudden U.S. government action of granting an enforcement discretion to an American company, allowing import of PCB waste. There was no knowledge that this American company was an "investor". The Mr. Mayne and Mr. Plummer's responses to questions confirm this⁷:

"There was no discussion of S.D. Myers Canada Inc. or Myers Company for Environmental Development (Companie de Developpement en Environnement Myers Inc.)" [responses of Aharon Mayne, in answer to question 28]

"I do not remember anyone or any document ever mentioning S.D. Myers Canada Inc. or Myers Company for Environmental Development (Companie de Developpement en Environnement Myers Inc.)". [responses of Reg Plummer, in answer to question 28]

14. SDMI argues that "relating to" should be interpreted as "affecting" because of the wording of Canada's *Statement of Implementation*. However Canada's *Statement of Implementation* is not a legal text and cannot be used to modify wording agreed by the three NAFTA Parties.
15. There are several examples where the text of the NAFTA uses the term "affects" rather than "relating to", such as in Chapters 7 and 9, in the context of defining the scope of those chapters. Therefore, the Parties meant something different by using the term "relating to" in Article 1101. As Canada stated in its earlier submission, "relating to" should be interpreted as something more than merely incidentally or indirectly affecting. There must be a more direct connection.

⁶*PCB Waste Export Regulations, 1996, Canada Gazette Part I, October 5, 1996.*

⁷Mr. Fosbrooke's responses to questions indicates that he has no recollection of whether or not these company were mentioned.

16. The Mexican submission supports Canada's interpretation⁸. It reads:

"[...] the Parties did not intend to subject and all governmental measures that might incidentally or indirectly affect an investor or an investment of an investor of another Party to investor-state arbitration. There must be a sufficient nexus between the measure and the subject matter of investment in order to constitute an "investment dispute" within the meaning of article 1115.

The measure must relate to the investment of an investor of another party within the territory of the host Party. Accordingly, Chapter Eleven applies only to the extent that such measures relate to the investment in the territory of the host Party, not measures which can be said to relate to the activities if the investor or its investment beyond the borders of the host Party."

17. Accordingly, the *Interim Order* was not a measure "relating to" NAFTA "investors" or "investments" as required by Article 1101. Therefore, Chapter Eleven does not apply. The *Interim Order* was a border measure of general application related to trade of dangerous goods and to environmental and health protection and therefore outside the scope of Chapter Eleven but covered by NAFTA Chapter Three. The Mexican submission supports Canada's position on this point. Canada also notes paragraphs 18 to 20 of Mexico's Submission which point out that Chapter Eleven does not apply to the provision *in the United States* of SDMI's PCB waste treatment and disposal services (i.e., cross-border provision of services covered by NAFTA Chapter Twelve), even if assisted or facilitated by Myers Canada as its agent.

C. Canada's actions were consistent with the *Basel Convention* and the *Canada-US Transboundary Agreement*

[Paragraphs 77-92 of SDMI's Supplemental Memorial]

18. SDMI now and for the first time argues that Canada's actions were inconsistent with its international law obligations, under the *Canada-US Transboundary Agreement* and the *Basel Convention*. SDMI has not presented any evidence to support this allegation.
19. The *Basel Convention* provides in Article 11 that its provisions shall not affect transboundary movements which take place pursuant to other agreements provided that such agreements are compatible with the environmentally sound management of hazardous waste⁹. In the absence of an agreement meeting these requirements, Canada

⁸Paragraphs 15 of the Mexican submission.

⁹Therefore, it is also simply false to say, as SDMI does, that bilateral agreements with non-Parties to Basel (such as the *Canada-US Transboundary Agreement*) prevail over the terms of the *Basel Convention* and that as a result Canada did not have to follow the provisions of the *Basel Convention*.

would have been prohibited under the *Basel Convention* to send PCB waste to the United States or would have potentially found itself in violation of its Basel obligations.

20. Canada therefore had to ascertain:

(1) that the *Canada-U.S. Transboundary Agreement* was an Article 11 agreement. For that to be the case, trade in PCB waste had to be covered by the bilateral agreement¹⁰.

(2) that the export of PCB waste to the U.S. was compatible with the environmentally sound management of hazardous waste and therefore that PCB waste was not going to be landfilled in the United States.

21. The transboundary movement of PCB waste was not covered by the *Canada-U.S. Transboundary Agreement* at the time it was executed. PCB were never defined as hazardous waste in the U.S. nor were they at the time the agreement was made subject to a manifest requirement (this became the case in February 1990)¹¹. Therefore, at the time of the *Interim Order*, Canadian officials had serious doubts about whether the *Canada-US Transboundary Agreement* applied¹². The question as to whether PCBs were covered under the Canada U.S. Agreement was posed to the Assistant Administrator of the EPA, the U.S. Agency responsible for regulating PCBs in November 1995. The Assistant Administrator did not know whether PCBs were covered by the Agreement but undertook to provide a response. Canada could not therefore assume that PCBs were covered under the Agreement. Canada only received confirmation from the U.S. that the agreement did apply to PCBs on January 26, 1996, almost two months after the *Interim Order* was made. Once this concern was addressed there remained a few other issues¹³ that needed to be addressed but shortly thereafter, Canada announced that it was working on new regulations to replace the export ban and permit the export SDMI was seeking.

¹⁰ In this regard, the assertion in Paragraph 79 of Myers Supplemental Memorial is false: "Thus, hazardous waste will be covered by the Agreement if it meets either of the definitions provided by Canada or the United States".

¹¹ See paragraph 111 of Canada's Counter-memorial

¹² The statements of Michael Valentine and Dana and Seth Myers indicating that they relied on Canada respecting the *Canada-U.S. Transboundary Agreement* are therefore without basis.

¹³ Such as landfilling.

22. Regardless of whether the *Canada-U.S. Transboundary Agreement* applied, the agreement is subject to the domestic law of the Parties¹⁴. To the extent that the domestic law of the Parties prohibited exports, the treaty can not be said to require that such exports take place. Therefore, Canada's actions could not have been inconsistent with the *Canada-U.S. Transboundary Agreement*¹⁵.
23. In any case, nothing in either the *Canada-US Transboundary Agreement* or in the *Basel Convention* obliges parties to allow trade in PCB waste¹⁶.
24. Finally, the scurrilous allegations that Canada "has attempted to suppress evidence dealing with its failure to meet these international law obligations" are completely unfounded. Canada has provided all requested material that was not protected by solicitor-client or other privilege.

D. Canada did not breach its NAFTA Chapter Eleven obligations

(1) National Treatment

[Paragraphs 99-104 of SDMI's Supplemental Memorial]

25. The joint-venture theory advanced by SDMI does not change in anyway change the fact that Myers Canada, the alleged investment, was simply not "in like circumstances" to Canadian PCB waste disposal facilities. The theory is an attempt to circumvent the clear criteria established by Article 1102 which calls for a comparison of the foreign investment with domestic investment and of the foreign investor *with respect to his investment* and domestic investors with respect to their investment. SDMI instead is asking for protection under the NAFTA for operations and activities of SDMI, a U.S. company in the United States. That is clearly not the object or purpose of the Investment Chapter in the NAFTA. In any case, according to SDMI's admission, Myers Canada was acting as SDMI's agent, therefore there was no joint-venture.

¹⁴Article 2 and Article 11 of the *Canada-US Transboundary Agreement*

¹⁵SDMI has not presented any evidence to support its allegation that Canada's actions were contrary to the *Canada-U.S. Transboundary Agreement*.

¹⁶ Contrary to what SDMI says, the *Basel Convention* does not, in any way, state that if such an Article 11 agreement exists then trade must be allowed.

26. The Mexican submission supports Canada's position on the necessity of applying strictly the "like circumstances" test provided by Article 1102¹⁷:

"Mexico concurs with Canada's view that "in like circumstances" requires a comparison of treatment accorded to domestic investors and investors of the other Parties who are engaged in (or seek to engage in) business activities that are substantially the same, not a loose "sectoral" comparison the Claimant urges."

27. There is no basis for SDMI's claim that the NAFTA should be interpreted in a "broad and liberal" fashion, as suggested in paragraph 103 of its Supplemental Memorial. That is not what the Ethyl passage cited by SDMI says. In fact, the Ethyl Tribunal in paragraph 55 of its decision (the paragraph immediately preceding the one relied on by the investor to support its assertion of "broad" interpretation) quotes approvingly from an ICSID decision which states:

"[L]ike any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and respect the common will of the parties..." [our emphasis]

Nor does Article 31 of the Vienna Convention support SDMI's claim. Article 31 reads:

"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"

The wording of Article 1102 is clear and should be applied and interpreted in accordance with its ordinary meaning.

28. SDMI misinterprets and misapplies Article 1102. Contrary to what it asserts, Article 1102 is not a test of intent. As stated above, the proper test requires examining whether a foreign investor and its investment in Canada were treated less favourably than investors or investments in like circumstances. If the treatment was not less favourable, then there is no violation of Article 1102, whatever the intent of the Government might have been.

(2) Minimum Standard of Treatment

[Paragraphs 105-131 of SDMI's Supplemental Memorial]

29. SDMI's expansive definition of the minimum standard of treatment obligation under Article 1105 is without any basis. It would render meaningless all the other obligations under Chapter Eleven. Mexico's submission supports Canada's position that the Tribunal

¹⁷ Paragraph 24 of Mexico's submission

should caution when deciding whether a regulatory measure taken by a NAFTA Party could amount to denial of treatment in accordance with international law¹⁸ and that such a determination should only be made in egregious cases¹⁹. It also notes²⁰:

" The minimum standard of treatment does not authorize a claimant to challenge decisions of public policy that may affect it adversely. The article is intended to ensure that the basic guarantees of investment protection are extended to investors and investments.

Similarly, tribunals established under Chapter Eleven are not vested with the jurisdiction to "second guess" the validity of propriety of governmental decisions on complex social, economic, legal or scientific issues. Article 1105 does not vest tribunals with a jurisdiction akin to that of judicial review by the domestic courts"

a) Canada acted in good faith

30. Canada fully agrees with SDMI' statement that "[i]t is a well-known principle of international law that governments are presumed to be acting in good faith and in full compliance with their municipal obligations."²¹ Hence, the burden of proof that needs to be met by any claimant, in this case SDMI, to demonstrate the government's alleged bad faith is quite substantial. No such evidence has been presented.
31. SDMI suggests in paragraph 3 and footnote 4 of its Supplemental Memorial that adverse inferences should be drawn from the non-production of the Clerk's agenda. However the Clerk's agenda was produced on December 13, 1999 and does not contain any evidence that supports the conclusion sought by SDMI. Certainly, there is no evidence of a meeting between Mel Cappe and Minister Copps to discuss "their knowledge of the discriminatory aspects of the measure".
32. SDMI states at Paragraph 109 of its Supplemental Memorial:

"Canada went beyond merely failing to accord procedural fairness in the drafting and imposition of the PCB Waste Export Ban, by specifically addressing itself to how the measure would directly harm the Investment. This means that Canada's breach of the obligation of good faith is more grievous because it embarked on a course of willful or reckless conduct deigned to cause injury to an alien or foreign investment"

¹⁸ Paragraph 34 of Mexico's submission.

¹⁹ Paragraph 35 of Mexico's submission.

²⁰ Paragraphs 29-30 of Mexico's submission.

²¹ at para. 15

This allegation is mere fancy. Canada refers the Tribunal to paragraph 9 above to paragraphs 63-71 of Canada's Supplemental Memorial. Canada did not know about Myers Canada and therefore about any foreign investment in Canada. As a result, Canada's actions cannot have been designed to harm the investment.

33. The fact that Canada changed its policy a few months later after having had time to analyse the consequences and alternatives is proof of Canada's good faith.
34. SDMI complains in paragraph 121 of its Supplemental Memorial that Canada breached its minimum standard of treatment obligation because "the best available lobbyist, who had been working for the Minister personally on this file a very short time earlier, was already taken". Even if this were true, the NAFTA certainly does not guarantee an investor access to the best lobbyist.

b) Canada's imposition of the *Interim Order* was based on legitimate concerns

35. Canada refers to its Counter-memorial paragraphs 140 and following.
36. Canada had several legitimate concerns that justified imposing the *Interim Order*²²:
 - whether the enforcement discretion was valid under U.S. law
 - whether exports of PCB wastes to the US, a non-party, would comply with the *Basel Convention*; in this context, Canada had concerns about the application of the *Canada U.S. Transboundary Agreement* to PCB wastes and did not know whether PCBs would be disposed of in the U.S. in an environmentally sound manner²³
 - compliance with Canada's 1989 policy to destroy Canadian PCBs in Canada
 - the long-term viability of domestic PCB disposal facilities; (in the context of its concern about respecting its Basel obligations, Canada's interest in protecting its domestic industry was a legitimate concern) and
 - what would happen in the event that US disposal facilities subsequently became unavailable, or if the US border was closed again, as eventually happened

²² Affidavit of Victor Shantora paragraphs 95-97 and affidavit of John Myslicki paragraphs 29-30, as annexed to Canada's Counter-Memorial.

²³ This concern that persisted after the *Interim Order*. Given that Canada learned that SDMI was not destroying PCBs at its facility at Tallmadge, Canada did not know where and how the PCBs would be destroyed and if it would be done in an environmentally sound manner.

c) Internal debate demonstrates that full consideration of the merits of the measure

37. Canada refers the Tribunal to its Supplemental Memorial at paragraphs 98-103.
38. Disagreement amongst officials is not relevant except to the extent it shows that a full discussion took place at the officials level on the basis of which recommendations were made to the Minister regarding the *Interim Order*. The Minister ultimately was the one who took the decision based on the different considerations and concerns that had been expressed and presented to her. The numerous internal Canadian government memoranda prepared both before the *Interim Order* and in the period leading to the PCB regulation demonstrate that analysis of various alternatives was undertaken.
39. SDMI misuses the responses of Mr. Mayne, Mr. Plummer and Mr. Fosbrooke. Many of the cited passages are taken out of context and the references to their responses do not support the conclusions SDMI purports to make. The witness statements speak for themselves, but Canada notes the following examples.
40. At paragraph 10 of Myers Supplemental Memorial, it is suggested that the witness statements show that Ms. Coppins had set her mind on imposing a ban "regardless of the government's domestic or international legal obligations." The witness statements rather seem to indicate that Canada was considering its legal obligations under CEPA and NAFTA²⁴.
41. At paragraph 12 of Myers Supplemental Memorial, SDMI refers to the responses to conclude that "only Myers and its Canadian competitors were discussed at these meetings". This is not what the responses say. In fact, the responses show that Myers Canada was never mentioned and that officials had no knowledge of it²⁵. SDMI also misuses Mr. Plummer's responses to claim that Canada knew in advance about the opening of the border. Nothing in Mr. Plummer's responses supports this²⁶.

²⁴ Responses of Reg Plummer, in answer to Question 27.

²⁵ See paragraph 13.

²⁶ SDMI misconstrues the following sentence from Reg Plummer's responses where he reports on an intervention by a foreign affairs official at a meeting: "[...] the US has been considering lifting the ban on PCB imports for 12 months. This was not new in their view and it should not have taken Environmental officials by surprise. Canada has refers the Tribunal to the sequence of events detailed in paragraphs 136 and following of its Counter-Memorial and which show that, although the issue was not new, the use of "enforcement discretion" and the time frame in which it happened was unexpected.

d) Canada's concerns about the validity of the enforcement discretions were founded

42. With respect to Canada's concerns about the legality of the EPA granting enforcement discretion, Canada refers to the conclusions of the Memorandum on U.S. law submitted on behalf of the Government of Canada by Canada's US co-counsel²⁷:

There was ample reason in 1995 to question whether EPA had lawfully exercised its enforcement discretion to allow SDMI to import PCBs into the United States and that, had a lawsuit been brought challenging EPA action, a U.S. court might have struck down such action.

43. While providing for statutory exemptions, as SDMI correctly suggests, is not foreign to Canadian law, an enforcement discretion is not a statutory exemption²⁸. As such, all the Canadian legislative examples cited by the investor are all irrelevant as none deal with the issuance of an enforcement discretion²⁹.

e) The PCB Waste Export Ban was not an Extraterritorial Act

[Paragraphs 93-98 of SDMI's Supplemental Memorial]

44. SDMI now argues that the *Interim Order* was an extraterritorial act. While it is not clear what the purpose of the allegation is, it is clearly incorrect. Export bans are not extraterritorial acts. They apply to persons within the jurisdiction of the state to prevent them from exporting. As is recognized in the NAFTA, they can be necessary in certain circumstances for the protection of human health and for the conservation of natural resources.

²⁷Paragraph 4 of the Memorandum of U.S. Law on behalf of the Government of Canada; also see paragraphs 25-30, paragraph 49 and 64-68.

²⁸See paragraph 21 of the Memorandum of U.S. Law on behalf of the Government of Canada

²⁹With respect to Bill C-62, it was never passed. In any case, Bill C-62 can be distinguished from an enforcement discretion in that it was intended to provide statutory authority to consider and approve compliance plans that met regulatory goals through alternatives to the requirements of certain designated regulations. Under the Bill, such plans, once approved, would substitute for the regulations in that they would be binding and subject to the same penal provisions for any violation thereof. Clearly this is different from an enforcement discretion which is simply a commitment by a regulatory agency to turn a blind eye to a violation of the law.

45. In any event, it is irrelevant for the purposes of this case, whether the PCB Waste Export Ban was an extraterritorial act. Even if it were an extraterritorial measure, this would clearly be insufficient to amount to a breach of NAFTA Article 1105.

f) Canada was not acting unilaterally

[Paragraphs 128-130 of SDMI's Supplemental Memorial]

46. SDMI argues in its paragraphs 128-129-130 that Canada violated its NAFTA Article 1105 obligation by acting unilaterally in imposing the *Interim Order*. SDMI's allegation is far-fetched. First, Canada was not acting unilaterally but in accordance with international consensus as reflected in the *Basel Convention*. Second, the basis for the argument made by SDMI is an incorrect reading and improper analogy with the *United States-Standards for Reformulated and Conventional Gasoline* and the *United States - Import of Certain Shrimp and Shrimp Products*³⁰ decisions. Canada refers the Tribunal to paragraph 309 of Canada's Counter-Memorial. Furthermore, Canada needed to take immediate action. Canada needed time to assess the consequences of the sudden U.S. unilateral action to grant enforcement discretions allowing importation of PCB waste - an action which effectively opened the border which had been closed for over ten years. Canada was concerned that it would find itself in violation of its obligations under an international environmental agreement, namely the *Basel Convention*.

g) The Regulatory Policy did not apply

[Paragraphs 107-108 and 115-118 of SDMI's Supplemental Memorial]

47. With respect to the application of the Regulatory Policy, SDMI's arguments do not stand in the face of the well-known principle that policy always gives way in the face of legislation. Here the procedural policy relied upon by SDMI did not apply and, in any event, conflicted with the powers granted under paragraph 35 of CEPA and government policy on the destruction of PCBs.
48. Again, SDMI takes out of context Richard Fosbrooke's statement of his duties and purports to make it say that the Regulatory Policy applied to the making of the *Interim Order*. Mr. Fosbrooke was simply responding to the question "What were the duties and responsibilities of your position in November 1995?". His answer was:

³⁰As cited in paragraphs 128 and 129 of SDMI's Supplemental Memorial

"In November 1995, my principal duties with the Regulatory Affairs Division were to: As requested, advise departments and agencies with respect to expectations under the government's Regulatory Policy 1992 and the related regulatory approval process; [...]"

Nowhere does his responses say or even imply that the Regulatory Policy applied to the making of the *Interim Order*.

49. SDMI cites an extract from the *ELSI* decision and concludes in Paragraph 126 that "the message by the Court in this passage is simply that an international tribunal must be responsible for making its own findings based on international standards, rather than relying exclusively on the findings of a lower-level domestic tribunal which interprets and applies only municipal standards". Canada submits that this is not what the passage cited from the *ELSI* decision says. What it says is that a domestic court finding of a violation of domestic law is not sufficient for an international tribunal to conclude that the decision was arbitrary and therefore constituted a breach of minimum standard of treatment obligation. This was also the conclusion of the Tribunal in the *Desona* case, as elaborated in Canada's Supplemental Memorial at paragraphs 77-90.

(3) Performance Requirements

[Paragraphs 132-141 of SDMI's Supplemental Memorial]

50. The ordinary wording of 1106 is clear. Canada refers the Tribunal to paragraphs 340-354 of Canada's Counter-memorial.
51. No direct requirement was imposed in connection with the alleged loan or with Myers Canada. Certainly, there was no requirement on Myers Canada or SDMI (which never themselves owned any Canadian PCB wastes) to buy Canadian goods or services or to achieve a certain level of Canadian content.

(4) Expropriation

[Paragraphs 142-167 of SDMI's Supplemental Memorial]

52. SDMI's only claim is that the *Interim Order* was a measure "tantamount to" expropriation and that measures "tantamount to" expropriation are unique and recognised in international law as distinct from "direct" and "indirect" expropriation. SDMI claims at paragraph 156 that: "the NAFTA must have been intended to cover situations that were broader than creeping expropriations by its use of the new term "measures tantamount to expropriation". This is not correct. The United States, in its Article 1128 submission on a question of interpretation of the NAFTA in *Metalclad (Metalclad Corporation v. The*

United Mexican States, ICSID Case No. ARB(AF)/97/1, Submission of the Government of the United States, November 9, 1999), and Mexico, in its Article 1128 submission in this case (paragraphs 39 to 52), join Canada in rejecting this approach.

53. SDMI suggests that the expropriation occurred when Canada made the *Interim Order*. However, Canada has shown that Myers Canada continued pursuing its business of looking for contracts and selling the services of SDMI after the *Interim Order*. Myers Canada appears to have continued its business of acting as an intermediary for companies selling waste disposal services as it had been doing for years prior to the U.S. granting SDMI an enforcement discretion. The evidence also showed that shipments to SDMI occurred once the ban was lifted in February 1997. SDMI has not showed what expropriation allegedly occurred.
54. Given the clear facts, the *Interim Order* was not a measure "tantamount to" expropriation. A temporary export ban could ever be expropriative according to international law given its effects in this case. If there was any interference with SDMI's use and enjoyment of its "investment", it was minimal and did not violate the international law standard thereby requiring compensation. There is no evidence that there was any diminution in the value of SDMI's "investment", and certainly not enough to violate any known international law test. Besides, according to international law, the *Interim Order* was a proper use of Canada's right to regulate or "police powers", as Mexico, in its Article 1128 submission in this case (paragraphs 47 to 52), notes.
55. Canada's actions were *bona fides* for legitimate purposes and of a general regulatory nature. The purpose was to protect health and the environment. The allegation that there was a discriminatory intent can simply not be sustained by the evidence. There exists a presumption that the state was acting in good faith. The fact that Canada announced it would be lifting the ban just a few months later (after having had time to analyse the situation) and did so by adopting the new regulations in February 1997, confirms Canada's good faith. In summary, in making the *Interim Order* Canada was acting within its general regulatory authority and police powers and therefore, even if its actions may have inadvertently affected adversely SDMI or Myers Canada they did not amount to expropriation.

E. Inconsistency between NAFTA Chapter Three and Chapter Eleven

56. SDMI deliberately mis-characterizes Canada's argument by stating at paragraph 172 that Canada is arguing that GATT Article XX exemptions apply to Chapter Eleven. What Canada has argued is that GATT Article XX exemptions justify in this case the imposition of an export ban contrary to the general prohibition against export bans in Chapter Three of NAFTA. Because this is the case, this would create an inconsistency with Chapter Eleven if the Tribunal were to find a violation of a Chapter Eleven

obligation. Therefore, in accordance with NAFTA Article 1112, Chapter Eleven must give way to Chapter Three.

F. Damages

57. If the investment is defined as the loan between SDMI and Myers Canada, then the treatment of the loan will need to be examined and if the Tribunal concludes to a violation of a Chapter Eleven obligation then the damages should be limited to the repayment of the loan plus interest.
58. If Myers Canada was only acting as an agent of SDMI and is otherwise found to be an enterprise within the meaning of NAFTA Article 1139, then the damages should be limited to the amount of money that Myers Canada would have made for its "marketing" of SDMI's services.
59. Similarly if the Tribunal concludes that there was a joint-venture between Myers Canada and SDMI, then the damages should be limited to the share of profit from the joint-venture's activities that would have accrued to Myers Canada and that was affected by a violation of a Chapter Eleven obligation.

All of which is respectfully submitted.



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